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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
15 **COUNTY OF ALAMEDA, RENE C. DAVIDSON COURTHOUSE**

16 KAWIKA SMITH, through his guardian ad  
17 litem LEILANI REED; GLORIA D., through  
her guardian ad litem DIANA I; STEPHEN C.,  
18 through his guardian ad litem, MARGARET F.;  
ALEXANDRA VILLEGAS, an individual;  
19 GARY W., an individual; CHINESE FOR  
AFFIRMATIVE ACTION, a nonprofit  
20 organization; COLLEGE ACCESS PLAN, a  
nonprofit organization; COLLEGE SEEKERS, a  
21 nonprofit organization; COMMUNITY  
COALITION, a nonprofit organization;  
22 DOLORES HUERTA FOUNDATION, a  
nonprofit organization; and LITTLE MANILA  
23 RISING, a nonprofit organization,

24 Plaintiff,

25 v.

26 REGENTS OF THE UNIVERSITY OF  
CALIFORNIA; JANET NAPOLITANO, in her  
27 official capacity as President of the University of  
California; and DOES 1-100,  
28

CASE NO. RG19046222  
(Consolidated with RG19046343)

**PLAINTIFFS' NOTICE OF MOTION  
AND MOTION FOR PRELIMINARY  
INJUNCTION; MEMORANDUM OF  
POINTS AND AUTHORITIES**

Date: August 20, 2020  
Time: 3:00 p.m.  
Reservation ID: R-2193299

Action Filed: December 10, 2019  
Trial Date: None Set

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Defendant.

AND RELATED CONSOLIDATED CASES

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1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on August 20, 2020, at 3:00 p.m., or as soon thereafter  
3 as counsel may be heard in Courtroom 23 of the above-captioned Court, located at 1221 Oak  
4 Street, Oakland, California 94612, Plaintiffs will and hereby do move for a preliminary injunction  
5 ordering Defendants Regents of the University of California, Janet Napolitano, and Does 1–100 to  
6 cease using the SAT and the ACT tests for all purposes, including admissions decisions,  
7 scholarship consideration, eligibility determination, or post-enrollment course placement, until  
8 Defendants can demonstrate that the tests are equally accessible to all students, including that all  
9 students with disabilities are able to timely test with the accommodations they need.

10 Good cause exists for the requested Preliminary Injunction. As demonstrated in detail in  
11 the accompanying Memorandum of Points and Authorities and supporting declarations,  
12 Defendants’ continued use of the SAT and ACT, including the ostensibly “test-optional” policy  
13 that Defendants intend to implement for the upcoming Fall 2021 admissions cycle, violates the  
14 California Government Code, California Education Code, California Disabled Persons Act, and  
15 Unruh Act, all of which incorporate and exceed the standards of Title II of the Americans with  
16 Disabilities Act, 42 U.S.C. § 12131 *et seq.* Moreover, Defendants’ continued use of the tests  
17 during the present COVID-19 pandemic will cause immediate and irreparable harm to individual  
18 Plaintiffs, student members of the organizational Plaintiffs, and students for whom the  
19 organizational Plaintiffs advocate, for whom access to the tests is either impossible or impaired,  
20 and who will thus be denied equal consideration in the University’s admissions and scholarship  
21 processes. The balance of hardships thus weighs decisively in Plaintiffs’ favor.

22

23 DATED: July 22 , 2020

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By:                   /s/ Mark Rosenbaum                  

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Mark Rosenbaum  
Attorneys for Plaintiffs

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1 **I. INTRODUCTION**

2 On May 21, 2020, the Regents of the University of California (“UC” or the “University”)  
3 made the highly publicized decision to eventually phase out the University’s use of the SAT and  
4 ACT, which multiple Regents denounced as discriminatory tests that measure applicants’ access to  
5 test preparation rather than college preparedness. As a chorus of Regents explained, they made this  
6 decision because the SAT and ACT are—in the Regents’ own words—“racist,”<sup>1</sup> “correlated to  
7 wealth and privilege,”<sup>2</sup> “exclusionary,”<sup>3</sup> and “discriminatory,”<sup>4</sup> such that their continued use  
8 “perpetuate[s] inequities across socioeconomic status and race” and “lends credibility to an  
9 inequitable and predatory enterprise.”<sup>5</sup> Despite the Regents’ express agreement that the SAT and  
10 ACT are discriminatory, contrary to the University’s values and to its constitutional obligation to  
11 reflect the diversity of the State, and unnecessary to its admissions decisions, the Regents failed to  
12 take the most obvious step to redress this discrimination: immediately cease all reliance on the  
13 tests. Instead, the Regents chose to continue using the tests for scholarship and statewide  
14 eligibility determinations for at least four more years, and for admissions purposes for all students  
15 for two more years, under an ostensibly “test-optional” policy.

16 Even if it were lawful for the Regents to adopt a discrimination-optional admissions  
17 policy, UC admissions are “test-optional” in name only. During the COVID-19 pandemic,  
18 significant numbers of students with disabilities across the State are functionally barred from

19 \_\_\_\_\_  
20 <sup>1</sup> Univ. of Cal. Bd. of Regents, *Board Afternoon* at 1:37, YouTube (May 21, 2020),  
21 <https://www.youtube.com/watch?v=gqjtgXr-niw> [hereinafter Regents Meeting (Afternoon  
22 Session)], <https://www.youtube.com/watch?v=gqjtgXr-niw&feature=youtu.be&t=5834> (statement  
23 of Regents Vice Chair Cecilia Estolano); *id.* at 1:52, <https://www.youtube.com/watch?v=gqjtgXr-niw&feature=youtu.be&t=6737> (statement of Regent Jonathan Sures).

24 <sup>2</sup> *Id.* at 0:28, <https://www.youtube.com/watch?v=gqjtgXr-niw&feature=youtu.be&t=1721>  
25 (statement of Regent Maria Anguiano).

26 <sup>3</sup> *Id.*; *id.* at 1:27, <https://www.youtube.com/watch?v=gqjtgXr-niw&feature=youtu.be&t=5245>  
27 (statement of Regent Christine Simmons).

28 <sup>4</sup> *Id.* at 1:27, <https://www.youtube.com/watch?v=gqjtgXr-niw&feature=youtu.be&t=2711>  
(statement of Regent Christine Simmons); *id.* at 0:45, [https://www.youtube.com/  
watch?v=gqjtgXr-niw&feature=youtu.be&t=6431](https://www.youtube.com/watch?v=gqjtgXr-niw&feature=youtu.be&t=6431) (statement of Alumni Regent-Designate Eric  
Mart); *id.* at 1:47, <https://www.youtube.com/watch?v=gqjtgXr-niw&feature=youtu.be&t=6414>  
(statement of Regents Chair John Pérez).

<sup>5</sup> *Id.* at 0:43, <https://www.youtube.com/watch?v=gqjtgXr-niw&feature=youtu.be&t=2581>  
(statement of Regent Hayley Weddle).



1 taking the tests with the accommodations they need. The pandemic has dramatically curtailed  
2 seating capacity for upcoming SAT and ACT administrations, due to the cancellation of test  
3 administrations, widespread school closures, and social distancing requirements that reduce test  
4 center capacity. Although these limitations affect all students, they disproportionately exclude  
5 students with disabilities, because UC does not require all test sites to permit accommodated test  
6 conditions. Students with disabilities—who even under normal circumstances often must search  
7 for months to identify a test center willing to accept their accommodations—are now finding it  
8 impossible to access the tests with the accommodations they need. A subset of these students—  
9 whose disabilities or health conditions render them particularly vulnerable to serious illness  
10 resulting from coronavirus—must risk their lives in order to test.<sup>6</sup> Thus, for far too many students  
11 with disabilities, submitting a test score is not an option at all.

12         The Regents and President Napolitano have no answer to this. They have refused even to  
13 acknowledge the question: over nearly six hours of deliberations on May 21, 2020, not a single  
14 Regent, nor President Napolitano, nor any of the 13 speakers invited by the Regents to opine on  
15 UC’s use of standardized tests, even mentioned the word “disability.” Similarly, UC’s  
16 Standardized Testing Task Force, in a report that claimed to present a “thorough, critical, and  
17 empirically based picture of the role of standardized testing [at] UC,”<sup>7</sup> did not consider the tests’  
18 disability discrimination at all,<sup>8</sup> and barely acknowledged the existence of students with  
19 disabilities, with a mere four mentions across 225 pages.<sup>9</sup> These omissions reflect precisely the  
20 “thoughtlessness” and “indifference” that disability rights laws were intended to combat.  
21 *Alexander v. Choate*, 469 U.S. 287, 295 (1985).

22         This motion seeks to enjoin the Regents’ use of a “test-optional” admissions policy that  
23

24 \_\_\_\_\_  
25 <sup>6</sup> Declaration of Ranit Mishori [hereinafter Mishori Decl.] ¶¶ 26–30, 33.

26 <sup>7</sup> Letter from Kum-Kum Bhavnani, Academic Council Chair, to Chairs of Academic Senate  
27 Divisions and Committees (Feb. 3, 2020), [https://senate.universityofcalifornia.edu/\\_files/  
28 underreview/sttf-report.pdf](https://senate.universityofcalifornia.edu/_files/underreview/sttf-report.pdf).

<sup>8</sup> Declaration of Patricia Gándara [hereinafter Gándara Decl.] ¶ 28.

<sup>9</sup> Univ. of Cal. Standardized Testing Task Force, *Report of the UC Academic Council  
Standardized Testing Task Force (STTF)* 40, 75, 86, 113 (Jan. 27, 2020), [https://  
senate.universityofcalifornia.edu/\\_files/underreview/sttf-report.pdf](https://senate.universityofcalifornia.edu/_files/underreview/sttf-report.pdf).

1 gives all applicants except students with disabilities the option of submitting an SAT or ACT  
2 score. Such a policy is not “optional” at all, since members of a protected class of students are  
3 effectively barred from submitting scores, and thus from competing on an equal basis with  
4 nondisabled students. But the policy’s harms are not limited to students with disabilities. The  
5 Regents’ decision to retain the tests inflicts a no less pernicious injury on students of color and  
6 students from low-income families. By refusing to drop the SAT and ACT despite publicly  
7 acknowledging that the tests are racist, classist, and unrelated to a college preparatory curriculum,  
8 the Regents have “‘ben[t] over backwards’ to preserve an advantage for privileged races and  
9 classes” and underscored that students of color and students from low-income families are not  
10 valued by the University.<sup>10</sup> The Regents’ message to these students is clear: “You don’t matter.  
11 We know that the tests are racist, and that they tell us nothing about your ability to perform at UC.  
12 We know that they are proxies for wealth and privilege, and that they advantage affluent students  
13 with access to test preparation. We choose to preserve that advantage.”<sup>11</sup> As a result of the  
14 Regents’ decision, tens of thousands of students with disabilities, students of color, and students  
15 from low-income families will continue to be needlessly excluded from the University.

16         The Regents will undoubtedly respond that phasing out UC’s use of the SAT and ACT is a  
17 complex endeavor, which they are undertaking with all deliberate speed. But there is nothing  
18 cumbersome about removing a discriminatory metric from an admissions process that ostensibly  
19 considers it along with 13 other factors in “holistic” review.<sup>12</sup> In fact, eliminating such a metric  
20 enables admissions officers to accord proper weight to criteria that are actually meaningful, such  
21 as academic achievement, civic engagement, and personal qualities like drive, resilience, and  
22 problem-solving ability. By contrast, what is time-consuming—because it is impossible—is the

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<sup>10</sup> Declaration of David E. Kirkland [hereinafter Kirkland Decl.] ¶ 20.

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<sup>11</sup> See Declaration of Kawika Smith [hereinafter Smith Decl.] ¶ 15; Declaration of N.P.

26

[hereinafter N.P. Decl.] ¶ 14; Declaration of A.H. [hereinafter A.H. Decl.] ¶ 8; Declaration of K.D. [hereinafter K.D. Decl.] ¶ 7; Declaration of R.R. [hereinafter R.R. Decl.] ¶ 4; 9.

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<sup>12</sup> Univ. of Cal. Admissions, *How Applications Are Reviewed*, [https://](https://admission.universityofcalifornia.edu/how-to-apply/applying-as-a-freshman/how-applications-are-reviewed.html)

28

[admission.universityofcalifornia.edu/how-to-apply/applying-as-a-freshman/how-applications-are-reviewed.html](https://admission.universityofcalifornia.edu/how-to-apply/applying-as-a-freshman/how-applications-are-reviewed.html).

1 Regents' futile effort to render discriminatory tests nondiscriminatory.

2 But students across the State cannot wait for UC's leaders to conclude their protracted  
3 deliberations over how to "retrofit[] test results around inequality"<sup>13</sup>—an issue that even they  
4 acknowledge has been "studied to death."<sup>14</sup> As UC President-elect Michael Drake recognized,  
5 "particularly in this time of COVID, when the . . . opportunity to study and prepare for a test is  
6 quite uneven," it is incumbent on UC "to remove any potential barriers for students who might not  
7 have access to all the support that they need[.]"<sup>15</sup> Meanwhile, as discussed *infra* Part II.C, many  
8 UC websites still erroneously inform students that they must submit SAT or ACT scores. And  
9 even counselors who know that UC has adopted a "test-optional" admissions policy have no  
10 information about how that policy will be implemented, and therefore advise their students to take  
11 the tests.<sup>16</sup> Left to fend for themselves, students are continuing to attempt to register for the tests,  
12 struggling to obtain approval for necessary accommodations, and searching in vain for test sites  
13 that will accommodate them.

14 Unlike UC's shifting policies, however, the law is clear: if an admissions criterion denies  
15 members of a protected class of students equal consideration in UC's admissions process, UC  
16 must not use it. So long as UC persists in using the tests, it must guarantee that they are equally  
17 accessible to all students, including that all students with disabilities are able to timely test with  
18 the accommodations they need. Because it cannot, UC must cease using the tests for all purposes.

19 **II. STATEMENT OF FACTS**

20 **A. UC's continued use of the SAT and ACT discriminates against students on the**  
21 **basis of disability, race, and wealth.**

22 By continuing to consider SAT and ACT scores in admissions and scholarship  
23

24 <sup>13</sup> Andre M. Perry, *Students Need More Than an SAT Adversity Score, They Need a Boost in*  
25 *Wealth*, Brookings (May 17, 2019), <https://www.brookings.edu/blog/the-avenue/2019/05/17/students-need-more-than-an-sat-adversity-score-they-need-a-boost-in-wealth>.

26 <sup>14</sup> Regents Meeting (Afternoon Session), *supra* note 1, at 1:38, <https://www.youtube.com/watch?v=gqjtgXr-niw&feature=youtu.be&t=2581> (statement of Regents Vice Chair Cecilia Estolano).

27 <sup>15</sup> Ex. 4 to Declaration of Gregory A. Ellis [hereinafter Ellis Decl.].

28 <sup>16</sup> Declaration of Laura Kazan [hereinafter Kazan Decl.] ¶¶ 28–33.

1 determinations, UC discriminates against students with disabilities in multiple respects. As a  
2 threshold matter, there is little evidence demonstrating that either test has the ability to predict *any*  
3 future outcome for these students, such as first-year college GPA or second-year retention.<sup>17</sup> Thus,  
4 there is no legitimate nondiscriminatory reason to justify considering the discriminatory tests.  
5 Even though their standardized test scores do not predict their ability to succeed in college,  
6 students with disabilities must nevertheless take the SAT or ACT in order to remain competitive in  
7 UC admissions.<sup>18</sup>

8           Significant numbers of students with disabilities require accommodations to access the  
9 tests.<sup>19</sup> Every stage of the SAT and ACT accommodations process poses barriers. Students with  
10 disabilities, particularly those without a lengthy record of school accommodations or seeking an  
11 accommodation they did not have in school, must spend substantial time and effort to obtain the  
12 evaluations necessary to meet the testing agencies' documentation requirements, even when such  
13 evaluations are not necessary for medical reasons.<sup>20</sup> These evaluations are costly and often are not  
14 covered by insurance.<sup>21</sup> Even after this effort, "students who have private evaluations but do not  
15 have a history of school accommodation plans are unlikely to receive SAT or ACT  
16 accommodations."<sup>22</sup> Because the accommodations process is so complex, College Board and  
17 ACT, Inc. urge students to work with school counselors to prepare and submit accommodations  
18 applications on their behalf.<sup>23</sup> Not all students have counselors able and willing to do so.<sup>24</sup>

19

20 <sup>17</sup> See Declaration of Peter Blanck ¶¶ 21–28 [hereinafter Blanck Decl.].

21 <sup>18</sup> *Id.* ¶¶ 39, 42–43; see also Kazan Decl. ¶¶ 30, 34.

22 <sup>19</sup> See Declaration of Nicole Ofiesh [hereinafter Ofiesh Decl.] ¶¶ 9, 20; Declaration of Lisa  
23 Grajewski [hereinafter Grajewski Decl.] ¶ 24.

24 <sup>20</sup> Ofiesh Decl. ¶¶ 24–27, 29.

25 <sup>21</sup> *Id.* ¶¶ 7, 24, 27, 29, 34; Blanck Decl. ¶ 30; Grajewski Decl. ¶ 13.

26 <sup>22</sup> Grajewski Decl. ¶ 18; see Ofiesh Decl. ¶ 28.

27 <sup>23</sup> College Board, *Students with Disabilities*, <https://collegereadiness.collegeboard.org/sat/register/special-circumstances/students-with-disabilities> ("Students and parents: The best way to get College Board approval for testing with accommodations is to work with your school. Find out why working with your school is best."); ACT, Inc., *Making a Request*, <http://www.act.org/content/act/en/products-and-services/the-act/registration/accommodations.html> ("You will need to work with a school official when making your requests. . . . Your school official will submit your request, with documentation, to ACT.").

28 <sup>24</sup> Declaration of Stephen C. [hereinafter Stephen C. Decl.] ¶¶ 12–13; Declaration of Gary W.

1 Even when students with disabilities secure approval to test with the accommodations they  
2 need, many accommodations are not available at standard or “national” test centers, and are only  
3 offered in school environments.<sup>25</sup> However, schools are not required to provide these  
4 accommodations.<sup>26</sup> Therefore, students with disabilities may be unable to test with their necessary  
5 accommodations in a timely manner or at test sites near their homes.<sup>27</sup> One student, whose parent  
6 unsuccessfully contacted 22 different school test sites and who missed two separate SAT  
7 administrations due to the inability to find a site willing to accept his accommodations, ultimately  
8 did not take the test.<sup>28</sup> As discussed *infra* Part II.D, the COVID-19 pandemic has rendered these  
9 already high barriers insurmountable, such that many, if not most, students with disabilities who  
10 require accommodations cannot access the tests at all.

11 But UC’s retention of the SAT and ACT does not only discriminate against students with  
12 disabilities, among whom students from low-income families are disproportionately represented.<sup>29</sup>  
13 It also unnecessarily places low-income, minority students at a severe disadvantage in UC’s  
14 admissions process. Studies by independent and UC psychometricians show—and the Regents  
15 agree—that SAT and ACT scores act as a proxy for students’ socioeconomic status and race.<sup>30</sup>  
16 The test development process itself tends iteratively to discard items on which underrepresented  
17 students perform well and to retain questions on which they do not do well.<sup>31</sup> Despite the tests’  
18 veneer of objectivity, UC psychometricians studying sections of the SAT have found that up to 12  
19 percent of items are biased against Black students, and up to 10 percent of items are biased against

20

21

[hereinafter Gary W. Decl.] ¶ 8; Grajewski Decl. ¶ 22; *see* Blanck Decl. ¶ 29; Kazan Decl. ¶ 8;  
22 Ofiesh Decl. ¶ 31.

23 <sup>25</sup> Kazan Decl. ¶ 14; Grajewski Decl. ¶ 21.

24 <sup>26</sup> Kazan Decl. ¶ 15.

25 <sup>27</sup> Grajewski Decl. ¶ 21; Kazan Decl. ¶¶ 15, 18–19.

26 <sup>28</sup> Kazan Decl. ¶ 17.

27 <sup>29</sup> Ofiesh Decl. ¶ 14; *see* Kirkland Decl. ¶ 14.

28 <sup>30</sup> Declaration of Jesse Rothstein ¶¶ 9–15 [hereinafter Rothstein Decl.].

<sup>31</sup> William C. Kidder & Jay Rosner, *How the SAT Creates “Built-in-Headwinds”*: An Educational  
and Legal Analysis of Disparate Impact, 43 Santa Clara L. Rev. 131, 158–59 (2002); Martin  
Shapiro, *A Psychometric Model for Preserving Discrimination*, 12 Berkeley La Raza L.J. 387,  
390–91 (2001).

1 Latinx students.<sup>32</sup> These biases, which persist in a historically biased test,<sup>33</sup> have resulted in the  
2 systematic exclusion of students of color and students from low-income families from UC.<sup>34</sup>

3 **B. The Regents preserved the SAT and ACT as discriminatory barriers to UC**  
4 **admission.**

5 On May 21, 2020, six months after this case was filed, the Regents voted unanimously to  
6 change the form of their reliance on the SAT and ACT in admissions and scholarship  
7 determinations.<sup>35</sup> Although prospective first-year students will no longer be required to submit  
8 SAT or ACT scores, during the Fall 2021 and Fall 2022 admissions cycles, UC will permit its  
9 campuses to consider scores in admissions decisions for students who choose to submit them.<sup>36</sup>  
10 During the Fall 2023 and Fall 2024 admissions cycles, UC campuses will be “test-blind,” *i.e.*, will  
11 not consider SAT or ACT scores in admissions decisions for California public and independent  
12 high school applicants.<sup>37</sup> And through at least the Fall 2024 admission cycle, UC will continue to  
13 use test scores in scholarship determinations, statewide eligibility index calculations, and post-  
14 enrollment course placement.<sup>38</sup>

15 The Regents chose to retain the SAT and ACT despite the fact that Plaintiffs have  
16 repeatedly brought the disability discrimination resulting from the tests to their attention and urged  
17 them to redress it. As early as October 2019, Plaintiffs described to the Regents how “[s]tudents  
18 with disabilities who require accommodations to take the exam experience discrimination . . .  
19 because not all test sites permit accommodations,” such that “students must find their own

20 \_\_\_\_\_  
21 <sup>32</sup> Maria Veronica Santelices & Mark Wilson, *On the Relationship Between Differential Item*  
22 *Functioning and Item Difficulty: An Issue of Methods? Item Response Theory Approach to*  
23 *Differential Item Functioning*, 72 *Educ. & Psychol. Measurement* 5, 24 (2012).

24 <sup>33</sup> Kirkland Decl. ¶¶ 5–10; *see generally* Declaration of Nicholas Lemann.

25 <sup>34</sup> Gándara Decl. ¶ 17.

26 <sup>35</sup> Press Release, Univ. of Cal. Office of the President, *University of California Board of Regents*  
27 *Unanimously Approved Changes to Standardized Testing Requirement for Undergraduates* (May  
28 21, 2020), <https://www.universityofcalifornia.edu/press-room/university-california-board-regents-approves-changes-standardized-testing-requirement>.

<sup>36</sup> Univ. of Cal. Office of the President, *Action Item: College Entrance Exam Use in University of*  
29 *California Undergraduate Admissions 2* (May 2020), <https://regents.universityofcalifornia.edu/regmeet/may20/b4.pdf>.

<sup>37</sup> *Id.*

<sup>38</sup> *See id.* at 2, 5.

1 location” to test and, if they cannot find one, may not be able to “take the test at all.”<sup>39</sup> Plaintiffs  
2 also explained that less privileged students with disabilities may not receive approval for the  
3 accommodations they need because they “cannot be identified soon enough or evaluated  
4 frequently enough” to meet the testing agencies’ documentation requirements.<sup>40</sup> In December  
5 2019, Plaintiffs raised the same concerns in their Complaint, setting out in significant detail the  
6 myriad ways in which UC’s use of SAT and ACT scores discriminates against and harms students  
7 with disabilities.<sup>41</sup> And before the Regents meeting on May 21, 2020, Plaintiffs *twice* asked the  
8 Regents to identify the steps they would take to ensure that an ostensibly “test-optional”  
9 admissions process would not discriminate against students with disabilities.<sup>42</sup>

10 By the time of their vote on May 21, therefore, the Regents should have been well aware of  
11 the impact of their continued use of the SAT and ACT on students with disabilities. But instead of  
12 responding to Plaintiffs’ questions, the Regents ignored the issue entirely. A spectator watching  
13 the May 21 proceedings could reasonably have concluded that, as far as the Regents were  
14 concerned, applicants with disabilities did not exist.

15 Whereas the effect of UC’s use of standardized tests on students with disabilities was a  
16 glaring omission from the STTF Report,<sup>43</sup> President Napolitano’s proposal, and the Regents’  
17 debate, equally striking was the Regents’ express admission that UC’s use of the tests  
18 discriminates against students of color and students from low-income families. In their own  
19 words:

20 “The highest predictive value of an SAT isn’t in how well a student will do in school, but  
21 how well they were able to avail themselves of prep material. And access to that prep  
22 material is still disproportionately tied to family income.”<sup>44</sup>

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23 <sup>39</sup> Ex. 1 to Ellis Decl., at 4 (Oct. 29, 2019 Letter from Plaintiffs’ counsel to Regents of the  
University of California).

24 <sup>40</sup> *Id.*

25 <sup>41</sup> Compl. ¶¶ 22–25, 37, 104–22, 177–80.

26 <sup>42</sup> *See* Ex. 2 to Ellis Decl. (May 13, 2020 Email from Katherine Farkas to Joshua Meltzer); *id.* Ex.  
3 (May 19, 2010 Letter from Gregory A. Ellis to Office of the Secretary and Chief of Staff to the  
Regents).

27 <sup>43</sup> Gándara Decl. ¶ 28.

28 <sup>44</sup> Teresa Watanabe, *Q&A: Raise UC Tuition? Eliminate SAT Tests? Board of Regents Chairman  
John A. Pérez Has Something to Say*, L.A. Times (Nov. 1, 2019), <https://www.latimes.com/>

1 “A large body of national data indicates that these tests perpetuate inequities across  
2 socioeconomic status and race.”<sup>45</sup>

3 “There’s decades of data and research showing that SAT scores are mostly correlated to  
4 wealth and privilege.”<sup>46</sup>

5 “[W]e are putting a lot of onus on a test that clearly disadvantages communities of low  
6 wealth, communities of color throughout the country.”<sup>47</sup>

7 “Is it really standardized? It’s standardized in the sense that some communities have an  
8 opportunity, and those that have a lot of money . . . and have parents that are involved, they  
9 are able to help and focus their kid on prep courses, which don’t teach you anything,  
10 really.”<sup>48</sup>

11 “[T]est-optional, if anything, is probably the [policy] that exacerbates the inequities. The  
12 finding that . . . it is the underrepresented students, socially, economically, disadvantaged,  
13 . . . they’re the ones that are least likely to submit their scores. And so by creating a test-  
14 optional [policy], you’re basically not making really much of an option.”<sup>49</sup>

15 After hours of these and similar statements from individual Regents, the Regents nevertheless  
16 voted to allow applicants to submit SAT and ACT scores to gain an advantage in admissions  
17 determinations for the next two years, and in scholarship determinations for at least the next four  
18 years. In doing so, the Regents failed to redress even the discrimination they explicitly  
19 acknowledged, let alone the discrimination they chose to ignore.

20 **C. The Regents failed to notify prospective students of their “test-optional”**  
21 **admissions policy.**

22 Nearly two months after the Regents’ vote and only days before UC’s Fall 2021  
23 admissions cycle opens on August 1, 2020, tens of thousands of rising high school seniors remain

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25 [california/story/2019-11-01/q-a-uc-board-of-regents-chairman-john-a-perez.](https://www.youtube.com/watch?v=gqjtgXr-niw&feature=youtu.be&t=2581)

26 <sup>45</sup> Regents Meeting (Afternoon Session), *supra* note 1, at 0:42–43, <https://www.youtube.com/watch?v=gqjtgXr-niw&feature=youtu.be&t=2581> (statement of Regent Hayley Weddle).

27 <sup>46</sup> *Id.* at 0:28, <https://www.youtube.com/watch?v=gqjtgXr-niw&feature=youtu.be&t=1721>  
28 (statement of Regent Maria Anguiano).

<sup>47</sup> *Id.* at 0:39, <https://www.youtube.com/watch?v=gqjtgXr-niw&feature=youtu.be&t=2387>  
(statement of Regent Eloy Ortiz Oakley).

<sup>48</sup> *Id.* at 1:03–04, <https://www.youtube.com/watch?v=gqjtgXr-niw&feature=youtu.be&t=3832>  
(statement of Regent Richard Leib).

<sup>49</sup> *Id.* at 0:58, <https://www.youtube.com/watch?v=gqjtgXr-niw&feature=youtu.be&t=3493>  
(statement of Regent William Um).



1 in the dark regarding how the University will assess their applications. As recently as July 19,  
2 2020, UC maintained a “Freshman Requirements” website instructing prospective applicants to  
3 “[m]eet the examination requirement by taking the ACT Plus Writing or SAT with Essay by  
4 December,”<sup>50</sup> as well as an “Exam Requirement” website stating:

5 All prospective freshmen must submit scores from either the ACT with Writing or SAT  
6 with Essay. . . . If you’re applying for admission to the fall term, be sure to take your  
7 admissions tests no later than December of your senior year . . . – preferably earlier – to  
ensure that your application receives prompt and full consideration.<sup>51</sup>

8 As of the same date, over half of UC’s undergraduate campuses—including the flagship UC  
9 Berkeley—had failed to update their first-year admissions requirements websites.<sup>52</sup>

10 Not only has UC failed to take down these outdated websites, but where it has  
11 acknowledged the Regents’ May 21 decision, it has posted conflicting information. UC’s main  
12 admissions website includes two links under the heading “UC announces changes to SAT/ACT  
13 requirement”:<sup>53</sup> one to the Regents’ May 21 press release, which states that UC will be “[t]est-  
14 optional for fall 2021 and fall 2022,”<sup>54</sup> and one to “UC’s response on admissions to COVID-19,”  
15 which states that “UC is temporarily suspending the standardized test requirement for students  
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18 <sup>50</sup> Univ. of Cal. Admissions, *Freshman Requirements*, [https://  
admission.universityofcalifornia.edu/admission-requirements/freshman-requirements/](https://admission.universityofcalifornia.edu/admission-requirements/freshman-requirements/) (accessed  
19 July 19, 2020), *archived at* <https://perma.cc/2L8P-NKWE>.

20 <sup>51</sup> Univ. of Cal. Admissions, *Exam Requirement*, [https://admission.universityofcalifornia.edu/  
admission-requirements/freshman-requirements/exam-requirement/](https://admission.universityofcalifornia.edu/admission-requirements/freshman-requirements/exam-requirement/) (accessed July 19, 2020),  
21 *archived at* <https://perma.cc/X8QG-H4E4>.

22 <sup>52</sup> Univ. of Cal., Berkeley, *Freshman Requirements*, [https://admissions.berkeley.edu/freshmen-  
requirements](https://admissions.berkeley.edu/freshmen-requirements) (accessed July 19, 2020), *archived at* <https://perma.cc/J7WY-K2Z6>; Univ. of Cal.,  
23 Davis, *Freshman Admission*, [https://www.ucdavis.edu/admissions/undergraduate/freshman/  
admissions/undergraduate/freshman/](https://www.ucdavis.edu/admissions/undergraduate/freshman/)  
(accessed July 19, 2020), *archived at* <https://perma.cc/J73K-X8XA>; Univ. of Cal., Merced, *First  
Year: Admission Requirements*, <https://admissions.ucmerced.edu/first-year/requirements> (accessed  
24 July 19, 2020), *archived at* <https://perma.cc/2SPR-SUM7>; Univ. of Cal., Riverside, *Freshman –  
Applying to UCR*, [https://admissions.ucr.edu/freshman#examination  
requirement](https://admissions.ucr.edu/freshman#examination_requirement) (accessed July  
25 19, 2020), *archived at* <https://perma.cc/5KCT-9TUF>; Univ. of Cal., Santa Cruz, *Freshman  
Admission and Selection: Fall 2020*, <https://admissions.ucsc.edu/apply/freshman.html> (accessed  
26 July 19, 2020), *archived at* <https://perma.cc/LHG6-8287>.

27 <sup>53</sup> Univ. of Cal., *Admissions*, <https://admission.universityofcalifornia.edu/index.html> (accessed  
July 19, 2020), *archived at* <https://perma.cc/WJ86-K8WX>.

28 <sup>54</sup> *Supra* note 35.

1 applying for fall 2021 freshman admission only.”<sup>55</sup>

2           What UC has not done is make available—much less publicize—to prospective applicants,  
3 their families, and their high schools, a sufficient description of how its test-optional policy will  
4 actually work. Such a description would include, at the very least, answers to what its own Task  
5 Force identified as “significant questions” that must be addressed in order for UC’s test-optional  
6 admissions process “to be transparent and fair,” including “how admissions offices [will]  
7 evaluate[] applicants who submit[] SAT scores relative to applicants who d[o] not” in both  
8 admissions and scholarship determinations and “whether or how admissions offices [will]  
9 impute[] scores” to applicants who do not provide them.<sup>56</sup> It would also explain what, if any, steps  
10 UC and individual campuses will take to mitigate the discriminatory effects of the tests and the  
11 structural advantage conferred by SAT and ACT scores on applicants who choose to submit them.  
12 But UC has provided no such information. It has not explained, for example, what implicit bias  
13 training it intends to implement, who will be trained, and whether those trainings will be  
14 completed before admissions officers begin evaluating applications for Fall 2021 admissions.  
15 Indeed, it has not taken any of the steps reasonably available to it to inform prospective applicants  
16 about the changed policy, such as removing outdated information from its system-wide and  
17 campus websites; notifying California high schools and high school counselors about how the  
18 policy will operate in practice and requesting that they inform their students about it; creating a  
19 hotline, dedicated email address, or other means to answer prospective applicants’ questions; or  
20 hosting webinars or other outreach events to discuss the change.<sup>57</sup>

21           Without clear information from UC, high school counselors and rising high school seniors  
22 deciding whether to take the tests have had to act on snatches of information from its leaders, such  
23 as UC Vice Provost and College Board Trustee Yvette Gullatt’s statement that SAT and ACT  
24

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26 <sup>55</sup> Univ. of Cal. Admissions, *UC’s Response on Admissions to COVID-19*, [https://](https://admission.universityofcalifornia.edu/response-covid-19.html)  
27 [admission.universityofcalifornia.edu/response-covid-19.html](https://admission.universityofcalifornia.edu/response-covid-19.html) (accessed July 19, 2020), *archived at*  
<https://perma.cc/T9SJ-EBLC>.

<sup>56</sup> Univ. of Cal. Standardized Testing Task Force, *supra* note 9, at 98.

28 <sup>57</sup> Kazan Decl. ¶¶ 29–34; Declaration of Monique Hyman [hereinafter Hyman Decl.] ¶¶ 6–9.

1 scores will function as a “value add” in admissions determinations.<sup>58</sup> Admissions  
2 directors at UC campuses have underscored the message that students who do not submit scores  
3 will be at a competitive disadvantage relative to those who do.<sup>59</sup> Lacking better information, high  
4 school counselors are advising students to—in the words of one campus admissions director—“err  
5 on the side of submitting scores.”<sup>60</sup>

6 **D. The COVID-19 pandemic has created unprecedented barriers to accessing the**  
7 **tests.**

8 In light of the tests’ discriminatory nature, the fairest and most straightforward solution  
9 would be to cease using the tests immediately and entirely. Instead, the Regents chose to retain  
10 them, ostensibly to provide students with “flexibility” during the COVID-19 pandemic.<sup>61</sup> But for  
11 students with disabilities, students of color, and students from low-income families, the Regents’  
12 decision has done just the opposite.

13 For these students, the pandemic has severely exacerbated the inequities of the SAT and  
14 ACT. Approximately one million high school juniors “scheduled to take the SAT for the first  
15 time” in spring 2020 had their test administrations cancelled.<sup>62</sup> Over 2,500 test sites cancelled  
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17 <sup>58</sup> Regents Meeting (Afternoon Session), *supra* note 1, at 1:14–15, <https://www.youtube.com/watch?v=ggjtgXr-niw&feature=youtu.be&t=4491> (statement of Vice Provost Yvette Gullatt).

18 <sup>59</sup> Teresa Watanabe, *UC Dropped the SAT. Should You Take It Anyway?*, L.A. Times (June 3,  
19 2020), <https://www.latimes.com/california/story/2020-06-03/uc-is-dropping-the-sat-and-act-but-high-school-counselors-say-students-should-take-the-test> (“UC Santa Barbara admissions director  
20 Lisa Przekop said students should consider submitting test scores that help them tell their stories.  
21 For instance, she said, those who are passionate about science, technology, engineering and math  
22 might . . . mention their math scores.”); *id.* (“At UC Riverside, students should generally err on the  
23 side of submitting scores, according to Emily Engelschall, director of undergraduate admissions.  
24 Even if a total score doesn’t reach a particular level, she said, strength in one area could add value  
25 to the application.”).

24 <sup>60</sup> *Id.*

25 <sup>61</sup> Univ. of Cal. Office of the President, *Action Item: College Entrance Exam Use in University of*  
26 *California Undergraduate Admissions* 9 (May 2020), <https://regents.universityofcalifornia.edu/regmeet/may20/b4.pdf>.

27 <sup>62</sup> Nick Anderson, *One Million-plus Juniors Will Miss Out on SATs and ACTs This Spring*  
28 *Because of Coronavirus*, Wash. Post (Apr. 13, 2020), [https://www.washingtonpost.com/local/education/one-million-plus-juniors-will-miss-out-on-sats-and-acts-this-spring-because-of-coronavirus/2020/04/12/4ccc827c-7a95-11ea-b6ff-597f170df8f8\\_story.html](https://www.washingtonpost.com/local/education/one-million-plus-juniors-will-miss-out-on-sats-and-acts-this-spring-because-of-coronavirus/2020/04/12/4ccc827c-7a95-11ea-b6ff-597f170df8f8_story.html).

1 ACT administrations in June 2020.<sup>63</sup> Consequently, there has been a surge in demand for summer  
2 and fall 2020 test administrations—as both the College Board and ACT, Inc. have  
3 acknowledged<sup>64</sup>—and students across the State are vying for limited opportunities to take the tests  
4 before UC’s Fall 2021 admissions cycle closes on November 30, 2020. As discussed *supra*,  
5 messages from UC leaders have only intensified this competition. Unsurprisingly, the students  
6 who are winning are those with the most resources, whose well-informed parents and counselors  
7 have assisted them in securing spots shortly after test registration opens, who are able to travel,  
8 sometimes out-of-state, to available test centers, and who do not have disabilities that limit their  
9 options of test sites.<sup>65</sup> By contrast, students of color and students from low-income families—who,  
10 together with their families, are disproportionately bearing both the health and economic impacts  
11 of the pandemic<sup>66</sup>—are unlikely to have the resources required to access or prepare for the tests.<sup>67</sup>  
12 Even if these students are able to secure seats for the limited upcoming test administrations, they  
13 are more likely to have family members vulnerable to COVID-19.<sup>68</sup> In order to test, these students

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15 <sup>63</sup> Kazan Decl. ¶ 22.

16 <sup>64</sup> College Board, *SAT and PSAT-Related Coronavirus Updates*, <https://pages.collegeboard.org/sat-covid-19-updates> (accessed July 21, 2020) (noting “unprecedented demand” and “a greater volume than usual of students trying to register”); Ron Kroichick, *Bay Area high school students eyeing college fret over ACT’s testing struggles*, S.F. Chron. (July 17, 2020), <https://www.sfchronicle.com/education/article/Bay-Area-high-school-students-eyeing-college-fret-15414756.php> (“Godwin [ACT, Inc.’s interim CEO] . . . pointed to rising demand for summer testing after the pandemic wiped out typical spring dates. She acknowledged ACT could not open enough test locations last month[.]”).

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20 <sup>65</sup> See Kazan Decl. ¶ 16; Hyman Decl. ¶ 12; Alaa Elassar, *For Many Students Who Tried to Take the ACT Test This Weekend, It Was a Total Fail*, CNN (July 20, 2020), <https://www.cnn.com/2020/07/19/us/july-act-tests-canceled-trnd/index.html> ([Parent Rana] “El Kaliouby said every cancellation costs her family time and money. Fortunately, she can afford to make accommodations, but not every family can. ‘I consider myself and Jana privileged,’ El Kaliouby said. ‘I am in a position to take the day off work and book a hotel to spend overnight, not to mention the thousands of dollars I continue to spend on tutoring every time the test gets canceled and we need to ramp up tutoring again for the next test date.’”).

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24 <sup>66</sup> Mishori Decl. ¶¶ 18–25; Joint Econ. Comm., *The Impact of Coronavirus on the Working Poor and People of Color* (Apr. 24, 2020), [https://www.jec.senate.gov/public/\\_cache/files/bbaf9c9f-1a8c-45b3-816c-1415a2c1ffec/coronavirus-race-and-class-jec-final.pdf](https://www.jec.senate.gov/public/_cache/files/bbaf9c9f-1a8c-45b3-816c-1415a2c1ffec/coronavirus-race-and-class-jec-final.pdf).

25  
26 <sup>67</sup> Hyman Decl. ¶ 12; Declaration of K.B. [hereinafter K.B. Decl.] ¶ 7; Declaration of K.F. [hereinafter K.F. Decl.] ¶ 6; A.H. Decl. ¶ 7; K.D Decl. ¶ 5; see Declaration of Dillon Delvo ¶¶ 2, 3, 5.

27  
28 <sup>68</sup> K.F. Decl. ¶ 8; Mishori Decl. ¶ 31; see *id.* ¶¶ 18–25.

1 will have to break quarantine, placing their family members at heightened risk.<sup>69</sup>

2 For students with disabilities, the COVID-19 pandemic has made it functionally  
3 impossible to access testing with necessary accommodations. Many students with recently  
4 diagnosed disabilities or who need updated accommodations cannot establish or modify their in-  
5 school accommodations to create the record necessary for the SAT and ACT.<sup>70</sup> Both the College  
6 Board and ACT, Inc. urge students to apply for accommodations through high school  
7 counselors,<sup>71</sup> who usually play a central role in preparing and submitting these applications, but  
8 most public high schools in California have been closed to in-person attendance since March  
9 2020,<sup>72</sup> leaving many students with little or no contact with their counselors.<sup>73</sup> Private evaluations  
10 that must take place in person are often not available.<sup>74</sup> Even before the pandemic, students with  
11 disabilities struggled to find test sites willing to accept their accommodations, because neither the  
12 College Board nor ACT, Inc. mandates that sites be accessible to all students with disabilities.<sup>75</sup>  
13 Students whose accommodations can be provided at national test centers must compete for an  
14 extremely limited number of seats at those centers. And students like Plaintiff Gary W., who  
15 require accommodations that are offered only in school environments (such as Braille, a scribe, or  
16 MP3 audio), are completely unable to test while schools remain closed.<sup>76</sup>

17 These problems will not abate in the coming school year: school districts across the  
18 State—including the largest, Los Angeles Unified—have already announced that they will remain  
19 closed this fall.<sup>77</sup> Governor and ex officio Regent Gavin Newsom, who has himself recognized the  
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21 <sup>69</sup> Mishori Decl. ¶¶ 29–32; N.P Decl. ¶ 10; K.D Decl. ¶ 6.

22 <sup>70</sup> Grajewski Decl. ¶ 16.

23 <sup>71</sup> See *supra* note 23.

24 <sup>72</sup> Sydney Johnson, *List of California K-12 Districts Closed for In-person Instruction Due to Coronavirus*, EdSource (Mar. 25, 2020), <https://edsources.org/2020/california-k-12-schools-closed-due-to-the-coronavirus/624984> (last updated Apr. 27, 2020).

25 <sup>73</sup> See Kazan Decl. ¶ 8.

26 <sup>74</sup> Ofiesh Decl. ¶¶ 38–42.

27 <sup>75</sup> See *supra* note 26.

28 <sup>76</sup> Gary W. Decl. ¶¶ 11–12.

<sup>77</sup> Diana Lambert, *Governor's Order Means Most California Campuses Won't Reopen at the Beginning of School Year*, EdSource (July 17, 2020), <https://edsources.org/2020/governors-order-means-most-california-school-campuses-wont-reopen-at-the-beginning-of-school-year/636590>.

1 discriminatory nature of the tests,<sup>78</sup> has announced that schools in counties on the State’s  
2 “Monitoring List” will not be permitted to reopen for in-person instruction until their counties  
3 have been off the list for 14 consecutive days.<sup>79</sup> As of July 17, thirty-two counties were on the list,  
4 encompassing five million students in 685 school districts and 1,131 charter schools.<sup>80</sup> Schools  
5 that are able to open will be required to close again if five percent of students and staff test  
6 positive for the coronavirus during a 14-day period.<sup>81</sup> Consequently, students requiring  
7 accommodations and students with limited resources will continue to face obstacles to accessing  
8 the tests for the foreseeable future.

9 **III. LEGAL STANDARD**

10 Plaintiffs are entitled to a preliminary injunction if they show that (1) they are “likely to  
11 prevail on the merits at trial” and (2) the interim harm they will suffer “if an injunction is denied is  
12 greater than the interim harm the opposing party is likely to suffer if the injunction is issued.”  
13 *Integrated Dynamic Sols., Inc. v. VitaVet Labs, Inc.*, 6 Cal. App. 5th 1178, 1183 (2016) (citation  
14 and alterations omitted). Courts apply a sliding scale approach to these factors: “the greater the  
15 plaintiff’s showing on one, the less must be shown on the other.” *Butt v. State of California*, 4 Cal.  
16 4th 668, 678 (1992).

17 **IV. ARGUMENT**

18 **A. Plaintiffs Are Likely to Succeed on the Merits of Their Disability**  
19 **Discrimination Claims.**

20 Between the voluminous literature documenting the discriminatory effects of the SAT and  
21 ACT, the ample evidence that these tests act as a proxy for an applicant’s race and socioeconomic  
22 status, and the Regents’ own admissions that the tests are “racist” and classist, Plaintiffs are likely

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23 <sup>78</sup> Office of Governor Gavin Newsom, *AB 751 Veto Message* (Oct. 12, 2019), [https://](https://www.gov.ca.gov/wp-content/uploads/2019/10/AB-751-Veto-Message.pdf)  
24 [www.gov.ca.gov/wp-content/uploads/2019/10/AB-751-Veto-Message.pdf](https://www.gov.ca.gov/wp-content/uploads/2019/10/AB-751-Veto-Message.pdf) (“[U]se [of the SAT  
25 and ACT] exacerbates the inequities for underrepresented students, given that performance on  
these tests is highly correlated with race and parental income, and is not the best predictor for  
college success.”).

26 <sup>79</sup> Office of Governor Gavin Newsom, *Governor Gavin Newsom Lays Out Pandemic Plan for*  
27 *Learning and Safe Schools* (July 17, 2020), [https://www.gov.ca.gov/2020/07/17/governor-gavin-](https://www.gov.ca.gov/2020/07/17/governor-gavin-newsom-lays-out-pandemic-plan-for-learning-and-safe-schools)  
[newsom-lays-out-pandemic-plan-for-learning-and-safe-schools](https://www.gov.ca.gov/2020/07/17/governor-gavin-newsom-lays-out-pandemic-plan-for-learning-and-safe-schools).

28 <sup>80</sup> Lambert, *supra* note 77.

<sup>81</sup> Office of Governor Gavin Newsom, *supra* note 79.

1 to succeed on the merits of all of their claims. At this time, however, the unprecedented  
2 circumstances of the COVID-19 pandemic have made enjoining UC’s use of the tests  
3 extraordinarily urgent for students with disabilities, for many of whom the tests have become  
4 wholly inaccessible, and for a subset of whom testing during the pandemic will have life or death  
5 consequences.

6 **1. Continuing to Rely on SAT and ACT Scores Discriminates Against**  
7 **Students with Disabilities.**

8 The Regents have failed to grapple with the reality that their “test-optional” policy will  
9 systematically disadvantage students with disabilities in the UC admissions process and any  
10 program in which UC intends to continue considering SAT and ACT scores. The pandemic has  
11 put the accommodations to which they are legally entitled out of reach for many of these  
12 students.<sup>82</sup> Students with disabilities that render them at high-risk for COVID-19 cannot take the  
13 test—even forgoing accommodations—without risking their lives.<sup>83</sup> COVID-19 compounds the  
14 inherently discriminatory nature of the tests, which even in ordinary times do not measure the  
15 potential of students with disabilities and likely screen them out of admission to UC. A “value  
16 add” to applications that is foreclosed to certain students because of their disabilities is  
17 discriminatory and must be enjoined.

18 California’s disability rights statutes incorporate and exceed the standards of Title II of the  
19 Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* (“ADA” or “Title II”). *See* Cal. Gov’t  
20 Code § 11135(b); Cal. Educ. Code § 66270;<sup>84</sup> Cal. Disabled Persons Act, Cal. Civ. Code § 54(c);  
21 Unruh Act, Cal. Civ. Code § 51(f). “Therefore, authority regarding the scope of the ADA is  
22 probative of the intended scope of” State law. *Hankins v. El Torito Restaurants, Inc.*, 63 Cal. App.  
23 4th 510, 523–24 (1998); *see also Miller v. Fortune Commercial Corp.*, 15 Cal. App. 5th 214, 223  
24 n.3 (2017) (“[W]here, as here, the issue is discrimination, California courts routinely look to  
25 federal statutes, regulations, and case law for guidance.”). To prove a claim for discrimination

26 \_\_\_\_\_  
27 <sup>82</sup> *See supra* Part II.D.

<sup>83</sup> Mishori Decl. ¶¶ 26–30, 33.

<sup>84</sup> Although the Education Code does not itself reference the ADA, it should be interpreted  
28 congruently to Section 11135. Cal. Educ. Code § 66252(g).

1 under Title II, plaintiffs must show that they are (1) “individual[s] with a disability” who are  
2 (2) “otherwise qualified to participate in or receive the benefit of [UC] services, programs, or  
3 activities” and were (3) “either excluded from participation in or denied the benefits of [UC’s]  
4 services, programs, or activities, or [were] otherwise discriminated against,” and (4) “such  
5 exclusion, denial of benefits, or discrimination was by reason of [their] disabilit[ies].” *Thompson*  
6 *v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002).

7         The ADA defines a disability as a physical or mental impairment that substantially limits a  
8 major life activity. 28 C.F.R. § 35.108(a)(1). “The definition of ‘disability’ shall be construed  
9 broadly in favor of expansive coverage.” *Id.* § 35.108(a)(2). Here, Plaintiff Stephen C. has  
10 learning and psychiatric disabilities that substantially limit the major life activities of learning,  
11 concentrating, sitting, focusing, reading, interacting, and sleeping. *See id.* § 35.108(c)(1)(i).<sup>85</sup>  
12 Plaintiff Gary W. has a learning disability, ADHD, and a serious health condition rendering him  
13 particularly vulnerable to COVID-19, that substantially limit his learning, concentrating, reading,  
14 sleeping, thinking, interacting, and attending school. *See id.*<sup>86</sup> Both have long received  
15 accommodations in school through Section 504 plans.<sup>87</sup> These individual Plaintiffs thus meet the  
16 definition of a person with a disability under the ADA and California law. In addition,  
17 organizational Plaintiff College Seekers’ members include a large subset of members who are  
18 parents of students and students with a wide range of disabilities, including autism spectrum  
19 disorder, hearing and vision impairments, serious health conditions, motor impairments, learning  
20 disabilities, and mental health disabilities.<sup>88</sup>

21         Plaintiffs Stephen C. and Gary W., as well as members of College Seekers with  
22 disabilities, are qualified to apply to UC. Plaintiffs Stephen C. and Gary W. have taken or are on  
23 track to complete UC’s required A–G coursework and intend to apply for admission to UC.<sup>89</sup>  
24 College Seekers has multiple high school student members who have disabilities; aspire to attend

25 \_\_\_\_\_  
<sup>85</sup> Stephen C. Decl. ¶ 5.

26 <sup>86</sup> Gary W. Decl. ¶¶ 4, 6.

27 <sup>87</sup> *Id.* ¶ 5; Stephen W. Decl. ¶ 6.

28 <sup>88</sup> Kazan Decl. ¶ 2.

<sup>89</sup> Stephen C. Decl. ¶¶ 4, 7; Gary W. Decl. ¶¶ 2–3.



1 UC; have taken or are on track to complete the A–G coursework or equivalent; and intend to apply  
2 to UC in the Fall 2021, Fall 2022, or Fall 2023 admissions cycles.<sup>90</sup>

3         Discrimination on the basis of disability includes the denial of an equal “opportunity to  
4 participate in or benefit from” a government program or to “obtain the same result, to gain the  
5 same benefit, or to reach the same level of achievement as that provided to others.” 28 C.F.R.  
6 § 35.130(b)(1)(i)–(iii). In particular, the ADA prohibits public entities from “utiliz[ing] criteria or  
7 methods of administration” that disparately impact individuals with disabilities, *id.* § 35.130(b)(3),  
8 or “that . . . tend to screen out” individuals with disabilities,” *id.* § 35.130(b)(8). Public entities  
9 must make reasonable modifications to their programs “when the modifications are necessary” to  
10 remedy unequal opportunities and discriminatory effects. *Id.* § 35.130(b)(7). Discrimination by a  
11 public entity is prohibited whether it occurs through actions the entity takes “directly” or that it  
12 outsources “through contractual, licensing, or other arrangements.” *Id.* § 35.130(b)(1), (3). The  
13 facts are clear that UC’s consideration of SAT and ACT scores for admission and scholarship  
14 decisions discriminates against individual Plaintiffs and members of organizational Plaintiffs  
15 because of their disabilities.

16                 **2. Applicants with Disabilities Do Not Have the Option of Submitting**  
17                 **SAT or ACT Scores That Fairly Reflect Their Potential to Succeed at**  
18                 **UC.**

19         “Test-optional” does not provide students with disabilities an equal opportunity to succeed  
20 in UC’s admissions and scholarship programs when they lack the option to take the SAT or ACT  
21 under fair conditions. “The purpose of [the ADA] is “to assure that persons with disabilities are  
22 not foreclosed from educational . . . opportunities because an examination . . . is conducted in an  
23 inaccessible site or without an accommodation.” *Enyart v. Nat’l Conf. of Bar Exam’rs, Inc.*, 630  
24 F.3d 1153, 1160 (9th Cir. 2011) (quoting H.R. Rep. No. 101–485, pt. 3, at 68–69 (1990)). “When  
25 properly considered and implemented, accommodations are necessary to ‘level the playing field,’  
26 at least somewhat, for tests which, for the most part, are designed for and validated with non-

27  
28 <sup>90</sup> Kazan Decl. ¶ 3.

1 disabled test-takers.”<sup>91</sup> UC knows that, because accommodations are out of reach for many  
2 students legally entitled to them, students with disabilities do not have an equal opportunity to  
3 submit standardized test scores and therefore to compete.

4 As a matter of policy, College Board and ACT, Inc. require students to go through an  
5 onerous and expensive process to receive accommodations.<sup>92</sup> Erecting unnecessary barriers to  
6 accommodations, including “requiring excessive documentation to support accommodation  
7 requests,” violates the ADA. *Dep’t of Fair Emp. & Hous. v. Law Sch. Admission Council Inc.*, 896  
8 F. Supp. 2d 849, 873 (N.D. Cal. 2012). UC accepts such practices by the College Board and ACT,  
9 Inc. and the bias they introduce into UC’s applicant pool. Significant numbers of students with  
10 disabilities lack the resources, school support, and/or information to run the gamut.<sup>93</sup> Others, most  
11 often students from lower income and minority families, “are never diagnosed or diagnosed late”  
12 and do not have a record, or sufficiently lengthy record, of accommodations” to convince the  
13 testing organizations to grant a request.<sup>94</sup> Still others have conditions, like Post-Traumatic Stress  
14 Disorder, that can be recognized as disabilities by the ADA, *e.g.*, *Menchaca v. Maricopa Cmty.*  
15 *Coll. Dist.*, 595 F. Supp. 2d 1063, 1068–70 (D. Ariz. 2009), but are not so recognized by the  
16 testing organizations.<sup>95</sup> Even students who are granted accommodations often cannot take  
17 advantage of them, because UC does not require the College Board, ACT, Inc., or test sites to  
18 honor them. *See supra* Part II.A.<sup>96</sup>

19 Students with disabilities are thus denied the advantage of the “value add” an SAT or ACT  
20 score provides in UC’s admissions or scholarship calculus unless they shoulder burdens that other  
21

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22 <sup>91</sup> Blanck Decl. ¶ 46; *see also* Ofiesh Decl. ¶¶ 19–20 (explaining how speeded tests like the SAT  
23 and ACT fail to accurately measure the skills of students with certain disabilities).

24 <sup>92</sup> Ofiesh Decl. ¶¶ 22, 24–27, 29; Grajewski Decl. ¶ 13.

25 <sup>93</sup> Kazan Decl. ¶ 9; Ofiesh Decl. ¶ 32; Blanck Decl. ¶¶ 29–30; Grajewski Decl. ¶¶ 22–23; *see*  
26 *supra* Part II.A.

27 <sup>94</sup> Ofiesh Decl. ¶ 23; *see also* Blanck Decl. ¶ 29; Grajewski Decl. ¶¶ 25–26.

28 <sup>95</sup> Grajewski Decl. ¶¶ 27–29.

<sup>96</sup> Kazan Decl. ¶ 15; *see also* Ofiesh Decl. ¶ 35 (“Families who have already strained their  
resources obtaining private evaluations and applying for accommodations may not be able to  
travel long distances, sometimes over multiple days, in order for their children to test with their  
accommodations.”).

1 students need not. These burdens include spending significant time and money coordinating with  
2 school counselors, seeking private evaluations, and searching for a site willing to accommodate  
3 them.<sup>97</sup> This not only violates the ADA in and of itself, *Crowder v. Kitagawa*, 81 F.3d 1480, 1484  
4 (9th Cir. 1996) (state discriminates when it “burdens [disabled] persons in a manner different and  
5 greater than it burdens others”), but also negatively impacts students’ performance,<sup>98</sup> further  
6 increasing the discriminatory effects of the tests.

7 As discussed *supra* Part II.D, COVID-19 has exacerbated these inequities. School closures  
8 have rendered access to accommodating testing sites more scarce.<sup>99</sup> Neither Stephen C. nor Gary  
9 W. has located an accessible test site, and all of the school districts near their homes are closed for  
10 the foreseeable future.<sup>100</sup> Applicants like Gary W. who are particularly susceptible to COVID-19  
11 cannot take the SAT or ACT at a site with other students without risking their lives.<sup>101</sup> The  
12 pandemic has also made documenting the need for an accommodation more difficult, both because  
13 students must work with schools that are closed and because certain evaluations for disabilities  
14 must be done in person.<sup>102</sup>

15 As UC well knows, students with disabilities, including Stephen C., Gary W., and  
16 members of College Seekers, cannot access the accommodations they need to take the SAT and  
17 ACT on an equal basis with students without disabilities. Thus, UC’s “test-optional” policy merely  
18 provides yet another advantage to students with racial, economic, and disability privilege in  
19 seeking UC admissions and scholarships, while denying Plaintiffs an equally effective opportunity  
20 “to obtain the same result” in the UC admissions and scholarship allocation process. 28 C.F.R. §  
21 35.130(b)(1)(iii).

22 **3. Considering the SAT and ACT Has the Effect of Subjecting Students**  
23 **with Disabilities to Discrimination.**

24 Using eligibility criteria, such as the SAT and ACT, that have the effect of subjecting

25 \_\_\_\_\_  
26 <sup>97</sup> Ofiesh Decl. ¶¶ 24–27; Kazan Decl. ¶¶ 17, 19.

27 <sup>98</sup> Ofiesh Decl. ¶¶ 35–36.

28 <sup>99</sup> Kazan Decl. ¶¶ 20–27.

<sup>100</sup> Stephen C. Decl. ¶¶ 17–18; Gary W. Decl. ¶¶ 10–12.

<sup>101</sup> Gary W. Decl. ¶ 13; Mishori Decl. ¶¶ 12, 26–33.

<sup>102</sup> Ofiesh Decl. ¶¶ 38–42; *see* Kazan Decl. ¶¶ 7–8; Gary W. Decl. ¶ 17.

1 individuals with disabilities to discrimination in admissions or of substantially impairing  
2 accomplishment of the objectives of UC’s admissions program for individuals with disabilities is  
3 prohibited by the ADA and California law. 28 C.F.R. § 35.130(b)(3). Neither intent, nor direct  
4 action, by UC is required. *Id.* (“A public entity may not, *directly or through contractual or other*  
5 *arrangements*, utilize [such] criteria or methods of administration . . . .” (emphasis added)). So  
6 long as a policy “effectuate[s] discrimination against disabled persons,” it is illegal. *Crowder*, 81  
7 F.3d at 1483. Plaintiffs may show discriminatory effects through a traditional disparate impact  
8 analysis, but they are not required to. *Y.G. v. Riverside Unified Sch. Dist.*, 774 F. Supp. 2d 1055,  
9 1066 (C.D. Cal. 2011).

10 Even when they receive accommodations, students with disabilities perform worse on the  
11 ACT and SAT than students without disabilities.<sup>103</sup> Considering these test scores, therefore, makes  
12 UC less likely to admit students with disabilities. UC’s use of the SAT and ACT is rendered even  
13 more inequitable by the fact that the SAT and ACT are “lacking scientific validity” for students  
14 with disabilities, “in that the tests are not accurately measuring the concepts that they purport to  
15 test, and reliability, in that the test outcomes are not sufficiently replicable over test occurrences,  
16 time, place, and circumstances.”<sup>104</sup> There has been little study given to the validity of the SAT and  
17 ACT controlling for specific disabilities, specific accommodations, and specific testing  
18 conditions.<sup>105</sup> For students who test without accommodations, the test likely measures the effect of  
19 their disability, not their skill or knowledge.<sup>106</sup> The timed aspect of the SAT and ACT, which  
20 greatly disadvantages students with disabilities, has also not been validated.<sup>107</sup> Because the  
21 validity of the SAT and ACT is not supported for students with disabilities, consideration of the  
22 tests illegally denies these students the opportunity to “demonstrate their true abilities.”  
23 *Breimhorst v. Educ. Testing Serv.*, No. C-99-CV-3387, 2000 WL 34510621, at \*4 (N.D. Cal. Mar.  
24 27, 2000). Moreover, since standardized test scores do not accurately predict these students’

25 \_\_\_\_\_  
<sup>103</sup> Blanck Decl. ¶ 33.

26 <sup>104</sup> *Id.* ¶ 21.

27 <sup>105</sup> *Id.* ¶¶ 22–23.

28 <sup>106</sup> *Id.* ¶ 25. The effect of “internalized stigma” also as “detrimental effects on test-taking and  
outcomes, thereby further placing in question the validity of the test results.” *Id.* ¶ 27.

<sup>107</sup> Ofiesh Decl. ¶ 16.

1 strengths and weaknesses, considering them impairs the accomplishment of UC’s objectives in its  
2 admissions and scholarship programs, which is ostensibly to admit and support students with the  
3 potential to succeed in college.

4         The move to a “test-optional” process fails to address the discriminatory effects of the SAT  
5 and ACT. “Test-optional” schools admit students who do not submit scores at lower rates.<sup>108</sup> UC  
6 cannot eliminate the discrimination by changing the policy only with respect to students with  
7 disabilities.<sup>109</sup> As Dr. Peter Blanck explains, there is no way for UC to simply disregard test scores  
8 when evaluating applicants who choose not to submit them, because applicants are considered  
9 only in relation to each other.<sup>110</sup> Admissions officers will have to compare students who submit  
10 standardized test scores with students who do not, even if the student without scores had no  
11 opportunity to take the test.<sup>111</sup> Because the tests have been required and relied upon in UC  
12 admissions for decades, admissions officers are likely to “assume that SAT/ACT are meaningful  
13 measurements of the characteristics that UC values, and that students who do not submit scores  
14 did not score well on the test and therefore are more likely to lack those valuable  
15 characteristics.”<sup>112</sup> The “test-optional” policy also perpetuates the continued stigmatization of  
16 students with disability, including feelings among such students themselves that they are not smart  
17 enough to succeed in college or do not deserve to be admitted.<sup>113</sup>

18         Even if the SAT and ACT served any legitimate purpose in the UC admissions process—  
19 and the evidence is that they do not<sup>114</sup>—by making the tests optional, UC has already conceded  
20 that an “alternative course of action could be adopted that would enable that interest to be served  
21 with less discriminatory impact.” *Yazdinian v. Las Virgenes Vill. Cmty. Ass’n*, No.  
22 CV1107611SJOJCX, 2012 WL 13009122, at \*5 (C.D. Cal. July 2, 2012). If UC can determine

23 \_\_\_\_\_  
24 <sup>108</sup> Blanck Decl. ¶¶ 40–43.

25 <sup>109</sup> Among other problems, applicants have a right to keep their disability status private. 34 C.F.R.  
26 § 104.42(b)(4). There is no way for UC to know, absent disclosure, which students have  
disabilities when it is evaluating applications.

27 <sup>110</sup> Blanck Decl. ¶ 34.

28 <sup>111</sup> *Id.* ¶ 38.

<sup>112</sup> *Id.* ¶ 39.

<sup>113</sup> *Id.* ¶¶ 46–49; Grajewski Decl. ¶ 31.

<sup>114</sup> *See* Rothstein Decl. ¶¶ 8–16.

1 some students’ potential without reference to discriminatory test scores, it can, and must, do the  
2 same for all students.

3 **B. The Balance of Harms Weighs Decidedly in Plaintiffs’ Favor.**

4 By adopting a so-called “test-optional” admissions policy under which submitting an SAT  
5 or ACT score is an option for all students except those with disabilities, the Regents have created  
6 an unlawful two-tiered admissions system. Under that system, students without disabilities can  
7 continue to take the tests and use their high scores to their advantage, whereas students with  
8 disabilities—for whom the tests have limited, if any, validity—are effectively barred from testing  
9 with the accommodations they need. Students with disabilities who are unable to access the tests  
10 with necessary accommodations thus face an impossible dilemma: if they apply without  
11 submitting a score, they will be at a competitive disadvantage relative to applicants who submit  
12 scores, and may feel obligated to self-identify as having a disability to explain why they did not  
13 submit a score. But if they test without the accommodations they need, their scores will even  
14 further underpredict their capacity to succeed at UC.<sup>115</sup> Students with disabilities have thus gone  
15 to extraordinary lengths attempting to test with their required accommodations, like Plaintiff Gary  
16 W., who has taken a gap year during which he hopes to find a test center that will allow him to test  
17 with the accommodations he needs.<sup>116</sup>

18 For students of color and those from low-income families, who are also disproportionately  
19 represented among students with disabilities, “test-optional” magnifies the harms of UC’s use of  
20 the SAT and ACT.<sup>117</sup> The Regents’ retention of the tests will continue to deter applications from  
21 students who do not know that the tests are discriminatory, and who may thus assume that low test  
22 scores reflect their inability to succeed at UC.<sup>118</sup> And for students who are aware of the Regents’  
23 decision to retain the tests notwithstanding their express recognition that the tests are racist,  
24 correlated to wealth and privilege, and unrelated to college preparedness, the very awareness that  
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26 <sup>115</sup> See Blanck Decl. ¶ 29; Ofiesh Decl. ¶ 20.

27 <sup>116</sup> See Gary W. Decl. ¶ 18.

28 <sup>117</sup> Smith Decl. ¶ 13; R.R. Decl. ¶ 7; K.B. Decl. ¶¶ 9–10.

<sup>118</sup> Love Decl. ¶ 11; Hyman Decl. ¶ 4; see Gándara Decl. ¶ 19.

1 the Regents chose to continue using the tests inflicts severe psychological and stigmatic harm.<sup>119</sup>  
2 In clinging to the tests while openly acknowledging their adverse effects on these groups of  
3 students, the Regents have made abundantly clear that the students who matter in UC’s admissions  
4 process are those who are most likely to benefit from UC’s retention of the tests: White,  
5 privileged, and nondisabled students who have the resources not only to secure scarce test seats,  
6 but also to pay for expensive test preparation services to maximize their scores.<sup>120</sup> The message to  
7 students with disabilities, students of color, and students from low-income families is  
8 unambiguous: “We know that the tests operate to exclude you from the University. We know that  
9 they discriminate against you and in favor of White, privileged, and nondisabled applicants.  
10 Because those applicants are the ones we value, we’re keeping the tests.”<sup>121</sup> This message both  
11 reinforces and reproduces centuries of State-inflicted psychological and economic violence against  
12 communities of color and low-income communities. As Dr. David E. Kirkland, a leading expert  
13 on educational equity, explains, the Regents’ insistence on using the tests despite openly  
14 acknowledging their racist nature is “in itself” “a racist act.”<sup>122</sup>

15         Students of color and students from low-income families might reasonably ask whether, if  
16 the circumstances were reversed and the Regents had determined that the tests excluded wealthy  
17 White students from becoming UC students and alumni, they would nevertheless have decided to  
18 retain the tests for two more years for admissions purposes, and for at least four more years for  
19 scholarship and statewide eligibility determinations. The answer is obvious. As one student  
20 explained:

21             It makes me feel like even though the UC leaders claim to care about equity, they are  
22             trying to backpedal in order to still adhere to what the wealthier applicants want. Those  
23             students are the ones who provide the money that funds schools . . . I come from a family  
24             that does not have generations of experience in higher education, and has historically been  
              excluded from the educational system. It is very discouraging to hear UC leaders say the  
              SAT and [ACT] are racist and problematic, but not problematic enough to completely get

25 <sup>119</sup> Love Decl. ¶ 12; Hyman Decl. ¶ 5; Smith Decl. ¶ 10; K.B. Decl. ¶ 11; Declaration of D.F. ¶ 5.

26 <sup>120</sup> Love Decl. ¶ 9; Kirkland Decl. ¶ 20; N.P. Decl. ¶¶ 15–16; A.H. Decl. ¶ 8; K.F. Decl. ¶ 9; R.R.  
Decl. ¶¶ 7–8; K.B. Decl. ¶ 9.

27 <sup>121</sup> Love Decl. ¶ 9; Smith Decl. ¶¶ 15–16; N.P. Decl. ¶ 14; K.D. Decl. ¶ 7; R.R. Decl. ¶¶ 4, 7; K.B.  
Decl. ¶¶ 9–10.

28 <sup>122</sup> Kirkland Decl. ¶ 20.

1           rid of them in the application process.<sup>123</sup>

2           In the words of another student: “How can you say those things about the tests in a meeting but  
3           not completely get rid of them?”<sup>124</sup>

4           By contrast, dropping the SAT and ACT from UC’s admissions process will cause no harm  
5           to the Regents, who have already conceded that their use of the tests discriminates against students  
6           on the basis of race and wealth. Indeed, ceasing to rely on the tests will benefit the Regents by  
7           relieving them of the impossible task of trying to find a way to employ discriminatory tests in a  
8           nondiscriminatory manner. The Regents simply have no legitimate interest in continuing to use an  
9           admissions criterion that denies protected classes of students equal consideration in UC’s  
10          admissions process, particularly when they admit that the criterion bears no relationship to  
11          students’ capacity to succeed at UC. Nor do they have an interest in implementing a “test-  
12          optional” admissions policy that they have not even developed; that is not, in fact, optional; that  
13          their own Task Force was too rushed to study;<sup>125</sup> and that treats as a “value add” test scores that  
14          provide value only to White, nondisabled, and affluent students. The Regents do not contest any of  
15          this. The only rationale they offer for their decision to retain the tests is their desire to “offer  
16          students” with the resources to take them “flexibility beyond one admissions cycle.”<sup>126</sup> But  
17          preserving the advantages conferred by the tests on the State’s most privileged students is neither a  
18          cognizable interest nor an option, particularly where, as here, both the Regents and the Task Force  
19          have already acknowledged the harms and impracticalities of a “test-optional” policy.<sup>127</sup> The  
20          balance of harms thus weighs sharply in favor of Plaintiffs.

21          **V. CONCLUSION**

22                 For the foregoing reasons, Plaintiffs request that this Court grant the preliminary  
23          injunction.

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26          <sup>123</sup> N.P. Decl. ¶ 14.

27          <sup>124</sup> K.B. Decl. ¶ 9.

27          <sup>125</sup> Gándara Decl. ¶ 24.

28          <sup>126</sup> *Supra* note 61.

28          <sup>127</sup> *See supra* notes 49, 56.



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DATED: July 22 , 2020

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DATED: July 22 , 2020

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