A160927

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

KAWIKA SMITH, ET AL.,
Plaintiffs-Respondents,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND JANET NAPOLITANO
Defendants-Petitioners.

Appeal from the Superior Court, County of Alameda
Case No. RG19046222
The Honorable Brad Seligman
Dept. 23, Telephone: (510) 267-6939

Government Code § 6103 — No Fee Required

CORRECTED APPLICATION TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF ASSOCIATION ON HIGHER EDUCATION AND DISABILITY, CALIFORNIA ASSOCIATION FOR POSTSECONDARY EDUCATION AND DISABILITY, CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS CALIFORNIA, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, DISABILITY RIGHTS LEGAL CENTER, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, LEGAL AID AT WORK, AND NATIONAL DISABLED LAW STUDENTS ASSOCIATION IN SUPPORT OF PLAINTIFFS-RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS OR OTHER STAY ORDER

Claudia Center
Malhar Shah
Disability Rights Education & Defense Fund
3075 Adeline Street, Suite 210
Berkeley, CA 94703
(510) 644-2555
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

TREATISES

REGULATIONS

APPLICATION TO FILE AMICUS CURIAE BRIEF

Petitions for writs of supersedeas are governed by California Rules of Court, rule 8.112. Although that rule does not expressly address amicus briefs or letters in support of a petition for writ of supersedeas, case law makes clear that the court has discretion to accept amicus briefs. (*See, e.g.*, *Leung v. Verdugo Hills Hospital* (2008) 168 Cal.App.4th 205, 216, fn. 3 [85 Cal.Rptr.3d 203, 211] [granting request to file amicus brief in support of petition for writ of supersedeas].)

By way of analogy to petitions for writ of mandate, California Rules of Court, rule 8.487 expressly permits the filing of amicus briefs after an appellate court issues an alternative writ or order to show cause. (Cal. Rules of Court, rule 8.487 subd. (e)(1).) However, the Advisory Committee comment on the California Rules of Court, rule 8.487 makes clear that amicus letters are also permissible *before* a court issues an alternative writ or order to show cause:

> Subdivisions (d) and (e). *These provisions do not alter the court's authority to request or permit the filing of amicus briefs or amicus letters in writ proceedings in circumstances not covered by these subdivisions, such as before the court has determined whether to issue an alternative writ or order to show cause* or when it notifies the parties that it is considering issuing a peremptory writ in the first instance.

(Emphasis added.) Indeed, one court has stated in a published opinion that the filing of amicus letters in connection with a writ petition was one factor the court considered in deciding whether to issue an order to show cause. (*Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 557-58 [163 Cal.Rptr.3d 205, 210], *as modified on denial of reh'g (Nov. 13, 2013)* [noting that amicus letters were filed in support of

a writ petition and that "based on the amici curiae submissions we have received" the matter "appears to be of widespread interest" such that writ review was appropriate]; *see Los Angeles County Bd. of Supervisors v. Superior Court of Los Angeles County* (2015) 235 Cal.App.4th 1154 [185 Cal. Rptr.3d 842, 847] ["[T]he Association of Southern California Defense Counsel, as amicus curiae, filed a[n] [amicus letter] in support of issuance of the writ."], *revd. on another ground* in (2016) 2 Cal.5th 282.)

Therefore, we ask the Court to grant this application and to consider this amicus brief in deciding whether to grant the Petitioners' petition for writ of supersedeas.

INTEREST OF AMICI CURIAE

The Association on Higher Education And Disability ("AHEAD") is a not-for-profit organization committed to full participation and equal access for persons with disabilities in higher education. Its membership includes faculty, staff and administrators at approximately 2,000 colleges and universities, not-for-profit service providers and professionals, and college and graduate students planning to enter the field of disability practice. AHEAD members strive to ensure that institutions of higher education comply with applicable disability rights protections and provide reasonable accommodations to both students and employees. AHEAD is a nationally-recognized voice advocating for access to higher education and graduate admissions and licensing examinations. The outcome of this case is of significant importance to AHEAD members and the individuals they serve.

California Association for Postsecondary Education and Disability ("CAPED") is the longest lasting association of professionals serving students with disabilities in postsecondary education. The organization was established unofficially as a grassroots effort in 1974 and formally

incorporated as a non-profit organization in April 1975. CAPED became affiliated with the Association on Higher Education and Disability (AHEAD) in 2009. The membership of CAPED consists of staff, faculty and administrators from colleges, universities, and community agencies dedicated to the provision of equal access to higher education for persons with disabilities. The tremendous breadth of knowledge and experience that exists within CAPED's membership enables it to maintain its reputation as a recognized leader in the field of services and instruction for students with disabilities in postsecondary education. CAPED is often sought out for input and guidance on issues that affect the state of postsecondary education for individuals with disabilities in California, and beyond.

The Civil Rights Education and Enforcement Center ("CREEC") is a national nonprofit membership organization based in Colorado whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC's efforts to defend human and civil rights extend to all walks of life, including ensuring that people with disabilities have full and equal access to and receive equal treatment in higher education and admissions to higher education. The decision under review threatens those efforts by permitting the UC Regents to rely upon discriminatory admissions criteria and to contract away its responsibility for compliance with anti-discrimination statutes.

Disability Rights Advocates ("DRA") is a non-profit public interest center that specializes in high-impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA's educational cases include *Enyart v. National Conference of Bar Examiners, Inc*. (9th Cir. 2011) 630 F.3d 1153, which required the National Conference to permit a blind law school graduate to use assistive technology to take the Multistate Bar Exam and the Multistate Professional Responsibility Exam, and *Breimhorst v. Educational Testing Services* (N.D.

Cal.), which ended the practice of "flagging" scores when students received disability-related accommodations when taking several nationally administered standardized tests.

Disability Rights California is the state and federally designated protection and advocacy system for California, with a mission to advance the legal rights of people with disabilities pursuant to Welf. & Inst. Code § 4900 *et seq*. Disability Rights California was established in 1978 and is the largest disability rights advocacy group in the nation. It has represented youth and adults with disabilities in litigation and individual advocacy regarding their rights to equal educational access. In 2019 alone, Disability Rights California assisted more than 24,000 disabled individuals throughout California, including students challenging disability discrimination in higher education.

The Disability Rights Education & Defense Fund ("DREDF"), based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. DREDF was founded by people with disabilities and parents of children with disabilities, and remains board- and staff-led by members of the communities for whom we advocate. Recognized for its expertise in the interpretation of federal disability civil rights laws, DREDF pursues its mission through education, advocacy and law reform efforts. Consistent with its civil rights mission, DREDF supports legal protections for all diversity and minority communities, including the intersectional interests of people within those communities who also have disabilities.

The Disability Rights Legal Center ("DRLC") is a non-profit legal organization founded in 1975 to represent and serve people with disabilities. Individuals with disabilities continue to struggle against ignorance, prejudice, insensitivity, and lack of legal protection in their endeavors to achieve fundamental dignity and respect. DRLC assists people

with disabilities in attaining the benefits, protections, and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and other state and federal laws. Its mission is to champion the rights of people with disabilities through education, advocacy, and litigation. DRLC advocates for equal opportunity in higher education, as people with disabilities continue to face unreasonable and unnecessary barriers, including unequal consideration in admissions.

Founded in 1972 as the Mental Health Law Project, the Judge David L. Bazelon Center for Mental Health Law is a national non-profit advocacy organization that provides legal assistance to individuals with mental disabilities. Through litigation, public policy advocacy, education, and training, the Bazelon Center works to advance the rights and dignity of individuals with mental disabilities in all aspects of life, including education, employment, health care, community living, housing, voting, parental and family rights, and other areas. The Center has represented numerous children and young adults in cases seeking equal educational opportunity.

Legal Aid at Work is a non-profit public interest law firm founded in 1916 whose mission is to protect, preserve, and advance the rights of individuals from traditionally under-represented communities. Legal Aid at Work has represented clients in cases covering a broad range of civil rights issues including discrimination on the basis of race, gender, age, disability, pregnancy, sexual orientation, and national origin. Legal Aid at Work has represented, and continues to represent, numerous clients faced with discrimination on the basis of their disabilities, including those with claims brought under the Title II of the Americans with Disabilities Act. Legal Aid at Work has also filed amicus briefs in numerous cases of importance to persons with disabilities.

The National Disabled Law Students Association ("NDLSA") is a national nonprofit dedicated to advocating and advancing disabled students' rights in higher education. NDLSA's mission is to eliminate the stigma of disability within the legal profession and promote an environment in which current and future attorneys can obtain the accommodations necessary to enjoy equal access and career success. Consistent with this goal, NDLSA works to eliminate systemic barriers, such as arbitrary obstacles to exam accommodations, that contribute to excluding disabled people from the legal profession.

No party or counsel for a party in the pending case authored the proposed amici curiae brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than the amici, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief.

PROPOSED AMICUS BRIEF

INTRODUCTION

California's disability rights statutes are intended to place disabled persons on equal footing with their non-disabled peers. But here, the Petitioners' retention of the SAT and ACT tests as a factor in admissions decisions is placing disabled applicants at an unnecessary disadvantage compared to their non-disabled peers. Research has repeatedly demonstrated that students with disabilities score lower on average on the SAT and ACT because the tests reflect their disabilities rather than their aptitude. (Declaration of Peter Blanck in Support of Plaintiffs' Motion for Preliminary Injunction ("Blanck Decl.") ¶¶ 19, 21-22, 24; Declaration of Nicole S. Ofiesh in Support of Plaintiffs' Motion for Preliminary Injunction ("Ofiesh Decl.") ¶¶ 15-16, 18-20; Declaration of Lisa Grajewski in Support

of Plaintiffs' Motion for Preliminary Injunction ("Grajewski Decl.") ¶ 34.) Moreover, disabled students often face insurmountable barriers in seeking essential testing accommodations due to the College Board and ACT, Inc.'s overly restrictive criteria. (Ofiesh Decl. ¶¶ 22-24, 30-31; Grajewski Decl. ¶ 22-23, 30.)

These barriers have increased by an order of magnitude during the COVID-19 pandemic. Disabled students who need testing accommodations cannot get their accommodations approved because of school closures. Those who secure accommodations often cannot access a suitable test site because of College Board and ACT, Inc. policies that sharply limit sites offering accommodations. Petitioners' own expert concedes that "the odds in this Covid time of students either getting their accommodations approved or finding a suitable testing site are *almost nil.*" (Declaration of William Hiss in Support of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ("Hiss Decl." ¶ 54).) Moreover, disabled students who are immunocompromised are denied access to the tests because there are no remote options for testing. These immunocompromised disabled students are forced to risk their health and lives by breaking quarantine to travel to the site and take the exam. (Declaration of Ranit Mishori in Support of Plaintiffs' Motion for Preliminary Injunction ("Mishori Decl.") ¶¶ 26-33.) Moreover, the fear and anxiety of testing in-person during the pandemic can deny these immunocompromised test takers meaningful access to the exams. (See Ofiesh Decl. ¶¶ 19, 36 and Grajewski Decl. ¶ 28.)

Despite knowing of the discriminatory effects of the SAT and ACT on disabled students, the UC Regents voted unanimously to treat test results as a "plus factor" that gives test-submitters a second opportunity for admissions consideration. (Transcript of Oral Argument at 45, *Smith v. Regents*, (Super. Ct. Alameda County, Aug. 31. 2020, No. RG19046222) ("Transcript").) In doing so, the Petitioners have adopted a two-tiered

admissions system that disadvantages disabled students by denying them an equal chance to access this second opportunity. Petitioners' argument that students with disabilities have an equal chance of gaining admission without exam scores, through the first review, is contradicted by their acknowledgement that the submission of a score is a "plus factor" for a second review. (Transcript at 45.) It is from this second opportunity for admissions that Plaintiffs are excluded, in violation of disability nondiscrimination statutes.

The trial court's ruling below is supported by an extensive factual record and decades of disability rights jurisprudence. The stay should be lifted. If the trial court's injunction remains stayed, and Petitioners' "plus factor" policy is maintained, thousands of disabled applicants will be denied a fair chance to be considered for admissions. The UC application cycle will be live between November 1 through 30, 2020. Until then, disabled students will be forced to continue their efforts to navigate insurmountable barriers to access the SAT and ACT, or waive their opportunity for a second review for admissions. The need for this Court's action in lifting the stay is urgent.

ARGUMENT

I. The Trial Court's Injunction Is Supported by the Evidence.

In issuing the injunction below, the Superior Court made several foundational findings of fact that are supported by the evidence and that are consistent with the experiences of the amici parties joining this brief.

A. Disabled Students Seeking Testing Accommodations on the SAT and ACT Face Significant Barriers.

The trial court found that disabled students seeking accommodations for the SAT or ACT process face significant barriers. (*Smith v. Regents*, Order Granting Preliminary Injunction (Super. Ct. Alameda County, Aug.

31. 2020, No. RG19046222), at 4 [citing Blanck Decl. 25-32; Offiesh Decl. 22-37].) The documentation requirements of the College Board and ACT for receiving accommodations are unnecessarily high and screen out low-income students and students of color. (Ofiesh Decl. ¶¶ 22-23.) Many of these students attend schools lacking in the resources and training needed to identify and diagnose disabilities, including learning disabilities. (*Id.* ¶¶ 23, 32.) As a result, many students have undiagnosed disabilities and have never received the services and supports needed or related documents. (*Id.* ¶ 23.) Students without diagnoses or documentation cannot obtain accommodations – not without spending thousands of dollars for private evaluations to document a disability, and sometimes re-evaluations, to meet the College Board and ACT, Inc.'s criteria. (*Id.* ¶ 24.) Even students who have diagnoses and documentation often do not receive necessary accommodations on the SAT or the ACT. (Grajewski Decl. ¶¶ 18, 20; Ofiesh Decl. ¶ 24.) Further, the College Board and ACT, Inc. fail to recognize psychological conditions such as anxiety and trauma as requiring testing accommodations, even though these conditions are covered by state and federal disability nondiscrimination statutes, and particularly impact low-income students. (Grajewski Decl. ¶ 27.)

The College Board and ACT's documentation requirements are by no means necessary. The Association of Higher Education and Disability ("AHEAD"), a leading organization on individuals with disabilities in higher education, and an amicus joining this brief, has established non-burdensome, practical, cost-effective, and reasonable documentation practices. (Ofiesh Decl. ¶ 30.) These requirements accurately identify students' disability-related needs while alleviating parents and families from the overwhelming weight of current documentation requirements. (*Id.* ¶ 31.)

Even when students have documentation demonstrating that they are

eligible for testing accommodations, the accommodations request process can be almost impossible to navigate. Students are required to work with their school counselors to submit requests for SAT and ACT accommodations, but even guidance counselors struggle to navigate the College Board and ACT, Inc.'s accommodations process. (*Id.*) Students at under-resourced schools do not have the ability to make these requests. (Grajewski Decl. ¶¶ 22-23.) Some schools are also hostile toward students who seek SAT or ACT accommodations, even if they have a long history of documented disabilities. (*Id.* ¶ 22.) One reason for this is that the College Board has adopted a program of reviewing and potentially rejecting a school's ability to document and verify accommodations if the College Board discovers a high proportion of test-takers approved for accommodations. (*Id.* ¶¶ 22, 30.) This policy deters schools from increasing the number of students who test with accommodations. (*Id.* ¶ 22.)

B. Disabled Students Score Lower On the SAT and ACT Because These Tests Reflect Disability and Not Aptitude.

The trial court found that, on average, students with disabilities score lower on these tests. (*Smith v. Regents*, Order Granting Preliminary Injunction, *supra*, at 4 [citing Blanck Decl. 33; Syverson Decl. 22].) Even with the best accommodations, the College Board and ACT, Inc. administer examinations that reflect students' disabilities and not their aptitude. Well-recognized scholars and practitioners in the field have concluded that the SAT and ACT unfairly penalize disabled students *on the basis of* their disabilities because they are: 1) less scientifically valid as to students with disabilities because they do not accurately reflect their knowledge and mastery; 2) less scientifically reliable estimates of disabled students' mastery and knowledge; and 3) less equitable with regard to students with disabilities because they hinder the display of the student's knowledge and learning. (Blanck Decl. ¶¶ 19, 21-22, 24.) For example, studies demonstrate

that one primary reason that these tests do not scientifically demonstrate the knowledge, skills, and academic potential of disabled students, even when they receive accommodations, is that a timed test inherently disadvantages such students. (*Id.* ¶ 24; Ofiesh Decl. ¶¶ 15-16, 18-20.) As a result, there is little data to show that the standardized test scores of disabled students are predictive of academic success. (Blanck Decl. ¶ 22; Ofiesh Decl.¶¶ 17-18; Grajewski Decl. ¶ 34.)

C. The COVID-19 Pandemic Has Made It Virtually Impossible for Disabled Students to Access the SAT or ACT.

The trial court found that COVID has exacerbated these barriers by disrupting test taking locations, closing schools, and limiting access to school counselors. (*Smith v. Regents*, Order Granting Preliminary Injunction, *supra*, at 4 [citing Hiss Decl. ¶ 54].) As Petitioners' expert points out, "the odds in this Covid time of students either getting their accommodations approved or finding a suitable testing site are almost nil, especially in California with its extraordinarily poor ratio of students to guidance counselors who are supposed to guide requests both because of the documentation requirements for accommodations, and given that most schools have been closed since mid-spring and are likely to remain in limbo well into the fall." (Hiss Decl. ¶ 54.)

Specifically, parents cannot access resources to provide documentation for their children because of school closures, difficulty of finding evaluators, and rescheduled or cancelled evaluations. (Ofiesh Decl. ¶ 38-42.) Students with recently diagnosed disabilities or who need updated accommodations cannot establish or modify their school records because schools are not conducting 504 or IEP meetings. (Grajewski Decl. ¶ 16.)

Even when students with disabilities secure approval to test with accommodations, many cannot find a testing site. Many basic testing accommodations, including double time and alternative formats, are not

available at standard or "national" test centers, the network of test centers made available through the College Board and the ACT, Inc. (Declaration of Laura Kazan in Support of Plaintiffs' Motion for Preliminary Injunction ("Kazan Decl.") ¶ 14; Grajewski Decl. ¶ 21.) The only alternative for students is to test at a school site. However, schools are not required to offer a testing site, and are often not willing or able to do so. (Kazan Decl. ¶ 15.) For example, one student, whose parent unsuccessfully contacted 22 different school test sites and who missed two separate SAT administrations due to the inability to find a site willing to administer the test with his accommodations, ultimately did not take the test. (Kazan Decl. ¶ 17.) Most students with disabilities who need to test at a school site do not have a place to take the test. (Grajewski Decl. ¶ 21; Kazan Decl. ¶¶ 15, 18-19.)

The pandemic has also rendered the SAT and ACT testing sites inaccessible for disabled students who are immunocompromised or who have family members who are COVID-vulnerable. Approximately one million high school juniors scheduled to take the SAT for the first time in spring 2020 had their test administrations cancelled.[1] Over 2,500 test sites cancelled ACT administrations in June 2020. (Kazan Decl. ¶ 22.) As a result, there has been a surge in demand for summer and fall 2020 test administrations and students across the State are vying for limited opportunities to take the tests before UC's Fall 2021 admission cycle closes on November 30, 2020.[2] Disabled students are more likely to have family

[1] Nick Anderson, One Million-plus Juniors Will Miss Out on SATs and ACTs This Spring Because of Coronavirus, Wash. Post (Apr. 13, 2020), https://www.washingtonpost.com/%20local/education/one-million-plus-juniors-will-miss-out-on-sats-and-acts-this-spring-because-ofcoronavirus/2020/04/12/.

[2] College Board, SAT and PSAT-Related Coronavirus Updates, https://pages.collegeboard.org/sat-covid-19-updates (accessed July 21,

members vulnerable to COVID-19; these students cannot safely test at centralized testing locations during the pandemic. (Mishori Decl. ¶¶ 26-33.) And disabled students who are immunocompromised cannot safety test at centralized testing locations. The College Board and ACT, Inc. cannot prevent the transmission of COVID at testing centers and forcing disabled students to sit for the SAT or ACT at centralized testing centers will worsen the spread of the virus. (*Id*.) Disabled students testing at these sites cannot practice any of the preventative interventions recommended by the CDC such as social distancing and quarantining. (*Id.* ¶¶ 26-29.) And the anxiety and fear of testing in person during the pandemic will likely exacerbate disabilities and interfere with testing performance, placing disabled students at a disadvantage compared to their non-disabled peers. (See Ofiesh Decl. ¶¶ 19, 36 and Grajewski Decl. ¶ 28.)

D. Submitting Test Scores—a "Plus Factor"—Gives Applicants a Second Opportunity for Admission at Six UC Campuses; Disabled Students Are Excluded From This Opportunity.

The trial court found that the UC Regents' "test optional" policy will help an applicant's chances of admission if they submit test scores. (*Smith v. Regents*, Order Granting Preliminary Injunction, *supra*, at 5.) Counsel for UC conceded at the hearing that submitting test scores can only help an applicant and that including such scores is treated as a "plus factor," giving test submitters a second opportunity for admissions consideration. (*Id.* at 5;

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-fret15414756.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[.]").

Transcript at 45.) Petitioners retained their policy knowing of its effects on disabled students. On May 21, 2020, six months after Plaintiffs filed this case detailing the discriminatory effects of the SAT and ACT, Petitioners voted unanimously to permit its campuses to continue relying on the tests in admission and scholarship determinations through the Fall 2022 admissions cycle.[3] Six out of nine campuses have adopted the "test optional" policy. (*Smith v. Regents*, Order Granting Preliminary Injunction, *supra*, at 5.)

Throughout the Regents' determination process, Plaintiffs repeatedly brought to their attention that consideration of the SAT and ACT would screen out disabled students and urged them to address it. In October 2019, Plaintiffs described to the Regents how "[s]tudents with disabilities who require accommodations to take the exam experience discrimination . . . because not all test sites permit accommodations," such that "students must find their own location" to test and, if they cannot find one, may not be able to "take the test at all."[4] Plaintiffs also explained that less privileged students with disabilities may not receive approval for the accommodations they need because they "cannot be identified soon enough or evaluated frequently enough" to meet the testing agencies' documentation requirements.[5] In December 2019, Plaintiffs raised the same concerns in their Complaint, setting out in significant detail the myriad ways in which

---

[3] Press Release, Univ. of Cal. Office of the President, University of California Board of Regents Unanimously Approved Changes to Standardized Testing Requirement for Undergraduates (May 21, 2020), https://www.universityofcalifornia.edu/press-room/university-california-board-regentsapproves-changes-standardized-testing-requirement; Univ. of Cal. Office of the President, Action Item: College Entrance Exam Use in University of California Undergraduate Admissions 2 (May 2020), https://regents.universityofcalifornia.edu/regmeet/may20/b4.pdf.

[4] Ex. 1 to Declaration of Gregory Ellis in Support of Plaintiffs' Motion for Preliminary Injunction ("Ellis Decl.") at 4 (Oct. 29, 2019 Letter from Plaintiffs' counsel to Regents of the University of California).

[5] *Id.*

UC's use of SAT and ACT scores discriminates against and harms students with disabilities. (Compl. ¶¶ 22-25, 37, 104-22, 177-180.) And before the Regents' meeting on May 21, 2020, Plaintiffs twice asked the Regents to identify the steps they would take to ensure that an ostensibly "test-optional" admissions process would not discriminate against students with disabilities.[6] During the meeting, the Regents expressly acknowledged that the UC's use of the tests discriminates against students of color and students from low-income families.[7] Nevertheless, the Regents unanimously voted to allow applicants to submit SAT and ACT scores to gain an advantage in admissions determinations for the next two years, and in scholarship determinations for at least the next four years.

II. The "Test Optional" Policy Discriminates Against Applicants With Disabilities.

California's legislature has expressly declared "[t]he law of this state in the area of disabilities provides protections independent from those in the [ADA]. Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections." (*Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1040 [207 Cal.Rptr.3d 120, 130] [alterations in original].) California Government Code Section 11135 prohibits denying

---

[6] 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).

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

persons with a disability "full and equal access to the benefits of, or . . . unlawfully subject[ing them] to discrimination under, any program or activity that . . . receives any financial assistance from the state." (Cal. Gov. Code § 11135 subd. (a).) Similarly, the Unruh Civil Rights Act provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their . . . disability . . . are entitled to the full and equal accommodations, advantages facilities, privileges, or services in all business establishments of every kind whatsoever." (Cal. Civil Code § 51 subd. (a).) Because both of these statutes expressly incorporate the ADA as a floor,[8] federal law is authoritative but does not set the limits on Plaintiffs' rights.

The Americans with Disabilities Act of 1990 ("ADA") is a sweeping federal civil rights law designed to eliminate discrimination against individuals with disabilities in a wide circle of activities, including education, in order to provide individuals with disabilities with equality of opportunity and full participation in American life. (42 U.S.C. § 12101.) The ADA was not meant to give disabled persons an advantage over other persons, but to place those with disabilities "on an equal footing." (*D'Amico v. New York State Bd. of Law Examiners* (W.D. N.Y. 1993) 813 F. Supp. 217, 221.)

---

[8] Cal. Gov. Code § 11135 subd. (b) ("With respect to discrimination on the basis of disability, programs and activities subject to subdivision (a) shall meet the protections and prohibitions contained in Section 202 of the federal Americans with Disabilities Act of 1990 (42 U.S.C. § 12132), and the federal rules and regulations adopted in implementation thereof, except that if the laws of this state prescribe stronger protections and prohibitions, the programs and activities subject to subdivision (a) shall be subject to the stronger protections and prohibitions."); Cal. Civil Code § 51 subd. (f) ("A violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.").

To prove a claim for discrimination under California's disability rights laws, plaintiffs must show that they are (1) "individual[s] with a disability" who are (2) "otherwise qualified to participate in or receive the benefit of services, programs, or activities" and were (3) "either excluded from participation in or denied the benefits of some public entity's services, programs, or activities, or [were] otherwise discriminated against," and (4) "such exclusion, denial of benefits, or discrimination was by reason of [their] disabilit[ies]." (*In re M.S.* (2009) 174 Cal.App.4th 1241, 1252 [95 Cal.Rptr.3d 273, 281]; *see also Thompson v. Davis* (9th Cir. 2002) 295 F.3d 890, 895.) In proving a violation of these laws, neither intent, nor direct action, by the public entity, is required. (28 C.F.R. § 35.130 subds. (b)(3)(i), (ii); 28 C.F.R. § 35.130 subd. (b)(8).) Public entities may also discriminate indirectly when they outsource "through contractual, licensing, or other arrangements." (28 C.F.R. § 35.130 subds. (b)(1).) A key principle behind these mandates is that where a policy "unduly burden[s]" individuals with disabilities, that policy discriminates "by reason of" disability and is unlawful. (*McGary v. City of* Portland (9th Cir. 2004) 386 F.3d 1259, 1265.)

Despite knowing of the discriminatory effects of the SAT and ACT on disabled students, the UC Regents voted unanimously to treat test results as a "plus factor" that gives test-submitters a second opportunity for admissions consideration. (*Smith v. Regents*, Order Granting Preliminary Injunction, *supra*, at 5; Transcript at 45.) In doing so, the Petitioners have adopted a two-tiered admissions system that disadvantages disabled students by denying them an equal chance to access this second opportunity. Petitioners' argument that students with disabilities have an equal chance of gaining admission without exam scores, through the first review, is contradicted by their acknowledgement that the submission of a score is a "plus factor" for a second review. (Transcript at 45.) It is from

this second opportunity for admissions that Plaintiffs are excluded, in violation of disability nondiscrimination statutes. Specifically, Petitioners' two-tiered system violates California's disability rights laws because Petitioners:

1. "Utilize criteria or methods of administration" that "tend to screen out" and disproportionately burden individuals with disabilities. (Cal. Code Regs., tit. 2, § 11154 subd. (i)(1)-(3); 28 C.F.R. § 35.130 subds. (b)(1)(i)-(iii).)
2. Contract with examination administrators who screen out and discriminate against disabled students. (Cal. Code Regs., tit. 2, § 11154 subds. (f), (i)(3); 28 C.F.R. § 35.130 subd. (b)(8).)
3. Contract with examination administrators who fail to ensure meaningful access to their exams or offer accommodations to "best ensure" that the tests reflect students' aptitude rather than their disabilities. (Code Regs., tit. 2, § 11154 subds. (f), (i)(3); 28 C.F.R. § 35.130 subd. (b)(7).)

A. Petitioners' "Test-Optional" Policy Screens Out And Unduly Burdens Disabled Students In their Admission Programs.

As Judge Seligman correctly held, the Petitioners' test-optional policy during the pandemic sharply exacerbates the preexisting inequities in the administration of the SAT and ACT, and functions as an eligibility criterion that has the effect of screening out disabled students who seek access to the second admissions consideration.

California and federal law prohibit the use of eligibility "criteria or methods of administration that . . . have the purpose or effect of subjecting a person to discrimination on the basis of . . . physical or mental disability," Cal. Code Regs., tit. 2, § 11154 subds. (i)(1)-(3), or that "screen out or tend to screen out an individual with a disability . . . from fully and equally

enjoying any service, program or activity," 28 C.F.R. § 35.130 subd. (b)(8). This tend-to-screen-out concept "makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, diminish an individual's chances of such participation." (*Doukas v. Metropolitan Life Ins. Co.* (D. N.H.1996) 950 F. Supp. 422, 426.)

Courts have interpreted this regulation to "prohibit policies that unnecessarily impose requirements or *burdens* on individuals with disabilities that are not placed on others." (28 C.F.R. § pt. 35, App. A at 468 [emphasis added]; *see, e.g.*, *Smith-Berch, Inc. v. Baltimore Cty., Md.* (D. Md. 1999) 68 F. Supp. 2d 602, 621 [finding genuine issue of material fact as to whether requiring methadone clinics to undergo public hearing and qualify as community care centers imposes disproportionate burden on a particular class of disabled individuals]; *Cota v. Maxwell-Jolly* (N.D. Cal. 2010) 688 F. Supp. 2d 980, 992 [holding that criteria for ADHC services imposed disproportionate burdens on those with mental and cognitive disabilities by making it more difficult for them to establish need]; *Bowers v. NCAA* (D. N.J. 2000) 118 F.Supp.2d 494, 518; [genuine issue of material fact existed as to whether NCAA's prohibition of first-year students from participating in athletic programs if they failed as high school students to complete a core academic curriculum, which screened out plaintiff with a learning disability, was necessary]; *Hahn ex rel. Barta v. Linn Cty., IA* (N.D. Iowa 2001) 130 F. Supp. 2d 1036, 1055 [genuine issue of material fact existed as to whether owner of residential home screened out disabled persons when it required autistic resident to take a literacy test before allowing its staff to use "facilitated communication" with him, where resident needed means of expression to demonstrate literacy abilities]; *see also* 29 C.F.R. § 36.301, App. B ["It would violate this section to establish exclusive or segregative eligibility criteria that would . . . limit the seating

of individuals with Down's syndrome to only particular areas of a restaurant."].)

Here, petitioners' test-optional policy unlawfully screens out and imposes burdens on disabled students seeking to access the second review opportunity during the pandemic, placing them at a significant disadvantage compared to their non-disabled peers in establishing their qualifications for admission. Disabled students who need testing accommodations are forced to navigate insurmountable barriers to access the test given the COVID-related closure of schools. As a result, as Petitioners conceded, these disabled applicants have an "almost nil" chance of accessing the opportunity of a second review during the admissions process. (Hiss Decl. ¶ 54.) Immunocompromised disabled students are similarly excluded from accessing the test during the pandemic, as there is no remote administration of the ACT or SAT. (Transcript at 45 [Petitioners' conceding that a student who is unable to submit test results cannot access the "plus factor" that gives test-submitters a second opportunity for admissions consideration].)

The barriers to accessing the ACT or SAT during the pandemic exacerbate by an order of magnitude the pre-COVID barriers faced by disabled students seeking to access testing. Many disabled students receive test scores that reflect their disabilities instead of their competence because they do not receive needed accommodations, and the tests themselves are not validated for disabled students even with accommodations. (28 C.F.R. § 36.309 subd. (b)(1)(i) [test administrators must provide examinations in a manner that "best ensures" that they accurately reflects the individual's aptitude or achievement level" rather than that person's disability].) The retention of the tests will continue to deter applications from students who know that the tests are discriminatory and who may thus assume that low scores reflect their inability to succeed at a UC. (Declaration of Bettina Love in Support of Plaintiffs' Motion for Preliminary Injunction ("Love

Decl.") ¶ 11; Declaration of Monique Hyman in Support of Plaintiffs' Motion for Preliminary Injunction ("Hyman Decl.") ¶ 4.)

Courts have found that such burdensome policies unlawfully screen out disabled persons under the ADA. In *Guckenberger v. Bos. Univ.*, the Court held that Boston University's unnecessary documentation requirements unlawfully "screened out or tended to screen out" students with learning disabilities where they forced plaintiffs to spend hundreds of dollars and undergo re-testing processes that took multiple days. ((D. Mass. 1997) 974 F. Supp. 106, 134–35 [holding that criteria for ADHC services imposed disproportionate burdens on those with mental and cognitive disabilities by making it more difficult for them to establish need].)

The Petitioners' arguments that the trial court incorrectly focused on whether disabled students could access the SAT or ACT instead of a UC miss the mark. (Petitioners' Petition for Writ of Supersedeas at 39.) Plaintiffs seek equal access to the *second admissions review*. Petitioners concede that the second review is conditioned upon the submission of a SAT or ACT score, and that Plaintiffs have an "almost nil" chance of securing such scores. (Def. Opp. at 18.) Moreover, *even if* Plaintiffs' theory was based on decreased chances of admission, Plaintiffs' evidence demonstrate that test-optional schools admit students who do not submit test scores at lower rates. (Blanck Decl. ¶¶ 40-43.) The test-optional policy therefore maintains one inferior admissions track for disabled students, while offering nondisabled students two tracks.

The Petitioners further argue that they should be accorded "academic deference" to ensure their goals "of enrolling a diverse student body . . . ." (Def. Opp. at 16-17.) But "extending deference to educational institutions must not impede [courts]] obligation to enforce the ADA[.]" (*Zukle v. Regents of University of California* (9th Cir. 1999) 166 F.3d 1041, 1048.) Petitioners' apparent expertise in diversity as it applies here is undercut by

their inability to collect data on students with disabilities and ignorance of their experiences in their decision-making. (*See* Deposition of UCLA Vice Chancellor for Enrollment Management Youlonda Copeland-Morgan, p. 39:18-20 ["[M]ost institutions don't collect information on whether or not a student has a disability."].)

However Petitioners attempt to frame their efforts or intentions in creating the test-optional policy, the record below demonstrates that the policy screens out disabled students from the second opportunity for admissions review. California disability nondiscrimination laws prohibit entities like Petitioners from maintaining such policies.

B. Petitioners Are Discriminating Through Their "Contractual or Other Arrangements" with the College Board and ACT, Inc.

The Petitioners are responsible for the discrimination against disabled students caused by their arrangements with the College Board and ACT, Inc. California and federal law prohibit public entities like the Regents from outsourcing their discrimination "through contractual, licensing, or other arrangements" with the testing companies or "to aid or perpetuate discrimination by transferring State support to another recipient that discriminates in providing any aid, benefit or service[.]" (Cal. Code Regs., tit. 2, § 11154 subd. (e); 28 C.F.R. § 35.130 subds. (b)(1), (3).) These provisions ensure that "an entity may not do indirectly through contractual arrangements what it is prohibited from doing directly under" the ADA. (H.R. Rep. No. 101-485(II), at 104, *reprinted in* 1990 U.S.C.C.A.N. 303, 387.) In other words, a public entity is "obligated to ensure that . . . contractors . . . compl[y] with federal laws prohibiting discrimination on the basis of disability." (*Castle v. Eurofresh, Inc.* (9th Cir. 2013) 731 F.3d 901, 910.)

Here, it is plain that the College Board and ACT, Inc. are

discriminating against disabled students who test with accommodations. These entities have set up a network of test centers that simply do not serve disabled students who need standard testing accommodations, such as double time, a private testing room, or an alternative format. (Kazan Decl. ¶ 14; Grajewski Decl. ¶ 21.) Discrimination on the basis of disability-based accommodations is a form of disability discrimination. (*Dep't of Fair Employment & Hous. v. Law Sch. Admission Council Inc.* (N.D. Cal. 2012) 896 F. Supp. 2d 849, 870 ([finding that plaintiff stated claim of disability discrimination based on LSAC's practice of "flagging" score reports of individuals who received disability related accommodations where plaintiff alleged that practice "discourages applicants from seeking an accommodation and punishes those who do receive accommodations" and "announces an individual's disability above all else"]; *Breimhorst v. Educ. Testing Serv.*, (No. C-99-3387 WHO, N.D. Cal. Mar. 27, 2000) 2000 U.S. Dist. LEXIS 23363, at *24 ["On the pleadings before the Court, plaintiffs allege that ETS discriminates against disabled test takers by flagging their scores without any justification for doing so. These allegations state a claim."]; *accord Giebeler v. M&B Assocs*. (9th Cir. 2003) 343 F.3d 1143, 1147-48 [finding that plaintiff's inability to comply with defendants' minimum income requirement was based on disability and required accommodation]; *Townsend v. Quasim* (9th Cir. 2003) 328 F.3d 511, 518 n.2 [finding that a law that discriminated against the "medically needy" "may be read to facially discriminate against disabled persons, because those who need the kind of long term assistance at issue here (i.e., assistance in performing essential life activities) are disabled within the meaning of the ADA"].)

Petitioners blame the College Board and ACT, Inc., claiming that they are not "vicariously liab[le]" for their decision to continue utilizing the admissions tests those companies develop and administer because "no

agency relationship" exists. (Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction ("Def. Opp.") at 28–29.) That is not the law. The term "contractual" should be interpreted by looking to the plain meaning of the term. (*U.S. v. American Trucking Ass'ns* (1940) 310 U.S. 534, 543.) "Contractual" means "of or relating to, or constituting a contract."[9] Contract is defined as "a binding agreement between two or more persons or parties."[10] (*See also* CONTRACT, (11th ed. 2019) Black's Law Dictionary [defining contract as "an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law <a binding contract>"].) Petitioners attempt to read into this language an ambiguity that does not exist and is not permitted. (*Royal Foods Co. v. RJR Holdings, Inc.* (9th Cir. 2001) 252 F.3d 1102, 1106 ["If from the plain meaning of the statute congressional intent is clear, that is the end of the matter."].)

Indeed, the Ninth Circuit has held that contractual relationships intended to "provide such individuals with various positive opportunities, from educational and treatment programs," are subject to the ADA regardless of whether there is an agency relationship. (*Armstrong v. Schwarzenegger* (9th Cir. 2010) 622 F.3d 1058, 1068; *Disabled Rights Action Committee v. Las Vegas Events, Inc.* (2004) 375 F.3d 851 [holding that private groups contracting with publicly-owned facility to stage an event could be subject to ADA's public accommodation provision].) Thus, in *Castle*, the Ninth Circuit held that the state was responsible for denial of accommodations to a prisoner assigned to work for a private company. (731

[9] Merriam-Webster's Dictionary, *Contractual*, https://www.merriam-webster.com/dictionary/contractual (last visited Sept. 26, 2020).
[10] Merriam-Webster's Dictionary, *Contract*, https://www.merriam-webster.com/dictionary/contract#:~:text=(Entry%201%20of%203),%2C%20he'll%20be%20sued (last visited Sept. 26, 2020).

F.3d at 910.) Similarly, in *Marks v. Colorado Department of Corrections*, the Tenth Circuit held that Colorado state agencies were liable for disability discrimination by a residential community corrections program, which a private company operated as a subcontractor of the Colorado Department of Criminal Justice. ((10th Cir., May 12, 2020, No. 19-1114) 2020 WL 5583652, *5-6; *see also* Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 FR 56164-01 "[T]hrough its experience in investigations and compliance reviews, the Department has noted that public entities contract for a number of services to be run by private or other public entities, for example, medical and mental health services, food services, laundry, prison industries, vocational programs, and drug treatment and substance abuse programs, all of which must be operated in accordance with title II requirements."].) None of these cases depended upon an agency relationship. (*See Garlock Sealing Techs., LLC v. NAK Sealing Techs. Corp.* (2007) 148 Cal. App. 4th 937, 964 [56 Cal. Rptr. 3d 177, 199] *as modified on denial of reh'g* (Apr. 17, 2007) ["The essential characteristics of an agency relationship as laid out in the Restatement are as follows: (1) An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself; (2) an agent is a fiduciary with respect to matters within the scope of the agency; and (3) a principal has the right to control the conduct of the agent with respect to matters entrusted to him."].)

District courts in California have made similar findings and followed this authority. *Wilkins-Jones v. Cty. of Alameda* (N.D. Cal. 2012) 859 F. Supp. 2d 1039, 1045 [noting that *Armstrong* holds "that public entities may not contract away their liability by partnering with private entities to perform certain services"]; *Indep. Hous. Servs. of S.F. v. Fillmore Ctr. Assocs*. (N.D. Cal. 1993) 840 F. Supp. 1328, 1344 [holding that the "crucial distinction" that rendered the public entity liable under the ADA for a

private actor's inaccessibility was that the public entity "ha[d] contracted with [the private actor] for [it] to provide aid, benefits, or services to beneficiaries of the [public entity's] redevelopment program"].)

Here, the Petitioners admit that they have contractual relationships with the College Board and ACT, Inc. (Declaration of Han Mi Yoon-Wu in Support of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ("Yoon-Wu Decl.") ¶ 54.8.) Moreover, Petitioners' decision to delegate part of their admissions process to the testing companies is also an "other arrangement" contemplated by Title II, especially as the U.S. Department of Education forbids universities to use discriminatory admissions tests, regardless of who owns or administers the tests. (34 C.F.R. § 104.42 subd. (b).) Petitioners do not contest that they would be liable under California disability nondiscrimination laws if their own entrance exams discriminated against disabled students. Petitioners should not be allowed to avoid such liability by contracting that responsibility away. Petitioners are therefore liable for the discrimination perpetuated by the College Board and ACT, Inc. against disabled students.

As Judge Seligman correctly held, the evidence in the trial court demonstrated that the College Board and ACT, Inc.'s documentation requirements and testing center limitations substantially burden and screen out disabled students by forcing them to navigate insurmountable barriers to access the tests. By maintaining these unreasonable documentation requirements and permitting testing centers to deny accommodations during the pandemic, the College Board and ACT, Inc. are forcing disabled students to forego testing. Indeed, Petitioners' own expert concedes that "the odds in this Covid time of students either getting their accommodations approved or finding a suitable testing site are *almost nil.*" (Hiss Decl. ¶ 54.) These burdens discriminate "by reason of" disability. (*Guckenberger*, 974 F. Supp. at 140 [finding that Boston University's

unnecessary documentation requirements unlawfully screened out students with learning disabilities by forcing them to spend hundreds of dollars and undergo re-testing processes that took multiple days and caused psychological stress].)

C. Petitioners Are Discriminating by Denying Immunocompromised Disabled Students Meaningful Access to the SAT and ACT.

The unsafe testing conditions at SAT and ACT testing centers force immunocompromised disabled students to make an untenable choice: risk their health and lives to access essential accommodations or forgo testing. Under the ADA and California law, the College Board and ACT, Inc. must offer examinations in a place and manner that is accessible to and useable by persons with disabilities. (42 U.S.C. § 12189; Cal. Code Regs., tit. 2, § 11191 ["[It] is a discriminatory practice where a qualified disabled person, because a recipient's facilities are inaccessible to or unusable by such person, is denied the benefits of . . . any program or activity to which this Division applies."].)

In the midst of this pandemic, which poses a specific threat to immunocompromised disabled persons, the College Board and ACT, Inc. are forcing immunocompromised students to risk their long-term health and lives to access the examination. Indeed, courts have held that exposing immunocompromised disabled persons to heightened risk of contracting COVID-19 violates the ADA. In *People's First of Alabama v. Merill*, the Northern District of Alabama held that a ban on curbside voting unlawfully exposed immunocompromised voters to the "heightened risk of exposure to COVID-19." (No. 2:20-cv-00619-AKK, D. Al. Sept. 30, 2020) Dkt. No. 250 at 153-54; *see also Peeples v. Clinical Support Options, Inc.*, (No. 3:20-cv-30144-KAR D. Mass. Sept. 16, 2020) 2020 WL 5542719 *3-4 [granting preliminary injunction requiring employer to allow an employee

with moderate asthma to telework during COVID-19]; *cf. California School for the Blind v. Honig* (9th Cir. 1984) 736 F.2d 538, 545-46 [holding defendant was "required to make the school for the blind as safe as other schools. . . . the state is also required to make such reasonable adjustments as are necessary to make a school for blind and multi-handicapped students as safe as other California schools are for their nonhandicapped students. Such adjustments are 'necessary to eliminate discrimination against otherwise qualified individuals.'"].)

Further, the regulations under the ADA impose an obligation to administer the examinations in a manner that "best ensures" that they accurately "reflect the individual's aptitude or achievement level" rather than that person's disability. (28 C.F.R. § 36.309 subd. (b)(1)(i).) Under the best ensure standard, entities "must provide disabled people with an equal opportunity to demonstrate their knowledge or abilities to the same degree as nondisabled people taking the exam – in other words, the entities must administer the exam 'so as to best ensure' that the exam results accurately reflect aptitude rather than disabilities." (*Enyart v. National Conference of Bar Examiners, Inc.* (9th Cir. 2011) 630 F.3d 1153, 1162.) The question "is not what might or might not accommodate other people . . . , but what is necessary to make the [exam] accessible given [the applicant's] specific impairment and the specific nature of these exams." (*Id.* at 1163; *accord Bonnette v. D.C. Court of Appeals* (D. D.C. 2011) 796 F. Supp. 2d 164, 182 [in providing accommodations, entities must "give primary consideration to the request of the individual with a disability," and explaining that the "primary consideration" requirement is incorporated into § 12189 through the "best ensure" language in its implementing regulation].)

In this matter, the unsafe conditions at testing centers will likely compromise immunocompromised disabled students' performance and in some situations, prevent them from taking the test altogether, as Petitioners

concede. (Def. Opp. at 18 ["Admissions officials know there will likely be many applicants this year without test scores due to COVID-19"].) In the context of a high stakes, highly competitive examination like the SAT or ACT, immunocompromised disabled students who test at testing centers will do so with the added stress of contracting COVID-19. These anxiety-inducing conditions will likely exacerbate students' disabilities and force them to "expend mental resources on issues other than the content of the exam," such as face-coverings, social-distancing, sanitizing, and fear of COVID-19. (See Ofiesh Decl. ¶¶ 19, 36 and Grajewski Decl. ¶ 28.) Compounding these conditions will be the near impossibility of obtaining essential accommodations. (Hiss Decl. ¶ 54.) In a similar circumstance, *Elder v. National Conference of Bar Examiners*, the Northern District of California held that an inferior accommodation did not "best ensure" accessibility because it forced the applicant to "expend mental resources on issues other than the content of the exam." ((N.D. Cal., Feb. 16, 2011, No. C-11-00199-SI) 2011 WL 672662, at *1.) As a result, now, more than ever, the test results of immunocompromised test-takers will reflect their disabilities, not their competence, and place them at a significant disadvantage compared to their non-disabled peers who can fully access the examination. (*See Enyart*, 630 F.3d at 1162 [Testing entities "must administer the exam so as to best ensure that exam results accurately reflect aptitude rather than disabilities."] [internal quotations omitted].)

CONCLUSION

This Court should deny Appellant's petition for writ of supersedeas and lift the stay on the trial court's injunction.

DATED: October 8, 2020 By: */s/ Malhar Shah*

Malhar Shah
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this Amici Curiae Brief, counsel certifies that the text of this brief (including footnotes) was produced using 13-point type and contains 6,994 words. This includes footnotes but excludes the tables required under Rule 8.204(a)(1), the cover information required under Rule 8.204(b)(10), the Certificate of Interested Entities or Persons required under Rule 8.208, the Application to File Amici Curiae Brief required under Rule 8.200(c), this certificate, and the signature blocks. See Rule 8.204(c)(3).

DATED: October 8, 2020

By: */s/ Malhar Shah*_____

Malhar Shah
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I, Malhar Shah, am over the age of 18, employed in Berkeley, California, and not a party to this action. My business address is DREDF, 3075 Adeline St #210, Berkeley, CA 94703.

I further declare that I served:

CORRECTED APPLICATION TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF ASSOCIATION ON HIGHER EDUCATION AND DISABILITY, *et al.* IN SUPPORT OF PLAINTIFFS-RESPONDENTS

by electronic service VIA True Filing on October 9, 2020 to the addresses listed below:

MUNGER TOLLES & OLSEN LLP
Hailyn J. Chen
hailyn.chen@mto.com
Omar H. Noureldin
Gina F. Elliot
350 South Grand Ave., 50th Floor
Los Angeles, CA 90071

MUNGER, TOLLES & OLSON LLP
Bryan H. Heckenlively
bryan.heckenlively@mto.com
Andrew C. Rubenstein
Usha Chilukuri Vance
506 Mission Street, 27th Floor
San Francisco, CA 94105

SCHEPER KIM & HARRIS LLP
Gregory A. Ellis gellis@scheperkim.com
Katherine B. Farkas kfarkas@scheperkim.com
Michael L. Lavetter
mlavetter@scheperkim.com
800 West Sixth Street, 18th Floor
Los Angeles, CA 90017

EQUAL JUSTICE SOCIETY
Eva Paterson

epaterson@equaljusticesociety.org
Mona Tawatao
mtawatao@equaljusticesociety.org
Lisa Holder
lisaholder@yahoo.com
634 S Spring Street, Suite 716
Los Angeles, CA 90014

PUBLIC COUNSEL
Mark Rosenbaum
mrosenbaum@publiccounsel.org
Amanda Savage
asavage@publiccounsel.org
610 S. Ardmore Avenue
Los Angeles, CA 90005

BROWN GOLDSTEIN LEVY, LLP
Eve L. Hill
ehill@browngold.com
Abigail A. Graber
agraber@browngold.com
120 East Baltimore Street, Suite 1700
Baltimore, Maryland 21202

OLIVAREZ MADRUGA LEMIEUX O'NEILL, LLP
Thomas M. Madruga
tmadruga@omlolaw.com
500 South Grand Avenue, 12th Floor
Los Angeles, CA 90071

MILLER ADVOCACY GROUP
Marci Lerner Miller
marci@milleradvocacy.com
1303 Avocado Ave, Suite 230
Newport Beach, CA 92660

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 9, 2020 in Berkeley, California.

/s/

Malhar Shah