CASE NO. 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

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS OR OTHER STAY ORDER; MEMORANDUM OF POINTS & AUTHORITIES

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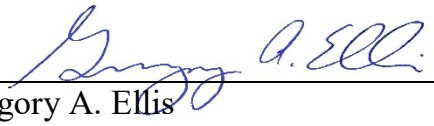
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rule 8.208, Plaintiffs-Respondents Kawika Smith, Gloria D., Stephen C., Alexandra Villegas, Gary W., Chinese for Affirmative Action, College Access Plan, College Seekers, Community Coalition, the Dolores Huerta Foundation, Little Manila Rising, and Compton Unified School District state that they are aware of no entities or persons that must be listed in this certificate under rule 8.208.

DATED: October 7, 2020 SCHEPER KIM & HARRIS LLP

By: 

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I. Introduction

The core facts of this case are not in dispute. Indeed, many have been furnished by the University of California's ("UC") own expert witnesses and campus admissions officials. The parties agree that the SAT and ACT are inaccessible to students with disabilities.[1] The COVID-19 pandemic has rendered already significant barriers to access wholly insurmountable, such that, in the words of UC's expert, the odds of students with disabilities "either getting their accommodations approved or finding a suitable testing site are almost nil, especially in California."[2] UC uses SAT and ACT scores as a "plus factor" in its admissions and scholarship determinations.[3] As Yvette Gullatt, UC Vice Provost and Trustee of the College Board (the company that administers the SAT), explained, SAT and ACT scores function as a "value add" for applicants.[4] The option of submitting test scores to obtain this "value add" is foreclosed to students with disabilities, placing them at a competitive disadvantage relative to their non-disabled peers.[5] Thus,

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[1] 5 PA 1041 (PI Order 2).

[2] 1 RA 223 (Hiss Decl. ¶ 54).

[3] 5 PA 1044 (PI Order 5). Contrary to UC's assertion, SAT and ACT scores are not "one among countless" admissions factors, Pet. 42; they are one among just 14 factors that UC campuses are permitted to consider in evaluating applicants. 2 PA 419 (Declaration of Han Mi Yoon-Wu [Executive Director, Undergraduate Admissions] ¶ 15) (There are "fourteen criteria that campuses may use to select their admitted class."); 2 PA 439–41 (Yoon-Wu Decl., Ex. B, Guidelines for Implementation of University Policy on Undergraduate Admissions) (describing 14 criteria as "a comprehensive list of factors campuses may use to select their admitted class"). Moreover, even if UC's policies permitted campuses to consider "countless" factors—which they do not—the sheer number of factors would not somehow cure the presence in the admissions process of a factor that undeniably discriminates on the basis of disability, race, and socioeconomic status.

[4] 1 RA 640 (Lavetter Decl., Ex. F, p. 57:10–12).

[5] 5 PA 1050 (PI Order 11) ("Plaintiffs have shown that they are denied meaningful access to the additional 'benefit, aid or service' that the test option affords. Unlike their non-disabled peers, they do not have the option to submit test scores; even if they did, their chances of obtaining necessary test accommodations are virtually non-existent. They get

UC's ostensible "test-optional" policy is, in fact, test-optional only for students *without* disabilities.[6]

As the Alameda Superior Court (Seligman, J.) recognized, neither UC nor the public has any legitimate interest in retaining the tests: "UC does not seriously argue that the test[s] [are] a valid and effective means of determining admissions."[7] Its own experts will not defend them. As UC expert Steven Syverson averred: "I fully acknowledge and endorse the numerous concerns over the lack of value, appropriateness, and accessibility of the SAT/ACT for LD [learning disabled] students."[8] UC expert William Hiss testified that the SAT and ACT "have very minimal predictive value," "have classist elements" that make it "easier for wealthy Marin County teenagers to prepare for the tests," and can lead to "racist outcomes."[9] UC's Regents reached the same conclusion. In voting unanimously to bar all campuses from using the SAT and ACT after two years, the Regents condemned the tests as "racist,"[10] "correlated to wealth and privilege,"[11] "exclusionary,"[12] and contrary to UC's mission.[13] They adopted a proposal by then-President Janet Napolitano, which recognized that the tests fail to fulfill their central

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no second look or 'plus factor' that non-disabled students are afforded in the admissions process.").

[6] 5 PA 1044 (PI Order 5).

[7] 5 PA 1051 (PI Order 12).

[8] 1 RA 200 (Syverson Decl. ¶ 26).

[9] 1 RA 217, 218 (Hiss Decl. ¶¶ 30, 36).

[10] 2 PA 362, 365 (Elliott Decl., Ex. C, Transcript of May 21, 2020 Regents Meeting, Afternoon Session [hereinafter "Regents Afternoon Transcript"] 74:7 (statement of Regents Vice Chair Cecilia Estolano); 87:2 (statement of Regent Jonathan Sures)).

[11] 2 PA 349 (Regents Afternoon Transcript 22:8–9 (statement of Regent Maria Anguiano)).

[12] *Id.*; 2 PA 360 (Regents Afternoon Transcript 66:6 (statement of Regent Christine Simmons)).

[13] 2 PA 350 (Regents Afternoon Transcript 28:12–19 (statement of Student Regent Jamaal Muwwakkil)).

purpose—assessing UC preparedness—because they "are not clearly linked" "to the curriculum that shapes student readiness."[14]

In light of this evidence, Judge Seligman determined that UC's continued use of the SAT and ACT would inflict significant harm not only on students with disabilities, but also on "disadvantaged applicants in general," by denying them an equal opportunity to compete in UC's admissions and scholarship processes.[15] To avert this harm before the upcoming admissions cycle, the Court entered a precisely tailored preliminary injunction prohibiting UC from using SAT and ACT scores for admissions and scholarship determinations for the pendency of this action.[16]

UC now seeks to stay, pending appeal, the preliminary injunction that Judge Seligman determined was necessary to protect Plaintiffs' rights to be free from discrimination in UC's upcoming admissions cycle. Such a stay would turn the Court's decision on its head by allowing UC to persist in using discriminatory SAT and ACT scores during that cycle, denying yet another cohort of students with disabilities and students with less privilege a fair chance at UC admission. But the law neither mandates nor warrants such a stay. The injunction is prohibitory because it does nothing more than bar UC from utilizing a discriminatory criterion—SAT and ACT scores—in its admissions and scholarship determinations. Although UC presents an extensive list of steps that it claims the injunction requires—and that its campuses supposedly cannot take "under an abbreviated schedule," Pet. 8—its warnings find no support in either the record or the actions of its own campuses, two more of which have decided, following the filing of UC's petition, to drop their use of test scores for the upcoming admissions cycle.[17] The

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[14] 1 RA 649 (Lavetter Decl., Ex. G, p. 8).

[15] 5 PA 1050 (PI Order 11).

[16] 5 PA 1053 (PI Order 14).

[17] As UC has yet to bring these decisions to this Court's attention, Plaintiffs request that this Court take judicial notice of these campuses' decisions to cease using test scores. *See*

fact that these campuses have done exactly what UC vehemently claims they cannot—immediately cease their use of test scores—fatally undermines the "factual" underpinnings of UC's claims.

UC's demonstrably incorrect speculation cannot supplant the findings made by Judge Seligman on the basis of an extensive and largely uncontroverted factual record. If accepted, UC's interpretation of mandatory versus prohibitory injunctions—which would automatically stay any prohibition of ongoing discriminatory conduct—would upend the most fundamental tenets and aims of California's robust antidiscrimination law. So, too, would its extraordinary assertion that students with disabilities are not entitled to equal consideration in UC's admissions and scholarship processes. Such a claim cannot justify a discretionary stay, which would eviscerate Plaintiffs' rights to compete in those processes on a level playing field. This Court should deny UC's petition in its entirety.

II. Factual Background

A. The University of California's Preservation of SAT and ACT Scores.

On May 21, 2020, the Regents of the University of California voted unanimously to stop requiring first-year applicants to submit SAT and ACT scores. In stark contrast to UC's present claim that the SAT and ACT "further its diversity and equity goals," Pet. 9–10, the Regents decided to eliminate UC's test requirement because they recognized that

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Requests for Judicial Notice, Exs. 1 and 2 (Univ. of Cal., Santa Barbara Office of Admissions, *Eligibility and Selection*, https://admissions.ext-prod.sa.ucsb.edu/freshman-eligibility-selection (accessed Oct. 3, 2020), *archived at* https://perma.cc/5GWZ-CGBP ("UCSB will not use SAT/ACT scores in our selection process for fall 2021 applicants."); Univ. of Cal., Riverside Undergraduate Admissions, *Frequently Asked Questions: What are the required SAT/ACT exams?*, https://admissions.ucr.edu/myucr#what_are_the_required_satact_exams (accessed Oct. 3, 2020), *archived at* https://perma.cc/64BM-6U3D ("UCR will not be using standardized exam scores (ACT/SAT) in our comprehensive review and selection process for the fall 2021 admission cycle.")).

UC's use of the "discriminatory"[18] tests "perpetuate[s] inequities across socioeconomic status and race" and "lends credibility to an inequitable and predatory enterprise."[19] As UCLA's Vice Chancellor for Enrollment Management Youlonda Copeland-Morgan explained to the Regents: "[H]igh test scores are most positively correlated with high family income. . . . *[E]ven in a holistic process*, standardized test scores have a disproportionate impact on admissions outcomes."[20] Echoing the consensus of the Regents, Vice Chair Cecilia Estolano stated: "We all know it's a racist test. . . . It is a proxy of opportunity. It has an excellent correlation to privilege."[21]

In voting to eliminate UC's testing requirement, the Regents rejected the core recommendation of UC's Standardized Testing Task Force ("STTF" or "Task Force")—on whose report they now rely, Pet. 16—that UC extend its SAT/ACT requirement for nine more years.[22] (Contrary to UC's characterization, the STTF report concluded that SAT and ACT scores contribute to, rather than alleviate, minority underrepresentation at UC.)[23] Instead, the Regents approved a proposal by then-President Napolitano that called

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[18] 2 PA 352, 360, 364 (Regents Afternoon Transcript 34:15 (statement of Regent Designate Eric Mart); 66:7 (statement of Regent Christine Simmons); 82:8 (statement of Regents Chair John Pérez)).

[19] 2 PA 351 (Regents Afternoon Transcript 32:21–22, 33: 1–2 (statement of Student Regent Hayley Weddle)).

[20] 1 RA 617 (Lavetter Decl., Ex. C, p. 55:19–20, 22–24 (emphasis added)).

[21] 2 PA 362 (Regents Afternoon Transcript 74:7, 25; 75:1).

[22] 3 PA 517 (Standardized Testing Task Force Report [hereinafter "STTF Report"] 7).

[23] 3 PA 515 (STTF Report 5) ("Roughly 25% of underrepresentation was due to UC admissions decisions overall. Test scores play a role in those decisions, and thus account for some of that 25%."). As UCLA Professor and STTF member Dr. Patricia Gándara attested, the STTF "mostly ignored" the question of whether the SAT and ACT "provide[] uniform assessment and [are] fair across demographic groups," failing to investigate, for example, "biases in the exams which tend to exclude students of color and students from low-socioeconomic status backgrounds from UC." 1 RA 88 (Gándara Decl. ¶¶ 15–17 (citation omitted)). Although not germane here, the STTF's concerns about potential grade inflation are refuted by the uncontroverted testimony of UC Berkeley

for ending the SAT/ACT requirement on the grounds that the tests fail to measure UC preparedness.[24] Rather than retain the tests, President Napolitano recommended and the Regents endorsed the development of "[a] properly designed and administered" assessment that, unlike the SAT and ACT, actually "enhance[s] equity and access" and is "aligned to . . . UC college readiness standards."[25]

Despite their express agreement that the SAT and ACT are both discriminatory and unnecessary to UC admissions decisions, the Regents did not immediately end UC's reliance on the tests. Instead, they adopted a so-called "test-optional" policy, which permitted campuses to continue considering SAT and ACT scores in admissions determinations for two more years, and in scholarship determinations for at least four more years.[26] As UC's experts recognized, the Regents did this to placate recalcitrant UC faculty and administrators, who insisted—and continue to insist—upon retaining the tests notwithstanding overwhelming evidence of their minimal predictive value and discriminatory effects. In the words of UC expert Steven Syverson: "In spite of the evidence disputing their value and equitable use, the assumed need for the SAT and ACT in the admission process is firmly entrenched in the minds . . . of many college personnel," such that efforts to eliminate them "meet with substantial resistance."[27] Because faculty and administrator "assumptions about the importance of the test-scores in evaluating the potential for 'success' in college are so firmly ingrained, . . . it requires a significant shift in understanding . . . to accept the reality that" SAT and ACT scores are

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Professor Dr. Jesse Rothstein, 1 PA 220-22 (Rothstein Decl. ¶¶ 5–7), and the testimony of UC's own admissions officials, *e.g.*, 1 RA 778 (Copeland-Morgan Dep. 124:16–19 (the "most reliable indicators of a student's ability to succeed [are] their grade point average and the level of rigor that the student has engaged in")).

[24] 1 RA 649 (Lavetter Decl., Ex. G, p. 8).

[25] 1 RA 647 (*Id.* at 6).

[26] 1 RA 643-44, 646 (*Id.* at 2–3, 5).

[27] 1 RA 198 (Syverson Decl. ¶ 16).

not necessary to admissions decision-making.[28] Thus, to soothe UC constituencies opposed to dropping the tests entirely, the Regents permitted campuses to temporarily continue using admittedly discriminatory test scores to evaluate applicants for admissions and scholarships.[29]

B. The University's Discrimination Against Students with Disabilities

Although the Regents opined at length on the discrimination against students of color and students from low-income families resulting from UC's use of the SAT and ACT, one group of prospective applicants was notably omitted from their discussion: students with disabilities. Over nearly six hours of deliberations, not a single Regent, nor President Napolitano, nor any of the 13 speakers invited by the Regents to weigh in on UC's use of standardized tests even mentioned the word "disability"—much less reflected on the impact of UC's ostensibly "test-optional" policy on students with disabilities.

Individual campus admissions directors display the same indifference. Of the five campus admissions officials that Plaintiffs have deposed, only one had ever communicated with the testing companies about their accommodations processes.[30] The remaining admissions officials had little to no knowledge of testing accessibility, nor had they ever inquired about these issues, as representative testimony from UCSD's admissions director illustrates:

> Q. Would it concern you . . . if there are students with disabilities who cannot find testing sites that will accommodate their disabilities and they want to take the SAT or the ACT? [. . .]

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[28] 1 RA 201 (*Id.* ¶ 29 (emphasis in original)).

[29] 2 PA 363 (Regents Afternoon Transcript 78:15–18 (statement of Regent Laphonza Butler) (describing the proposed "test-optional" policy as a "compromise" between "the situational reality of California families and students" and the recommendation "put forward by the faculty")).

[30] 1 RA 774-76 (Copeland-Morgan Dep. 120:19–24; 121:11–22; 122:1–9).

A. No.

Q. . . . Have you ever conducted any research regarding the appropriateness of the College Board accommodations process?

A. I have not.

Q. Do you know whether or not the College Board has an accommodation process?

A. I do not know.

Q. . . . [H]ave you ever conducted any research regarding the appropriateness of the ACT accommodations process?

A. I have not.

Q. Do you know whether, in fact, the ACT has an accommodation process?

A. I do not know.[31]

Similarly, the Standardized Testing Task Force failed entirely to consider the tests' disability discrimination in a report that nevertheless claimed to present a "thorough, critical, and empirically based picture of the role of standardized testing [at] UC."[32] The report barely acknowledges the existence of students with disabilities at all, with a mere four mentions across 225 pages, three of which are quotations from other sources.[33] As UCLA Professor and STTF member Dr. Patricia Gándara attested, UC's Academic Council, which empaneled the Task Force, never asked it to examine the impact of the

[31] 1 RA 553-54 (Saddler Dep. 68:4–7, 13–20, 22–25; 69:1–3); *see also* 1 RA 245-46 (Przekop Dep. 14:8 – 11; 15:3–11); 4 PA 868, 876–77 (Engelschall Dep. 72:9–12, 14; 106:5–12; 107:8–11); 1 RA 391, 459 (Lewis Dep. 15:9–13, 18–22; 83:2–8).

[32] 3 PA 508.

[33] 3 PA 550, 585, 596, 623 (STTF Report 40, 75, 86, 113).

SAT and ACT on applicants with disabilities.[34] One of six Task Force members who authored the report, Dr. Gándara testified that she could not recall "a single conversation about the impact that using standardized testing in admissions decisions had on students with disabilities."[35]

Strikingly, even after Judge Seligman entered a preliminary injunction ordering it to stop discriminating against students with disabilities, the University still talks about its student population as though students with disabilities do not exist: although its writ petition states four times that its entering class is the "most diverse" in UC history, Pet. 11, 12, 15, 41, this definition of diversity yet again excludes students with disabilities.[36] The University thus continues to display the "thoughtlessness" and "indifference" that disability rights laws were intended to combat. *Alexander v. Choate*, 469 U.S. 287, 295 (1985).

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[34] 1 RA 90 (Gándara Decl. ¶ 28). Nor did the Task Force's Writing Group "examine the impact of standardized testing on admissions rates for non-Native English speakers," even though "roughly one-third of California students are non-Native English speakers, and these students are disproportionately students of color." 1 RA 88 (*Id.* ¶ 18).

[35] 1 RA 90 (Gándara Decl. ¶ 28).

[36] Request for Judicial Notice, Ex. 4 (Univ. of Cal. Office of the President, *UC Admission of California Students at All-Time Record High* (July 16, 2020), https://www.universityofcalifornia.edu/press-room/uc-admission-california-students-all-time-record-high). Although UC may lack comprehensive data on applicants with disabilities, the record demonstrates that campus admissions officials have failed to take even the most rudimentary steps to understand the accessibility barriers facing these applicants. *E.g.*, 4 PA 876–77 (Engelschall Dep. 106:5–12; 107:8–11):

> Q. With respect to [students with disabilities], have you, or . . . anyone on your staff, had a conversation with them in terms of what it was like to take the test? Did the College Board or ACT make appropriate accommodations? The challenges they had in taking the test?
>
> A. No. [. . .]
>
> Q. Anyone ever say it would be a good idea to check with those students to see what their experience was?
>
> A. No.

This wholesale indifference to students with disabilities facilitated the Regents' adoption of UC's so-called "test-optional policy," which, as Judge Seligman recognized, is in fact "test-optional" only for students *without* disabilities.[37] As Plaintiffs repeatedly emphasized to the University both before and after the policy's enactment,[38] and as the Court found,[39] students with disabilities must shoulder extraordinary burdens in seeking to take the SAT or ACT with the accommodations they need. To obtain approval even to test with accommodations, they and their families are forced to devote significant time, effort, and resources to the testing companies' arduous application processes. They must secure costly evaluations (even when not needed for medical reasons), demonstrate a history of school accommodation plans, and work with school counselors whom the testing agencies expect to submit accommodations applications on their behalf.[40] Like the impacts of the tests themselves, the burdens of this process fall hardest on the students least able to bear them, *i.e.*, those whose public schools lack the resources to diagnose or evaluate them frequently enough to establish a history of accommodations, whose families cannot afford expensive private evaluations, and who lack access to counselors who are able and willing to work with them on accommodations applications.[41]

But obtaining approval to test with accommodations is only the first step. To actually test with the accommodations they need, students with disabilities must locate a test center that will accept their accommodations. Standard or "national" test centers do not accept many of the accommodations that students with disabilities require, which are

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[37] 5 PA 1044 (PI Order 5).

[38] 1 PA 167–68 (PI Mot. 14–15).

[39] 5 PA 1043 (PI Order 4).

[40] 1 RA 56, 60-63 (Ofiesh Decl. ¶¶ 7, 22–27, 29, 34); 1 RA 47-49 (Grajewski Decl. ¶ 22, 25); *see* 1 RA 45-47 (*id.* ¶¶ 13, 17–20).

[41] 1 RA 60-63 (Ofiesh Decl. ¶¶ 23–25, 27, 29, 32–34); 1 RA 48 (Grajewski Decl. ¶ 23); 1 RA 130 (Blanck Decl. ¶ 29).

available only in school environments.[42] Neither the University nor the testing agencies require schools to provide these accommodations.[43] Thus, students with disabilities are frequently unable to test in a timely manner or at test sites near their homes.[44] Some, like a student whose parent unsuccessfully contacted 22 different test sites and who missed two separate SAT administrations because none would accept his accommodations,[45] may not test with necessary accommodations, or may not test at all.

As Plaintiffs detailed in their motion for a preliminary injunction,[46] and as the Court found,[47] the COVID-19 pandemic has exacerbated these already significant barriers at every stage of the accommodations process, rendering it virtually impossible for students with disabilities to test with the accommodations they need. Students who have recently been diagnosed with a disability or who require new or updated evaluations cannot meet the testing agencies' onerous documentation requirements.[48] Widespread school closures have resulted in students' having little to no contact with their high school counselors, whom the testing agencies expect to prepare and submit students' applications for accommodations.[49] The odds of finding a test site that will accept necessary accommodations—already an uphill battle before the pandemic—are now, in the words of UC's expert, "almost nil."[50] COVID-related test cancellations have resulted

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[42] 1 RA 36 (Kazan Decl. ¶ 14); 1 RA 47 (Grajewski Decl. ¶ 21).

[43] 1 RA 36 (Kazan Decl. ¶ 15).

[44] 1 RA 47 (Grajewski Decl. ¶ 21); 1 RA 36-37 (Kazan Decl. ¶¶ 15, 18–19).

[45] 1 RA 36 (Kazan Decl. ¶ 17).

[46] 1 PA 172–75 (PI Mot. 19–22).

[47] 5 PA 1043 (PI Order 4).

[48] 1 RA 46 (Grajewski Decl. ¶ 16); 1 RA 64-65 (Ofiesh Decl. ¶¶ 38–42).

[49] 1 RA 47-48 (Grajewski Decl. ¶ 22); *see* 1 RA 35 (Kazan Decl. ¶ 8), 1 RA 64 (Ofiesh Decl. ¶ 38).

[50] 1 RA 223 (Hiss Decl. ¶ 54).

in a surge in demand for remaining test administrations, such that students whose accommodations can be provided at national test centers must compete with students across the country for a dramatically limited number of seats.[51] And while schools remain closed, students like Plaintiffs Gary W. and Stephen C., whose accommodations are only available in school environments, cannot test at all.[52]

Although its own experts "fully acknowledge and endorse" these concerns,[53] the University opposed Plaintiffs' motion for a preliminary injunction. In its briefs and at the hearing on the preliminary injunction, the University made two primary arguments: first, it asserted that Plaintiffs' claims were premature, because none of its "test-optional" campuses had in fact finalized their admissions policies or procedures.[54] Second, it maintained that its failure to afford students with disabilities a level playing field did not violate disability discrimination statutes. According to UC, students with disabilities who wish to have an equal opportunity to compete in its admissions processes have two alternatives: they can curtail their college aspirations by applying only to UC's test-blind campuses, or, if their desired campus continues to use SAT and ACT scores, they can try for future admission by attending community college and then seeking to transfer.[55] Counsel for UC put it bluntly: If students with disabilities want to be treated fairly at "the remaining . . . campuses that are not initially test blind, . . . there is a transfer pathway."[56] UC's failure to recognize that its admissions process is itself a program which students with disabilities must have equal opportunity to access is reflected in its extraordinary position, articulated at the preliminary injunction hearing, that offering admissions

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[51] 1 PA 172–73 (PI Mot. 19–20).

[52] 1 RA 191 (Stephen C. Decl. ¶¶ 17–18); 1 PA 196-97 (Gary W. Decl. ¶¶ 10–12).

[53] 1 RA 200 (Syverson Decl. ¶ 26).

[54] 1 PA 263 (PI Opp'n 21)

[55] Ellis Declaration, Ex. A (PI Hr'g Tr. 65:3–5, 10–13).

[56] Ellis Declaration, Ex. A (PI Hr'g Tr. 65:10–12).

interviews to all applicants *except* those with disabilities would not violate the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* ("ADA"), or the California statutes that incorporate and exceed it, *infra* Part IV.B.[57] As Judge Seligman recognized in granting the preliminary injunction, that is not the law.[58]

C. Judge Seligman's Order Enjoining UC's Continued Discrimination

On August 31, 2020, based on Plaintiffs' unrebutted evidence and the testimony of UC's own expert witnesses, Judge Seligman found that UC's continued use of SAT and ACT scores discriminated against students with disabilities by denying them equal opportunity to compete in UC's admissions and scholarship processes.[59] As Judge Seligman explained, because the chances of students with disabilities being able to obtain and submit test scores are, as UC's expert testified, "almost nil,"[60] those students are denied the "plus factor" of a score that students without disabilities enjoy in the admissions process.[61] Rejecting UC's argument—which it repeats here, Pet. 20—that "its 'holistic' process might make up for" its denial of the SAT/ACT "plus factor" to students with disabilities, Judge Seligman found that, "as [UC]'s counsel admitted in the hearing on this matter, a test can only help the applicant."[62]

Now, contrary to this admission and its prior representations that test scores will

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[57] Ellis Declaration, Ex. A (PI Hr'g Tr. 47:8–16).

[58] 5 PA 1050 (PI Order 11).

[59] 5 PA 1049–50 (PI Order 10–11). Judge Seligman's factual findings are presumed to be true in this proceeding. *People v. Stutz*, 66 Cal. App. 2d 791, 792 (1944) ("In deciding a petition for supersedeas we have nothing to do with the ultimate decision of the appeal on its merits and we must presume the truth of the findings of the trial court.").

[60] 5 PA 1041, 1043 (PI Order 2, 4).

[61] 5 PA 1044, 1049–50 (PI Order 5, 10–11).

[62] 5 PA 1049 (PI Order 10).

operate only as a "value add" in admissions decisions,[63] UC suggests that some applicants may choose to submit low test scores that diminish their odds of admission, Pet. 20. But as Judge Seligman correctly recognized, UC denies students with disabilities equal opportunity in its admissions process because it awards credit for scores that those students do not even have the *option* of submitting.[64] Whereas students without disabilities can take the SAT or ACT and then, after receiving their scores, decide whether to submit—or, "if they believe the test will not assist them," not submit—those scores, students with disabilities simply do not have this choice.[65] Thus, UC's so-called "test-optional" policy is, in fact, test-optional only for students without disabilities. As Judge Seligman found: "Of course, . . . students with disabilities do not have a test option as a practical matter because the chances of being able to take either standardized test with or without accommodations are almost nil."[66]

In reaching this conclusion, Judge Seligman relied on an extensive factual record that was unrebutted and in fact supported by the testimony of UC's own expert witnesses. As Judge Seligman observed, "many basic facts in this case are not disputed."[67] These facts include:

(1) The inaccessibility of the tests for students with disabilities.

In finding that the SAT and ACT are inaccessible to students with disabilities, Judge Seligman relied on testimony both from Plaintiffs' experts and UC expert William Hiss,[68] who explained:

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[63] 1 RA 640 (Lavetter Decl., Ex. F, p. 57:10–12 (statement of UC Vice Provost and College Board Trustee Yvette Gullatt)).

[64] 5 PA 1050 (PI Order 11).

[65] 5 PA. 1049 (PI Order 10).

[66] 5 PA 1044 (PI Order 5).

[67] 5 PA 1041 (PI Order 2).

[68] 5 PA 1043 (PI Order 4).

> As [Plaintiffs'] expert witnesses have expressed, 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 for accommodations, and given that most schools have been closed since mid-spring, and are likely to remain in limbo well into the fall.[69]

Citing declarations from Plaintiffs' experts and UC expert Steven Syverson, the Court opined that even in the "pre-Covid-19 world," "[s]ignificant barriers faced [students with disabilities] seeking accommodations in the SAT or ACT process."[70] As the Court found, these barriers have been "greatly exacerbated" by the pandemic and "are *indisputably* significantly greater than those faced by non-disabled students."[71]

(2) The lack of "validity or reliability of [the SAT and ACT] for test-takers with disabilities."[72]

Judge Seligman determined that "the evidence shows that the efficacy of the tests is at best minimal,"[73] a fact that UC did not dispute: "UC does not seriously argue that the test is a valid and effective means of determining admissions."[74] Dr. Peter Blanck, one of the nation's foremost experts on disability rights,[75] testified that the SAT and ACT "lack[] scientific validity" for students with disabilities, "in that the tests are not accurately measuring the concepts that they purport to test, and reliability, in that the test outcomes are not sufficiently replicable over test occurrences, time, place, and circumstances"[76]—concerns that UC expert Steven Syverson "fully acknowledge[d] and

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[69] 1 RA 223 (Hiss Decl. ¶ 54).

[70] 5 PA 1043 (PI Order 4).

[71] *Id.* (emphasis added).

[72] *Id.*

[73] 5 PA 1050 (PI Order 11).

[74] 5 PA 1051 (PI Order 12).

[75] 1 RA 122-125 (Blanck Decl. ¶¶ 1 – 15).

[76] 1 RA 127 (Blanck Decl. ¶ 21).

endorse[d]."[77] Dr. Syverson further lamented that the "pernicious" outcome of the College Board and ACT, Inc.'s "use of massive amounts of aggregated data" to "suggest persuasively greater validity" was to ingrain in the minds of faculty and administrators incorrect "assumptions about the importance of the test-scores."[78] In the words of the Court: "The experts from both sides in this case agree that [concerns about the tests' validity and bias] are serious matters which limit the utility of the tests [even] under normal circumstances."[79] Uncontroverted evidence demonstrates that UC's continued use of the SAT and ACT to evaluate applicants notwithstanding the tests' minimal efficacy and bias inflicts severe stigmatic harm not only on students with disabilities, but also on students of color and students from low-income families.[80]

(3) The lack of necessity for the tests in UC's admissions process.

In light of UC's plans to "abandon" the SAT and ACT and the fact that (at the time) "three UC campuses, including [flagship] Berkeley" had decided to "immediately cease using test results in admissions," the Court could discern neither "[t]he public interest in" nor the necessity of UC's continued use of the tests.[81] UC's experts emphasized that SAT and ACT scores are unnecessary to admissions decision-making:

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[77] 1 RA 200 (Syverson Decl. ¶ 26).

[78] 1 RA 200-01 (Syverson Decl. ¶ 29 (emphasis in original)).

[79] 5 PA 1042 (PI Order 3).

[80] 1 RA 138 (Blanck Decl. ¶ 49 ("'Test-optional' continues to express that UC believes the SAT and ACT have a degree of predictive value, and as a result, students with disabilities who cannot perform well on the tests will continue to experience stigma and doubt in their own abilities."); 1 RA 11-12 (Love Decl. ¶ 12 ("[A] Black or Brown student who knows that the Regents have recognized that the tests are discriminatory, but have chosen to use them anyway, is likely to experience severe stigmatic injury as a result of that knowledge. Such a student would correctly understand that in choosing to retain the tests, the Regents deliberately maintained a gatekeeping mechanism that privileges White and affluent students and excludes Black and Brown students and students from low-income families.")).

[81] 5 PA 1051 (PI Order 12).

"Our research and earlier research" belies "the perspective that reasonable admissions decisions are so dependent upon the presence of an SAT/ACT score, that in their absence, we will need another datapoint to have the information necessary to make good decisions."[82] As Dr. Syverson explained, contrary to faculty and administrators' "firmly ingrained" "assumptions about the importance of the test-scores," "the reality [is] that reasonable admission decisions can (and are) being made in the absence of SAT/ACT scores."[83]

(4) The "inherent advantage" for "non-disabled, economically advantaged, and white test takers."[84]

As it does here, UC asserted below that "a test-optional regime might assist some applicants from disadvantaged backgrounds."[85] UC made no attempt to quantify how many less privileged students would be benefitted, rather than harmed, by its "test-optional" policy, and Judge Seligman correctly rejected UC's claim as "speculative."[86] Instead, the Court based its findings on the facts UC did not dispute: (i) "that applicants with disabilities will be unable to take advantage of the [test score] benefit"; (ii) that "the test option is likely to be more available to students from higher-income families who have the means to pay for test preparation courses and travel to distant available test

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[82] 1 RA 201 (Syverson Decl. ¶ 30).

[83] 1 RA 200-01 (Syverson Decl. ¶ 29).

[84] 5 PA 1051 (PI Order 12).

[85] 5 PA 1050 (PI Order 11).

[86] *Id.* Although UC now tries to seize on Dr. Jesse Rothstein's "acknowledg[ment] that some students from underrepresented backgrounds" may benefit under UC's "test-optional" policy, Pet. 30 (emphasis omitted), that—as both Dr. Rothstein and the Court recognized—is not the point. (Otherwise, UC could overcome any finding of discriminatory harm so long as it could identify at least one disadvantaged student benefited under its policy.) Rather, what matters is whether the number of less privileged students *excluded* under UC's "test-optional" policy will be greater than the number of less privileged students benefitted by that policy. As Dr. Rothstein concluded—and UC does not contest—"[g]iven . . . socioeconomic gaps in SAT scores, . . . the latter group is certain to be much larger than the former." 4 PA 918 (Rothstein Supp. Decl. ¶ 13).

locations"; and, critically, (iii) "that *disadvantaged applicants in general would be much less likely to be able to benefit from the test option than non-disadvantaged applicants.*"[87] As the Court recognized, UC does not "deny that" the students primarily benefitted by its retention of the tests are "non-disabled, economically advantaged, and white test takers" that "have an inherent advantage in the test process"—nor does it deny that such advantage is "likely exacerbate[d]" "in the current pandemic conditions."[88]

(5) UC's lack of finalized admissions policies.

At the time Judge Seligman entered the preliminary injunction, not a single UC test-optional campus had finalized its admissions process: "While some campuses have made *preliminary* decisions to be test-optional, admissions directors at *all* test-optional campuses are still consulting with their governing faculty committees to finalize policies and procedures."[89] As the deposition of UCSD's admissions director demonstrated, the "carefully planned admissions processes"[90] that UC claims must now be "overhauled" had, at some campuses, not even been developed:

> Q. [D]o you have a date as to when you would expect . . . that precise [admissions] policy to be finalized?
>
> A. Prior to our reader training. . . . . That will take place in November. [. . .]
>
> Q. [D]o you know anything more specific than prior to November?
>
> A. No. We're conducting a study now.
>
> Q. [. . .] And what are the elements of that study?
>
> A. [. . .] [T]he study is still being developed[.] . . . It is still being developed and the nuances of it are still in the works. [. . .]

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[87] 5 PA 1050–51 (PI Order 11–12) (emphasis added).

[88] 5 PA 1051–52 (PI Order 12–13).

[89] 1 PA 263 (PI Opp'n 21) (emphases added).

[90] 5 PA 1066 (UC Ex Parte Application [hereinafter "UC App."] 9).

> Q. [. . .] [D]o you have a date by which the design of that study will be finished, or is that also a work in progress?
>
> A. That is a work in progress.[91]

Judge Seligman thus found that "[t]he precise manner in which the test-optional schools will implement the new process has not been firmly established" and that campuses had not "uniformly published" "information about the process."[92] As the Court noted, UC has not even begun accepting applications,[93] let alone made any decisions on them. Rejecting UC's "'chaos and confusion' argument," the Court found that "[t]he fact that a number of campuses have decided *in short order* to eliminate the test[s] as part of the admission process" undermined UC's claim that ceasing to use discriminatory scores would impose a significant burden on its campuses.[94]

On the basis of these undisputed facts, Judge Seligman concluded not only that Plaintiffs were likely to succeed on the merits of their disability claims,[95] but also that "the balance of harms tips decidedly in favor of the Plaintiffs."[96] To safeguard Plaintiffs' right to be free from discrimination in UC's upcoming admissions cycle, Judge Seligman entered a carefully limited preliminary injunction that prohibited UC only "from using SAT and the ACT test results for admissions or scholarship decisions during the pendency of this action."[97]

D. Judge Seligman's Denial of UC's Stay Request

Ten days after Judge Seligman ordered it to cease its discrimination, UC filed an

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[91] 1 RA 515-17 (Saddler Dep. 30:22–25; 31:4, 9–13, 17; 32:1–2, 20–23).

[92] 5 PA 1051 (PI Order 12).

[93] *Id.* UC's application window does not open until November 1. Pet. 17.

[94] *Id.* (emphasis added).

[95] 5 PA 1050 (PI Order 11).

[96] 5 PA 1052 (PI Order 13).

[97] 5 PA 1053 (PI Order 14) (footnote omitted).

ex parte application asking the Court to deem the preliminary injunction mandatory and thus automatically stayed, or else to enter a discretionary stay. UC made the same two arguments it does here, asserting that the injunction is mandatory because it changes the status quo and claiming in the alternative that it is entitled to a discretionary stay.[98] Judge Seligman rejected both. First, in response to UC's attempt to read additional requirements into the Court's order, Judge Seligman made clear that the order meant what it said: "Far from requiring defendant to restructure its admission process in any way, the order simply says this illegal component may not be used. The injunction does not compel any affirmative act."[99] Because the preliminary injunction does nothing more than "prohibit[] ongoing reliance on" SAT and ACT scores, it is prohibitory not only "in form, but also in substance."[100] Second, the Court declined to issue a discretionary stay, reaffirming its finding that a preliminary injunction is necessary to prevent harm to Plaintiffs resulting from UC's continued use of the tests.[101] Judge Seligman thus denied UC's application in its entirety.

On September 21, 2020, twenty-two days after entry of the preliminary injunction (sixteen of which are attributable to UC's own delay),[102] UC filed the instant petition.[103]

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[98] 5 PA 1064–65 (UC App. 7–8).

[99] 5 PA 1101 (Ex Parte Order 2).

[100] *Id.*

[101] *Id.*

[102] Judge Seligman issued the preliminary injunction order on August 31, 2020. UC did not file its ex parte application for a stay until September 10, 2020. Following the denial of its application on September 15, 2020, UC waited six more days before filing the instant petition and seeking an "emergency immediate stay" therein. Pet. 1.

[103] UC's delayed response to the preliminary injunction has left "hundreds of thousands of prospective applicants" across the State and beyond in the dark about its upcoming admissions cycle. Pet. 22. A high school senior would reasonably have expected that, following Judge Seligman's entry of the preliminary injunction, UC would have updated its systemwide admissions website to notify applicants that it had been ordered to refrain from using SAT and ACT scores for the duration of this lawsuit. UC did not do this.

III. The Preliminary Injunction Is Prohibitory, So No Automatic Stay Applies

A. UC Cannot Unilaterally Create a Status Quo by Its Ongoing Discriminatory Conduct

Having found that UC's use of SAT and ACT scores discriminates against students with disabilities, Judge Seligman determined that a preliminary injunction was necessary to halt UC's discriminatory conduct and avert significant harm to those students in the upcoming admissions cycle.[104] UC argues that, notwithstanding this determination, Judge Seligman's injunction is automatically stayed because UC's discrimination predated his order, and thus constitutes the "status quo." Pet. 21–22. Under UC's interpretation of the law, so long as a party's discriminatory conduct has been ongoing, any injunction requiring it to cease discriminating must be mandatory, resulting in an automatic stay and subjecting the injunction to a higher standard of review. As Plaintiffs noted below, such a rule would subvert the purposes of both antidiscrimination law and preliminary injunctive relief by rewarding a party for its longstanding discriminatory conduct with an automatic stay. Under UC's rule, a court would *never* have the power to immediately enjoin pre-existing discrimination, because any such injunction would necessarily change the discriminatory status quo.

UC has no answer to this. And a simple hypothetical underscores the untenability of its position: imagine that at their May meeting, the Regents had adopted a policy

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Instead, consistent with its typical lack of transparency, 3 PA 577 (STTF Report 67 (UC's "admissions practices are opaque to the public and even to UC faculty")), UC's main admissions website mentions neither the preliminary injunction nor this Court's temporary stay. *See* Request for Judicial Notice, Ex. 3 (Univ. of Cal. Admissions, *Apply Now*, https://admission.universityofcalifornia.edu/apply-now.html (accessed October 5, 2020), *archived at* https://perma.cc/T7P5-VKFM ("Here's what you'll need [to complete an application]: . . . **Test scores.** The SAT/ACT is optional for all freshman and sophomore applicants beginning fall 2021. You may want to report the SAT/ACT along with any SAT Subject Tests, Advanced Placement, International Baccalaureate, TOEFL or IELTS exams they [sic] have taken.").

[104] 5 PA 1050–53 (PI Order 11–14).

permitting UC campuses to award only white applicants credit for their racial background. Pursuant to that policy, some UC campuses began restructuring their admissions processes to incorporate this racial "plus factor." Although such a policy would be plainly unlawful, under UC's interpretation, a court would have no power to immediately enjoin it. According to UC, an injunction is mandatory—and therefore automatically stayed—whenever "it compels performance of an affirmative act that changes the position of the parties and alters the status quo." Pet. 9 (internal quotation marks and citation omitted). An injunction that prohibited the racial plus factor policy would meet both these criteria. UC would argue, as it does here, that (1) the injunction alters the status quo, because UC had already adopted the policy and its campuses had already begun implementing it; and (2) the injunction compels performance of affirmative acts, because its campuses would have to restructure their admissions policies "to excise the consideration of" the racial plus factor. Pet. 27. Therefore, despite its clear discrimination and the irreparable harm its conduct would inflict upon applicants, UC could stay the injunction and persist in its discriminatory conduct simply by taking an appeal.

That, for obvious reasons, is not the law. As UC's own authority recognizes, "a party cannot unilaterally create a status quo for purposes of the prohibitory/mandatory dichotomy by its improper conduct." *URS Corp. v. Atkinson/Walsh Joint Venture*, 15 Cal. App. 5th 872, 886 (2017) (citing *United Railroads v. Superior Court*, 172 Cal. 80, 87 (1916)). The fact that a party has "for some time" been engaged in discriminatory conduct "does not change the character" of a prohibitory injunction. *Jaynes v. Weickman*, 51 Cal. App. 696, 701 (1921). "If this were not so, almost any injunction against the doing of repeated acts would be mandatory if the performance of the acts had been begun and carried on for any considerable time." *Id.* at 701–02. But "[t]here is no magic in the phrase 'maintaining the status quo' which transforms an injunction essentially prohibitive into an injunction essentially mandatory," *URS*, 15 Cal. App. 5th at 886 (citing *United*

Railroads, 172 Cal. at 87)—particularly where, as even UC's Standardized Testing Task Force recognized, "the current 'system' is unequal and thus intolerable."[105]

B. The Primary Purpose of the Injunction Is to Prohibit UC's Discrimination

Rather than allow a party to "unilaterally create a status quo . . . by its improper conduct," *URS*, 15 Cal. App. 5th at 886, California courts ask whether the primary purpose—and thus the nature—of an injunction is to prohibit or compel behavior. Contrary to UC's assertion, Pet. 27, this inquiry finds support not only in Plaintiffs' cited authorities, but also in those cited by UC. *E.g.*, *People ex rel. Brown v. iMergent, Inc.*, 170 Cal. App. 4th 333, 342 (2009) (defining a prohibitive order by its purpose "to restrain a party from a course of conduct or to halt a particular condition," and finding injunction at issue to be prohibitory because its "purpose . . . is to restrain defendants' continued [statutory] violation"); *Ohaver v. Fenech*, 206 Cal. 118, 123 (1928) (UC citation) (finding injunction to be prohibitory where its "main purpose . . . is to restrain the appellants from" continuing unlawful conduct); *Mark v. Superior Court*, 129 Cal. 1, 5 (1900) (UC citation) (finding injunction to be mandatory where the "main purpose[] of the injunction is its mandatory feature"); *Paramount Pictures Corp. v. Davis*, 228 Cal. App. 2d 827, 838 (1964) (UC citation) (finding injunction to be mandatory where it "was intended to coerce or induce defendant into immediate affirmative action").

The rule could hardly be otherwise. Because an injunction by definition orders a party to change its behavior, both types of injunctions—prohibitory and mandatory—alter the position of the parties by requiring the enjoined party to act in a way that it otherwise would not. Thus, courts do not inquire whether an enjoined party has taken *any* affirmative acts to comply with the injunction; enjoined parties will act differently regardless of the injunction's character. Instead, as UC acknowledges, courts ask whether

[105] 3 PA 579 (STTF Report 69).

those affirmative acts are central or incidental to the injunction's primary purpose. Pet. 35. Where the primary purpose of the injunction is to compel the affirmative acts themselves, the injunction is mandatory. *Mark*, 129 Cal. at 5; *Davis*, 228 Cal. App. 2d at 838. By contrast, where the primary purpose of the injunction is to prohibit a party's conduct, any affirmative acts necessary to comply with that prohibition "are merely incidental to" its prohibitive objective. *Brown*, 170 Cal. App. 4th at 342; *see also People v. Mobile Magic Sales, Inc.*, 96 Cal. App. 3d 1, 13 (1979) (although compliance with injunction required affirmative "act of removal," act was "incidental to the injunction's prohibitive objective to restrain further [statutory] violation" and injunctive provision was therefore prohibitory); *Jaynes*, 51 Cal. App. at 700 (that "affirmative acts . . . are necessary to effectuate the principal purpose of the injunction, which is to forbid further infringement" does not "transform[]" the injunction from prohibitory to mandatory).

Notably, UC never disputes that the primary purpose of the preliminary injunction is to prohibit its continued use of SAT and ACT scores in its admissions and scholarship determinations. Nor could it. To identify whether the primary purpose of an injunction is to prohibit or compel action, California courts have long asked a fundamental question: "What essentially are the features of the injunction?" *Jaynes*, 51 Cal. App. at 701; *United Railroads*, 172 Cal. at 88. That is, what does the injunction *actually* require (or not require) of the party enjoined? The Court's order is clear: "The defendants, their officers, agents and employees (including their individual campuses), are hereby enjoined from using SAT and the ACT test results for admissions and scholarship decisions during the pendency of this action."[106] The single "feature[]" of this injunction is its prohibition of UC's continued consideration of discriminatory SAT and ACT scores in its admissions and scholarship determinations. The injunction is therefore prohibitory.

C. The Injunction Does Not Mandate Any of the Acts UC Describes

[106] 5 PA 1053 (PI Order 14) (footnote omitted).

Because the prohibitive objective of the Court's injunction is both undisputed and unambiguous, UC resorts to arguing that Judge Seligman "misapprehended the effect" of his own order. Pet. 30 (internal capitalization removed). But the Court did no such thing. As Judge Seligman explained in denying UC's stay application, "far from requiring [UC] to restructure its admissions process in any way," the order only requires that an "illegal component . . . not be used."[107] Because UC campuses remain free to design their admissions processes as they choose—so long as they refrain from using discriminatory SAT and ACT scores—the "preliminary injunction is not only prohibitory in form, but also in substance. It prohibits ongoing reliance on [the SAT and ACT]," but "does not compel any affirmative act."[108] As Plaintiffs explained and Judge Seligman recognized, the supposedly onerous "affirmative steps" that UC contends the Court has "require[d]," Pet. 22—including "re-engineering complex admissions processes . . . , assessing those processes, obtaining layers of approvals, [and] communicating the changes to hundreds of thousands of applicants and families," *id.* at 36–37—are nowhere to be found in the preliminary injunction.

As UC's own authority illustrates, a party's decision to comply with a prohibitory injunction via a certain course of action does not render such actions mandatory. In *Ohaver*, the defendants were enjoined from shipping garbage from the City of Sacramento to their ranch and feeding it to their hogs. 206 Cal. at 121. The defendants claimed that the injunction was mandatory, because it "necessarily require[d] the removal by them of the hogs" to another location. *Id.* at 123. The California Supreme Court disagreed, reasoning that the defendants could keep their hogs on their ranch and simply feed them food other than the prohibited garbage. *Id.* The Court thus rejected the defendants' attempt to "distort[]" its preliminary injunction "into an order requiring the

[107] 5 PA 1101 (Ex Parte Order 2).

[108] *Id.*

removal of the hogs." *Dry Cleaners & Dyers Inst. v. Reiss*, 5 Cal. 2d 306, 309 (1936) (construing *Ohaver*).

The California Supreme Court reiterated this conclusion in *Dry Cleaners*, in which a dry cleaning business was enjoined from charging anything less than fixed minimum prices for its services. 5 Cal. 2d at 308. The defendants moved for a writ of supersedeas, arguing that the injunction "requir[ed] them to carry on their business as dry cleaners and charge for [their services] the minimum price fixed." *Id.* The Court disagreed, finding that contrary to the defendants' assertion, the injunction did not "direct them to carry on their business or perform any other affirmative act." *Id.* at 309. Instead, the defendants could take any number of actions consistent with the injunction's prohibition: they could "continue in business as before and charge the fixed rates"; they could choose to charge "rates [even] higher than those fixed by the written agreement"; or they could cease business temporarily. *Id.* "The only requirement that the injunction lays upon them is that if they do engage in business as dry cleaners they shall not charge for their work a price less than the [minimum rates]." *Id.* at 308. The injunction was therefore prohibitory. *Id.* at 308–09.

UC attempts to distinguish *Dry Cleaners* on the grounds that *one* of the options available to the defendants in that case—temporary cessation of business—is not open to it. Pet. 35–36. But that argument fundamentally misunderstands the holding of *Dry Cleaners*, which is that a court determines the character of an injunction by looking only at what the injunction in fact requires, *supra* Part III.B—not what the enjoined party says it intends to do in response.[109] Here, as in *Dry Cleaners*, UC "is not required to perform

[109] Although UC repeatedly asserts that the preliminary injunction requires it "to *admit* a first-year class," the injunction does no such thing. Pet. 21 (emphasis in original). As UC acknowledges, its constitutional mission—not the injunction itself—requires it to admit a first-year class. *Id.* at 36. All that the injunction requires is that, in taking the constitutionally mandated action of admitting a first-year class, UC refrain from using a discriminatory criterion.

any act whatever." 5 Cal. 2d at 308. The Court has not directed UC to "total[ly] overhaul" its admissions processes, nor has it prescribed procedures and methodologies by which individual UC campuses must admit applicants. Pet. 12. It has not substituted its own criteria for UC's comprehensive review factors, nor has it mandated that UC ascribe certain weights to specific factors (such as GPA) or otherwise apply a particular formula in assessing applicants. It has not set out steps that individual UC campuses must follow in setting their admissions policies and selecting their first-year classes. Even if their mission prevents them from declining to admit a first-year class, individual UC campuses, like the business in *Dry Cleaners*, can still choose to structure their admissions processes in any number of ways, as they did before the injunction. "The only requirement that the injunction lays upon them is that" in structuring those processes, "they shall not" use a discriminatory criterion, SAT and ACT scores. *Dry Cleaners*, 5 Cal. 2d at 308; *see also Jaynes*, 51 Cal. App. at 701 ("The defendants are not compelled to surrender their business. . . . They are, however, forbidden to do that which the court below determined to be illegal and improper[.]").

UC's reliance on *Mark* was and remains unavailing, for the simple reason that—unlike the injunction here, which does nothing more than prohibit UC from using a discriminatory criterion—the injunction at issue in *Mark* not only prohibited the use of one system of penmanship, but also *expressly mandated* the use of another.[110] 129 Cal. at

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[110] UC cites *City of Corona v. AMG Outdoor Advertising, Inc.*, 244 Cal. App. 4th 291 (2016) and *Shoemaker v. County of Los Angeles*, 37 Cal. App. 4th 618 (1995) for the proposition that a "nominally" prohibitive injunction may nevertheless be mandatory in effect. Pet. 33–34. But as in *Mark*, the injunctions in both of those cases—unlike the injunction here—contained both prohibitory and mandatory components. *Corona*, 244 Cal. App. at 297; *Shoemaker*, 37 Cal. App. 4th at 624. Thus, in *Corona*, what UC describes as an "injunction restraining [the] use of [a] billboard" was not mandatory because it in effect "required removal of the billboard," Pet. 34, but because it expressly "order[ed] defendants to immediately remove" it. 244 Cal. App. at 297. Similarly, the injunction in *Shoemaker* "was undoubtedly mandatory" not because it required the hospital to "refrain from removing" its employee, but because it expressly "ordered defendants to take affirmative

3. It both "restrain[ed] [petitioners] from using, or causing to be used, . . . the text-books of the Shaylor system" (the prohibitory component) and at the same time "command[ed] them to cause to be used . . . the text-books of the California system of vertical penmanship" (the mandatory component). *Id.* UC continues to claim that the only issue on appeal in *Mark* was the injunction's prohibitory component. Pet. 33 n.8. But as Plaintiffs explained below: "The question presented" was "whether the prohibitory portion of the injunction can be separated from the mandatory portion, or whether the two are so inseparably connected as to render it improper during the appeal to enforce one while the other is suspended." *Mark*, 129 Cal. at 4.

To answer this question, the Court returned to the fundamental consideration in ascertaining the nature of the injunction: its primary purpose. Weighing the two components of the injunction, the Court concluded that "the main purpose[] of the injunction is its mandatory feature," *i.e.*, its express mandate that petitioners cause public schools to use the "California system" of penmanship. *Id.* at 3, 5. Thus, because the prohibitory component of the injunction—which restrained petitioners from using the "Shaylor system" of penmanship—was "subordinate and ancillary to" its mandatory component—"the portion of the injunction which commands the board of education to cause [the California system] to be used in the public schools"—the Court stayed the predominantly mandatory injunction in its entirety. *Id.* at 4–5, 7.[111]

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steps to restore [the employee] to his administrative positions" by mandating that the hospital "rescind all orders removing [the employee] from [those] posts." 37 Cal. App. 4th at 624, 626 n.4.

[111] The Court in *Mark* did not hold, as UC claims, that the prohibitory component of the injunction "was, in effect, mandatory." Pet. 33. Instead, it held that the prohibitory component of the injunction was "subordinate and ancillary to" its express mandatory component, which the Court found to be the main purpose of the injunction. *Mark*, 129 Cal. at 5. There is no mandatory component here, and as Judge Seligman's order makes clear, the main (and only) purpose of the injunction is to prohibit UC's use of a discriminatory criterion. 5 PA 1041 (PI Order 2).

Had Judge Seligman not only prohibited UC from using SAT and ACT scores, but also "command[ed]" all UC campuses to adopt a different test or some other admissions factor that the Court prescribed, *id.* at 3, the holding in *Mark* might have some bearing on the question at issue. But the Court did no such thing. Contrary to UC's claim that the Court "mandate[d] a single course of action," UC campuses—so long as they refrain from using a discriminatory criterion—can continue to design and implement their admissions procedures as they choose. Pet. 35 (emphasis omitted). *Mark* remains inapposite.

D. UC's Assertions are Belied by the Record and by the Actions of Its Own Campuses

In denying UC's stay application, Judge Seligman found that "the prohibition of the use of test results will not require a substantial restructure of the admissions process."[112] This finding was supported not only by an extensive factual record, which included testimony from multiple campus admissions directors, but also by UC's own representations in opposing the preliminary injunction. In an attempt to justify its continued use of the SAT and ACT even though—as its own experts recognized[113]—the tests are inaccessible to students with disabilities, UC emphasized that test scores play only a minor role in campus admissions and scholarship determinations.[114] It now asserts the opposite. According to UC, SAT and ACT scores play such an integral role in campuses' admissions processes that excising their consideration will "requir[e] a total overhaul" of those processes. Pet. 12. But both the record and the decisions of UC's own campuses demonstrate otherwise.

The recent experiences of UC Santa Barbara ("UCSB") and UC Riverside are

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[112] 5 PA 1101 (Ex Parte Order 2).

[113] 1 RA 223 (Hiss Decl. ¶ 54); *see* 1 RA 200 (Syverson Decl. ¶ 26).

[114] *See, e.g.*, 1 PA 270 (PI Opp'n 28).

illustrative. In opposing the preliminary injunction, counsel for UC sought to minimize the role of test scores in UCSB's admissions process. Prior to the Regents' vote, UCSB used SAT and ACT scores during a "second look" at applicants following its initial review.[115] At the hearing on the preliminary injunction, counsel for UC downplayed the importance of this "second look process," asserting that it was not a significant "loophole that are [sic] going to favor students who have test scores," but rather a minor step "under which 10 to 15 additional students are admitted each year."[116] After the preliminary injunction was granted, however, UC engaged in a striking reversal. Applying to the Court for a stay, UC claimed that Judge Seligman "misapprehend[ed] the significance of the . . . 'second look' process[] to . . . UC Santa Barbara."[117] It warned that campuses including UCSB could not "eliminate this 'second step' protection without potentially compromising the entire process."[118] UC made similar allegations with respect to UC Riverside.[119] According to UC, if UCSB and UC Riverside could not "consider test scores, they [would] need to reassess their *entire* admissions processes."[120]

UC repeats these allegations here. Pet. 30 ("[T]he court misapprehended the significance of the admissions processes at" "UC Riverside, UC Santa Barbara, and UC Davis."). It claims that, "[a]lthough some campuses have determined that they can transition immediately to test-blind admissions given their specific circumstances, other campuses"—including UCSB and UC Riverside—"have determined that they cannot." *Id.* at 31. According to UC, UCSB, UC Riverside, and other "test-optional campuses established updated processes for considering test scores, after months of study, because

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[115] 4 PA 848 (Przekop Decl. ¶ 8).

[116] Ellis Decl., Ex. A (PI Hr'g Tr. 54:8–10, 12–13).

[117] 5 PA 1067 (UC App. 10).

[118] 5 PA 1068 (UC App. 11).

[119] 5 PA 1067–68 (UC App. 10 – 11).

[120] 5 PA 1067 (UC App. 10) (emphasis in original).

of concerns that eliminating consideration of test scores would negatively impact their ability to identify and select" applicants. *Id.* (citing declarations of UC Riverside and UCSB admissions directors). As evidence that these "campuses would need to restructure their carefully planned admissions processes to excise the consideration of test scores," UC cites the testimony of UC Riverside's admissions director "that UCR took 9 months to design and implement the new test-optional policy, that an order requiring immediate transition to test-blind would throw UCR's planning for Fall 2021 admissions 'into disarray,' and that reprogramming the UCR quantitative algorithm would stretch IT resources beyond capacity." *Id.* at 27 & n.2.

UC thus attacks as "unfounded speculation" Judge Seligman's finding that test-optional campuses like UCSB and UC Riverside "can simply excise consideration of test scores." *Id.* at 31. It asserts that such campuses cannot, "under an abbreviated schedule," simply stop using SAT and ACT scores; instead, they must take all of the steps UC claims that the injunction requires: "design new processes, evaluate them to ensure they enable UC to admit a qualified and diverse student body, convene faculty to approve them, and communicate them to hundreds of thousands of prospective applicants." *Id.* at 8, 22. Dismissing Judge Seligman's determination that campuses that had not finalized their admissions processes could stop using SAT and ACT scores without restructuring, UC argues that "[t]he fact that some campuses have not yet taken the final step of *finalizing* the new policies after months of work does not support Plaintiffs' argument that it would take no work to re-design them." *Id.* at 31–32 n.7 (emphasis in original).

Strikingly, when UCSB and UC Riverside's admissions committees did "take the final step of *finalizing*" their admissions policies, *id.*, they chose *not* to continue considering SAT and ACT scores in their admissions processes.[121] Contrary to UC's representation that these campuses had conclusively "determined that they cannot"

[121] *Supra* note 17.

"transition immediately to test-blind admissions," Pet. 31, neither UCSB nor UC Riverside had made such a determination, as the record demonstrates.[122] And when their admissions committees *did* face the decision of whether or not to use test scores, they voted to do precisely what UC claimed they could not: "transition immediately to test-blind admissions." Pet. 31. Despite UC's warning that UCSB and UC Riverside could not cease to use SAT and ACT scores "without potentially compromising the entire process,"[123] these campuses have done just that, in short order, with their processes intact.

UCSB and UC Riverside's recent decisions to stop using SAT and ACT scores do not just further refute UC's representations about the lengths to which its campuses must go in order to transition away from their (not yet finalized) "test-optional" processes, they also thoroughly discredit any assertion that campuses are somehow incapable of complying with the injunction's prohibition. The experience of UCSB and UC Riverside demonstrates that campuses can, in fact, "simply excise consideration of test scores." Pet. 31. It proves that the steps UC claims campuses must take in order to stop using scores—"re-engineering complex admissions processes that took months to design . . . , assessing those processes, obtaining layers of approvals, [and] communicating the changes to hundreds of thousands of applicants and families," Pet. 36–37—are not, in fact, necessary (or else are capable of rapid completion). And it provides yet more evidence for Judge Seligman's already well-supported finding that "prohibition of the use of test results will not require a substantial restructure of the admissions process."[124] As Judge Seligman observed in rejecting UC's argument that "the injunction would cause confusion and upend the admissions process," "[t]he fact that a number of campuses have decided in short order to eliminate the test[s] as part of the admission process . . . undermines a

[122] 4 PA 850 (Przekop Decl. ¶ 14); 4 PA 800 (Engelschall Decl. ¶ 19).

[123] 5 PA 1068 (UC App. 11).

[124] 5 PA 1101 (Ex Parte Order 2).

claim that eliminating the test will result in chaos or confusion by the admissions departments."[125]

When considered in light of the evidentiary record, the ability of these campuses to immediately cease using SAT and ACT scores is unsurprising. In fact, it was the "test-optional" policy that campuses struggled to implement, because there is no way to render discriminatory tests nondiscriminatory. As UC admissions officials testified, the "test-optional" policy required campuses wishing to retain SAT and ACT scores to develop two methods for evaluating applicants: one that included test scores, and one that did not.[126] UC Riverside, for example, developed "two algorithms: one that gives no weight to SAT or ACT scores, and one that does."[127] Admissions directors repeated this in their depositions, confirming their ability to admit a first-year class without relying on SAT or ACT scores.[128]

Contrary to UC's dire warnings that eliminating test score consideration would throw these campuses' admissions processes into "disarray," Pet. 8, campus admissions directors explained that, in the event that they were unable to use SAT or ACT scores, they could simply apply their methods for evaluating students without such scores to the entire applicant pool. As UC Riverside's admissions director testified, if the campus could not use SAT or ACT scores, it would not, as UC asserts, "be required to entirely restructure its admissions policies";[129] it would just evaluate all applicants using its (already-developed) algorithm that omits those scores.[130] (This, presumably, is what UC

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[125] 5 PA 1051 (PI Order 12).

[126] *See* 1 PA 260 (PI Opp'n 18).

[127] *Id.*

[128] *See, e.g.*, 4 PA 871 (Engelschall Dep. 85:14–22); 1 RA 558 (Saddler Dep. 73:4–10, 13–20).

[129] 5 PA 1070 (UC App. 13).

[130] 4 PA 871 (Engelschall Dep. 85:14–22).

Riverside's admissions committee recently voted to do.) So, too, with campuses utilizing "holistic review." Intuitively—and as UCSD's admissions director confirmed—if that campus cannot use SAT or ACT scores, it will still employ the *same* holistic review process, absent the scores.[131]

UC's extensive representations regarding the ostensibly mandatory "requirements" of the injunction are not credible. The injunction is prohibitory and thus, no automatic stay applies.

IV. UC Has Not Carried Its Burden to Justify a Discretionary Stay

A. A Discretionary Stay Would Destroy Plaintiffs' Rights and Deprive Them of the Benefit That They Have Already Won

UC argues in the alternative that this Court should enter a discretionary stay so as not to deny UC the "fruits" of its ostensibly "meritorious appeal." Pet. 37. According to UC, a stay is necessary because if UC campuses remove an indisputably discriminatory criterion from their admissions processes and admit students without that criterion, "it would be too late to undo those actions" if UC were to prevail on appeal. *Id.* at 38. As Plaintiffs noted below, UC never explains *why* it would seek to "undo those actions" at all. Why should UC seek to re-inject an admittedly discriminatory and inaccessible metric into its admissions process? What interest does it have in rescinding the admission of a class of students evaluated, for the first time in decades, without reference to a criterion that its own Regents and experts have determined to be "racist" and "classist," that its former President recognized was unrelated to UC preparedness, and that students with disabilities are, for all intents and purposes, excluded from meeting? *Supra* Parts I, II.A–B. As Judge Seligman found: "UC does not seriously argue that the test is a valid and effective means of determining admissions nor does it deny that . . . non-disabled, economically advantaged, and white test takers have an inherent advantage in the test

[131] 1 RA 558 (Saddler Dep. 73:4–10, 13–20).

process."[132]

In adjudicating a petition for a writ of supersedeas, this Court "must consider the rights of the respondents, as well as those of the appellants. . . . If the appellant may ask that it shall not lose the fruits of an appeal which may turn out to be meritorious, the respondents are in at least as good a position to demand that the appellate court shall not irrevocably take away from them the benefit which they have already won and which will be confirmed to them if the judgment should be sustained." *Sun-Maid Raisin Growers of Cal. v. Paul*, 229 Cal. App. 2d 368, 375 (1964). "Affirmances must be contemplated as well as reversals and the presumption is in favor of the lower court's decision." *Deepwell Homeowners' Protective Ass'n v. City Council of Palm Springs*, 239 Cal. App. 2d 63, 67 (1965) (citation omitted). In addition to applying a "presumption in favor of the trial court's action," this Court "must [also] presume the truth of the findings of the trial court." *Id.* (citation omitted).

Judge Seligman determined that allowing UC to continue considering SAT and ACT scores would deny Plaintiffs and other students with disabilities the competitive advantage afforded by those scores in UC admissions and scholarship determinations.[133] It would further concentrate and calcify privilege in the UC system, because, as UC "do[es] not dispute," the tests are "more available to students from higher-income families who have the means to pay for test preparation courses and travel to distant available test locations."[134] Judge Seligman rejected as "speculative" UC's unsupported

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[132] 5 PA 1051–52 (PI Order 12–13). As Judge Seligman explained, the fact that "the evidence shows that the efficacy of the [SAT and ACT] is at best minimal" distinguishes this case from *O'Connell v. Superior Court*, 141 Cal. App. 4th 1452 (2006), where there was "no question that the high school diploma requirement was a valid method of measuring academic achievement and that there was a clear public interest in requiring such a measure." 5 PA 1049–50 (PI Order 10–11).

[133] 5 PA 1050 (PI Order 11).

[134] 5 PA 1050–51 (PI Order 11–12). These harms stand in stark contrast to the facts in *Food & Grocery Bureau v. Garfield*, 18 Cal. 2d 174 (1941), UC's primary support. In that case,

suggestion—which it repeats here, Pet. 9–10, 38—that its consideration of SAT and ACT scores would on balance help, rather than hurt, students from disadvantaged backgrounds. As the Court found, UC "does not dispute [either] that applicants with disabilities will be unable to take advantage of this benefit or"—crucially—"that disadvantaged applicants *in general* would be much less likely to be able to benefit from the test option than non-disadvantaged applicants."[135] The Court also could not discern "[t]he public interest in continuing the use of tests that the University has indicated that it will abandon."[136] UC's speculative claims about the effects the injunction might have on its campuses—which Judge Seligman rejected and which have been disproven by the decisions of several campuses themselves, *supra*—do not constitute the "clear and compelling proof of extraordinary circumstances" necessary for UC to carry its burden to justify a discretionary writ of supersedeas. *Sun-Maid*, 229 Cal. App. 2d at 376.

A stay is neither "necessary [n]or proper" when it "can be granted only at the risk of destroying rights which will unquestionably belong to the respondent, if the judgment" is affirmed. *Sun-Maid*, 229 Cal. App. 2d at 376. That is precisely the case here: allowing UC to continue using SAT and ACT scores pending appeal will "destroy[]" the rights of Plaintiffs, other students with disabilities, and students with less privilege to equal consideration in UC's admissions process. *Id.* For Plaintiff Gary W. and members of organizational plaintiffs who plan to seek admission in the upcoming cycle, a stay of the preliminary injunction will "irrevocably take away from them the benefit which they have already won": the right to be free from discrimination in applying to the University

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the respondent "admit[ted] that of itself it is not injured by petitioner's activities," leading the Court to conclude that a stay could "be granted without injury to or destruction of" respondent's rights. *Id.* at 178.

[135] 5 PA 1050 (PI Order 11) (emphasis added); *see also supra* note 86.

[136] 5 PA 1051 (PI Order 12).

of California.[137] *Id.* at 375.

B. The University's Appeal Presents No "Substantial Questions"

UC has not met its burden to show "substantial questions" and "a probability [of] error" raised by the trial court's decision. *Milne v. Goldstein*, 194 Cal. App. 2d 552, 555 (1961). UC presents no legal argument supporting its view of the merits, and for good reason. Its cramped interpretation of the scope of its obligations to applicants with disabilities finds no support in the governing law.

The trial court correctly determined that allowing UC to continue to subject students with disabilities to a competitive disadvantage in admissions and scholarship decisions by considering SAT and ACT scores violated the ADA, and therefore California law, which incorporates and exceeds the ADA's standards, *see* Cal. Gov't Code § 11135(b); Cal. Educ. Code § 66270;[138] Cal. Disabled Persons Act, Cal. Civ. Code § 54(c); Unruh Act, Cal. Civ. Code § 51(f); *Munson v. Del Taco, Inc.*, 46 Cal.4th 661, 669 (2009). UC's error derives primarily from its mistaken assumption that the only way Plaintiffs can succeed on their disability discrimination claims is by proving that fewer students with disabilities are admitted to UC because of the SAT and ACT, or that students with disabilities have no pathway to admission at all. Pet. 39–40.[139] But the

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[137] In its September 22, 2020 order, this Court asked the parties to address "whether any conditions should be imposed in the event supersedeas is granted, such as an expedited briefing schedule in the appeal without allowance for automatic or stipulated extensions of time." UC's one-month admissions window opens on November 1, 2020, and students will begin to submit applications on that date. Pet. 17. Therefore, Plaintiffs respectfully submit that, in the event supersedeas is granted, resolution of the appeal prior to November 1, 2020 would be in the interest of both parties. Plaintiffs would agree to any briefing and hearing schedule that enables resolution of the appeal before that date.

[138] Although the Education Code does not itself reference the ADA, it should be interpreted congruently to Section 11135. Cal. Educ. Code § 66252(g).

[139] To the extent any UC scholarship requires the submission of ACT or SAT scores, UC does not and cannot refute that such requirement, which would wholly bar students with disabilities from consideration, is discriminatory and illegal.

ADA requires not only equal access to an underlying benefit, but also equal consideration in the process by which that benefit is awarded. 42 U.S.C. § 12101(a)(8) (people with disabilities should have "the opportunity to compete on an equal basis"). Public entities must provide a person with disabilities an equal "*opportunity* to participate in or benefit from" a government program and an equal "*opportunity* to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others." 28 C.F.R. § 35.130(b)(1)(ii)–(iii) (emphases added). In other words, Plaintiffs establish an injury under the ADA when they show "discriminatory access to a government program, not the underlying [benefit] itself." *Smith v. City of Oakland*, No. 19-CV-05398-JST, 2020 WL 2517857, at *5 (N.D. Cal. Apr. 2, 2020); *see also Davis v. Astrue*, 874 F. Supp. 2d 856, 863–64 (N.D. Cal. 2012) ("discrimination in the process" gives rise to plaintiffs' injury).

UC admissions is a government program. *See Fortyune v. City of Lomita*, 766 F.3d 1098, 1101–02 (9th Cir. 2014) ("[T]he term 'services, programs, or activities' as used in the ADA is . . . broad, bringing within its scope anything a public entity does."). UC violates the ADA when it offers students without disabilities a pathway, or opportunity, for admission that is barred to students with disabilities. Unsurprisingly, given the evidence of its own experts, UC does not claim that students with disabilities have equal access to the SAT or ACT, or that the tests fairly measure their abilities. UC argues only that it does not matter, because some students with disabilities may be admitted regardless, Pet. 39–40, or may eventually gain admission by enrolling elsewhere until they are eligible to transfer, *supra* Part II.B. This argument does not undermine the legal violation shown by Plaintiffs. The ADA does not require government merely to afford individuals with disabilities *some* opportunity to take advantage of *some* benefits. It requires the *equal* opportunity to access *all* benefits. *See, e.g.*, *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 503 (4th Cir. 2016) ("Title II does not only prohibit 'exclusion from participation' in a public program; it also separately prohibits 'den[ying] the

benefits' of that program" (quoting 42 U.S.C. § 12132)); *Cal. Council of the Blind v. Cty. of Alameda*, 985 F. Supp. 2d 1229, 1238 (N.D. Cal. 2013) ("Even if the service is 'voting,' one of the central features of voting, and one of its benefits, is voting privately and independently."). Thus, for example, public entities must offer people with disabilities equal pathways to vote, not "merely the opportunity to vote at some time and in some way," *Disabled in Action v. Bd. of Elections in City of N.Y.*, 752 F.3d 189, 199 (2d Cir. 2014); *accord, e.g.*, *Lamone*, 813 F.3d at 505. As Judge Seligman noted, a government has not satisfied its obligation towards people with disabilities when they are "able to attend court by crawling up the courthouse steps."[140] *See Tennessee v. Lane*, 541 U.S. 509 (2004).

As Judge Seligman found, and as UC admitted at the preliminary injunction hearing, SAT and ACT scores can only help a student's prospects, especially now, when only students with high scores will submit them.[141] Students with disabilities cannot benefit from this extra credit, or in UC's words, the "second look" or "value add" an SAT or ACT score can afford.[142] UCLA's Vice Provost of Enrollment Management admits that, whether review is "holistic" or mechanical, the discrimination persists: "[A]s a 40-

[140] 5 PA 1048–49 (PI Order 9–10) (quoting *Smith*, 2020 WL 2517857, at *9).

[141] 5 PA 1049 (PI Order 10). Even if that were not true, UC would still violate the ADA. To give an analogy, if a teacher gave a test with 100 questions, but allowed students with disabilities only to answer the first 90 questions, that would be discrimination—even if some of the students without disabilities answered the last ten questions wrong and did not benefit from them. A student with disabilities who correctly answered 80 of 90 questions would receive a B (88 percent). If that student had been given the opportunity to answer the last ten questions, they could have received an A (90 of 100, or 90 percent). Just as the last ten questions give students without disabilities an opportunity to bolster their score, the SAT and ACT give students without disabilities an opportunity to bolster their applications. And just as in the classroom test analogy, even small differences can cross important thresholds, whether from B to A or rejection to admission.

[142] 4 PA 848 (Przekop Decl. ¶ 8); 1 RA 640 (Lavetter Decl., Ex. F, p. 57:10–12 (statement of UC Vice Provost and College Board Trustee Yvette Gullatt)); *see, e.g.*, 4 PA 799–800 (Engelschall Decl. ¶¶ 17–18).

year professional in this field . . . what I am saying here is generally, in a comprehensive review environment, the standardized test scores still have a disproportionate effect on admissions outcomes."[143]

UC's misconceived building access analogy graphically illustrates its continued, fundamental misunderstanding of its obligations under disability rights statutes. As a threshold matter, equal access to government programs, services, and activities, such as those at issue here, is subject to a wholly different standard than building access under the ADA. *See* 28 C.F.R. § 35.149–35.152 (building access regulations). Unlike ramps and stairs, which provide equivalent access, the benefits of SAT/ACT scores and other parts of the UC application are cumulative. The scores are therefore a separate benefit that must be accessible. To use UC's ramp analogy, students without disabilities are given credit for ascending the stairs, which is taken into consideration in deciding whether to open the door. Students who must take the ramp instead of the stairs receive no such credit. UC's failure to recognize that the ADA requires equal opportunity to compete in UC's admissions process is demonstrated by its (wrong) insistence that offering admissions interviews to all applicants except those with disabilities would not violate the law.[144]

UC maintains that proscribing it from considering scores on standardized tests that are unavailable to students with disabilities would also deprive dancers and athletes of the opportunity to include extracurricular activities in their applications.[145] This argument is

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[143] 1 RA 683 (Copeland-Morgan Dep. 29:13–17).

[144] Ellis Decl., Ex. A (PI Hr'g Tr. 47:8–16).

[145] UC does not cite any part of Judge Seligman's opinion where the Court "improperly shifted the burden of proof" and "required *UC* to establish that such students are equally able to avail themselves of every single factor that may inform . . . admission to UC" instead of holding Plaintiffs to the burden of showing reasonable modifications. Pet. 39. The Court's decision does not, as UC appears to believe, rest on the ADA's reasonable modification requirements, 28 C.F.R. § 35.130(b)(7), but its prohibition against unequal opportunities and discriminatory criteria. *See* 5 PA 1047–48 (PI Order 8–9) (citing 28

a red herring based on a mischaracterization of UC's own admissions process. As UC well knows, its campuses consider all kinds of extracurricular activities as part of two broad factors within UC's comprehensive review process: (1) "special talents, achievements, and awards in a particular field . . . ; special skills . . . ; special interests . . . ; . . . experiences that demonstrate unusual promise for leadership . . . ; or other significant experiences or achievements that demonstrate the applicant's promise for contributing to" a campus's "intellectual vitality," and (2) "[c]ompletion of special projects."[146] The fact that UC considers special talents and projects as unitary factors means that UC campuses will not give credit only to a single extracurricular activity from which students with disabilities are excluded (which would indeed be discriminatory). There is no limit on the types of special talents or projects that can be considered—they include activities that students with and without disabilities can do and the different types of activities are given equal weight. Thus, for example, UC does not give admissions credit to students who compete in sports while denying credit to students who compete in adaptive sports or who participate in other activities. Instead, an applicant with disabilities can earn extracurricular points in a variety of ways, by excelling, for example, as a debater or a member of the robotics club. Because no applicant will be able to compete in every extracurricular activity, students with disabilities are substantially less burdened by the fact that certain of these activities may be inaccessible to them. By contrast, there is no way to obtain credit for standardized test scores other than taking the SAT or ACT, both of which exclude students with disabilities, particularly during the pandemic.[147]

C.F.R. § 35.130(b)(1), (b)(8)). The Court did not require UC to prove anything about any of its admissions factors—it accepted UC's admission that students with disabilities cannot access the SAT or ACT. 5 PA 1041, 1049 (PI Order 2, 10).

[146] 2 PA 440–41.

[147] Moreover, accepting students with varied extracurricular interests and talents plainly furthers UC's stated "goal of enrolling a diverse student body." 1 PA 259 (PI Opp'n 17).

Just as requiring people with disabilities to use assistance to vote "at best provides these individuals with an inferior voting experience 'not equal to that afforded others,'" *Cal. Council of the Blind*, 985 F. Supp. 2d at 1239 (quoting 28 C.F.R. § 35.130(b)(1)(ii)), requiring applicants with disabilities to compete against students with SAT and ACT scores relegates them to an inferior opportunity for admission. UC's proposed curtailment of the ADA raises neither "a probability [of] error" nor "substantial questions" on the merits. *Milne*, 194 Cal. App. 2d at 555. A discretionary stay is not warranted.

V. Conclusion

For the foregoing reasons, this Court should deny UC's petition in its entirety.

DATED: October 7, 2020

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By contrast, as the Court noted, there is no clear nexus between SAT and ACT scores and UC's desired admissions outcomes. *See* 5 PA 1051 (PI Order 12).

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that, pursuant to Rules 8.486(a)(6) and 8.204(c) of the California Rules of Curt, the enclosed "Respondents' Opposition to the Regents of the University of California and Janet Napolitano's Petition for Writ of Supersedeas Or Other Stay Order" contains 13,995 words, not counting the items excluded under rules 8.204(c)(3) and 8.486(a)(6).

DATED: October 7, 2020 SCHEPER KIM & HARRIS LLP

By: 

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CERTIFICATE OF SERVICE

I, Gregory A. Ellis, an attorney for Plaintiffs and Respondents, hereby certify that on this seventh day of October 7, 2020, a copy of the foregoing **RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS OR OTHER STAY ORDER; MEMORANDUM OF POINTS & AUTHORITIES**was electronically filed with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system.

Gregory A. Ellis