

No. A160927

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION ONE**

KAWIKA SMITH, ET AL.,

Plaintiffs-Respondents,

vs.

**THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND
JANET NAPOLITANO,**

Defendants-Petitioners.

Appeal from the Superior Court, County of Alameda
The Honorable Brad Seligman
Superior Court Case No. RG19046343

**APPLICATION TO FILE AMICUS CURIAE BRIEF
and
[PROPOSED] AMICI CURIAE BRIEF IN SUPPORT OF
PLAINTIFFS-RESPONDENTS**

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Sections 8.208(e) and 8.488 of the California Rules of Court (“Rule”), Amici certify that they know of no other person or entity that has a financial or other interest in this case.

Dated: October 7, 2020

By: /s/ Ana Mendoza
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Attorney for Amici Curiae

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APPLICATION TO FILE AMICI CURIAE BRIEF

HON. JIM HUMES, ADMINISTRATIVE PRESIDING JUSTICE
OF THE FIRST DISTRICT COURT OF APPEAL:

Pursuant to California Rules of Court, Rule 8.200(c), proposed amici curiae American Civil Liberties Union (“ACLU”) of Southern California, ACLU of Northern California, ACLU of San Diego and Imperial Counties (collectively “ACLU of California Affiliates”), Lawyers’ Committee for Civil Rights Under Law, National Center for Youth Law, and Public Advocates Inc. (collectively, “Civil Rights Amici”) respectfully request leave to file the accompanying [Proposed] Amicus Curiae Brief in Support of Plaintiffs-Respondents.

The ACLU of California Affiliates are regional affiliates of the ACLU, a national nonprofit, nonpartisan organization dedicated to furthering the principles of liberty and equality embodied in the United States Constitution and this Nation’s civil rights laws. The ACLU works to advance the civil rights and civil liberties of Californians in the courts, in legislative and policy arenas, and in the community. The ACLU has participated in numerous prior cases, both as direct counsel and as amicus, that involve enforcing the state and federal constitutions’ guarantees of equal protection and due process, as well as statutory substantive civil rights protections and procedural safeguards.

The ACLU of California Affiliates recognize that the educational system in the U.S. was built on a foundation of white supremacy, attempted cultural genocide, and racial capitalism. The organizations seek to

reimagine, redesign, and reinvest in a substantially different education system where Black, Indigenous, and other students of color are authentically supported; their experiences, culture and history are reflected; and their needs are prioritized. Accordingly, the ACLU of California affiliates have spent decades advocating for education equity, including ensuring the equal treatment of students in California’s education system based on protected characteristics, such as race, wealth, sexual orientation, gender identity, immigration status, and others.

For example, the ACLU California Affiliates litigated *Smith v. LAUSD*, CV 93-7044 LEW (C.D. Cal. 1996), which challenged Los Angeles Unified School District’s (“LAUSD”) failure to provide adequate special education services for students with disabilities; *Daniel v. California*, BC214156 (L.A. Super. Ct.1999), which challenged students’ lack of access to Advancement Placement courses in Inglewood and Kern Unified School Districts; *Williams v. California*, 312236 (S.F. Super. Ct. 2000), which challenged substandard learning conditions, including insufficient textbooks, lack of sufficiently trained teachers, and inadequate facilities; *Gensaw v. Del Norte Unified Sch. Dist.*, 3:07-cv-03009 (N.D. Cal. 2008), which challenged racial discrimination in the form of disparate discipline of Native American students and closure of the only school in the district where a majority of the students were Native American; *Reed v. California*, BC432420 (L.A. Super. Ct. 2010), which challenged LAUSD’s practice of disproportionately laying off teachers at the district’s highest-need schools; *Casey A. v. Gundry*, CV 10-00192 GHK (C.D. Cal. 2010),

which challenged deficient education and conditions in Los Angeles County’s largest juvenile probation facility; *Palmer v. W. Contra Costa*, N12-1013 (Contra Costa Super. Ct. 2012), which sought to improve conditions at a community day school program; *DJ v. California* BS142775 (L.A. Super. Ct. 2013), which challenged the state’s failure to ensure that English learners received sufficient English language instructional services; *Jessica K. v. Eureka City Schs.*, 3:13-cv-05854-JSC (N.D. Cal. 2013), which challenged a racially hostile educational environment for Black and Native American students, including disparate discipline and culturally denigrating curricula; *Cnty. Coal. v. LAUSD*, BS156259 (L.A. Super. Ct. 2015), which challenged LAUSD’s failure to provide sufficient targeted services for low-income students, English learners, and foster youth as required by the Local Control Funding Formula; and *Sigma Beta Xi v. Riverside*, 5:18-cv-01399 (E.D. Cal. 2018), which challenged a so-called voluntary probation program that criminalized students, particularly students of color, for normal childhood behavior.

Lawyers’ Committee for Civil Rights Under Law (“Lawyers’ Committee”) is a tax-exempt, non-profit civil rights organization founded in 1963 at the request of President Kennedy to mobilize the private bar in securing equal justice for all through the rule of law, specifically targeting the injustices and inequities confronting African-Americans and other people of color. The Lawyers’ Committee is dedicated to, among other goals, eradicating all forms of inequity and racial discrimination in education. As a leading national racial justice organization, the Lawyers’

Committee has a vested interest in challenging unconstitutional or statutorily unlawful practices that may disserve and discriminate against communities of color, including those students who also identify as low-income, students with disabilities, and English learners. Consistent with these principles, the Lawyers' Committee has experience challenging discriminatory enrollment policies and advocating for admissions policies that expand racially equitable access for highly talented Black, Latinx, and other students of color to attend high-quality K-12 schools and postsecondary institutions (e.g., *Students for Fair Admissions Inc. (SFFA) v. University of North Carolina*, 319 F.R.D. 490 (M.D.N.C. 2017) (representing multi-racial student-amici defending race-conscious admissions in higher education); *SFFA v. President & Fellows of Harvard Coll.*, 19-2005 (1st Cir. 2020) (same on behalf of student-intervenors); and *N.C. State Conf. of the NAACP, et al. v. State of North Carolina, et al.*, 20-CVS-5194 (Wake Cty., N.C.) (challenging state law permitting discriminatory enrollment policies at K-12 charter schools)). The Lawyers' Committee has also been substantially engaged in higher education policy and advocacy with California organizations and advocates, including the submission of a letter to the California Assembly on behalf of itself and several organizations urging the repeal of Proposition 209 to help ensure greater access for underrepresented students of color and other underserved students.

National Center for Youth Law (“NCYL”) is a private, non-profit law firm that uses the law to help children achieve their potential by

transforming the public agencies that serve them. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need to become self-sufficient adults. One of NCYL’s highest priorities is to ensure that youth of color and youth with disabilities have access to equitable education opportunities. NCYL provides representation to children and youth in cases that have broad impact; and has represented many students in individual and class litigation and administrative complaints to ensure their access to education is adequate, appropriate, and non-discriminatory. NCYL currently represents, and has represented, students in challenging the violation of their state and federal rights to education.

Public Advocates Inc. (“Public Advocates”) is a non-profit, public interest law firm and one of the oldest public interest law firms in the nation. The firm’s mission has always been to challenge the systemic causes of poverty and discrimination by strengthening community voices in public policy and achieving tangible legal victories advancing education, housing and transit equity, and climate justice. Since 1971, Public Advocates has focused on “making rights real” across California by collaborating with grassroots groups representing people of color, immigrants, and low-income individuals to achieve strategic policy reform, enforce civil rights, and support movement-building.

Public Advocates frequently brings class action and institutional reform civil rights lawsuits to carry out its mission, including cases that challenge discriminatory tests like the SAT and ACT. *See, e.g., Larry P. v.*

Riles, 495 F.Supp. 926 (N.D. Cal. 1979) aff'd 793 F.2d 969 (9th Cir. 1984) amended (9th Cir. 1986) (judgment halting California's use of discriminatory IQ tests with certain African-American special education students); *Officers for Justice v. Civ. Serv. Com'n*, 979 F.2d 721 (9th Cir. 1992) (consent decree and various court orders ending race and sex discrimination in testing and selection procedures for hiring and promotion in SFPD). More generally, Public Advocates has played a crucial role in developing, implementing, and monitoring a more equitable school funding system in California through the Local Control Funding Formula and by litigating cases designed to address structural inequities in California's school system that lead to racially and economically disparate college access. *See, e.g., Serrano v. Priest*, 18 Cal. 3d 728 (1976) (establishing education as a fundamental right and essentially eliminating wealth-based funding disparities in California); *Williams v. California* (2000); *CQE v. California* (2016) (challenging state's failure to adequately and equitably fund its schools so that all students have a reasonable opportunity to obtain a meaningful education that prepares them for college, career, and civic engagement). Public Advocates has also been instrumental in developing higher education policy in California, including implementation of AB 705, which required colleges to stop relying on discriminatory standardized placement tests and gave students the right to enroll in transfer-level courses that are most likely to result in college completion.

Civil Rights Amici are nonprofit organizations with an interest in ensuring equal opportunity for students to access public education

institutions free from discrimination. Civil Rights Amici assert that the attached brief will assist this Court by providing further analysis of the discriminatory nature of the Scholastic Assessment Test (“SAT”) and American College Testing (“ACT”) and their deleterious and illegal impact on protected classes, including Black and Brown students,¹ female students, students with disabilities, English learners, and low-income students. Amici will also provide research about the amplified harms such students currently face during the COVID-19 pandemic and why a stay of the lower court’s preliminary injunction would cause irreparable harm to California’s highest-need students. As such, Civil Rights Amici respectfully request leave to submit the attached [Proposed] Amicus Curiae Brief in Support of Plaintiffs-Respondents to present additional discussion in support of Appellant’s arguments on these issues.

This application is timely under Rule 8.200(c)(1) of the California Rules of Court.

In accordance with California Rules of Court, Rule 8.200(c)(3), no party or counsel for any party in the pending appeal authored this brief in whole or in part, and no party or counsel for any party in the pending appeal made a monetary contribution intended to fund the brief’s preparation or submission. No person or entity other than counsel for the

¹ This application and [proposed] brief use the term “Black and Brown” students to mean Black, Latinx, Native American, and Asian American sub-groups with less access to educational and economic resources, including but not limited to Hmong and Filipino students. The brief uses “Black” and “African American” interchangeably, and the term “white” means white/Non-Hispanic. The term “Hispanic” is used interchangeably with the gender-neutral term “Latinx” and “Latino.”

proposed Civil Rights Amici made a monetary contribution intended to fund the preparation or submission of this brief.

For all of the reasons set forth above, Civil Rights Amici respectfully request that they be granted leave to file the accompanying amicus curiae brief.

Dated: October 7, 2020

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INTRODUCTION

The promise of the K-16 public education system is that it can eliminate societal inequities, drive economic class mobility, and improve civic engagement. However, that promise is too often unfulfilled because of systemic inequities that prevent traditionally underserved students—including Black and Brown² students, low-income students, English learners, and students with disabilities, among others—from succeeding. The SAT and ACT tests represent such critical barriers because they are granted considerable weight in the college admissions process, despite research showing that they are flawed and biased measures of college preparedness that prevent thousands of underserved students from fair access to higher education. Indeed, certain board members of the Regents of the University of California (“UCs” or “Defendants”) have described the SAT and ACT as racist and discriminatory instruments, but nonetheless the UCs seek to preserve their use in the admissions process—to the detriment of California students.

The elimination of the SAT and ACT is a civil rights, racial justice, and economic justice issue. The California Constitution charges the UCs with an obligation to provide higher education to all Californians.³ The California Constitution and state and federal civil rights statutes prohibit the UCs from discriminating on the basis of race, ethnicity, nationality,

² See *supra* n.1 for Civil Rights Amici’s definition of “Black and Brown students.”

³ CAL. CONST. art. IX § 9(a), *et seq.*

disability, wealth, gender, or any other protected category.⁴ Accordingly, the SAT and ACT’s failure to measure potential student outcomes and their disproportionate impact on Black, Brown, and low-income students is effectively, not only contrary to the principles with which the UCs were founded but, illegal.

This Court must reject Defendants’ attempt to stay the preliminary injunction in the UCs’ Petition for Writ of Supersedeas because Defendants have not met the high burden of establishing that substantial questions will be raised on appeal or that the injunction is otherwise defective.⁵ Civil

⁴ CAL. CONST. art. I, § 7(a), art. IV, § 16(a); *Butt v. State*, 4 Cal. 4th 668, 681 (1992) (observing that, under the state constitution, the State is required to take steps to correct disparities “even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents”); *Collins v. Thurmond*, 41 Cal. App. 5th 879, 896-897 (Ct. App. 2019); *Serrano v. Priest*, 18 Cal. 3d 728, 766 n.45 (1976) (*Serrano II*); CAL. EDUC. CODE § 66270; Unruh Civil Rights Act, CAL. CIV. CODE § 51 (2015); CAL. GOV’T CODE § 11135 (2011); Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c *et seq.*; Title VI of the Civil Rights Act of 1964, 42 § 2000d *et seq.*; Title IX Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*; Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 *et seq.* (Title II) (1990); Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (2010) (IDEA); Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (2015); Equal Educational Opportunities Act, 20 U.S.C. § 1703(f) (1974); *Horne v. Flores*, 557 U.S. 433, 439 (2009).

⁵ *Walnut Creek Police Officers’ Ass’n v. City of Walnut Creek*, 33 Cal. App. 5th 940, 941 (2019) (denying writ of supersedeas where appellants “have not shown that ‘substantial questions will be raised on appeal’”); *Nuckolls v. Bank of Cal., Nat’l Ass’n*, 7 Cal. 2d 574, 578 (1936) (“until the contrary is shown, the presumption is in favor of the lower court’s decision...If a stay can be granted only at the risk of destroying rights which would belong to the respondent if the judgment is affirmed, it cannot be said to be necessary or proper to the complete exercise of appellate jurisdiction.”); *Homestake Mining Co. v. Super. Ct. of City & Cty. of S.F.*, 11 Cal. App. 2d 488, 492 (1936) (“since the issuance of the writ is discretionary, it is

Rights Amici further urge this Court to exercise its discretion and not stay the lower court's injunction for several key reasons. First, Petitioners have established that they are likely to prevail on the merits and Defendants' allegations in its Petition averring that it would have to uproot its admissions systems are unavailing, especially in light of the harm that would be imposed on underserved students. As the Alameda Superior Court properly recognized, the SAT and ACT illegally discriminate against students on the basis of disability. Although the Superior Court did not reach the question of whether the tests have a disproportionate impact on students based on race or wealth, research and arguments cited below make clear that Plaintiffs are likely to succeed on the merits of those claims as well. Specifically, Civil Rights Amici demonstrate how the tests are biased and discriminate against Black and Brown students, female students, students with disabilities, English learners, and low-income students.

Second, the tests have been shown to have a deleterious stigmatic impact on such students, which results in reduced educational and career opportunities. This disparate impact is felt even more acutely by some groups during the COVID-19 pandemic, as lower-income families and students of color have faced greater challenges than most. For example, economic pressures on such students will make it even more difficult for them to prepare for the tests, and closed test sites will make it more difficult for them to travel to and protect themselves at the facilities.

incumbent upon the applicant here to show that substantial questions will be presented upon the appeal”).

Lastly, staying the preliminary injunction would cause irreparable harm by triggering mass confusion, which will disproportionately impact Black, Brown, and low-income students and English learners, all of whom are more likely to be first-generation college-goers and less likely to have access to high-quality college counseling. A stay would also harm students with disabilities, who may not be able to receive accommodations or access testing sites.⁶

Accordingly, the Court should reject Defendants' attempt to stay the preliminary injunction pending appeal.

ARGUMENT

I. The Court Should Not Stay the Injunction Because the UCs' Use of the SAT and ACT Discriminates Against Protected Classes in College Admissions.

The UCs' briefing in this appeal tries to gloss over a critical moral, legal, and educational injustice that should have long ago resolved this case in the halls of the Regents of the University of California: both parties' members and witnesses agree that the SAT and ACT tests disproportionately disadvantage Black, Brown, and low-income students, and such tests are not educationally necessary for evaluating admission to the UC system. State and federal laws strongly prohibit precisely this type of unjustifiable discriminatory impact. Thus, when the UC System uses SAT and ACT scores—as it has for decades—to determine who is admitted to its universities and who receives crucial scholarships that make the

⁶ See, generally Pls.' Notice of Mot. and Mot. for Prelim. Inj.; Mem. of P. & A.

dream of a first-class college education a financial reality for students and their families, it wrongfully stacks the deck against qualified, deserving high-school students because of their race, ethnicity, and family income. Further, the SAT and ACT also discriminate against students on the basis of their gender, immigration status, disability status, wealth, and other categories of identity that are protected under the California Constitution and state and federal civil rights laws.

Black and Latinx students make up over 60% of students in California public schools,⁷ yet Latinx students are underrepresented at seven of the nine undergraduate UC campuses and Black and Native American students are underrepresented at all nine campuses.⁸ The use of SAT and ACT scores represents gate-keeping in elite and selective universities at its ugliest: in defense of white supremacy, which was embedded into the admissions systems decades ago.⁹ This insidious

⁷ DataQuest, *2019-20 Enrollment by Ethnicity and Grade, State Report*, CAL. DEPT. OF EDUC., <https://dq.cde.ca.gov/dataquest/dqcensus/EnrEthGrd.aspx?cds=00&aggleveI=state&year=2019-20> (last accessed Oct. 7, 2020) (showing that 54.9% of California's K-12 students in the 2019-2020 school year were Hispanic, 5.3% were Black, 2.4% were Filipino, 0.5% were Native American, and 0.4% were Pacific Islander).

⁸ Urban Inst., *How Racially Representative Is Your College?* (June 18, 2020), <https://apps.urban.org/features/college-racial-representation/>; Ashley A. Smith, *Students at California's Top-Tier Universities Don't Reflect State's Racial and Ethnic Diversity, Says Urban Institute Study*, EDSOURCE (July 10, 2020), <https://edsource.org/2020/students-at-californias-top-tier-universities-dont-reflect-states-racial-and-ethnic-diversity-says-urban-institute-study/635332>.

⁹ Saul Geiser, *Norm-Referenced Tests and Race-Blind Admissions: The Case for Eliminating the SAT and ACT at the University of California*, CTR. FOR STUD. IN HIGHER EDUC. (Dec. 2017),

discrimination in admissions and scholarships decisions at the key point of entry to the UC system is legally infirm and morally unacceptable. It leads to lifelong consequences that perpetuate and exacerbate the staggering racialized economic and wealth gaps in our country.

A. Discrimination on the Basis of Race, Ethnicity, Wealth, Gender, Gender Expression, and Immigration Status Is Illegal Under the California Constitution and State and Federal Civil Rights Statutes.

The California Constitution guarantees students equal protection under the law.¹⁰ Moreover, education is a fundamental right under the

https://cshe.berkeley.edu/sites/default/files/publications/2.rops.cshe.15.2017.geiser.testsrace-blind_admissions.12.18.2017.pdf (noting that UC adopted the SAT in the 1960s to “cull [its] eligibility pool” and began using those scores more extensively in the period between 1979-1986 “to sort the ballooning volume of applications after the UC system introduced multiple filing in 1986”); Paul Tough, *The Years That Matter Most: How College Makes or Breaks Us*, 73-74 HOUGHTON MIFFLIN HARCOURT (Sep. 10, 2019),

https://books.google.com/books?id=RgF_DwAAQBAJ&pg=PA71&source=gbs_toc_r&cad=2#v=onepage&q&f=false (noting that in the 1960s and 1970s, “the social and racial imbalances apparent in SAT scores became a growing public relations problem for the College Board...Crusading journalists, African American psychologists, even the reform activist Ralph Nader: all lined up to take a whack at the SAT, deriding it in articles and reports as a tool of discrimination and oppression.”).

¹⁰ CAL. CONST. art. I, § 7(a); art. IV, § 16(a); *Butt*, 4 Cal. 4th at 681 (observing that, under the state constitution, the State is required to take steps to correct disparities “even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents”); *Collins*, 41 Cal. App. 5th at 896-897 (“under California’s equal protection clause, a claim is stated when a policy adopted in California has a substantial disparate impact on the minority children of its schools, causing de facto segregation of the schools and appreciable impact to a district’s educational quality, and no action is taken to correct that policy when its impacts are identified.”); *Serrano II*, 18 Cal. 3d at 766 n.45 (holding that a classification based on district wealth, that “clearly affects the fundamental

California Constitution.¹¹ Thus, policies and practices that negatively impact that fundamental right are closely scrutinized by California courts and can be overruled as a matter of law.¹² The State of California is the legal and political entity responsible for ensuring that all California public school students receive their individual and fundamental right to an equal education, under the Equal Protection Clause of the California Constitution.¹³

Federal and state civil rights statutes also prohibit discrimination on the basis of race, ethnicity, national origin, religion, gender, gender identity, sexual orientation and disability, among other categories, placing upon the school district the affirmative obligation to combat bias against students within its schools.¹⁴ Title IV and Title VI of the Civil Rights Act of 1964—

interest of the children of the state in education...warrants strict judicial scrutiny under our state equal protection provisions”).

¹¹ CAL. CONST. art. IX, §§ 1, 5.

¹² *Butt*, 4 Cal. 4th 668 at 692.

¹³ CAL. CONST. art. IX, § 9(a); *Butt*, 4 Cal. 4th at 680 (concluding that “[p]ublic education is an obligation which the State assumed by the adoption of the Constitution.”).

¹⁴ 42 U.S.C. § 2000c (authorizing the Attorney General to address certain equal protections violations based on race, color, national origin, sex and religion in public schools and institutions of higher education); 42 § 2000d (prohibiting discrimination on the basis of race, color or national origin in programs or activities that receive federal financial assistance); 20 U.S.C. § 1681 (prohibiting discrimination on the basis of sex and gender identity in programs or activities that receive Federal financial assistance); Title II, 42 U.S.C. § 12132; 20 U.S.C. § 1400; 29 U.S.C. § 794; 20 U.S.C. § 1703(f) (requiring state educational agencies to take action to overcome language barriers that impede English Language Learner students from participating equally in state educational programs, including policies that restrict access to English learners or any practices that disproportionately discourage them from applying or enrolling); *Horne*, 557 U.S. at 439 (holding that state agencies as well as local educational agencies have an affirmative duty for

together with Title VI regulations¹⁵—and California Government Code Section 11135 not only prohibit educational agencies from adopting policies that intentionally discriminate against students in protected classes, they also prohibit educational agencies from maintaining policies or engaging in practices that have an unjustified, adverse disparate impact on those student groups.¹⁶

states as well as local educational agencies to ameliorate language barriers); EDUC. § 66270 (declaring that “[n]o person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any characteristic listed or defined in Section 11135 of the Government Code or . . . immigration status, in any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid”); CIV. § 51 (Unruh Civil Rights Act); GOV’T § 11135 (prohibiting both intentional discrimination and policies or practices that have an adverse disparate impact on protected classes).

¹⁵ Title VI’s implementing regulations prohibit the use of “criteria or methods of administration” that have “the effect of subjecting individuals to discrimination” on the basis of race, color, or national origin, irrespective of intent. *See* 34 C.F.R. § 100.3(b)(2). While the Supreme Court’s decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), held that private parties could not enforce Title VI’s disparate impact provisions, the provisions are enforceable by the federal government.

¹⁶ CAL. GOV’T CODE § 11135. To determine whether a policy or practice has an adverse disparate impact under Title VI of the Civil Rights Act, a court will first look at whether the policy has an unjustified adverse impact on a group of students in a protected class. The court will then assess whether the policy is necessary to meet an important educational goal. Finally, the court will determine whether there are alternative policies that would meet the stated goal with less of a burden or unjustified adverse impact on the affected group. *See Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993); *see also* Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, 1291 (2011) (observing that universities’ reliance on tests like the SAT “results in unjustified disparate impact that violates federal civil rights law, such as Title VI of the Civil Rights Act of 1964” and that “racial

Therefore, the UCs have an affirmative obligation not to use discriminatory tools in admissions that reinforce unlawful bias against students on the basis of social inequality, including on the basis of the student’s race, ethnicity, and wealth (or lack thereof), among other protected categories.¹⁷

B. The SAT and ACT Are Racially Discriminatory.

Certain board members of the UC Regents themselves acknowledge that the SAT discriminates against students on the basis of race and wealth by acting as a “weeding mechanism.”¹⁸ In fact, the SAT was originally designed in the 1920s by eugenicist Carl Brigham to be racially discriminatory through a testing method that subscribed to his inherently white supremacist theory of an intellectual racial hierarchy with Nordic, white people in the “highest” position.¹⁹

disparities in admissions rates stemming from the use of admissions tests premised on a flawed theory of intelligence cannot be justified as an ‘educational necessity’”).

¹⁷ *Supra* n.14.

¹⁸ Univ. of Cal. Bd. of Regents, *Board Afternoon*, 1:37–41, YOUTUBE (May 21, 2020), <https://www.youtube.com/watch?v=gqjtgXr-niw> (statement of Regent Cecilia Estolano) (“all know it’s a racist test...As designed, it’s a weeding mechanism...It is a proxy of opportunity. It has excellent correlation to privilege.”); *Id.* at 1:52 (statement of Regent Jonathan Sures) (“I believe this test is a racist test. There’s no two ways about it.”).

¹⁹ See Nicholas Lemann, *The Big Test: The Secret History of American Meritocracy*, 29–31, 34 (Farrar, Straus and Giroux, 1st Ed. 2000); Ibram X. Kendi, *Stamped from the Beginning: The Definitive History of Racist Ideas in America* 311-12 (Bold Type Books, 2016). See also Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075 (2009) (explaining that “Brigham was among the first of many psychometricians to calculate the racial group mean (average) scores of the men who took the Army tests and to point to the lower average score of particular groups, such as African Americans

Nearly 100 years later, racial biases continue to be built into the development of the SAT and ACT exams. Both tests use a “norm-referenced” design that reflects the unsubstantiated theory that intelligence in the population is distributed in a bell curve.²⁰ Black and Brown students have historically scored lower on the SAT and ACT tests for reasons including structural biases in the education system and less access to the wealth needed to afford expensive test preparation courses.²¹ To reproduce score distributions on subsequent tests, the SAT and ACT test developers iteratively omit questions on which underrepresented students of color perform better but white students do not do as well; and correspondingly, the test developers keep questions on which underrepresented students of color do not do as well but white students perform better.²² Indeed,

and Eastern Europeans, as proof that such groups were innately less intelligent...than Nordic whites.”)

²⁰ See Geiser, *supra* n.9; Coll. Bd., *SAT Suite of Assessments Annual Report: Total Group* (2019), <https://reports.collegeboard.org/pdf/2019-total-group-sat-suite-assessments-annual-report.pdf>; James J. Heckman, *Lessons from the Bell Curve* 1102, 103 J. POL. ECON. 1091 (1995) (contesting the “empirically incorrect claim that a single factor—g or IQ—that explains linear correlations among test scores is primarily responsible for differences in individual performance in society at large”).

²¹ See, e.g., Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, 1271 (2011) (“Multiple explanations for the racial differences in factorist test scores have been suggested: cultural, economic, and hereditary differences among racial groups, the psychological impact of racial stereotypes about intellectual differences among racial groups, and racially disparate impacts of test development procedures and item selection processes have all been identified as factors that may contribute to ‘the racial gap’ in factorist test scores.”).

²² Br. for Nat’l Ctr. for Fair & Open Testing (FairTest) as Amicus Curiae Supp. Resp’ts at 18, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); see also William C. Kidder & Jay Rosner, *How the SAT Creates*

researchers at the University of California found that up to 12% of test questions are biased against Black students and up to 10% of items are biased against Latinx students.²³

In addition, the SAT and ACT tests underpredict the potential of many talented students of color because cultural biases are embedded into the exam questions. For example, one researcher who had worked for Educational Testing Services, the creator of the SAT, for over three decades observed that Black and Latinx examinees consistently outperformed white students on “hard” questions, which use vocabulary taught at school. However, white students outperformed Black and Latinx examinees on “easy” questions, which use words with culturally-imbued meaning and which credit the interpretations most commonly subscribed to by white, middle class families.²⁴ Because “easy” questions (those tainted by cultural

Built-in-Headwinds: An Educational and Legal Analysis of Disparate Impact, 43 SANTA CLARA L. REV. 131, 156–59 (2002); Martin Shapiro, *A Psychometric Model for Preserving Discrimination*, 12 BERKELEY LA RAZA L.J. 387, 390–91 (2001) (“Pre-test items which the higher-scoring group answers correctly and the lower-scoring group answers incorrectly are considered to be good items and are likely to be included...on a subsequent test form. The same process is repeated on each subsequent test form...[T]he selection process for pre-tested items continues to discard items which would reduce the test-score difference between the two groups.”); Geiser, *supra* n.9.

²³ Maria Veronica Santelices & Mark Wilson, *On the Relationship Between Differential Item Functioning and Item Difficulty: An Issue of Methods? Item Response Theory Approach to Differential Item Functioning*, 72 EDUC. & PSYCH. MEASUREMENT 5, 24 (2012).

²⁴ See generally Roy O. Freedle, *Correcting the SAT’s Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores*, 73 HARVARD EDUC. REV. 1 (2003).

bias) and “hard” questions received equal credit, test scores for Black examinees were artificially depressed by as much as 200 or 300 points.²⁵

Unsurprisingly, then, Black and Brown students continue to score lower on the SAT and ACT than their white peers. According to data from 2019 for students taking the SAT in California, 45% of white students scored 1200 or above (out of 1600), compared to only 9% of Black students and 12% of Latinx students.²⁶ Only 1% of Black students and 2% of Latinx students scored in the top score bracket, compared to 12% of white students.²⁷ In contrast, 63% of Black students and 57% of Latinx students scored in the three lowest score brackets, compared to 17% of white students.²⁸ Native American students also consistently receive significantly lower SAT scores than their white peers.²⁹ According to national data, in

²⁵ *Id.* at 12-13; Maria Veronica Santelices & Mark Wilson, *Unfair Treatment? The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning*, 80 HARVARD EDUC. REV. 106, 126 (2010)

https://pdfs.semanticscholar.org/8731/67a59796d31bf6d8ccf7fc21447f0ef06a48.pdf?_ga=2.62338091.687663009.1602032809-2016760791.1602032809 (describing a study that replicated Freedle’s findings, showing that the SAT “favors one ethnic group over another” and calling into “question the validity of SAT verbal scores for Black examinees”).

²⁶ Coll. Bd., *SAT Suite of Assessments Annual Report: California* (2019), <https://reports.collegeboard.org/pdf/2019-california-sat-suite-assessments-annual-report.pdf>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Nat’l Ctr. for Educ. Stat., *Table 226.10. SAT Mean Scores of College-Bound Seniors, By Race/Ethnicity: Selected Years, 1986-87 Through 2015-16* (Feb. 2017),

https://nces.ed.gov/programs/digest/d16/tables/dt16_226.10.asp (demonstrating that, on average, the average SAT score for Native

2018, Native American students scored, on average, 174 points lower on the SAT than white students. Similarly, the average score for Native American students dropped by 14% from the previous year, while the average score for white students increased by 5%.³⁰

The ACT similarly reflects racial disparities that disadvantage Black and Brown students in admissions. For example, in California in 2018, Black and Latinx students had average scores of 19.0 and 19.7, respectively, compared to 25.5 for white students.³¹

Although Asian American students score higher than average on the SAT and ACT as a group, they are a strikingly heterogeneous racial demographic,³² many of whom are subjected to significant education inequities, including school segregation,³³ inadequate preparation for

American students is about 10% lower than the average SAT score for white students over the last decade).

³⁰ Scott Jaschik, *SAT Scores Are Up, Especially for Asians*, INSIDE HIGHER ED. (Oct. 29, 2018), <https://www.insidehighered.com/admissions/article/2018/10/29/sat-scores-are-gaps-remain-significant-among-racial-and-ethnic-groups>.

³¹ ACT, Inc., *ACT Profile Report – California: Graduating Class 2018* (2018), https://www.act.org/content/dam/act/unsecured/documents/cccr2018/P_05_059999_S_S_N00_ACTGCPR_California.pdf.

³² Robert T. Teranishi, *ET AL.*, *The Data Quality Movement for the Asian American and Pacific Islander Community: An Unresolved Civil Rights Issue*, in *Race, Equity, and Education: Sixty Years from Brown* 139, 142 (Pedro A. Noguera et al. eds., 2016) (“According to the U.S. Census Bureau, the AAPI racial category consists of 48 different ethnic groups that occupy positions along the full range of the socioeconomic spectrum, from the poor and underprivileged, to the affluent and highly skilled.”).

³³ See, e.g., Robert Teranishi, *Southeast Asians, School Segregation, and Post-secondary Outcomes*, COMM’N ON ASIAN AM. RSCH. IN HIGHER EDUC. (2004), http://care.igeucla.org/wp-content/uploads/2015/04/save_congress_brief_9-20-04.pdf; Wayne E. Wright & Sovicheth Boun, *Southeast Asian American Education 35 Years*

college,³⁴ and other barriers to higher education.³⁵ Research demonstrates that certain Asian American subgroups score markedly lower than average on standardized tests.³⁶ For example, a 2013 study of SAT scores in Asian ethnic enclaves found that, while 48.3% of California test-takers received a total SAT score greater than 1500 (out of 2400),³⁷ only 7.6% of test-takers at a predominantly Hmong high school and 12.8% of a predominantly Filipino high school test-takers received a score in the same range.³⁸

After Initial Resettlement: Research Report and Policy Recommendations, 6 J. SE. ASIAN AM. EDUC. ADVANCEMENT 1, 22 (2011), <https://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=1017&context=jsaa> ea.

³⁴ See, e.g., Asian Americans, Native Hawaiians, Pacific Islanders Report, *The State of Higher Education in California*, ASIAN AM. ADVANCING JUSTICE—L.A. 27–31 (2015), https://advancingjustice-la.org/sites/default/files/2015-State-of-Higher-Education_AANHPI2.pdf (explaining that, in California, Native Hawaiians and Pacific Islanders experience lower college preparatory coursework completion rates; more than sixty percent of Cambodian and Filipino community college students enroll in pre-college-level or remedial work; and nearly three-quarters of Hmong admitted students need remedial courses).

³⁵ See generally, Asian Americans, Native Hawaiians, Pacific Islanders Report, *supra* n.34.

³⁶ The Educ. Trust-W., *Overlooked and Underserved: Debunking the Asian “Model Minority” Myth in California Schools* 3-4 (Aug. 2010), <https://west.edtrust.org/wp-content/uploads/sites/3/2015/01/ETW-Policy-Brief-August-2010-Overlooked-and-Underserved.pdf> (discussing elementary school and secondary school standardized testing gaps).

³⁷ The SAT traditionally has been scored on a scale from 400-1600. This research was performed when the SAT revised its scale to 800-2400. The SAT has since reverted to the 1600 scale.

³⁸ See Robert Teranishi ET AL., *iCount: A Data Quality Movement for Asian Americans and Pacific Islanders in Higher Education*, COMM’N ON ASIAN AM. RSCH. IN HIGHER EDUC., 18 (2013) https://aapip.org/sites/default/files/publication/files/2013_icount_report.pdf.

Students in the Hmong and Filipino enclaves averaged 1174 and 1208, respectively, well below the state average of 1502.³⁹

The impact of the testing gap is felt in college admissions rates for Asian American students, as Filipinos and Pacific Islanders are admitted to the UCs at rates 3% and 6% below white students, respectively.⁴⁰ The disparities are even more acute at UC Berkeley, with Hmong students being admitted at the lowest rate of any racial group (6% lower than white students), and other subgroups faring almost as poorly, including Filipino, Pacific Islander, and Vietnamese, among others.⁴¹

For all students, after controlling for parents' education and family income, race "has a large, independent, and growing statistical effect" on students' SAT and ACT scores.⁴² Of those three factors—parents' education, family income, and race—race has become the strongest predictor of SAT and ACT test scores and has seen the most dramatic growth in its importance as a predictor of those scores.⁴³

Defendants grasp at straws by presenting, for the first time, an unsupported claim that the UCs must retain these standardized tests to "attain...diversity"⁴⁴ because an exceedingly small number of Black and

³⁹ *Id.*

⁴⁰ Randall, "Filipino Americans tell U. of California to stop using ACT & SAT tests for admission," ASAM NEWS (Oct. 30, 2019), <https://asamnews.com/2019/10/30/filipino-americans-tell-u-of-california-to-stop-using-act-sat-tests-for-admission/> (citing analysis of University of California Disaggregated Data by Kevin Nadal, Ph.D.).

⁴¹ *Id.*

⁴² Geiser, *supra* n.9.

⁴³ *Id.*

⁴⁴ Pet. for Writ of Supersedeas 10.

Brown students may have received guaranteed admission due to very high standardized test scores. This assertion does not support the conclusion that considering such tests promotes diversity *across the class* as Defendants try to suggest. The prevailing research, and admissions by certain Regents board members as described above, acknowledge that the SAT has an “excellent correlation to privilege,” is a “racist test,” and disproportionately excludes talented Black and Brown students.⁴⁵ At no point do Defendants seriously dispute that wealthy, white students are disproportionately advantaged by the consideration of SAT and ACT scores. In light of these aggregate effects, there is no persuasive support that consideration of SAT and ACT scores diversifies the admitted class by race or socioeconomic status. In fact, the record and research support the opposite conclusion.

Some of the Regents argue that SAT and ACT scores provide a “value-add to the application,”⁴⁶ implying that these standardized test scores help predict student success in college. But research shows that SAT and ACT scores contribute no compelling, meaningful information to the admission process, while adversely impacting admission rates for already marginalized students.⁴⁷ Standardized testing measures are even less

⁴⁵ *Supra* n.18.

⁴⁶ *Supra* n.18 at 1:14-15 (Statement of Vice Provost Yvette Gullatt).

⁴⁷ Saul Geiser & Maria Veronica Santelices, *Validity of High School Grades in Predicting Student Success Beyond the Freshman Year: High-School Record vs. Standardized Tests as Indicators of Four-Year College Outcomes*, UC BERKELEY CSHE.6.07, 25 (2007), <https://cshe.berkeley.edu/publications/validity-high-school-gradespredicting-student-success-beyond-freshman-yearhigh-school> (finding that the SAT only minimally predicted first-year college grades); Michael Kurlaender & Kramer Cohen, *Predicting College Success: How Do Different High School Assessments Measure Up?* POL’Y ANALYSIS FOR

accurate predictors of future success for Black and Brown students than they are for white students.⁴⁸

The research demonstrates that any consideration of SAT or ACT scores in admissions criteria is inherently infected with racial bias. As the University of California Standardized Testing Task Force (“STTF”) recognized in its study of this issue, “UC admissions practices do not fully make up for disparities that persist along lines of race and class...[T]he outcome of the UC admissions processes is that many of the populations historically excluded from opportunity are still underrepresented by wide margins.”⁴⁹ Practically speaking, Proposition 209’s directive that an applicant’s race cannot be considered in admissions decisions further hamstrings and prevents the UCs from mitigating the discriminatory biases

CAL. EDUC. (2019), <https://edpolicyinca.org/publications/predicting-college-success-how-do-different-high-school-assessments-measure-2019> (finding that high school grades—not the SAT—are more predictive of first-year college grades, second-year persistence, and five-year graduation rates after controlling for socioeconomic status). Other studies show that high school grades are a much more statistically significant predictor of 6-year graduation rates, while the SAT and ACT are not statistically significant after accounting for high school grades. See William G. Bowen, Matthew M. Chingos & Michael S. McPherson, *Crossing the Finish Line: Completing College at America’s Public Universities*, PRINCETON UNIVERSITY PRESS (2009); Steven T. Syverson, Valerie W. Franks & William C. Hiss, *Defining Access: How Test-Optional Works*, NAT. ASS’N FOR COLL. ADMISSION COUNSELING (2018), <https://www.nacacnet.org/globalassets/documents/publications/research/defining-access-report-2018.pdf>.

⁴⁸ See Herman Aguinis, ET AL., *Differential Prediction Generalization in College Admissions Testing*, 108 J. OF EDUC. PSYCH. 1045, 1053 (2016).

⁴⁹ Standardized Testing Task Force, *Report of the UC Academic Council Standardized Testing Task Force (STTF)*, UNIV. OF CAL. 5 (Jan. 27, 2020), https://senate.universityofcalifornia.edu/_files/committees/sttf/sttf-report.pdf.

built into the SAT and ACT. Even though UC researchers have found that race has a very significant effect on students' SAT and ACT scores,⁵⁰ UC admissions officers may not take the bias into account when evaluating students for admission. Thus, using SAT and ACT scores in admissions decisions incorporates systematic racial discrimination into the UC admissions process.

C. The SAT and ACT are Discriminatory Against Students from Low-Income Households.

The UCs' use of the SAT and ACT is known to have a discriminatory effect on applicants from low-income backgrounds,⁵¹ yet the UCs have misleadingly framed the use of these test scores as a pathway to diversify their campuses with students from disadvantaged communities.⁵²

When compared to other admissions metrics such as grades or class rank, SAT and ACT scores are more highly correlated with student background characteristics like race, family income, and parent education.⁵³

⁵⁰ Geiser, *supra* n.9.

⁵¹ *Supra* n.49 (highlighting that the SAT and ACT's limited ability to predict student performance in college and that these test scores is strongly influenced by socioeconomic factors, such as family income or parents' education, is "well-known" among colleges that continue to use the ACT and SAT in admissions.); *see also* Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV.1075, 1118-1119 (2009) (observing that "[d]ecades of analysis of SAT scores have shown a variety of group disparities when students are separated based on certain categories. Specifically, men score, on average, better than women; whites and some Asian groups score better than Latinos and African Americans; *the rich score better than the poor*; and city dwellers score better than students from rural communities.") (emphasis added).

⁵² *See* Pet. for Writ of Supersedeas 9-10.

⁵³ Geiser, *supra* n.9.

Put simply, the more money a student’s parents earn or the more education the student’s parents have, the higher that student’s SAT or ACT scores are likely to be.

The UCs are well-aware that the SAT and ACT scores act as a proxy for a student’s wealth. The UCs have long recognized that students can improve their test scores, and consequently their chances for admission or scholarships, by purchasing test-preparation materials, costly courses, or even private tutors to coach students to better scores. A decade ago, for example, the Board of Admissions and Relations with Schools (“BOARS”) reported to the UC Regents that “[c]oaching among students and not others disadvantages low-income groups and distracts participants from college preparatory coursework.”⁵⁴ Last year, a UC Regent openly acknowledged that “the highest predictive value of an SAT isn’t in how well a student will do in school, but how well they were able to avail themselves of prep material. And access to that prep material is still disproportionately tied to family income.”⁵⁵ Earlier this year, the UCs’ Standardized Testing Task Force clearly recognized that low-income students do not have the advantages accessible to their wealthier peers to perform better on the SAT and ACT by explaining that “[s]tudents from more affluent homes can take

⁵⁴ Bd. of Admissions and Rel. with Sch. (BOARS), *Admission Tests and UC Principles for Admissions Testing*, UNIV. OF CAL., ACAD. SENATE 21 (Jan. 6, 2010), https://senate.universityofcalifornia.edu/_files/reports/hp2mgy_boars-testing_010609.pdf.

⁵⁵ Teresa Watanabe, *Q&A: Raise UC Tuition: Eliminate SAT Tests? Board of Regents Chairman John A. Pérez Has Something to Say*, L.A. TIMES (Nov. 1, 2019), <https://www.latimes.com/california/story/2019-11-01/q-a-uc-board-of-regents-chairman-john-a-perez>.

advantage of an entire industry dedicated to increasing their test scores. In addition to test preparation materials and classes that can cost on average about \$1,000, families can purchase coaches or counselors who, for several thousand more dollars, will work with students with the preparation materials and provide tailor-made assessments and advice. These coaches promise significant gains on the tests, and they produce them.”⁵⁶

Despite knowledge that test scores serve as a proxy for wealth, the UCs’ desire to continue using SAT and ACT scores results in an admissions process that disadvantages students from low-income households and advantages students from wealthier households. Consequently, the UCs’ SAT and ACT scores incorporates systemic wealth discrimination into its admission process.

D. UCs’ Continued Use of the SAT and ACT Inflicts Ongoing, Severe Stigmatic Harm on Students of Color and Students from Low-Income Families.

That UC is trying to find new avenues to defend its discriminatory admissions practices exposes the inherent hypocrisy of its declaration that it has a “historic commitment” to enroll a student body that “encompasses the broad diversity” of the State.⁵⁷ That hypocrisy has been confirmed by the recent statements from certain UC Regents and administrators,⁵⁸ and by UC

⁵⁶ *Supra* n.49; STTF Report, 75.

⁵⁷ Bd. of Regents, *Regents Policy 2102: Policy on Undergraduate Admissions*, UNIV. OF. CAL. (May 20, 1988), <https://regents.universityofcalifornia.edu/governance/policies/2102.html>.

⁵⁸ *Supra* n.18; Teresa Watanabe, *Drop the SAT and ACT as a Requirement for Admission, Top UC Officials Say*, L.A. TIMES (Nov. 23, 2019), <https://www.latimes.com/california/story/2019-11-23/uc-officials-recommend-dropping-sat-admission-requirement> (quoting UC Berkeley

psychometricians who have documented the bias against Black and Brown students for many years.⁵⁹ It reasonably follows that the UCs *know* they are discriminating against Black, Brown, and low-income students, and yet they continue to attempt to defend their discriminatory practices, thus inflicting even further stigmatic harm on those students. In essence, the UCs are sending the message to Black and Brown students that preserving systems that uphold white supremacy is of paramount importance over any principle that students not be evaluated by the color of their skin, their ethnic heritage, or their family’s income level. If UCs continue to consider the tests, tens of thousands of students of color and students from low-income families will continue to be excluded unjustly from the UCs; and those students who are admitted or currently attend the UCs will also be harmed by the message of white supremacy—that they are worth less than

Chancellor Carol T. Christ that the SAT and ACT “really contribute to the inequities of our system” and noting concerns expressed by UC Provost Michael Brown that performance on the SAT and ACT were so strongly influenced by family income, parents’ education, and race that those scores should not be used for high-stakes admissions decisions); Teresa Watanabe, *Q&A: Raise UC Tuition? Eliminate SAT Tests? Board of Regents Chairman John A. Pérez Has Something to Say*, L.A. TIMES (Nov. 1, 2019), <https://www.latimes.com/california/story/2019-11-01/q-a-uc-board-of-regents-chairman-john-a-perez> (quoting Chairman Pérez, “The highest predictive value of an SAT [is]...how well they were able to avail themselves of prep material. And access to that prep material is still disproportionately tied to family income.”).

⁵⁹ Santelices, *supra*; Bd. of Admissions and Rel. with Sch. (BOARS), *Admission Tests and UC Principles for Admissions Testing*, UNIV. OF CAL., ACAD. SENATE 21 (Jan. 6, 2010), https://senate.universityofcalifornia.edu/_files/reports/hp2mgy_boars-testing_010609.pdf (noting that “students can be coached, to advantage” on both the SAT and ACT and that “[c]oaching among some students and not others disadvantages low-income groups”).

their white, wealthy peers who continue to gain an unfair benefit from the ACT and SAT in the UC system—undergirding their University leaders’ strident demands to maintain the status quo.

Moreover, the UCs’ retention of SAT and ACT scores in admissions and scholarship determinations would continue to deter applications from Black, Brown, and low-income students who are unaware the tests are discriminatory, and who may thus assume if they receive a low SAT or ACT score, that they are less academically qualified than their counterparts.⁶⁰

E. The Intersection Between Discrimination on the Basis of Race and Discrimination on the Basis of Wealth Exacerbates the Racialized Wealth Gap.

The intersection of discrimination on the basis of race (against Black and Brown students) and on the basis of income (against low-income students) amplifies barriers to higher education for low-income Black and Brown students. Because education is so closely correlated with income in adulthood, discrimination in admissions and scholarships decisions at the key point of entry to universities generally, and to the UC system specifically, leads to lifelong consequences that perpetuate and exacerbate the staggering racialized wealth gap in our country.

⁶⁰ Teaching Tolerance, *Professional Development: How Stereotypes Undermine Test Scores*, <https://www.tolerance.org/professional-development/how-stereotypes-undermine-test-scores> (accessed on Oct. 7, 2020) (“ When a stereotype paints a negative image, whether it’s that professors are absentminded or that students of color ‘don’t do well on tests,’ it can impact those targeted internally, creating a sense of risk about living up—or down—to the negative stereotype.”).

According to the Bureau of Labor and Statistics, individuals with less than a high school diploma earn the least amount of money and face the highest levels of unemployment,⁶¹ while those who possess a graduate degree earn the most amount of money and are subject to the lowest levels of unemployment.⁶² Between these two categories, average income improves at each step of education attainment.⁶³ Perversely, the ability to attain higher education is strongly correlated with socioeconomic status.⁶⁴ Due to historical harms, Black families and other families of color are at a severe disadvantage; Black families on average possess only \$17,150 in wealth as compared to the \$171,000 in wealth possessed by white families.⁶⁵

⁶¹ Career Outlook, *Learn More, Earn More: Education Leads to Higher Wages, Lower Unemployment*, U.S. BUREAU OF LAB. STAT., (May 2020) <https://www.bls.gov/careeroutlook/2020/data-on-display/education-pays.htm>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Karin Fischer, *The Barriers to Mobility: Why Higher Ed's Promise Remains Unfulfilled*, THE CHRON. OF HIGHER EDUC. (Dec. 30, 2019), <https://www.chronicle.com/article/why-higher-ed-s-promise-remains-unfulfilled/>.

⁶⁵ Dania Francis and Christian E. Weller, *The Black-White Wealth Gap Will Widen Educational Disparities During the Coronavirus Pandemic*, CTR. FOR AM. PROGRESS, (Aug. 12, 2020) <https://www.americanprogress.org/issues/race/news/2020/08/12/489260/black-white-wealth-gap-will-widen-educational-disparities-coronavirus-pandemic/>.

i. Inequities for Black, Brown, and Low-Income People Begin Early in Life and Continue Throughout their Educational Careers

The wealth gap does not exist in a vacuum, but rather is a component of a racially stratified social ecosystem that disadvantages Black children and other children of color starting as early as kindergarten.⁶⁶ A study published in 2018 by the U.S. Department of Education, *The Summer After Kindergarten: Children’s Experiences by Socioeconomic Characteristics*, revealed that children from higher income households were more likely to have engaged in educational activities that utilized a computer and to have visited a zoo or aquarium.⁶⁷ In addition, children from higher income households and from households with parents with a higher level of educational attainment were more likely to have visited art galleries,⁶⁸ as well as plays and concerts.⁶⁹ Another study published in 2018, titled *Income Inequality and Class Divides in Parental Investments*, found that, as state-based income inequality rises, the most affluent parents increase their financial investments in their children.⁷⁰

In summary, we provide new evidence that rising income inequality is reshaping parenting practices in the United States along class lines. Rising income inequality appears to have increased the class gap in parents’ financial investments

⁶⁶ Jeremy Redford & Stephanie Burns, *The Summer After Kindergarten: Children’s Experiences by Socioeconomic Characteristics*, NAT’L. CTR. FOR EDUC. STAT. (2018), <https://nces.ed.gov/pubs2018/2018160.pdf>.

⁶⁷ *Id.* at 3.

⁶⁸ *Id.* at 17.

⁶⁹ *Id.* at 18.

⁷⁰ Daniel Schneider, ET AL., *Income Inequality and Class Divides in Parental Investments*, 83(3) AM. SOCIO. REV. 475–507 (May 21, 2018), <https://journals.sagepub.com/doi/full/10.1177/0003122418772034>.

in children—money spent on childcare, lessons, and schooling. We find evidence that this is due to the mechanical concentration of income and changing parental preferences. Our evidence for the latter helps tell the origin story of the much-discussed rise in concerted cultivation among high-SES parents in the United States. These widening class gaps in financial investments do not appear to have been offset by narrowing class gaps in parental time investments in children. As inequality rose, so did the class gap in parents’ developmental investment in U.S. children, a finding that has troubling implications for intergenerational mobility.⁷¹

According to a survey of 750 affluent Americans, “20% of younger millionaires (those 55 and under) spent in excess of \$50,000 in hopes it would help their kid land a spot at a college of their choice.”⁷² Importantly, these parents have the financial resources to make choices about how and what they will directly invest in to “game” the system, a fact that is even more salient here.⁷³ The nature of these advantages are well studied.

A recent report by the California State Auditor about admissions in the UC system highlighted some of the ways in which affluence and access to resources have allowed rich families to take advantage of the combination of application processes rules and financial incentives to have their children admitted.⁷⁴ The report found that, of the 64 students who

⁷¹ *Id.*

⁷² Eric Rosenbaum, *This is the Amount of Money Rich Families Spend to Get Their Kids Into College*, CNBC (June 14, 2019), <https://www.cnbc.com/2019/06/14/this-is-how-much-money-rich-families-spend-to-get-kids-into-college.html>.

⁷³ See, e.g., Abigail Hess, *Rich Students Get Better SAT Scores—Here’s Why*, CNBC (Oct 3, 2019), <https://www.cnbc.com/2019/10/03/rich-students-get-better-sat-scores-heres-why.html>.

⁷⁴ Elaine M. Howler, *The University of California Qualified Students Face an Inconsistent and Unfair Admissions System That Has Been Improperly Influenced by Relationships and Monetary Donations*, CAL. STATE

were improperly admitted to UC schools, the majority were white and at least half came from families with an annual income for \$150,000 or more.⁷⁵ The University of Berkeley “admitted 42 applicants through its regular admissions process based on their connections to donors and staff, while concurrently denying admission to others who were more qualified.”⁷⁶ Some of the students admitted included: one who “babysat for the colleague of the former director of undergraduate admissions,” one whose family was “friends with a regent,” one who was the “child of a major donor,” and one who was the child of a prominent alumnus.”⁷⁷ The cases are stunning examples of the access to higher education that social, political, and financial capital can grant.

The barriers to college admission and the decisions about who does and who does not receive scholarships are directly connected to the continued economic deprivation of Black students and other students of color.⁷⁸ For example, 86.6% of Black students borrow federal loans to attend four-year colleges as compared to only 59.9% of white students.⁷⁹ Black students default on student loans at a rate that is five times higher than white students.⁸⁰ Black students graduate with approximately \$7,400

AUDITOR (Sept. 2020), <https://www.auditor.ca.gov/pdfs/reports/2019-113.pdf>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 13.

⁷⁸ Allana Akhtar and Hillary Hoffower, *9 Startling Facts That Show Just How Hard the Student-Debt Crisis is Hurting Black Americans*, BUS. INSIDER (Jun 10, 2020), <https://www.businessinsider.com/how-americas-student-debt-crisis-impacts-black-students-2019-7>.

⁷⁹ *Id.*

⁸⁰ *Id.*

dollars more debt than white students.⁸¹ Alarmingly, this debt balloons to more than \$50,000 within four years of graduation.⁸² Black students are also more likely to borrow money for graduate school.⁸³ At least one analysis has found that Black students receive a greater economic benefit from achievement of a graduate level degree than their white counterparts; however, that benefit is complicated by the ways in which the debt impacts Black student's financial future.⁸⁴

Let's take the case of average white and African American advance degree graduates with identical incomes and identical monthly student loan payment amounts of \$300. Given a constant 6% interest rate compounded monthly, it would take the average white student just over 10 years to pay off the principal and interest of their \$28,000 in student loans. By contrast, it would take the average African American student 21 years to pay off the principal and interest of their \$43,000 in student loans with the same \$300 rate.

Current and historic racialized economic stratification have placed Black and other parents and students of color in the precarious position of both needing access to higher education to increase their economic standing while also not having the economic standing to increase access. More starkly, even when that access is granted, it too often comes with dire financial consequences that further exacerbate economic gaps between them and their peers. For these reasons, the Court should bar use of the

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Jaymes Pyne and Eric Grodsky, *African Americans Take On More Debt For Grad School – But the Payoff is Also Bigger*, THE CHICAGO REP. (Jan. 24, 2020) <https://www.chicagoreporter.com/african-americans-take-on-more-debt-for-grad-school-but-the-payoff-is-also-bigger/>.

SAT and ACT for any purpose, including as a holistic view of applicants for scholarship eligibility.

ii. COVID-19 Has Intensified Inequities for Black, Brown, and Low-Income Communities.

These long-standing disparities have been exacerbated by the COVID-19 crisis and ensuing recession. COVID-19 exposure and mortality have hit Black and Brown communities the hardest.⁸⁵ According to data from the Centers of Disease Control and Prevention, “as of May 30, Black people made up 22% and Hispanic people made up 33%”⁸⁶ of confirmed COVID-19 cases despite only “constitut[ing] 13% and 18% of the population, respectively.”⁸⁷ Death rate disparities exist across all age groups⁸⁸ and persist regardless of income.⁸⁹ Of the 121 people under the age of 21 that died from the virus, nearly two-thirds have been Black or Hispanic.⁹⁰ Racial segregation exacerbates these disparities. “Counties

⁸⁵ Marin Wolf, *How Coronavirus and Race Collide in the U.S.*, WASHINGTON POST (Aug. 20, 2020), https://www.washingtonpost.com/business/how-coronavirus-and-race-collide-in-the-us/2020/08/11/2b0e75d0-db95-11ea-b4f1-25b762cdbbf4_story.html.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Tiffany Ford, ET AL., *Race Gaps in Covid-19 Deaths Are Even Bigger Than They Appear*, BROOKINGS INST. (Jun. 16, 2020), <https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear/>.

⁸⁹ Sasha Walek, *Racial Disparities in COVID-19–Related Deaths Exist Beyond Income Differences in Large U.S. Cities*, N.Y.U LANGONE HEALTH NEWS (July 28, 2020), <https://nyulangone.org/news/racial-disparities-covid-19-related-deaths-exist-beyond-income-differences-large-us-cities>.

⁹⁰ Will Feuer, *The Coronavirus Has Killed at Least 121 Young People in the U.S., Mostly Minorities, CDC Says*, CNBC (Sept. 15, 2020)

where more than 86% of residents are Black experienced up to 10 times higher death rates from COVID-19.”⁹¹ This is no accident, but the natural result of generations of policy decisions as described by emergency physician Uché Blackstock:⁹²

What systemic racism has done is limit the opportunities Black Americans have, to the effect that it’s placed us in a situation where we are most vulnerable to this virus. Add onto that the fact that our communities carry the highest burden of chronic disease—which, again, is a result of racism, lack of access to care, lack of quality care, lack of investment in our communities, lack of opportunities for finding healthy food options in our neighborhoods. All of what we’re seeing right now just shows how deeply embedded racism is in this country, in every aspect of the lives that we lead.

Unsurprisingly, the COVID-19 crisis has caused a devastating economic impact on Black and Brown communities as well.⁹³ Findings from the Pew Research Center revealed that “61% of Hispanic Americans and 44% of [B]lack Americans surveyed in April said that they or someone in their household had experienced a job or wage loss due to the

<https://www.cnn.com/2020/09/15/the-coronavirus-has-killed-at-least-121-young-people-in-the-us-mostly-minorities-cdc-says.html>.

⁹¹ Karthik Sivashanker, ET AL., *A Data-Driven Approach to Addressing Racial Disparities in Health Care Outcomes*, Harvard Bus. Rev. (July 21, 2020),

<https://hbr.org/2020/07/a-data-driven-approach-to-addressing-racial-disparities-in-health-care-outcomes>.

⁹² Julia Craven, *Six Months of the Coronavirus in Black America*, SLATE (Sept. 13, 2020),

<https://slate.com/news-and-politics/2020/09/black-america-coronavirus-deaths-explanation.html>.

⁹³ *Id.*; George Avalos, *California Jobless Claims Top 7 Million During Coronavirus Shutdowns*, THE ORANGE CTY. REG. (July 30, 2020),

<https://www.ocregister.com/2020/07/30/coronavirus-unemployment-claim-job-jobless-layoff-economy-tech-edd/>.

coronavirus outbreak, compared with 38% of white adults.”⁹⁴ In addition, findings showed that “nearly three-quarters of [B]lack (73%) and Hispanic adults (70%) said they did not have emergency funds to cover three months of expenses; around half of white adults (47%) said the same.”⁹⁵ A majority of the Black and Hispanic respondents who did not have emergency reserves “also said they would not be able to cover their expenses for three months by borrowing money, using savings or selling assets.”⁹⁶

COVID-19 has further widened already existing racialized gaps in unemployment and wealth acquisition, particularly for Black Americans.⁹⁷ The unemployment rate for Black Americans has remained nearly double that of white Americans.⁹⁸ In May 2020, not only were a higher percentage of Black workers (16.8%) impacted by unemployment, but Black workers also had the slowest rate of employment gains as COVID-19 restrictions were lifted.⁹⁹

⁹⁴ Mark Hugo Lopez, ET AL., *Financial and Health Impacts of COVID-19 Vary Widely by Race and Ethnicity*, PEW RSCH. CTR. (May 5, 2020), <https://www.pewresearch.org/fact-tank/2020/05/05/financial-and-health-impacts-of-covid-19-vary-widely-by-race-and-ethnicity/>; Natalie Spievack, ET AL., *Latinx Unemployment is Highest of all Racial and Ethnic Groups for the First Time on Record*, URB. INST., (May 8, 2020), <https://www.urban.org/urban-wire/latinx-unemployment-highest-all-racial-and-ethnic-groups-first-time-record>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Lauren Aratani and Dominic Rushe, *African Americans Bear the Brunt of Covid-19’s Economic Impact*, THE GUARDIAN (Apr. 28, 2020), <https://www.theguardian.com/us-news/2020/apr/28/african-americans-unemployment-covid-19-economic-impact>.

⁹⁸ *Id.*

⁹⁹ Bureau of Lab. and Stat., *The Unemployment Situation—July 2020* (Aug. 20, 2020), <https://www.bls.gov/news.release/pdf/empisit.pdf>.

Racialized stratification of occupational markets has resulted in people of color being overrepresented in low-wage jobs that do not have a work-from-home option and that are more susceptible to layoffs.¹⁰⁰ Those families that have been able to keep their jobs in industries dominated by low wage work have often had to put their health at risk to do so.¹⁰¹

Finally, recovery from the pandemic and recession is also happening far more slowly for Black and Brown communities. The Washington Post recently declared that the current period is the “most unequal [recession] in modern U.S. history.”¹⁰² According to its analysis, “white Americans have recovered more than half of their jobs lost,” while “Black Americans have recovered just over a third of employment lost.”¹⁰³ Specifically, white women have recovered the largest percentage of their jobs lost at 61%,

¹⁰⁰ The majority of essential workers in the food and agriculture industry, as well as industrial, commercial, and residential facilities and services, are people of color (50% and 53%, respectively). Econ. Pol’y Inst. (EPI) Analysis of Current Population Surv. Outgoing Rotation Grp. Microdata, *Current Population Survey Extracts, Version 1.0.2*, ECON. POL’Y INST., <https://microdata.epi.org> (accessed Aug. 20, 2020); *see also* The Insight Center, *Rules of Our Economy are Harming People of Color, Women and Immigrants During COVID-19*, https://insightccd.org/wp-content/uploads/2020/05/INSIGHT_one_pager_Covid19_01.pdf (accessed Aug. 20, 2020).

¹⁰¹ Daily Chart, *America’s Essential Workers Are Under-Protected in the Face of COVID-19*, THE ECONOMIST (May 14, 2020), <https://www.economist.com/graphic-detail/2020/05/13/americas-essential-workers-are-under-protected-in-the-face-of-covid-19>.

¹⁰² Heather Long, ET AL., *The COVID-19 Recession is the Most Unequal in Modern U.S. History*, WASHINGTON POST (Sept. 30, 2020), <https://www.washingtonpost.com/graphics/2020/business/coronavirus-recession-equality/>.

¹⁰³ *Id.*

while Black women have recovered the least at just 34%.¹⁰⁴ Black men have had the second worst recovery.¹⁰⁵ Hispanic workers experienced the “steepest initial employment losses and still have the most ground to gain to make up for pre-employment losses.”¹⁰⁶ In addition, workers with a college degree recovered a higher percentage of their jobs than workers with only a high school diploma.¹⁰⁷

The unequal recovery for Black women is part of a larger trend called “occupational segregation,” which refers to women being relegated to lower paying jobs while men occupy a large percentage of higher wage positions.¹⁰⁸ According to data analyzed by the Economic Policy Institute, Black women are underpaid relative to white men in every category regardless of educational attainment.¹⁰⁹ Data from 2016 revealed that “Black women with a high school degree or less earned 57.5 percent of what their white male counterparts with the same level of education made,” and Black women with advanced degrees earned 59.6 percent of what white men with advanced degrees made.”¹¹⁰ Not only are Black women

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Julia Carpenter, *The Gender Gap Isn't About What You Make. It's About What You Do*, CNN BUSINESS (Apr. 10, 2018), <https://www.cnn.com/2018/09/30/success/wage-gap-occupational-segregation/index.html>.

¹⁰⁹ Madison Matthews and Valerie Wilson, *Separate is Still Unequal: How Patterns of Occupational Segregation Impact Pay for Black Women*, ECON. POL'Y INST. (Aug. 6, 2018), <https://www.epi.org/blog/separate-is-still-unequal-how-patterns-of-occupational-segregation-impact-pay-for-black-women/>.

¹¹⁰ *Id.*

underpaid relative to their education, but they are also overrepresented in low wage positions. This overrepresentation is so pernicious that, in order to remove this disparity, “56 percent of black women (or white men) would need to change occupations in order to achieve occupational equity, or full integration of these two groups in the workforce.”¹¹¹

F. The SAT and ACT Are Discriminatory Against Female Students.

Beyond the racial and wealth disparities discussed above, standardized tests also have a longstanding and demonstrated gender bias that disadvantages female students. For example,

In 1967, boys scored 10 points higher than girls in mathematics; by 1987, the boys’ lead grew to 24 points; between 1987 and 2006, the boys’ math lead grew again, to between 33 and 41 points. As with the PSAT, boys also outscored girls on the verbal section, although by a much smaller margin. Boys outperform girls on both the SAT verbal (now called critical reading) as well as math sections, and have since 1972.¹¹²

In 1997, male students scored 40 points higher than female students on the SAT, and, in 1998, male students scored 42 points higher than their female counterparts.¹¹³ More recently, in 2016, male students maintained a 30-

¹¹¹ *Id.*

¹¹² David Sadker and Karen R. Zittleman, *Still Failing at Fairness: How Gender Bias Cheats Girls and Boys in School and What We Can Do About It* 183, (Scribner Mar. 29, 2009 Edition, 2009).

¹¹³ Andrea L. Silverstein, *Standardized Tests: The Continuation of Gender Bias in Higher Education*, 29 HOFSTRA LAW REV. (Issue 2, Art. 8) 670 n.6 (2000), <https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2124&context=hlr>.

point advantage over female students in the SAT math section, and a 16-point gap in overall mean scores.¹¹⁴ ACT scores contain smaller but similar gender disparities.¹¹⁵

Researchers have explored a number of reasons for the testing gap. A recent Stanford Graduate School of Education study found that male students perform better than female students on multiple-choice questions while females perform better in other types of questions.¹¹⁶ As such, male students perform better on tests like the SAT and ACT that rely heavily on such question formats.¹¹⁷ Others have hypothesized that male students outperform female students on timed tests because they are more likely to assume risks or jump to conclusions, while female students generally are more thoughtful and careful when selecting answers.¹¹⁸

Critically, the gender gap may also be caused by gender-based biases imbued within the tests themselves. For example, one question in the SAT

¹¹⁴ Coll. Bd., *Total Group Profile Report*, (2016), <https://secure-media.collegeboard.org/digitalServices/pdf/sat/total-group-2016.pdf>.

¹¹⁵ Richard Buddin, “Gender Gaps in High School GPA and ACT Scores,” ACT RSCH. & POL’Y. (Mar. 2014), <https://www.act.org/content/dam/act/unsecured/documents/Info-Brief-2014-12.pdf>.

¹¹⁶ Sean F. Reardon, ET AL., *The Relationship Between Test Item Format and Gender Achievement Gaps on Math and ELA Tests in Fourth and Eighth Grades*, 47 EDUC. RSCH. (Issue 5) (Mar. 27, 2018), <https://journals.sagepub.com/stoken/default+domain/fqfKir4qKS6R7nfsrCn/full>.

¹¹⁷ *Id.*; see also Silverstein, *supra* n.113, at 680-81.

¹¹⁸ Rachel Eliza Browne, *Gender Awareness and Preparation in California Teaching Credential Programs* (2011) (Master of Arts Thesis, Cal. State University, Sacramento) <http://csus-dspace.calstate.edu/bitstream/handle/10211.9/1394/Thesis%20-%20R%20Browne.pdf?sequence=4> (citing *Sadker, supra* n.112).

math section showed more boys than girls in math classes.¹¹⁹ Another question in the SAT verbal section asked students to analyze “a 19th-century polemic arguing that women’s place was in the home.”¹²⁰ The SAT also includes more questions about male characters and topics that are more traditionally associated with males, such as sports or politics.¹²¹ Experts have argued that such gendered framing may “trigger stereotype-driven test anxiety” and “could induce ‘cognitive fatigue’ for girls who were bothered by it.”¹²²

As with other groups disadvantaged by the SAT and ACT, women suffer from reduced short- and long-term opportunities. For example, “[a]lthough women fill close to half of all jobs in the U.S. economy, they hold less than 25 percent of STEM jobs.”¹²³ The U.S. Census Bureau data also shows that “between 2018 and 2019, no progress was made on closing the overall wage gender gap, with the average full-time working woman still earning just \$0.82 for every dollar earned by men.”¹²⁴ The

¹¹⁹ Anemona Hartocollis, *Tutors See Stereotypes and Gender Bias in SAT. Testers See None of the Above*, NEW YORK TIMES (Jun. 26, 2016), <https://www.nytimes.com/2016/06/27/us/tutors-see-stereotypes-and-gender-bias-in-sat-testers-see-none-of-the-above.html>.

¹²⁰ *Id.*

¹²¹ Helen Johnson, *Gender Bias in Tests: Numbers Themselves Prove Sexist*, THE MISCELLANY NEWS (Apr. 25, 2019), <https://miscellanynews.org/2019/04/25/opinions/gender-bias-in-tests-numbers-themselves-prove-sexist/>; *see also* Browne, *supra* n.118, at 27.

¹²² Hartocollis, *supra* n.119.

¹²³ David Beede, *ET AL.*, *Women in STEM: A Gender Gap to Innovation*, U.S. DEP’T. OF COM. 1 (Aug. 2011), <https://files.eric.ed.gov/fulltext/ED523766.pdf>.

¹²⁴ Courtney Connley, *New Census Data Reveals No Progress Has Been Made on Closing the Overall Gender Pay Gap*, CNBC LLC (Sept. 18,

discriminatory nature of standardized tests remains a significant contributing factor to female students' diminished higher education and career opportunities.

G. The SAT and ACT Discriminate Against English Learners.

In the United States, standardized tests have historically disadvantaged people for whom English is not their primary language. As far back as the early 1900s, immigrants who arrived in the United States through Ellis Island were subjected to tests that failed to recognize the role of English proficiency in those tests.¹²⁵ This trend survives today and translates into the education system with standardized exams that continue to disadvantage English learners.¹²⁶

2020), <https://www.cnn.com/2020/09/18/new-census-data-reveals-no-progress-has-been-made-closing-the-gender-pay-gap.html>.

¹²⁵ Kate Menkin, *English Learners Left Behind: Standardized Testing as Language Policy*, MULTILINGUAL MATTERS 17 (2008) (“Testing English language learners is a central component of recent federal education policy, but is by no means new. In fact, testing in the United States has historically been tied to the status of immigrants and minorities, serving as a gatekeeping function that perpetuates the power of the dominant groups...Coinciding with the Americanization period of the early 20th century, [IQ] tests were used by H.H. Goddard to evaluate immigrants to the United States who passed through Ellis Island and, failing to recognize the critical role of English proficiency on such tests, Goddard concluded that 25 of the 30 Jews tested were unintelligent.”) (internal citation omitted).

¹²⁶ See, e.g., John Bender, *SAT Scores Show English Language Learners Far Behind*, THE PUB. RADIO (Oct. 2019), <https://thepublicradio.org/article/sat-scores-show-english-language-learners-far-behind> (“Most 11th grade students who took the SATs in Rhode Island and speak English as a second language, aren’t considered ‘college or career ready,’ according to scores released this week...A recent agreement with the U.S. Department of Justice was supposed to rectify

In 2019, 19.3% of California’s approximately 6 million K-12 public school students were English learners.¹²⁷ Despite California’s large English learner population, the state’s pre-K through postsecondary education systems are not designed to address the needs of English learners adequately and are designed in ways that harm English learners’ chances of fairly accessing higher education.¹²⁸

First, standardized tests have a long-standing history of harming those whose primary language is not English. Standardized exams, like the SAT and the ACT, are not valid measures of an English learners’ knowledge or ability to perform well in school because these tests confound an English learners’ proficiency and their content knowledge.¹²⁹ The SAT,

numerous failings teaching multilingual learners in Providence. However, a report by the Council of Great City Schools...found many problems persisted, including need for trained English as second language teachers.”).

¹²⁷ Cal. Sch. Dashboard, *State of California Performance Overview for 2019*, CAL. DEP’T OF EDUC., <https://www.caschooldashboard.org/reports/ca/2019> (last accessed October 3, 2020).

¹²⁸ Lucrecia Santibañez & Ilana Umansky, *English Learners: Charting Their Experiences and Mapping Their Futures in California Schools*, STANFORD UNIV. & POL’Y ANALYSIS FOR CAL. EDUC. (Sept. 2018), https://gettingdowntofacts.com/sites/default/files/2018-09/GDTFII_Brief_EngishLearners.pdf.

¹²⁹ Yasuko Kanno, *High-Performing English Learners’ Limited Access to Four-Year College*, 120 TCHRS. COLL. REC. 22 (April 2018), <http://www.bu.edu/wheelock/files/2018/04/Kanno-2018.pdf>; see also Santibañez, *supra* n.128 (High stakes assessments “given to ELs have limited validity and reliability because of the difficulty of creating a test that can separate students’ knowledge of content from their abilities in English. (Validity is the ability of an assessment to measure the skills or knowledge it is designed to measure; reliability is the ability of an assessment to measure a given individual consistently.)”).

for example, fails to eliminate bias against English learners in its exam by using word-heavy math problems. For test-takers for whom English is not their primary language, lengthy word problems can slow their pace during the exam or limit their comprehension of the question at hand, even when they have the ability to solve the underlying math problems.¹³⁰

Second, structural inequities such as the lack of adequate supports for English learners in K-12 schools have a serious impact on their college-going decisions and outcomes. “Because many [English learners] have immigrant parents who are less likely to be familiar with the U.S. education system, research points to the importance of college advising among [English learners] and former (reclassified) [English learners].”¹³¹ Without proper college advising, even academically high-performing English learners may not understand the importance of, or understand how to register for, the SAT or ACT and, consequently, unwittingly lose eligibility for the more selective colleges.¹³²

¹³⁰ James S. Murphy, *New SAT, New Problems*, THE ATLANTIC (Jan. 20, 2015), <https://www.theatlantic.com/education/archive/2015/01/new-sat-new-problems/384596/>.

¹³¹ Santibañez, *supra* n.128 (“ELs’ opportunities in K-12 affect their college-going decisions and outcomes. At the opposite end of the education continuum, ELs are far less likely to graduate from high school, enroll in college, and complete college compared to their non-EL peers. Because many ELs have immigrant parents who are less likely to be familiar with the U.S. education system, research points to the importance of college advising among ELs and former (reclassified) ELs. Research highlights that with insufficient supports, students who graduate from high school as ELs tend to enter less selective schools, such as community colleges, and that even academically high-performing ELs face numerous barriers to college entry.”).

¹³² *Id.*; see Kanno, *supra* n.129, at 27-28.

Efforts by the College Board, the entity that administers the SAT and ACT, to provide test accommodations to English learners continue to fall short in improving test performance to English learners taking these standardized exams.¹³³ The results continue to show lower test scores for these students.¹³⁴ Despite the sizeable English learner student population in California, the UCs' continued use of the SAT and ACT ignores the negative impacts of using standardized exams for English learners. In fact, a member of the UCs' recent Standardized Testing Task Force explained that task force report writers "did not examine the impact of standardized testing on admissions for non-Native English speakers, even though non-Native English speakers score about 130 points lower on the SAT than white native English speaker."¹³⁵ Because standardized exams have historically harmed test-takers whose primary language is not English and the UCs have consistently failed to address the disparities, fairness and the anti-discrimination laws require that the UCs remove consideration of the SAT and ACT from the admissions process.¹³⁶

¹³³ See Bender, *supra* n.126; see also Coll. Bd., *Testing Supports for English Learners*, <https://collegereadiness.collegeboard.org/educators/k-12/english-learner-supports> (listing the test accommodations available to English Learners).

¹³⁴ See Bender, *supra* n.126.

¹³⁵ 1 RA 88 (Gándara Decl. ¶ 18).

¹³⁶ Title VI bars colleges and universities that receive federal financial assistance from operating in ways that are discriminatory based on race, color, or national origin, including in admissions, recruitment, and financial aid. See, e.g., U.S. Dep't of Educ., *Education and Title VI of the Civil Rights Act of 1964* (Jan. 10, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html#:~:text=Title%20VI%20states%20that%3A,activity%20receiving%20Federal%20financial%20assistance>.

II. The Court Should Not Stay the Injunction Because the UCs’ Failure to Notify the Public about the Preliminary Injunction Is Causing Further Harm to Prospective Applicants of Color and Prospective Applicants from Low-Income Communities.

The UCs’ failure to notify the public about the preliminary injunction has left prospective applicants across California uncertain about its upcoming admissions cycle, causing unnecessary anxiety that disproportionately harms students from non-college-going families and students without access to well-informed counselors. This uncertainty is especially pronounced due to the COVID-19 pandemic, which has disproportionately impacted low-income, Black, and Brown communities and schools in California and across the country. This Court should reject the UCs’ attempt to stay an injunctive order that rightly recognized the acute, ongoing harms inflicted by UCs’ test-optional policy and ordered the UC—consistent with prohibitory injunctions—to end its use of an illegal component in admissions, which requires no comprehensive restructuring since the UC already has a process in place for evaluating students without SAT and ACT scores.¹³⁷

¹³⁷ *Walnut Creek Police Officers’ Ass’n*, 33 Cal. App. 5th at 941 (denying writ of supersedeas where appellants “have not shown that ‘substantial questions will be raised on appeal’”); *Nuckolls*, 7 Cal. 2d at 578 (1936) (“until the contrary is shown, the presumption is in favor of the lower court’s decision...If a stay can be granted only at the risk of destroying rights which would belong to the respondent if the judgment is affirmed, it cannot be said to be necessary or proper to the complete exercise of appellate jurisdiction.”).

A. K-12 Students of Color and Low-Income Students Face Structural Barriers to Reliable Information about College Admissions Processes

California woefully underfunds its K-12 public schools.¹³⁸ This lack of funding results in schools being forced to make difficult decisions about scarce resources. For example, many schools cannot afford to hire sufficient critical staff like school counselors, who support students to prepare for college and career, as well as support students' social and emotional well-being.¹³⁹ For at least a decade, California schools have lagged behind those in most other states in providing students with adequate access to counselors. While the American School Counselors Association recommends a 250-to-1 student-to-counselor ratio, California provides 1 counselor for approximately every 644 students.¹⁴⁰

¹³⁸ See, e.g., Jennifer Imazeki ET AL., *Working Toward K-12 Funding Adequacy: California's Current Policies and Funding Levels*, STANFORD UNIV. & POL'Y ANALYSIS FOR CAL. EDUC. (Oct. 2018), https://gettingdowntofacts.com/sites/default/files/GDTFII_Brief_Adequacy.pdf (last accessed Oct. 2, 2020) (“In 2016-17, California public K-12 schools reported about \$66.7 billion in actual operational spending was used to educate their students. The main results of this study suggest that an additional \$25.6 billion—38% above actual spending—would have been necessary to ensure that all students had the opportunity to meet the state’s goals.”)

¹³⁹ See Carolyn Jones, *How some California school districts invest in counseling—and achieve results*, EDSOURCE (Feb. 10, 2020), <https://edsource.org/2020/how-some-california-school-districts-invest-in-counseling-and-achieve-results/623489> (explaining that California needs to invest \$2 billion dollar in education to provide student with adequate access to counselors who can support first-generation and diverse students with the college application process, as well as support students' social and emotional needs).

¹⁴⁰ Am. Ass'n of Sch. Couns., *Student-to-School-Counselor Ratio 2017-2018*, <https://www.schoolcounselor.org/asca/media/asca/home/Ratios17-18.pdf> (last accessed October 1, 2020); see also Susan Frey, *California*

Unsurprisingly, low-income students and students of color are more likely to attend underresourced schools and thus are more likely to lack access to a counselor.¹⁴¹ This lack of access to counselors compounds the inequity, because it is first-generation college students, low-income students, and students from Black and Brown communities who most need someone to guide them through the complex college admissions process.¹⁴² Indeed, even the College Board acknowledges that students need counselors to help them register for standardized exams.¹⁴³ Accordingly, when students lack

near bottom in number of school counselors, EDSOURCE (Dec. 21, 2012), <https://edsource.org/2012/california-near-bottom-in-numbers-of-school-counselors/24557> (reporting that California’s K-12 public schools averaged 810 students to every counselors, well above the recommended 250-to-1 ratio, in the 2009-10 school year).

¹⁴¹ Linda Darling-Hammond, *Inequality in Teaching and Schooling: How Opportunity is Rationed to Students of Color in America*, (2001), <https://www.ncbi.nlm.nih.gov/books/NBK223640/> (“In most states, schools serving minority and low-income students lack the courses, materials, equipment, and qualified teachers that would give students access to the education they will need to participate in today’s and tomorrow’s world.”); Ed Trust, *School Counselors Matter* (Feb. 1, 2019), <https://edtrust.org/resource/school-counselors-matter/> (reporting that California has “too few school counselors” and that nationally “school counselors are not available to students of color and students from low-income families”).

¹⁴² *See, e.g.*, Kanno, *supra* n.129, at 23 (“The process involved in applying to college—taking the SAT or the ACT, for instance—may seem to be common knowledge, but they are not obvious to underrepresented students and their families”) (internal citation omitted).

¹⁴³ BigFuture, *Applying to College: Your Counselor's Role*, COLL. BD., <https://bigfuture.collegeboard.org/get-in/applying-101/applying-to-college-your-counselors-role> (last accessed Oct. 6, 2020) (providing the following information to high school students about counselors: “Understand Requirements: Colleges have different application requirements. Most require applicants to submit an essay. Many ask applicants to send scores from an admission test, such as the SAT or the ACT®. Your counselor can

meaningful or adequate access to school counselors, they are severely disadvantaged when applying to the UCs.

The UCs' failure to notify the public about the preliminary injunction will harm students without the resources to navigate the conflicting public instructions about the upcoming application cycle, which will disproportionately harm Black, Brown, and low-income students.¹⁴⁴ Without the critical information that the "test optional" policy is not in effect in the November application window, more privileged students with access to resources will be more knowledgeable about how and whether to submit test scores as part of their applications. Further, as discussed below, low-income students and students of color have even less access to counselors during the COVID-19 pandemic, underscoring the need for the UCs to make clear their admissions policy immediately.

explain the requirements of each college and help you register for admission tests, if necessary.”

¹⁴⁴ Theresa Harrington, *Quick Guide: What California parents and students should know about the coronavirus*, EDSOURCE (Sept. 11, 2020), <https://edsource.org/2020/coronavirus-qa-what-california-parents-and-students-should-know-about-covid-19/624413> (explaining that “[b]oth the University of California system and CSU systems have suspended admission requirements for SAT or ACT tests for the class of 2021 and the UC system decided in May to abandon the SAT and ACT exams as a freshman admission requirement and to develop its own substitute standardized test by 2025. However, some campuses initially gave students the option of submitting those test scores as part of their application. But, a judge ruled Sept. 1 that all UC campuses must suspend use of the tests in admissions decisions. Some students want to take the SAT/ACT but are finding it difficult to find scheduled exams.”)

B. The COVID-19 Pandemic Has Exacerbated Inequities for Prospective Students, Particularly Those Who Are Traditionally Underresourced.

The spread of COVID-19 in March 2020 caused public K-12 schools throughout California and the country to close suddenly and unexpectedly, with no ability to plan for the months ahead. As schools transitioned to distance learning, students of color and students from low-income households have suffered disproportionately due to the lack of access to technology or internet to learn from home.¹⁴⁵ While many schools turned to internet-based services to provide instruction and online learning to students, 15-16 million households with school-aged children, or 30% of all public K-12 students, in the United States lacked either a device or Internet connection to participate in distance learning.¹⁴⁶ A recent study found that “[t]he digital divide is a major problem for students in all 50 states and all types of communities but is most pronounced in rural communities and households with Black, Latinx, and Native American students.”¹⁴⁷ The same study found that 25% of California’s students lack adequate Internet connection and 17% lack adequate devices at home, making it only second to Texas in states with the largest population of K-12 students without the

¹⁴⁵ Paloma Esquivel & Howard Blume, *L.A. Latino, Black students suffered deep disparities in online learning, records show*, L.A. TIMES (July 16, 2020), <https://www.latimes.com/california/story/2020-07-16/latino-and-black-students-hard-hit-with-disparities-in-their-struggle-with-online-learning>.

¹⁴⁶ Sumit Chandra ET AL., *Closing the K-12 Digital Divide in the Age of Distance Learning*, COMMON SENSE MEDIA & BOSTON CONSULTING GRP. (2020), https://www.common Sense Media.org/sites/default/files/uploads/pdfs/comm on_sense_media_report_final_7_1_3pm_web.pdf.

¹⁴⁷ *Id.* at 5.

needed technology to learn from home.¹⁴⁸ And the impact on students who lack access to online resources and education is obvious—they are unable to access college admissions information, study online for standardized tests, or contact their teachers or counselors in the same meaningful and deep ways that their more affluent or connected peers can, further exacerbating inequities in K-12 education and college access.

Further, it is highly troubling for the UCs to implicitly place pressure on high school students to forgo social distancing measures to take the ACT and SAT in person at test centers to gain a boost in their applications, when the UCs are engaged in distance learning and not forcing their own students to attend classes in person.¹⁴⁹ This pressure for students to subject themselves to dangerous in-person disproportionately impacts applicants from low-income communities and communities of color because, as discussed above, their communities are already suffering disproportionately as a result of the COVID-19 pandemic. Specifically, such students will be less likely to be able to travel safely to testing sites (for example by having to take public transportation), less likely to have adequate personal protective equipment, and more likely to take tests in areas with higher incidents of COVID-19 infection.¹⁵⁰

¹⁴⁸ *Id.* at 12.

¹⁴⁹ Larry Gordon, *Many California high school seniors still want to take SAT/ACT even though they are optional at many colleges*, EDSOURCE (Sept. 8, 2020), <https://edsource.org/2020/many-california-high-school-seniors-still-want-to-take-sat-act-even-though-they-are-optional-at-many-colleges/639703> (“So far in August and September, many testing sites remain closed in California and elsewhere, although some limited testing continues around the country.”).

¹⁵⁰ See discussion *supra* Part I.E.i.

The UCs “test-optional” approach in this era of school closures also severely disadvantages English learners who seek accommodations during the exam and need to sit for the exam to apply in the next admissions cycle, because accommodations are not available at testing sites where students take regular weekend SAT administrations.¹⁵¹ Instead, English learner accommodations are only available during “SAT School Day,” which is when school administrators can administer the SAT at their school site.¹⁵² Due to the pandemic, many California high schools remain closed and most K-12 schools have not yet determined how to re-open in the middle of the pandemic.¹⁵³ Even if a high school decides to re-open for SAT School Day so its English Learners can take the SAT with accommodations, it is now too late. The next SAT School Day is scheduled for Wednesday, October 14, and school administrators must submit requests for test books and English learners’ accommodations for SAT School Day four weeks before the exam date, meaning that school administrators should have submitted requests for such accommodations by *September 16*.¹⁵⁴ If a school

¹⁵¹ See Coll. Bd., *supra* n.133 (testing supports for English learners are only available “during SAT School Day, the PSAT 10, and the PSAT 8/9” and “[s]upports aren’t available for weekend SAT administrations, SAT Subject Tests, or the PSAT/NMSQT.”).

¹⁵² *Id.*

¹⁵³ EdSource Staff, *The next big hurdle: California schools grapple with how, when or if to reopen campuses*, EDSOURCE (Sept. 10, 2020), <https://edsource.org/2020/the-next-big-hurdle-california-schools-grapple-with-how-when-or-if-to-reopen-campus/639797>.

¹⁵⁴ See Coll. Bd., *supra* n.133 (“The deadline to request extended time for English learners is the same as the deadline to order standard and accommodated books...For the October 14 administration, requests must be submitted by September 16.”).

administrator reasonably relied on news articles published in early September that the preliminary injunction eliminated the use of the SAT or ACT for the upcoming admissions cycle, then such administrators would not have counseled their English learners to prepare for the exam. Critically, these administrators also would not have ordered the test books and requested the English learner supports by the College Board's September 16 deadline. By now requesting a stay of the preliminary injunction, the UCs effectively demonstrate they are indifferent to the fact that English learners can no longer take the exam with accommodations on October 14. The UCs should not benefit from the confusion and anxiety they now cause by requesting a stay of the preliminary injunction.

Finally, the UCs "test-optional" approach is particularly devastating to students with disabilities, who may not be able to secure the accommodations needed to take standardized exams and, even if possible, they would run the risk of serious illness or death if medically vulnerable and exposed to the coronavirus.¹⁵⁵

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¹⁵⁵ R. at 162, 176 (PI Mot. 9, 23 (citing Declaration of Dr. Ranit Mishori ¶¶ 26–30, 33)).

CONCLUSION

For the reasons stated above, Civil Rights Amici respectfully request the Court to reject Defendants' meritless attempt to stay the preliminary injunction pending appeal.

Dated: October 7, 2020

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Pursuant to Rule 8.204(c)(1) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this Proposed Amici Curiae Brief, counsel certifies that the text of this brief (including footnotes) was produced using 13-point type and contains 12,711 words. This includes footnotes but excludes the tables required under Rule 8.204(a)(1), the cover information required under Rule 8.204(b)(10), the Certificate of Interested Entities or Persons required under Rule 8.208, the Application to File Amici Curiae Brief required under Rule 8.200(c), this certificate, and the signature blocks. *See* Rule 8.204(c)(3).

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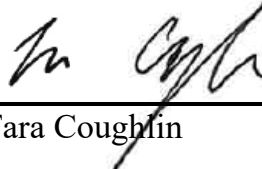
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