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COUNTY OF ALAMEDA, RENE C. DAVIDSON COURTHOUSE

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litem LEILANI REED; GLORIA D., through
her guardian ad litem DIANA I.; STEPHEN C.,
through his guardian ad litem MARGARET F.;
ALEXANDRA VILLEGAS, an individual;
CHINESE FOR AFFIRMATIVE ACTION, a
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PLAN, a nonprofit organization; COLLEGE
SEEKERS, a nonprofit organization;
COMMUNITY COALITION, a nonprofit
organization; DOLORES HUERTA
FOUNDATION, a nonprofit organization; and
LITTLE MANILA RISING, a nonprofit
organization,

Plaintiffs,

v.

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

CASE NO. RG19046222
(Consolidated with RG19046343)

**PLAINTIFFS' OPPOSITION TO
DEMURRER TO COMPLAINT**

Hearing Date: May 12, 2020
Time: 3:00 p.m.
Dept.: 23

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

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1 **ARGUMENT**

2 **I. Plaintiffs Have Stated a Claim for Disparate Impact Discrimination Under Section**
3 **11135.**

4 A cornerstone of California’s expansive antidiscrimination framework, California
5 Government Code Section 11135 (“Section 11135”) provides that “[n]o person in the State of
6 California shall, on the basis of race, color, . . . national origin, ethnic group identification, . . .
7 mental disability, physical disability, [or] medical condition . . . be unlawfully denied full and
8 equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or
9 activity” of the State, a State agency, or a State-funded entity. The statute’s implementing
10 regulations define discrimination to include both intentional discrimination and disparate impact:
11 they prohibit covered entities from “utiliz[ing] criteria or methods of administration that . . . have
12 the *purpose or effect* of subjecting a person to discrimination” or “have the *purpose or effect* of
13 defeating or substantially impairing the accomplishment of the objectives of the [entity]’s program
14 with respect to a person of a particular ethnic group identification, . . . color, or with a physical or
15 mental disability.” Cal. Code Regs. tit. 2, §§ 11154(i)(1)–(2) (emphasis added).

16 Ignoring this regulation, UC attempts to excise disparate impact liability entirely from
17 Section 11135, arguing that the statute prohibits only intentional discrimination and is thus merely
18 redundant with federal constitutional law. Dem. 16 & n.2. But nothing in Section 11135’s
19 language, implementing regulations, applicable case law, or legislative history supports UC’s
20 novel interpretation, which would render Section 11135 a nullity as applied to the State and its
21 agencies. UC’s bid to strip Section 11135 of its protections against disparate impact discrimination
22 flies in the face of clear legislative intent that the statute be broadly construed and reflects a total
23 misapprehension of both the letter and spirit of California antidiscrimination law.

24 **A. UC’s narrow interpretation of Section 11135 is irreconcilable with the**
25 **statutory text, implementing regulations, legislative history, and California’s**
26 **strong antidiscrimination public policy.**

27 Section 11135’s text and legislative history make plain that the Legislature intended it to
28

1 provide strong antidiscrimination protections, including against disparate impact discrimination.²
2 UC’s novel assertion that Section 11135 excludes disparate impact discrimination—and thus adds
3 *nothing* to the antidiscrimination prohibitions of federal constitutional law—is directly at odds not
4 only with the text and history, but also with longstanding California case law mandating the broad
5 construction of State antidiscrimination statutes.

6 As noted above, Section 11135’s implementing regulations expressly prohibit practices
7 with either a discriminatory purpose or *effect*, clearly incorporating disparate impact
8 discrimination. Cal. Code Regs. tit. 2, §§ 11154(i)(1)–(2), (j)(1)–(2). In 1999, the Legislature
9 ratified this definition of discrimination when it incorporated these regulations, unchanged, into
10 the statute, codifying a private right of action to enforce “[t]his article and regulations adopted
11 pursuant to this article.” Cal. Gov’t Code § 11139. UC simply ignores this text.

12 The Legislature’s codification of a private right of action—overriding *Arriaga v. Loma*
13 *Linda University*, 10 Cal. App. 4th 1556 (1992), which held that no private right of action existed
14 under Section 11135—demonstrated its intent to protect the expansive reach of the statute.³ At the
15 same time as it countered *Arriaga* by explicitly providing for private enforcement, the Legislature
16 sought to prevent future courts from narrowing the statute’s protections, amending Section 11139
17 to require broad construction: “This article shall not be interpreted in a manner that would frustrate
18 its purpose.” 1999 Cal. Stat. ch. 591 (A.B. 1670).

20 ² UC correctly asserts that California Education Code Section 66270 (“Section 66270”) should be
21 interpreted consistently with Section 11135, Cal. Educ. Code § 66252(g), but this vindicates rather
22 than defeats Plaintiffs’ claims. The express legislative intent of Section 66270 provides for its
23 “interpret[ation] as consistent with” an inclusive list of federal and State antidiscrimination
24 statutes, “except where [it] may grant more protections or impose additional obligations.” *Id.* UC
25 does not address, much less explain, how a statute that prohibits only intentional discrimination
26 can be “interpreted as consistent with” statutes that, at the time of its enactment in 1998, were
understood to encompass prohibitions against disparate impact discrimination. 1998 Cal. Stat. ch.
914 (A.B. 499); *see, e.g., Alexander v. Choate*, 469 U.S. 287, 295–97 (1985) (disparate impact
covered under Rehabilitation Act); *City & County of San Francisco v. Fair Emp’t & Hous. Com.*,
191 Cal. App. 3d 976, 985–86 (1987) (applying Title VII disparate impact standards to claim
under Fair Employment and Housing Act).

27 ³ 1999 Cal. Stat. ch. 591 (A.B. 1670); Sen. Rules Com., Third Reading Analysis of Assem. Bill
28 No. 1670 (1999–2000 Reg. Sess.) Sept. 3, 1999 (in light of *Arriaga*, amendments “will permit
private individuals to seek judicial relief to force agencies or entities receiving state funds to halt
their discriminatory practices”).

1 In the following years, the Legislature continued to strengthen and expand the statute. In
2 2001, it amended Section 11139 to make clear that private individuals were not required to
3 exhaust administrative remedies before suing for equitable relief under Section 11135, stating that
4 the private right of action “shall be independent of any other rights and remedies.” 2001 Cal. Stat.
5 ch. 708 (A.B. 677). The 2001 amendments also subjected the State and its agencies to the statute’s
6 antidiscrimination provisions—a change that would have been wholly superfluous if, as UC
7 argues, those provisions are merely coextensive with federal equal protection law. *Id.* In 2005, the
8 Legislature amended Section 11135 to apply explicitly to the California State University, rejecting
9 a State appellate court’s holding that the University was excluded from the statute’s scope.⁴ These
10 amendments are of a piece with an unbroken line of legislative history expanding the protections
11 of Section 11135.⁵

12 The Legislature’s repeated amendments evince a clear intent to bolster and broaden the
13 reach of Section 11135, consistent with California’s strong antidiscrimination public policy. In
14 recognition of the State’s commitment to equal opportunity, California courts construe State
15 antidiscrimination statutes “liberally.” *E.g., Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 666
16 (2009); *McDonald v. Antelope Valley Cmty. Coll. Dist.*, 45 Cal. 4th 88, 107–08 (2008). Section
17 11135’s text and legislative history plainly demonstrate that it should be no exception.

18 **B. Sandoval does not apply to Section 11135.**

19 No case has ever held that Section 11135 excludes disparate impact discrimination—
20 indeed, UC has located none. *See* Dem. 16 n.2. In fact, every court to address the issue has
21 concluded that Section 11135 covers disparate impact claims.⁶ UC nevertheless argues that
22

23 ⁴ *See Garcia v. Bd. of Trustees of Cal. State Univ.*, 131 Cal. App. 4th 1283, *ordered unpublished*,
24 32 Cal. Rptr. 3d 724 (2005); 2005 Cal. Stat. ch. 706 (A.B. 1742) (“It is the intent of the
Legislature . . . to reject the interpretation given to the law in *Garcia*[.]”).

25 ⁵ *See, e.g.*, 1992 Cal. Stat. ch. 913 (A.B. 1077) (incorporating “protections and prohibitions” of
26 Title II of the ADA and its implementing regulations, which prohibited, and continue to prohibit,
disparate impact discrimination, *see, e.g.*, 56 Fed. Reg. 35,694, 35,718 (July 26, 1991)); 2002 Cal.
27 Stat. ch. 1102 (S.B. 105) (race and national origin added as protected classes); 2006 Cal. Stat. ch.
182 (S.B. 1441) (sexual orientation added as protected class and prohibitions extended to
discrimination based on perceived protected characteristics and association).

28 ⁶ *See, e.g., Darensburg v. Metro. Transp. Comm’n*, 636 F.3d 511, 519 (9th Cir. 2011); *Darensburg*

1 Section 11135 should be interpreted in line with federal case law that was written 24 years after its
2 enactment and that construes only federal law. *See* Dem. 16 (citing *Alexander v. Sandoval*, 532
3 U.S. 275, 280 (2001)). The long history of amendments to the statute since *Sandoval* demonstrates
4 that, despite many opportunities, the Legislature has not chosen to adopt *Sandoval*'s interpretation
5 of federal law into State law.

6 UC's demurrer dismisses the single relevant case it cites, *Darensburg v. Metropolitan*
7 *Transportation Commission*, 636 F.3d 511 (9th Cir. 2011), as "inconsistent with the substantial
8 precedent clarifying that California antidiscrimination statutes should be interpreted consistently
9 with their analogous federal statutes (here, Titles VI and IX)." ⁷ Dem. 16 n.2. UC's claim that
10 *Darensburg* does not interpret Section 11135 "consistently with [its] analogous federal statutes" is
11 not only wrong, *see* 636 F.3d at 519 (recognizing the relevance of federal law to construing
12 Section 11135), but also fails to consider the interpretation of federal law that prevailed at the time
13 Section 11135 was enacted. The error is fatal to its argument.

14 When construing a statute, a court looks to the case law in effect at the time of its passage.
15 *Trope v. Katz*, 11 Cal. 4th 274, 282 (1995) (citing pre-enactment cases to demonstrate that terms
16 "had an established legal meaning at the time the Legislature enacted" the statute); *Hodge v.*
17 *Kirkpatrick Dev., Inc.*, 130 Cal. App. 4th 540, 555 (2005) ("When the Legislature adopts the
18 substance of a non-California statute, [it] is presumed to have acted with knowledge and in light of
19 decisions interpreting the adopted statute."). Section 11135 was enacted in 1977. 1977 Cal. Stat.
20 ch. 972, p. 2942. At that time, the Supreme Court not only recognized privately enforceable
21 disparate impact claims under federal antidiscrimination law, but further required defendants'

22
23 *v. Metro. Transp. Comm'n*, 611 F. Supp. 2d 994, 1042 (N.D. Cal. 2009), *aff'd*, 636 F.3d 511 (9th
24 Cir. 2011); *Crenshaw Subway Coal. v. L.A. Cty. Metro. Transp. Auth.*, No. CV 11-9603 FMO
(JCX), 2015 WL 6150847, at *37–38 (C.D. Cal. Sept. 23, 2015).

25 ⁷ *Donovan v. Poway Unified School District*, 167 Cal. App. 4th 567 (2008), and *Videckis v.*
26 *Pepperdine University*, 100 F. Supp. 3d 927 (C.D. Cal. 2015), are inapposite. *Donovan* addressed
27 a school district's monetary liability for peer sexual harassment, taking up only the narrow
28 question of "whether a private enforcement action under [Education Code] section 220 includes
recovery of money damages and, if so, what level of response is required of a funding recipient to
avoid liability." 167 Cal. App. 4th at 589. This question does not even apply to section 11135,
because—as *Donovan* itself recognized—the remedies for a private action thereunder are limited
to injunctive relief. *Id.* at 594–95. *Videckis* simply followed *Donovan*. 100 F. Supp. 3d at 935.

1 justifications to meet a rigorous standard of “business necessity” to rebut a showing of disparate
2 impact. *Griggs v. Duke Power Co.*, 401 U.S. 424, 426, 431–34 (1971); *Dothard v. Rawlinson*, 433
3 U.S. 321, 323–24, 328–29, 331 n.14 (1977). Federal courts then applied this analysis to disparate
4 impact claims under Title VI’s implementing regulations. *See, e.g., Larry P. v. Riles*, 793 F.2d
5 969, 982 & n.9 (9th Cir. 1984) (Title VI disparate impact analysis “derives from that applied in
6 Title VII disparate impact claims”). Because *Griggs* and its progeny governed federal statutory
7 disparate impact claims when Section 11135 was first enacted, the Ninth Circuit properly
8 determined that the Legislature always intended to incorporate the legal standards articulated in
9 those cases.⁸ *See Darensburg*, 636 F.3d at 519.

10 The federal district court in *Darensburg* rejected exactly the argument UC makes here—
11 that California law should automatically follow subsequent interpretations of federal law. *See*
12 *Dem. 16*. As the district court recognized, Section 11135 “differ[s] in an essential way from Title
13 VI” because it “expressly provides a private right of action.”⁹ *Darensburg v. Metro. Transp.*

15 ⁸ At the demurrer stage, Plaintiffs need only allege that “the defendant’s facially neutral practice
16 causes a disproportionate adverse impact on a protected class.” *Darensburg*, 636 F.3d at 519. The
17 Complaint sufficiently alleges the disparate adverse impact of UC’s test score requirement on
underrepresented minority students and students with disabilities, Compl. ¶¶ 167–80, and to the
extent UC disputes such allegations, that is a factual question that cannot be resolved on demurrer.

18 ⁹ UC does not cite, and has therefore waived any reliance on, *Collins v. Thurmond*, 41 Cal. App.
5th 879 (2019), which is inapplicable in the higher education context in any event. In *Collins*, the
19 Court of Appeal held that plaintiffs’ Section 11135 claims, which could have been “brought under
Education Code section 200,” were “mooted” by the 2017 amendments to Government Code
20 Sections 11136 and 12930. *Id.* at 905. According to the *Collins* court, because those amendments
removed such claims from the investigative authority of the Department of Fair Employment and
21 Housing (DFEH), the Legislature must also have intended to remove them from the scope of
Section 11135. *Id.* Critically, the amendment to Section 12930 excised from DFEH’s investigative
22 authority only “complaints relating to educational equity brought under [Educ. Code §§ 200 *et*
seq.] and investigated pursuant to the procedures set forth [at Cal. Code Regs. tit. 5, §§ 4600 *et*
23 *seq.*].” Cal. Gov’t Code § 12930(f)(4). Because these statutory sections and investigation
procedures are limited to the K–12 context, Plaintiffs’ claim remains actionable under Section
24 11135. *See* Leg. Counsel’s Dig., A.B. 499 (Feb. 24, 1997) (discussing “2 legislative schemes, one
... applicable to elementary and secondary schools, and one ... applicable to postsecondary
25 educational institutions”); *Doe v. Lassen Cmty. Coll. Dist.*, No. 07-CV-01521LEWDADX, 2007
WL 4623042, at *4 (E.D. Cal. Dec. 28, 2007). Even if *Collins* did apply in the higher education
26 context—which it does not—Plaintiffs submit that it was wrongly decided as to Section 11135,
because the 2017 amendments to Sections 11136 and 12930 altered neither the scope of
27 substantive rights protected by Section 11135 nor the private right of action to enforce those rights
pursuant to Section 11139. *Compare* Cal. Gov’t Code §§ 11135, 11139 (2001–2016) *with* Cal.
28 Gov’t Code §§ 11135, 11139 (2017–present); *see also* Sen. Judiciary Com., Third Reading

1 *Comm’n*, No. C-05-01597 EDL, 2008 WL 3915349, at *14 (N.D. Cal. Aug. 21, 2008). UC “has
2 pointed to no federal analogue to section 11139, so the reasoning of *Sandoval* is not applicable.”
3 *Id.* This Court should reject UC’s invitation to eschew Section 11135’s text, regulations,
4 legislative history, and role within California’s antidiscrimination framework in order to mirror
5 later federal law that both the Legislature and California courts have shown no intent to adopt.

6 **II. Plaintiffs Have Adequately Alleged Intentional Discrimination.**

7 Even if UC were correct in its assertion that Section 11135 and Section 66270 prohibit
8 only intentional discrimination, Plaintiffs have sufficiently pled claims under those statutes and the
9 Unruh Civil Rights Act, Cal. Civ. Code §§ 51 *et seq.* (“Unruh Act”).¹⁰ To state an intentional
10 discrimination claim, Plaintiffs need allege only that a discriminatory purpose was a “motivating
11 factor” in UC’s decision to maintain its SAT/ACT requirement. *Vill. of Arlington Heights v.*
12 *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). Discriminatory purpose may be proved
13 through circumstantial evidence. *Id.* at 266. *Arlington Heights* sets forth a non-exhaustive list of
14 factors relevant to ascertaining discriminatory purpose, including evidence of disparate adverse
15 impact, the decision’s “historical background,” the “sequence of events leading up to” the
16 decision, including departures from normal procedures or substantive conclusions, and the
17 decision’s “legislative or administrative history.” *Id.* at 266–68. That a decision has a “foreseeable
18 and anticipated disparate impact” is also “relevant evidence” of discriminatory purpose, and the
19 Supreme Court has expressly approved of courts’ considering decision-makers’ “[a]dherence to a
20 particular policy or practice, ‘with full knowledge of the predictable effects of such adherence
21 upon racial imbalance in a school system’” as evidence of discriminatory intent. *Columbus Bd. of*
22 *Educ. v. Penick*, 443 U.S. 449, 464–65 (1979) (citation omitted).

23 Applying these factors to the Complaint, Plaintiffs have alleged ample evidence of UC’s
24 intentional discrimination. Plaintiffs allege that UC’s test score requirement places

25 _____
26 Analysis of Sen. Bill No. 1442 (2015–2016 Reg. Sess.) Aug. 12, 2016 (amendments “reorganize[]
27 various anti-discrimination statutes” while “keeping the substance of existing rights, remedies, and
28 regulations intact”).

¹⁰ As discussed *infra* Part III, UC does not deny that both the Unruh Act and Section 11135
incorporate Title II of the ADA and thus, at the very least, do not require allegations of intent in
the context of disability discrimination.

1 underrepresented minority students, students with disabilities, and students from low-income
2 families at a pronounced disadvantage in its admissions process, resulting in substantially lower
3 acceptance rates. Compl. ¶¶ 7, 54–64, 167–77. Despite knowing for decades that the SAT and
4 ACT have only minimal predictive validity and operate to disproportionately exclude low-income
5 and underrepresented minority students, UC has chosen to continue requiring these tests. *Id.* ¶¶ 5,
6 140–43, 145–47, 149. In so choosing, UC has brushed aside years of consistent findings and
7 recommendations from its own psychometricians, who have shown that SAT and ACT scores act
8 as a proxy for applicants’ wealth and race and that high school GPA is a superior predictor of
9 college outcomes. *Id.* ¶¶ 5–6, 54–58, 62–64, 77–82, 140–43, 146–47, 149. UC has also ignored
10 entreaties from its own leaders and faculty, who have recognized that UC’s testing requirement
11 harms underrepresented students, “compromis[es]” the State’s K–12 education system, and
12 undermines “public confidence in the fairness of [UC]’s admissions process.” *Id.* ¶¶ 8, 146; *see*
13 *also id.* ¶¶ 2, 143, 147. Plaintiffs allege that UC departed from its own policies and procedures,
14 which require it to ensure that admissions tests are “demonstrably useful in predicting student
15 success at UC and provide information beyond that which is contained in other parts of the
16 application,” when it adopted the 2016 redesigned SAT without having studied its predictive
17 validity. *Id.* ¶¶ 150, 154. Plaintiffs further allege that reports of UC’s decision-making—the
18 closest analogues to the “legislative or administrative history” of its decision—reflect its
19 knowledge that the tests adversely impact underrepresented minority and low-income students,
20 that inequalities in test preparation harm less privileged students, and that high school GPA is a
21 superior predictor of student retention and “has less adverse impact on disadvantaged groups.” *Id.*
22 ¶ 153. Finally, Plaintiffs allege that UC has deliberately maintained its test score requirement
23 despite its foreseeable and anticipated exclusion of deserving low-income students,
24 underrepresented minority students, and students with disabilities. *Id.* ¶¶ 2, 5, 9, 75, 79–82, 143,
25 146, 153, 165, 183, 186. UC has never explained how its continued reliance on the SAT and ACT
26 can be reconciled with its mandate to enroll a student body that reflects the broad diversity of the
27 State. *Id.* ¶¶ 128–33. Taken together, Plaintiffs’ allegations more than suffice to state a claim for
28 intentional discrimination under *Arlington Heights and Penick*.

1 **III. Plaintiffs Have Stated Disability Discrimination Claims Under California Law.**

2 UC does not deny that the Unruh Act and Section 11135 incorporate Title II of the ADA,
3 such that neither statute requires allegations of intent in the context of disability discrimination.
4 Dem. 15, 17.¹¹ Instead, UC contends that (1) Plaintiffs have not pled that they are qualified for UC
5 undergraduate admission, and (2) UC is not responsible for discrimination by the College Board
6 and ACT, Inc. Dem. 17–18. These arguments do violence to both the ADA and the California
7 statutes that incorporate it.

8 **A. Plaintiffs have pled violations of Title II of the ADA.**

9 **1. Plaintiffs need not allege that they were qualified for admission to UC.**

10 Title II’s implementing regulation makes clear that Plaintiffs may challenge UC’s
11 discriminatory admissions criteria and perpetuation of the College Board and ACT, Inc.’s
12 discrimination without proving they would otherwise be admitted to UC.¹² Although in many
13 instances plaintiffs must prove they are “qualified,” attempting such a showing is futile for those
14 challenging discriminatory criteria and third-party discrimination, because they cannot know what
15 criteria defendants will use once forced to stop discriminating. Thus, the regulatory provisions that
16 prohibit “eligibility criteria that screen out or tend to screen out” people with disabilities, the
17 perpetuation of third-party discrimination, and methods of administration that have the “effect of
18 . . . impairing accomplishment of the objectives of the . . . program with respect to individuals
19 with disabilities” do not limit their protection to only people with disabilities who are “qualified.”
20 28 C.F.R. § 35.130(b)(1)(iv), (b)(3)(ii), (b)(8).

21 The Court should therefore reject UC’s protest that Plaintiffs must plead that they have
22 been rejected from UC when they would have been admitted under fair criteria. Dem. 17–18.
23 Plaintiffs have pled that they or their members are in the class of people with disabilities who tend
24

25 ¹¹ UC argues only that California Civil Code Section 51(f)—the Unruh Act provision that
26 specifically incorporates the ADA—is limited to cases seeking statutory damages for ADA
27 violations and that Plaintiffs have not alleged such a claim. Dem. 15. But Plaintiffs alleged a
violation of Section 51 as a whole, including Section 51(f). Compl. ¶¶ 228–39. There is no basis to
limit Section 51(f) to claims for statutory damages when it incorporates all of Title II.

28 ¹² The Department of Justice ADA regulation receives *Chevron* deference. *Armstrong v.*
Schwarzenegger, 622 F.3d 1058, 1065 (9th Cir. 2010).

1 to be screened out of admission to UC by the SAT and ACT, Compl. ¶¶ 22–25, 36–37, 39–40; that
2 UC perpetuates the College Board and ACT, Inc.’s discrimination, *id.* ¶¶ 209–10, 222–23, 231–
3 34; and that requiring these tests defeats UC’s mission to promote diversity and educate all
4 citizens of California, *id.* ¶¶ 128–33. These allegations state a claim under Title II.

5 **2. At most, Plaintiffs need allege only that they are qualified to apply to**
6 **UC.**

7 Even if Plaintiffs were required to allege that they were “otherwise qualified” for UC’s
8 programs, UC misconstrues the program to which it denies Plaintiffs equal access. Dem. 17.
9 “[T]he term ‘services, programs, or activities’ as used in the ADA is . . . broad, bringing within its
10 scope anything a public entity does.” *Fortyune v. City of Lomita*, 766 F.3d 1098, 1101–02 (9th
11 Cir. 2014) (citation omitted). In this case, Plaintiffs allege that they are denied equal consideration
12 in UC’s admissions process, not equal access to its undergraduate program. The admissions
13 process is, in and of itself, a program, service, or activity of the State.

14 The ADA requires not only access to an underlying benefit, but also equal consideration in
15 the process by which that benefit is awarded. 42 U.S.C. § 12101(a)(8) (people with disabilities
16 should have “the opportunity to compete on an equal basis”). Public entities thus may not provide
17 either unequal benefits or unequal opportunities to people with disabilities. 28 C.F.R. §
18 35.130(b)(1)(ii)–(iii).¹³ Plaintiffs contend that, because the SAT and ACT are not validated for,
19 and discriminate against, people with disabilities, UC denies them the “equal opportunity to obtain
20 the same result” in its admissions process as applicants without disabilities. *Id.* § 35.130(b)(1)(iii);
21 Compl. ¶¶ 104–11, 119, 122. That claim is cognizable under Title II.

22 In keeping with the ADA’s “purpose . . . to create a ‘level playing field’ for those with
23 disabilities,” *Fontanilla v. City & Cty. of San Francisco*, No. C-96-3916 JCS, 2001 WL 513395, at
24 *15 (N.D. Cal. Feb. 28, 2001), disability discrimination claims challenging unfair processes have
25 proceeded without plaintiffs showing entitlement to the underlying benefit. *Larry P.*, 793 F.2d 969
26

27 ¹³ Similarly, equal “benefits” under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794,
28 include fair “treatment” and “handling” of matters, not only fair “decision[s].” 28 C.F.R.
§ 42.540(j); *see McGary v. City of Portland*, 386 F.3d 1259, 1269 n.7 (9th Cir. 2004) (applying
regulation to Title II analysis).

1 (enjoining use of unvalidated IQ tests to place children in “special classes for the educable
2 mentally retarded” without requiring plaintiffs to prove that they would otherwise have been
3 mainstreamed); *Thompson v. Davis*, 295 F.3d 890, 896, 898 (9th Cir. 2002) (holding that prisoners
4 in addiction recovery were entitled to “full and fair consideration for parole” without requiring
5 proof that they would in fact receive parole). As in these challenges to subjective processes,
6 Plaintiffs cannot predict what other criteria, if any, UC will turn to when it can no longer rely on
7 discriminatory tests. Title II “should not be construed to allow the creation of spheres” exempt
8 from its requirements. *Id.* at 899 (citation omitted); *see Hason v. Med. Bd. of Cal.*, 279 F.3d 1167,
9 1172 (9th Cir. 2002) (a “narrow construction of . . . ‘services, programs, or activities’ is at odds
10 with the remedial goals underlying the ADA”). Requiring Plaintiffs to prove a hypothetical before
11 they can challenge UC’s actual discriminatory admissions criteria is contrary to that intent.

12 Because the service to which UC has denied Plaintiffs equal access is its admissions
13 process, not its undergraduate program, UC’s claim that Plaintiffs have not shown they are
14 “otherwise qualified” is easily dispatched. Anyone can apply to UC. Plaintiffs are qualified to be
15 fairly considered and to challenge discriminatory requirements.

16 **3. UC is responsible for requiring Plaintiffs to take a discriminatory**
17 **admissions test designed and administered by a third party.**

18 UC assumes that it need redress only its own direct discrimination. Dem. 18. But Title II
19 prohibits a public entity’s use of discriminatory criteria whether “directly or through contractual,
20 licensing, or other arrangements.” 28 C.F.R. § 35.130(b)(1), (b)(3); *see, e.g., Armstrong*, 622 F.3d
21 at 1066. UC is also liable when it “provid[es] significant assistance to an . . . organization . . . that
22 discriminates on the basis of disability” when serving UC’s beneficiaries. 28 C.F.R. §
23 35.130(b)(1)(v). UC is therefore responsible for its choice to use the SAT and ACT when the
24 College Board and ACT, Inc. have failed to make them accessible.

25 The Rehabilitation Act, and therefore Title II, *see Duvall v. Cty. of Kitsap*, 260 F.3d 1124,
26 1135 (9th Cir. 2001), forbid a public university to “make use of any test” with a disparate impact
27 on people with disabilities unless it “has been validated” and no less discriminatory “tests or
28 criteria” are “available.” 34 C.F.R. § 104.42(b)(2). A university must “assure itself” that

1 admissions tests “are . . . administered so as best to ensure that” they measure “whatever . . . factor
2 the test purports to measure,” not an applicant’s disability, and that accessible tests “are offered as
3 often and . . . as timely . . . as are other admissions tests.” *Id.* § 104.42(b)(3). These obligations do
4 not depend on whether the university administers the test, contracts for its administration, or
5 requires students to subject themselves to its administration. Plaintiffs allege that UC requires
6 admissions tests that are not validated for and that discriminate against people with disabilities,
7 and for which less discriminatory criteria are available. *E.g.*, Compl. ¶¶ 65–85, 119, 122, 181–89.
8 Plaintiffs also allege that students with disabilities are not guaranteed an accessible test site on
9 their desired testing date (or at all). *Id.* ¶¶ 104–11. Barriers to obtaining accommodations further
10 delay testing for some students with disabilities and result in others receiving no or inadequate
11 accommodations, and therefore inaccessible tests. *Id.* ¶¶ 112–20. Thus, UC has failed to “assure
12 itself” that the SAT and ACT “best ensure” measurement of the tested skills rather than the effects
13 of disability; that accessible tests are administered in accessible facilities as often and as timely as
14 inaccessible versions; and that the least discriminatory criteria available, such as high school
15 GPAs, are used.

16 UC does not deny that the Complaint adequately alleges the testing entities discriminate,
17 contending only that it is not responsible for their failures. Dem. 18. But by requiring applicants to
18 take the discriminatory SAT and ACT, UC has made an arrangement with the testing entities that
19 results in UC using discriminatory admissions criteria, Compl. ¶¶ 104–11, 165, 177, and gives
20 those entities considerable material aid, perpetuating their discrimination, *id.* ¶ 47. Doing so
21 substantially defeats UC’s objectives to serve all Californians equally. *Id.* ¶¶ 131–33. These
22 allegations state a claim under Title II and California law.¹⁴ 28 C.F.R. § 35.130(b)(1), (b)(3).

23 **B. Plaintiffs have alleged that UC violated the CDPA.**

24 Because Plaintiffs have stated a claim under the ADA, they have stated a claim under the
25

26 ¹⁴ The cases on which UC relies, Dem. 18, are inapposite. The *Cho v. Montgomery County*
27 plaintiff sued the county for the failings of a state agency. No. CV DKC 2005-2350, 2006 WL
28 8456955, at *4 (D. Md. Nov. 7, 2006). The *Wendel v. New York* court rejected a claim against the
state for third parties’ failure to respect handicapped parking tags. 574 F. Supp. 2d 290, 306
(E.D.N.Y. 2008). These defendants did not use the third parties to facilitate their own programs.

1 Disabled Persons Act, Cal. Civ. Code §§ 54 et seq. (“CDPA”). The Organizational Plaintiffs
2 (“Organizations”) have stated an additional claim for the denial of physical access to UC testing
3 sites. UC wrongly assumes that none of the Organizations’ members require accommodations to
4 physically access test sites. Dem. 18–19. But Plaintiffs allege that “[n]either [testing entity]
5 mandates that test sites be accessible to all students with disabilities who require
6 accommodations;” that “[d]isability accommodations vary depending on student need;” and that
7 “test sites . . . may not provide all necessary accommodations for test-takers for all test
8 administrations.” Compl. ¶ 104. Drawing all inferences in Plaintiffs’ favor, the Organizations have
9 alleged that some of the accommodations their members need are related to physical access.

10 The CDPA “may also be construed as requiring equal physical access to a nontangible
11 location such as an internet site.” *Turner v. Ass’n of Am. Med. Colls.*, 167 Cal. App. 4th 1401,
12 1412 (2008). Students without disabilities can take the ACT online, but some students with
13 disabilities, including members of College Seekers, cannot. Compl. ¶ 108. UC’s failure to make
14 the online version of the ACT accessible to all applicants violates the CDPA.

15 **IV. Plaintiffs Have Adequately Pled Their Standing.**

16 **A. Kawika Smith, Alexandra Villegas, and Stephen C. have alleged injury.**

17 Because UC requires first-year applicants to take discriminatory tests and publishes the
18 average SAT and ACT scores of students admitted to each campus, Kawika and Alexandra have
19 been deterred from applying to their preferred UC campuses. *See* Compl. ¶¶ 16, 30. They were
20 also required to spend time and effort preparing for illegal tests, *id.* ¶¶ 14–16, 28–29, and
21 Alexandra has been denied admission to schools where she could have excelled, *see id.* ¶ 30.
22 Stephen C. faces imminent and inevitable burdens on his path to taking the unvalidated entrance
23 exam UC requires. *See id.* ¶¶ 22–31. Each has adequately pled standing.

24 When they were deterred from applying to UC campuses where they could have thrived,
25 Kawika and Alexandra suffered injuries sufficient to confer standing. Applicants experience an
26 injury when they are deterred from applying for a position by “[a] consistently enforced
27 discriminatory policy.” *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365 (1977)
28 (employment); *see also White v. Square, Inc.*, 7 Cal. 5th 1019, 1023, 1031 (2019) (plaintiff

1 deterred by discriminatory “terms and conditions” on business’s website “personally experienced
2 the application of a discriminatory policy” sufficient to confer Unruh Act standing). Kawika and
3 Alexandra “personally experienced the application of a discriminatory policy,” *White*, 7 Cal. 5th at
4 1031, when they concluded it would be futile to apply due to UC’s SAT/ACT requirement.
5 Compl. ¶¶ 16, 30. Both Kawika and Alexandra also expended time and effort preparing to take the
6 SAT and experienced self-doubt and anxiety related to their test scores. *Id.* ¶¶ 14–16, 28–29.
7 These additional injuries confer standing. *See Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019, 1021
8 (9th Cir. 1983); *Reichman v. Poshmark, Inc.*, 267 F. Supp. 3d 1278, 1284–85 (S.D. Cal. 2017).
9 Alexandra again experienced discrimination when she was rejected by UC Davis, UC Santa Cruz,
10 and UC Riverside. Compl. ¶¶ 26–30. UC’s blithe assertion that her “legally protected interests”
11 were not injured because she was admitted to UC Merced, Dem. 21, ignores that admitting a
12 student to one campus within a school system does not excuse discriminatory policies throughout
13 the system. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

14 In addition, UC’s admissions policies mean Stephen C. will inevitably have to expend time
15 and resources preparing for the SAT or ACT. He will also be treated unequally throughout the
16 testing process because of his disabilities. Compl. ¶¶ 22–25. Even if he obtains accommodations,
17 he will be denied opportunities available to UC applicants without disabilities, such as a choice of
18 testing locations and the option to take the ACT online. *Id.* ¶¶ 105–10. *Blumhorst v. Jewish Family*
19 *Services of Los Angeles*, 126 Cal. App. 4th 993 (2005), on which UC relies, Dem. 20–21,
20 acknowledges that a plaintiff can show standing by pleading “a likelihood he will be harmed in the
21 future if the injunction is not granted.” *Blumhorst*, 126 Cal. App. 4th at 1004. Comparing a tenth-
22 grader who has alleged he intends to apply to UC, Compl. ¶ 22—a decision within his control and
23 consistent with his current circumstances—to the plaintiff in *Blumhorst*, a man seeking relief for
24 wholly speculative future domestic violence, is sophistry.¹⁵ Moreover, UC is well-aware that

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27 ¹⁵ Standing exists where a plaintiff’s anticipated injury is much less imminent than Stephen C.’s
28 injury here. *See, e.g., Coral Constr., Inc. v. City & County of San Francisco*, 116 Cal. App. 4th 6,
20 (2004) (contractor has standing to seek to enjoin discriminatory ordinance, even without
identifying “a *specific* contract it will bid upon *in the near future*”).

1 many college-bound students begin preparing for the SAT and ACT in tenth grade (if not
2 earlier).¹⁶ Stephen C. has alleged sufficient facts to support the inference not only that he will face
3 higher costs in time and effort to take the tests than his nondisabled peers, but also that it is very
4 likely that he will have a discriminatory test experience. Compl. ¶¶ 22–25, 104–20.

5 Finally, UC’s SAT/ACT requirement inevitably injures students with disabilities because
6 the tests have not been validated for them. *Id.* ¶ 122. Using these tests to evaluate students with
7 disabilities therefore denies them equal consideration in UC’s admissions process, which is an
8 actionable injury under the ADA. *See supra* Part III.A. Because Stephen C. inevitably will suffer
9 this injury when he applies to UC, as he credibly pleads he intends to do, he has standing.

10 **B. UC’s interpretation of ripeness and mootness is contrary to California law.**

11 UC argues that a prospective student has standing to seek injunctive relief only at the
12 moment s/he has been rejected by UC and before s/he chooses a fallback college. *See* Dem. 21–22
13 & n.4 (arguing that Stephen C., who has not yet applied, cannot allege a ripe controversy, whereas
14 Alexandra alleges a moot controversy because she now attends a community college and does not
15 allege that she plans to reapply as a first-year). Because standing must be maintained throughout a
16 case, by UC’s view, a student who challenges discrimination in UC admissions must forgo
17 attending college until litigation is completed. Even if UC were right, this Court could still hear
18 this matter as a case of public concern “arising from situations which are ‘capable of repetition,
19 yet evading review.’” *See, e.g., In re William M.*, 3 Cal. 3d 16, 23 n.14 (1970) (citation omitted).
20 But the Court need not reach this doctrine here.

21 “A controversy is ‘ripe’ when it has reached, but has not passed, the point that the facts
22 have sufficiently congealed to permit an intelligent and useful decision to be made.” *Cal. Water &*
23 *Tel. Co. v. Los Angeles County*, 253 Cal. App. 2d 16, 22 (1967). An “actual controversy”
24 “encompasses a probable future controversy relating to the legal rights and duties of the parties.”

25
26 ¹⁶ UC publishes a “UC Preparation Calendar” that includes multiple entries for the tenth grade
27 related to the SAT. *See* UC, *Achieve UC: UC Preparation Calendar for Students and Their Parents*
28 *or Guardians* (2017), <https://admission.universityofcalifornia.edu/counselors/files/achieve-uc-preparation-calendar-english.pdf>.

1 *Envtl. Def. Project v. County of Sierra*, 158 Cal. App. 4th 877, 885 (2008). Stephen C.’s claims
2 (and those of students represented by the Organizations) are ripe because of a probable future
3 injury. *See supra* Part IV.A. Alexandra’s claim, too, has not passed the point where an intelligent
4 and useful decision may be made. She still plans to apply to a UC campus but believes it would be
5 futile to reapply as a first-year under UC’s regular admissions policies. Compl. ¶¶ 30–31. “The
6 pivotal question in determining if a case is moot is . . . whether the court can grant the plaintiff any
7 effectual relief.” *Wilson & Wilson v. City Council of Redwood City*, 191 Cal. App. 4th 1559, 1574
8 (2011). Prospective relief, such as enjoining consideration of SAT/ACT scores for all applicants,
9 would provide Alexandra a nondiscriminatory path to admission.¹⁷ Continuing her education
10 elsewhere while seeking relief in this Court does not moot her claim. *See id.*

11 **C. The Organizations have standing.**

12 While UC acknowledges that an organization may sue on behalf of its members, it claims
13 (1) the Organizations are not membership organizations, and (2) the students they serve would not
14 themselves have standing. *See* Dem. 23–24. UC ignores allegations in the Complaint which plead
15 both elements. Moreover, the Organizations can pursue claims for the harms they have suffered
16 directly due to diversion of resources.

17 First, the Organizations have standing to seek relief for their student “members” or
18 constituents.¹⁸ *See* Compl. ¶¶ 32–41; Compton Unified School District (“CUSD”) Compl. ¶ 7;
19 *Collins*, 41 Cal. App. 5th at 921 (where organization alleged its “members are affected by the
20 allegedly discriminatory actions taken by [defendant], that the organization’s mission consists of
21 remedying such actions and otherwise improving the local school districts, and that none of the

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24 ¹⁷ After UC filed its demurrer, it announced a one-year adjustment to its admissions process.
25 Applicants for fall 2021 admission are permitted, but not required, to submit SAT or ACT scores.
26 Because UC has not yet divulged how it will evaluate applicants who submit scores as compared
to applicants who do not submit them, Plaintiffs cannot evaluate whether or to what degree this
temporary adjustment will ameliorate harms to fall 2021 applicants.

27 ¹⁸ Although cited by UC, Dem. 23, *Students for Fair Admissions, Inc. v. President & Fellows of*
28 *Harvard College* in fact supports denial of UC’s demurrer. *See* 261 F. Supp. 3d 99, 108–09 (D.
Mass. 2017) (organization with formal members is presumed adequate to represent “interests of its
current members without needing to test this further based on the indicia-of-membership factors”).

individual members are needed to pursue the organization’s claims,” standing was adequately
pled). The Organizations have alleged their members’ standing to seek relief. Compl. ¶ 10
(Organizations “serve thousands of well-qualified students who have been adversely impacted by
UC’s” SAT/ACT requirement); *see also id.* ¶¶ 32–41 (pleading standing of members of each
Organization); CUSD Compl. ¶¶ 10, 12. That is enough. *See Collins*, 41 Cal. App. 5th at 921.

Second, the Organizations independently have standing, as each has suffered its own injury
by “divert[ing] significant organizational resources to combat” UC’s unlawful conduct.¹⁹ *Animal*
Legal Def. Fund v. LT Napa Partners LLC, 234 Cal. App. 4th 1270, 1280 (2015); *see* Compl. ¶¶
33, 35, 37, 38, 40, 41; CUSD Compl. ¶¶ 10, 12.

**D. CUSD and Micah Ali have standing to challenge the direct harms to the school
district and its students.**

Finally, CUSD has adequately pled standing to sue both on its own behalf and on behalf of
its students. A school district has “standing to challenge . . . [policy] which it contends directly
affects its boundaries, its property and its funds.” *See San Carlos Sch. Dist. v. State Bd. of Educ.*,
258 Cal. App. 2d 317, 323 (1968). CUSD is directly harmed because it must expend substantial
funds and instructional time to prepare its students for a test that will systematically disadvantage
many of them—resources that it could otherwise devote to its core mission: educating students.
See CUSD Compl. ¶ 12.

CUSD and the President of its Board of Trustees, Micah Ali, have also adequately pled
their standing to sue on behalf of CUSD’s students. First, the rights of CUSD students to be free of
discrimination in UC admissions are “inextricably bound up” with the activity CUSD and Mr. Ali
wish to pursue: focusing on education instead of test preparation. *Selinger v. City Council*, 216
Cal. App. 3d 259, 271 (1989) (quoting *Singleton v. Wulff*, 428 U.S. 106, 114–16). Second, CUSD
and Mr. Ali and the district students have a close relationship and shared interest in a fair UC
admissions policy “such that the former [are] fully, or very nearly, as effective a proponent of the

¹⁹ The holding in *Midpeninsula Citizens for Fair Housing v. Westwood Investors*, 221 Cal. App.
3d 1377 (1990), Dem. 24, is expressly limited to claims under the Unruh Act. *See id.* at 1383,
1385. The Organizations have standing to pursue their other claims in their first-party capacities.

1 right as the latter.” *Id.* Finally, there are “genuine obstacle[s]” to CUSD students suing in their
2 own names. *Id.* Prospective plaintiffs have reason to fear that suing UC could lead to further
3 discrimination in UC admissions. Moreover, if UC were to prevail on its mootness and ripeness
4 arguments, it is unlikely that any individual plaintiffs with ripe claims at the outset of a lawsuit
5 could avoid having their claims become moot before a trial could be held.

6 CONCLUSION

7 For the foregoing reasons, UC’s demurrer should be overruled.

8
9 DATED: April 14, 2020

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PROOF OF SERVICE

**Smith v. The Regents of the University of California
Case No. RG19046222**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 800 West Sixth Street, 18th Floor, Los Angeles, CA 90017-2701.

On April 14, 2020, I served true copies of the following document(s) described as **PLAINTIFFS' OPPOSITION TO DEMURRER TO COMPLAINT** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address rramierz@scheperkim.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 14, 2020, at Los Angeles, California.

/s/ Rocio Ramirez

Rocio Ramirez

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SERVICE LIST
Smith v. The Regents of the University of California
Case No. RG19046222

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