

PUBLIC COUNSEL

MARK ROSENBAUM (State Bar No. 59940)

mrosenbaum@publiccounsel.org

AMANDA SAVAGE (State Bar No. 325996)

asavage@publiccounsel.org

610 S. Ardmore Avenue

Los Angeles, CA 90005

Tel: (213) 385-2977 - Fax: (213) 385-9089

SCHEPER KIM & HARRIS LLP

GREGORY A. ELLIS (State Bar No. 204478)

gellis@scheperkim.com

KATHERINE B. FARKAS (State Bar No. 234924)

kfarkas@scheperkim.com

MICHAEL L. LAVETTER (State Bar No. 224423)

mlavetter@scheperkim.com

800 West Sixth Street, 18th Floor

Los Angeles, California 90017-2701

Tel: (213) 613-4655 - Fax: (213) 613-4656

Additional Counsel listed on next page

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA, RENE C. DAVIDSON COURTHOUSE

KAWIKA SMITH, through his guardian ad 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; GARY W., an individual; CHINESE FOR AFFIRMATIVE ACTION, a nonprofit organization; COLLEGE ACCESS 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,

Plaintiff,

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
DEFENDANTS' EX PARTE
APPLICATION FOR STAY OF
PRELIMINARY INJUNCTION**

Judge: Hon. Brad Seligman
Dept. 23

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Defendant.

AND RELATED CONSOLIDATED CASES

EQUAL JUSTICE SOCIETY

EVA PATERSON (State Bar No. 67081)

epaterson@equaljusticesociety.org

MONA TAWATAO (State Bar No. 128779)

mtawatao@equaljusticesociety.org

LISA HOLDER, EJS Of Counsel (State Bar No. 212628)

lisaholder@yahoo.com

634 S Spring Street, Suite 716

Los Angeles, CA 90014 Tel: (415) 288-8700 – Fax: (510) 338-3030

BROWN GOLDSTEIN LEVY, LLP

EVE L. HILL (State Bar No. 202178)

ehill@browngold.com

ABIGAIL A. GRABER (admitted *pro hac vice*)

agraber@browngold.com

120 East Baltimore Street, Suite 1700

Baltimore, Maryland 21202

Tel: (410) 962-1030 – Fax: (410) 385-0869

MILLER ADVOCACY GROUP

MARCI LERNER MILLER (State Bar No. 162790)

marci@milleradvocacy.com

1303 Avocado Ave, Suite 230

Newport Beach, CA 92660-7804

Tel: (949) 706-9734 – Fax: (949) 266-8069

OLIVAREZ MADRUGA LEMIEUX O'NEILL, LLP

THOMAS M. MADRUGA (State Bar No. 160421)

tmadruga@omlowlaw.com

500 South Grand Avenue, 12th Floor

Los Angeles, California 90071-2701

Tel: (213) 744-0099 – Fax: (213) 744-0093

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	5
(1) UC’s development of fair “test-blind” policies.....	5
(2) Role of SAT and ACT scores.....	6
(3) No finalized admissions processes.....	7
II. THE PRELIMINARY INJUNCTION IS PROHIBITORY, SO NO AUTOMATIC STAY APPLIES.....	8
III. A DISCRETIONARY STAY WOULD EVISCERATE THIS COURT’S DETERMINATION THAT UC’S DISCRIMINATION RESULTS IN IRREPARABLE HARM TO PLAINTIFFS AND THE PUBLIC.	14
IV. CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

<i>Davenport v. Blue Cross,</i> 52 Cal. App. 4th 435 (1997).....	12
<i>Dry Cleaners & Dyers Inst. v. Reiss,</i> 5 Cal. 2d 306 (1936).....	10, 11, 12
<i>Food & Grocery Bureau v. Garfield,</i> 18 Cal. 2d 174 (1941).....	15
<i>Jaynes v. Weickman,</i> 51 Cal. App. 696 (1921).....	8, 9, 11
<i>Mark v. Superior Court,</i> 129 Cal. 1 (1900).....	12
<i>O’Connell v. Superior Court,</i> 141 Cal. App. 4th 1452 (2006).....	12
<i>Ohaver v. French,</i> 206 Cal. 118 (1928).....	9, 11
<i>People ex rel. Brown v. iMergent, Inc.,</i> 170 Cal. App. 4th 333 (2009).....	8
<i>Smith v. City of Oakland,</i> 2020 WL 2517857 (N.D. Cal. Apr. 2, 2020)	17
<i>Sun-Maid Raisin Growers v. Paul,</i> 229 Cal. App. 2d 368 (1964).....	15
<i>United Railroads v. Superior Court,</i> 172 Cal. 80 (1916).....	8, 9
<i>URS Corp. v. Atkinson/Walsh Joint Venture,</i> 15 Cal. App. 5th 872 (2017).....	8, 10

1 **I. INTRODUCTION**

2 In a thinly veiled attempt to make an end run around this Court’s determination that the
3 University of California (“UC”)’s discrimination is inflicting irreparable harm on Plaintiffs and
4 the public, UC now seeks to stay, pending appeal, the preliminary injunction the Court entered to
5 prevent that harm. Such a stay would turn this Court’s decision on its head by allowing UC to
6 persist in using discriminatory SAT and ACT scores as a “plus factor” in the upcoming admissions
7 cycle, denying yet another cohort of students with disabilities and students with less privilege a
8 fair chance at UC admission. Nevertheless, in order to preserve in its admissions system tests that
9 its own leaders and experts have condemned as discriminatory, UC now revises the facts in a
10 striking series of reversals.

11 In opposing the preliminary injunction, UC made three major representations about its
12 admissions and scholarship processes. First, it assured the Court that all of its campuses had either
13 developed or were currently developing processes to fairly evaluate applicants without SAT and
14 ACT scores. PI Opp’n 18, 27. Second, it emphasized that even though—as its experts
15 recognized¹—SAT and ACT scores are inaccessible to students with disabilities, they play only a
16 minor role in UC admissions and scholarship determinations. *See, e.g., id.* at 28. And finally, it
17 maintained that Plaintiffs’ claims were premature, because none of UC’s “test-optional” campuses
18 had finalized their admissions policies or procedures. *Id.* at 21. Now, in its unwillingness to let go
19 of the tests, UC changes its narrative to assert the opposite.

20 **(1) UC’s development of fair “test-blind” policies.**

21 An equitable “test-optional” system requires a university to develop an admissions process
22 that fairly evaluates students without SAT or ACT scores. In its opposition to the preliminary
23 injunction, UC represented that each of its “test-optional” campuses had either already developed,
24 or was then developing, such a process. *See, e.g.,* PI Opp’n 27 (“At the campuses that currently
25 plan to use test scores this fall, admissions staff are consciously designing their systems to ensure
26 they will not discriminate against any individuals who do not submit test scores.”). UC now
27

28 ¹ Hiss Decl. ¶ 54; *see* Syverson Decl. ¶ 26.

1 maintains that this Court’s injunction will require individual campuses to “entirely” “re-engineer”
2 and “restructure their carefully planned admissions processes to excise the consideration of test
3 scores.” App. 7, 9, 13.

4 Given that UC’s “carefully planned admissions processes” would necessarily have
5 encompassed processes for admitting students without test scores, these representations are not
6 credible. For example, UC Riverside has developed “two algorithms: one that gives no weight to
7 SAT or ACT scores, and one that does.” PI Opp’n 18. UC now asserts that if campuses like UC
8 Riverside are not able to use SAT or ACT scores, “they will need to reassess their *entire*
9 admissions processes.” App. 11 (emphasis in original). Not so: as UC Riverside’s admissions
10 director testified, if the campus cannot use SAT or ACT scores, it will simply evaluate all
11 applicants using the (already-developed) algorithm that omits those scores.² UC’s claim that
12 UCLA and UCSD—which planned to consider SAT and ACT scores during “holistic review”—
13 “would need to . . . restructure [their admissions processes] in their entirety” is similarly
14 unavailing. App. 10. Intuitively—and as UCSD’s admissions director confirmed—if that campus
15 cannot use SAT or ACT scores, it will still employ the *same* holistic review process, absent the
16 scores.³

17 **(2) Role of SAT and ACT scores.**

18 In its opposition and at the preliminary injunction hearing, counsel for UC sought to
19 minimize the role of SAT and ACT scores in UC admissions processes. Counsel asserted, for
20 example, that UCSB’s “second look process” was not a significant “loophole that are [sic] going
21 to favor students who have test scores,” but rather a minor step “under which 10 to 15 additional
22 students are admitted each year.” PI Hr’g Tr. 54:8–10, 12–13. Now, UC claims that this Court
23 “misapprehends the significance of the . . . ‘second look’ process[] to . . . UC Santa Barbara.”
24 App. 10. According to UC, campuses including UCSB “cannot eliminate this ‘second step’
25 protection without potentially compromising the entire process.” *Id.* at 11. Such hyperbolic
26

27 ² Engelschall Dep. 85:14–22.

28 ³ Saddler Dep. 73:4–10, 13–20.

warnings find no support in the record.

(3) No finalized admissions processes.

In its opposition to the preliminary injunction, UC made clear that not a single test-optional campus had finalized its admissions process: “While some campuses have made *preliminary* decisions to be test-optional, admissions directors at *all* test-optional campuses are still consulting with their governing faculty committees to finalize policies and procedures.” PI Opp’n 21 (emphases added). Because “UC is still developing its policy,” UC argued, the Court would have to “speculate about [UC’s] hypothetical future actions” in order to adjudicate Plaintiffs’ claims. *Id.* at 23 (citation omitted). UC now asserts that, contrary to its prior representations, its campuses’ plans were not “preliminary,” “hypothetical,” and in development, but rather final and immutable. In addition to UC’s own statements, the record belies this position.⁴ The steps that UC now claims it must take in order to comply with the preliminary injunction—finalizing its admissions policies; convening faculty committees “to review and approve” those policies; and communicating final policies to prospective applicants, App. 6–7—are all steps that UC had not yet taken prior to the preliminary injunction and would have taken in any event.

Relying on these newly revised facts, UC now seeks to stay the preliminary injunction that this Court found was necessary to stop UC’s unlawful discrimination and avert irreparable harm to

⁴ **Davis:** “We anticipate updating the website with further details after the Committee on Admission and Enrollment decision.” Lewis Decl. ¶ 20.

Los Angeles: “I expect that CUARS [Committee on Undergraduate Admissions and Relations with Schools] will approve a new policy on the use of SAT and ACT scores in admissions at its first meeting in fall 2020. I have requested that this take place in September.” Copeland-Morgan Decl. ¶ 16.

Merced: “The Undergraduate Council will decide whether to continue to consider SAT and ACT scores, if submitted with applications, for admissions for fall 2021 and fall 2022. The Undergraduate Council will likely meet in early September to discuss a revised policy, and finalize their decision at the end of September.” Orcutt Decl. ¶ 8.

Riverside: “UCR’s goal is to have approval of its new model no later than September 1, 2020.” Engelschall Decl. ¶ 19.

San Diego: “We will present a proposal to the Committee on Admissions in the fall and expect that they will make a final decision on the policy by early November 2020.” Brumfield Decl. ¶ 10.

Santa Barbara: “CAERS [Committee on Admissions, Enrollment, and Relations with Schools] expects to make decisions regarding (a) whether to allow admissions readers to view applicants’ SAT and ACT scores when calculating the Academic Promise score and (b) whether to keep test scores as one of the four ‘second look’ categories after consultation with other Academic Senate committees and UCSB administration[.]” Przekop Decl. ¶ 21.

1 Plaintiffs and the public. For the reasons stated below, the law does not warrant such a result,
2 which would permit UC to override this Court’s finding of its significant discriminatory conduct
3 and destroy Plaintiffs’ right to relief therefrom.

4 **II. THE PRELIMINARY INJUNCTION IS PROHIBITORY, SO NO AUTOMATIC**
5 **STAY APPLIES.**

6 UC takes the position that, because its discriminatory conduct has been ongoing, any
7 injunction requiring it to cease discriminating must be mandatory, resulting in an automatic stay
8 and subjecting the injunction to a heightened standard of review. App. 9. Such a rule would
9 subvert the purposes of both antidiscrimination law and preliminary injunctive relief by rewarding
10 a party for its pre-existing discriminatory conduct. Under UC’s interpretation, so long as a party’s
11 discrimination predates the motion for a preliminary injunction, that discriminatory conduct
12 constitutes the “status quo” from which any deviation—even pursuant to a preliminary injunction
13 seeking to prevent the irreparable harm that will result from that conduct—is automatically stayed.

14 That, unsurprisingly, is not the law: “[A] party cannot unilaterally create a status quo for
15 purposes of the prohibitory/mandatory dichotomy by its improper conduct.” *URS Corp. v.*
16 *Atkinson/Walsh Joint Venture*, 15 Cal. App. 5th 872, 886 (2017) (citing *United Railroads v.*
17 *Superior Court*, 172 Cal. 80, 87 (1916)). The fact that a party has “for some time” been engaged in
18 discriminatory conduct “does not change the character” of a prohibitory injunction. *Jaynes v.*
19 *Weickman*, 51 Cal. App. 696, 701 (1921). “If this were not so, almost any injunction against the
20 doing of repeated acts would be mandatory if the performance of the acts had been begun and
21 carried on for any considerable time.” *Id.* at 701–02.

22 Thus, rather than looking to the duration of a party’s unlawful behavior—which would
23 unjustly allow the party to “unilaterally create a status quo . . . by its improper conduct,” *URS*, 15
24 Cal. App. 5th at 886—California courts ascertain the nature of a preliminary injunction by
25 identifying its primary purpose. Where the primary purpose is to “restrain a party from a course of
26 conduct or to halt a particular condition,” the injunction—even if it requires the party, in ceasing
27 its unlawful conduct, to engage in affirmative acts—is prohibitory. *People ex rel. Brown v.*
28 *iMergent, Inc.*, 170 Cal. App. 4th 333, 342 (2009) (quoting *People v. Mobile Magic Sales, Inc.*, 96

1 Cal. App. 3d 1, 13 (1979)); *see also Ohaver v. Fenech*, 206 Cal. 118, 123 (1928) (injunction is
2 prohibitory where its “main purpose . . . is to restrain the appellants from” continuing unlawful
3 conduct).

4 Notably, UC never disputes that the primary purpose of the preliminary injunction is to
5 prohibit its continued use of SAT and ACT scores in its admissions and scholarship
6 determinations. *See* App. 13. Nor could it. To identify whether the primary purpose of an
7 injunction is to prohibit or compel behavior, California courts have long asked a fundamental
8 question: “What essentially are the features of the injunction?” *Jaynes*, 51 Cal. App. at 701;
9 *United Railroads*, 172 Cal. at 88. That is, what does the injunction *actually* require (or not require)
10 of the party enjoined? The Court’s order is clear: “The defendants, their officers, agents and
11 employees (including their individual campuses), are hereby enjoined from using SAT and the
12 ACT test results for admissions and scholarship decisions during the pendency of this action.”
13 Order 14 (footnote omitted). The single “feature[]” of this injunction is its prohibition of UC’s
14 continued consideration of discriminatory SAT and ACT scores in its admissions and scholarship
15 determinations. The injunction is therefore prohibitory.

16 Because the primary purpose—and thus the nature—of the injunction is unambiguous, UC
17 can argue only that it is mere “semantic[s]” to characterize as “prohibitory” an injunction whose
18 sole purpose is to prohibit UC from using a discriminatory admissions criterion. App. 13. But
19 identifying the essential “injunctive feature[]” of an order is a substantive, not a semantic, inquiry.
20 *Jaynes* is instructive: in that case, the court prohibited a party from operating its business under a
21 proscribed trade name. 51 Cal. App. at 697. The enjoined party moved for a writ of *supersedeas*,
22 characterizing the injunction as “mandatory” because it would have to engage in affirmative acts
23 in order to comply. *See id.* at 698. The court acknowledged “that, in order to carry on their
24 business in a manner conformable to the injunctive features of the judgment,” the party would
25 have to remove the proscribed trade names from their trucks, business entrance, and advertising
26 signs. *Id.* at 699–700. That the injunction would require the party to take these affirmative acts
27 “necessary to effectuate”—and thus incidental to—“the principal purpose of the injunction, which
28 is to forbid further infringement” did not somehow “transform[]” the injunction from prohibitory

1 to mandatory. *Id.* at 700.

2 UC has no meaningful answer to *Jaynes* and similar cases. *See* App. 13. Because it cannot
3 deny that the primary purpose of the injunction is to prohibit its continued use of SAT and ACT
4 scores—the definitive inquiry in determining whether an injunction is prohibitory or mandatory—
5 it pivots, quibbling that because the actions it plans to take to comply with the injunction’s
6 prohibition are “significant” and “change[] the position of the parties,” the injunction must be
7 mandatory. *Id.* As discussed *supra*, the latter argument is easily dispensed with: “There is
8 no magic in the phrase ‘maintaining the status quo’ which transforms an injunction essentially
9 prohibitive into an injunction essentially mandatory.” *URS*, 15 Cal. App. 5th at 886 (citing *United*
10 *Railroads*, 172 Cal. at 87). UC’s only remaining argument, therefore, is one of degree: because the
11 actions it plans to take to comply with the prohibition are ostensibly “significant,” they cannot
12 therefore be “incidental” to the injunction’s primary purpose of barring UC from continuing to use
13 SAT and ACT scores to evaluate applicants. *See* App. 13.

14 Critically, however, the injunction does not, in fact, require UC to take *any* of the actions it
15 describes. Instead, the injunction only prohibits UC from considering SAT and ACT scores in its
16 admissions and scholarship processes. “By its terms [UC is] not required to perform any act
17 whatever.” *Dry Cleaners & Dyers Inst. v. Reiss*, 5 Cal. 2d 306, 308 (1936). The supposedly
18 onerous “requirements” that UC contends this Court has imposed—“restructur[ing] . . . carefully
19 planned admissions processes . . . ; assessing those new processes to ensure that the changes do
20 not have . . . unintended consequences . . . ; conven[ing] faculty committees and obtain[ing]
21 approval of the restructured processes; and re-issu[ing] . . . prior communications to prospective
22 applicants and families,” App. 9–10 (footnotes omitted)—are nowhere to be found in the
23 injunction.

24 The California Supreme Court rejected a similar argument in *Dry Cleaners*, where a dry
25 cleaning business had been enjoined from charging anything less than fixed minimum prices for
26 its services. 5 Cal. 2d at 308. The defendants moved for a writ of *supersedeas*, arguing that the
27 injunction “requir[ed] them to carry on their business as dry cleaners and charge for [their
28 services] the minimum price fixed.” *Id.* The Court disagreed, finding that contrary to the

1 defendants' assertion, the injunction did not "direct them to carry on their business or perform any
2 other affirmative act." *Id.* at 309. Instead, the defendants could take any number of actions
3 consistent with the injunction's prohibition: they could cease business temporarily; they could
4 "continue to do business as before and charge the fixed rates"; or they could choose to charge
5 "rates [even] higher than those fixed by the written agreement." *Id.* "The only requirement that the
6 injunction lays upon them is that if they do engage in business as dry cleaners they shall not
7 charge for their work a price less than the [minimum rates]." *Id.* at 308. The injunction was
8 therefore prohibitory. *Id.* at 308–09.

9 That holding governs here.⁵ The Court has not directed UC to "entirely restructure its
10 admissions policies," nor has it prescribed procedures and methodologies by which individual UC
11 campuses must admit applicants. App. 13. It has not, for example, substituted its own criteria for
12 UC's comprehensive review factors, nor has it mandated that UC ascribe certain weights to
13 specific factors (such as GPA) or otherwise follow a particular formula in assessing applicants. It
14 has not set out steps that individual UC campuses must follow in setting their admissions policies
15 and selecting their first-year classes. Individual UC campuses, like the defendants in *Dry*
16 *Cleaners*, can choose to structure their admissions processes in any number of ways, as they did
17 before the injunction. Instead, "[t]he only requirement that the injunction lays upon them is that"
18 in structuring those processes, "they shall not" use a discriminatory criterion, SAT and ACT
19 scores. *Dry Cleaners*, 5 Cal. 2d at 308; *see also Jaynes*, 51 Cal. App. at 701 ("The defendants are
20 not compelled to surrender their business. . . . They are, however, forbidden to do that which the
21 court below determined to be illegal and improper[.]").

22
23
24 ⁵ The California Supreme Court reached the same conclusion in *Ohaver*, a case cited by UC for
25 the proposition that the nature of an injunction depends on "*the effect upon the parties against*
26 *whom it is issued.*" App. 9 (emphasis in original) (citing *Ohaver*, 206 Cal. at 122). In *Ohaver*, the
27 defendants had been enjoined from shipping to their ranch and feeding to their hogs garbage from
28 the City of Sacramento. 206 Cal. at 121. The defendants claimed that the injunction was
mandatory, because it "necessarily require[d] the removal by them of the hogs" to another
location. *Id.* at 123. The Court disagreed, reasoning that the defendants could keep their hogs on
their ranch and feed them food other than the prohibited garbage. *Id.* The Court thus rejected the
defendants' attempt to "distort[]" its preliminary injunction "into an order requiring the removal of
the hogs." *Dry Cleaners*, 5 Cal. 2d at 309 (construing *Ohaver*).

1 The fact that the injunction contains no mandatory component—that “[b]y its terms [UC
2 is] not required to perform any act whatever,” *Dry Cleaners*, 5 Cal. 2d at 308—distinguishes this
3 case from *Mark v. Superior Court*, 129 Cal. 1 (1900), on which UC primarily relies.⁶ Unlike this
4 Court’s injunction, the injunction at issue in *Mark* contained both a prohibitory component and a
5 mandatory component: it “restrain[ed] [petitioners] from using, or causing to be used, in the public
6 schools of the city and county of San Francisco the text-books of the Shaylor system of vertical
7 round-hand penmanship” (the prohibitory component) and at the same time “command[ed] them
8 to cause to be used in said public schools the text-books of the California system of vertical
9 penmanship” (the mandatory component). *Id.* at 3. UC claims that “[t]he only issue on appeal was
10 the first aspect of the injunction,” *i.e.*, the prohibitory component. App. 11. Not so: “The question
11 presented” was “whether the prohibitory portion of the injunction can be separated from the
12 mandatory portion, or whether the two are so inseparably connected as to render it improper
13 during the appeal to enforce one while the other is suspended.” *Id.* at 4.

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

23 Had the Court in this case not only prohibited UC from using SAT and ACT scores, but
24 also “command[ed]” all UC campuses to adopt an alternative admissions procedure that the Court
25

26
27 ⁶ The other case UC cites repeatedly, *O’Connell v. Superior Court*, 141 Cal. App. 4th 1452
28 (2006), does not even address the question of what constitutes a prohibitory versus mandatory
 injunction. *Cf. Davenport v. Blue Cross*, 52 Cal. App. 4th 435, 448 (1997) (“Cases are not
 authority for propositions not therein considered.”).

1 prescribed, *id.* at 3, the holding in *Mark* might have some bearing on the question at issue. But this
2 Court did no such thing; unlike in *Mark*, there is no mandatory component to this Court’s
3 injunction, as evidenced by the fact that UC campuses—so long as they refrain from using a
4 discriminatory criterion—can design and implement their admissions procedures as they choose.
5 *Mark* is therefore inapposite.

6 Finally, even if UC were correct—which it is not—in asserting that any injunction that
7 “changes the ‘relative positions of . . . the parties’” is therefore mandatory, App. 12, the record
8 makes clear that the Court’s injunction does not, in fact, effect such a change. Prior to the Court’s
9 injunction, *none* of the six UC campuses contemplating continued use of SAT and ACT scores
10 had finalized their admissions policies,⁷ nor had they admitted any students thereunder. Indeed,
11 several of UC’s admissions directors could not even state a firm date by which their procedures
12 would be finalized.⁸ The “carefully planned admissions processes” that UC claims must now be
13 “re-engineer[ed],” App. 7, 9, had, at some campuses, not even been developed,⁹ and were in any
14

15 ⁷ *Supra* note 4.

16 ⁸ *See, e.g.*, Copeland-Morgan Decl. ¶ 16 (UCLA) (“I *expect* that CUARS [Committee on
17 Undergraduate Admissions and Relations with Schools] will approve a new policy on the use of
18 SAT and ACT scores in admissions at its first meeting in fall 2020. I have *requested* that this take
19 place in September.” (emphases added)); Orcutt Decl. ¶ 8 (Merced) (“The Undergraduate Council
20 will *likely* meet in early September to discuss a revised policy, and finalize their decision at the
end of September.” (emphasis added)); Engelschall Decl. ¶ 19 (Riverside) (“UCR’s *goal* is to have
approval of its new model no later than September 1, 2020.” (emphasis added)); Brumfield Decl. ¶
10 (San Diego) (“We will present a proposal to the Committee on Admissions in the fall and
expect that they will make a final decision on the policy by early November 2020.” (emphasis
added)).

21 ⁹ *See, e.g.*, Saddler Dep. 30:22–25; 31:4, 9–13, 17; 32:1–2, 20–23 (UCSD):

22
23 Q. [D]o you have a date as to when you would expect . . . that precise [admissions] policy
to be finalized?

24 A. Prior to our reader training. . . . That will take place in November. [. . .]

25 Q. [D]o you know anything more specific than prior to November?

26 A. No. We’re conducting a study now.

27 Q. [. . .] And what are the elements of that study?

28 A. [. . .] [T]he study is still being developed[.] . . . It is still being developed and the
nuances of it are still in the works. [. . .]

1 event nothing more than recommendations, since they had not yet been approved by the necessary
2 faculty committees.¹⁰ Thus, at every ostensibly “impacted” campus, there was no fixed admissions
3 procedure prior to the injunction, and there *remains* no fixed admissions procedure after the
4 injunction. There is nothing for UC campuses to undo.

5 Ultimately, UC’s position would gut timely enforcement of California’s robust
6 antidiscrimination laws by enabling wrongdoers to stay prohibition of their preexisting
7 discriminatory policies simply by filing an appeal. Fortunately, the law contemplates no such
8 outcome. The preliminary injunction is prohibitory and thus, no automatic stay applies.

9 **III. A DISCRETIONARY STAY WOULD EVISCERATE THIS COURT’S**
10 **DETERMINATION THAT UC’S DISCRIMINATION RESULTS IN**
11 **IRREPARABLE HARM TO PLAINTIFFS AND THE PUBLIC.**

12 UC argues in the alternative that this Court should enter a discretionary stay so as not to
13 deny UC the “fruits” of its ostensibly “meritorious appeal.”¹¹ App. 14. Thus, UC asserts, a stay is
14 necessary because if UC campuses remove an indisputably discriminatory criterion from their
15 admissions processes and admit students without that criterion—which all UC campuses were in
16 fact preparing to do, as required by a “test-optional” system—“it would be too late to undo those
17 actions” if UC were to prevail on appeal. *Id.* UC never explains *why* it would seek to “undo those
18 actions” at all. Why should UC seek to re-inject an admittedly discriminatory and inaccessible
19 metric into its admissions process? What interest does it have in rescinding the admission of a
20 class of students evaluated, for the first time in decades, without reference to this unfair criterion?
21 As this Court found: “UC does not seriously argue that the test is a valid and effective means of
22 determining admissions nor does it deny that that non-disabled, economically advantaged, and

23
24 Q. [. . .] [D]o you have a date by which the design of that study will be finished, or is that
25 also a work in progress?

26 A. That is a work in progress.

27 ¹⁰ *Supra* note 4.

28 ¹¹ UC also asserts, without additional argument, that “at a minimum” this Court should grant a 10-
day administrative stay. App. 15. Such a stay should be denied for the same reasons stated herein.
Moreover, UC will not even begin accepting applications until November 1. *Id.* at 6.

1 white test takers have an inherent advantage in the test process.” Order 12-13.

2 In deciding whether to issue a discretionary stay, this Court “must consider the rights of
3 the respondents, as well as those of the appellants. If the judgment of [this Court] is right, the
4 plaintiffs are absolutely entitled to have the wrongful acts stopped, not only after the determination
5 of the appeal, but pending the appeal.” *Sun-Maid Raisin Growers v. Paul*, 229 Cal. App. 2d 368,
6 375 (1964). This Court determined that allowing UC to continue considering SAT and ACT scores
7 would deny students with disabilities the competitive advantage afforded by those scores in UC
8 admissions and scholarship determinations. It would further concentrate and calcify privilege in
9 the UC system, because, as UC “do[es] not dispute,” the tests are “more available to students from
10 higher-income families who have the means to pay for test preparation courses and travel to
11 distant available test locations.” Order 11–12.¹² It is these privileged students for whom UC is
12 going to the mat. *See* App. 14. But a stay is neither “necessary [n]or proper” when it “can be
13 granted only at the risk of destroying rights which will unquestionably belong to the respondent, if
14 the judgment” is affirmed. *Sun-Maid*, 229 Cal. App. 2d at 376. That is precisely the case here:
15 allowing UC to continue using SAT and ACT scores pending appeal will “destroy[]” the rights of
16 Plaintiffs, other students with disabilities, and students with less privilege to equal consideration in
17 UC’s admissions process. *Id.*; *see also id.* at 375 (“If the appellant may ask that it shall not lose the
18 fruits of an appeal which may turn out to be meritorious, the respondents are in at least as good a
19 position to demand that” a stay not “irrevocably take away from them the benefit which they have
20 already won.”).

21 This Court correctly determined, based on Plaintiffs’ un rebutted evidence, that Gary W.
22 and members of College Seekers have been excluded from the SAT and ACT tests—and thus
23 from the benefit of having SAT/ACT scores considered in UC’s admissions and scholarship
24 processes—in violation of California antidiscrimination statutes, which incorporate and exceed
25

26
27 ¹² These harms stand in stark contrast to the facts in *Food & Grocery Bureau v. Garfield*, 18 Cal.
28 2d 174 (1941), UC’s primary support. In that case, the respondent “admit[ted] that of itself it is not
injured by petitioner’s activities,” leading the Court to conclude that a stay could “be granted
without injury to or destruction of” respondent’s rights. *Id.* at 178.

1 Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12131 *et seq.* See Order 8,
2 11. UC does not contest the fundamental factual findings on which the Court’s decision was
3 based: it does not deny that a high SAT/ACT score can only improve a student’s chances in UC’s
4 admissions and scholarship processes. Nor does it deny that the SAT and ACT are largely
5 inaccessible to students with disabilities, and that even those students with disabilities who
6 somehow access the tests do so only at tremendous costs that other students need not bear.

7 Instead, UC maintains that proscribing it from considering scores on standardized tests that
8 are largely inaccessible to students with disabilities would also deprive “athletes, performing
9 artists, visual artists, and many other applicants” of “the ability to put their best self forward,”
10 because not all extracurricular activities are equally available to students with disabilities. App. 7.
11 This argument misconstrues UC’s own admissions process. As UC well knows, its campuses
12 consider extracurricular activities as part of two broad categories, or “factors,” within UC’s
13 comprehensive review process: (1) “special talents, achievements, and awards in a particular field
14 . . . ; special skills . . . ; special interests . . . ; . . . experiences that demonstrate unusual promise for
15 leadership . . . ; or other significant experiences or achievements that demonstrate the applicant’s
16 promise for contributing to” a campus’s “intellectual vitality,” and (2) “[c]ompletion of special
17 projects.” Am. Compl. ¶ 245 & n.366 (citing Univ. of Cal., *Guidelines for Implementation of*
18 *University Policy on Undergraduate Admissions*, [http://www.ucop.edu/student-affairs/_files/](http://www.ucop.edu/student-affairs/_files/guidelines-for-implementation-of-undergraduate-admissions--rev-7-2019.pdf)
19 [guidelines-for-implementation-of-undergraduate-admissions--rev-7-2019.pdf](http://www.ucop.edu/student-affairs/_files/guidelines-for-implementation-of-undergraduate-admissions--rev-7-2019.pdf)). The fact that UC
20 considers special talents and projects as unitary factors means that UC campuses will not compare
21 an applicant who plays football to an applicant who cannot play football due to disability, then
22 give credit to the football player while denying any credit to the applicant with a disability (which
23 would indeed be discriminatory). Instead, that applicant can earn extracurricular points in other
24 ways, by excelling, for example, as a debater or a member of the robotics club. Because no
25 applicant will be able to compete in every extracurricular activity, students with disabilities are
26 substantially less burdened by the fact that certain of these activities may be inaccessible to them.
27 By contrast, there is no way to obtain credit for standardized test scores other than taking the SAT
28

1 or ACT.¹³

2 Finally, UC's misconceived building access analogy graphically illustrates its continued
3 fundamental misunderstanding of its obligations under disability rights statutes. As a threshold
4 matter, program access and building access are governed by different standards under the ADA.
5 See 28 C.F.R. 35.149–35.152 (building access regulations). There is no “process” to access a
6 building,¹⁴ and therefore no analogous right to fair consideration in such a process. Nor is using a
7 ramp more burdensome for persons with disabilities than using stairs is for others. Moreover,
8 unlike the benefits of ramps and stairs, which separately provide equivalent access, the benefits of
9 SAT/ACT scores and other parts of the UC application are cumulative. The scores are therefore
10 themselves benefits subject to ADA access requirements. UC's failure to recognize that the ADA
11 requires equal opportunity to compete in UC's admissions process is reflected in its striking
12 position, articulated by counsel at the preliminary injunction hearing, that offering admissions
13 interviews to all applicants except those with disabilities would not violate the ADA. PI Hr'g Tr.
14 47:8–16. That is not the law. See *Smith v. City of Oakland*, No. 19-CV-05398-JST, 2020 WL
15 2517857, at *5 (N.D. Cal. Apr. 2, 2020) (plaintiffs' injury “focuses on discriminatory access to a
16 government program, not the underlying [benefit] itself”).

17 **IV. CONCLUSION**

18 For the foregoing reasons, the Court should deny UC's application to stay the preliminary
19 injunction.

22 ¹³ Moreover, accepting students with varied extracurricular interests and talents plainly furthers
23 UC's stated “goal of enrolling a diverse student body.” PI Opp'n 17. By contrast, as the Court
24 noted, there is no clear nexus between SAT and ACT scores and UC's desired admissions
outcomes. See Order 12.

25 ¹⁴ According to UC, the ramp for students with disabilities need not even lead to the same building
26 as the stairs. See, e.g., PI Hr'g Tr. 65:3, 5, 10–12 (“Three campuses [Berkeley, Irvine, Santa Cruz]
27 . . . are test blind. . . . For the remaining five campuses that are not initially test blind, . . . there is a
transfer pathway.”). But as this Court noted, UC “campuses are not fungible.” Order 11. Nor are
28 UC admissions pathways. “Students with disabilities do not have the same meaningful access as
non-disabled students if they are relegated to only a few of the UC campuses” or forced to transfer
into the UC system. *Id.*

1 DATED: September 14, 2020

PUBLIC COUNSEL
MARK ROSENBAUM
AMANDA SAVAGE

2
3
4 By: /s/ Mark Rosenbaum
5 Mark Rosenbaum
6

7
8 DATED: September 14, 2020

SCHEPER KIM & HARRIS, LLP
GREGORY A. ELLIS
KATHERINE B. FARKAS
MICHAEL L. LAVETTER

9
10
11 By: /s/ Katherine Farkas
12 Katherine B. Farkas
13
14

15 DATED: September 14, 2020

EQUAL JUSTICE SOCIETY
MONA TAWATAO
LISA HOLDER

16
17
18 By: /s/ Mona Tawatao
19 Mona Tawatao
20

21
22 DATED: September 14, 2020

MILLER ADVOCACY GROUP
MARCI LERNER MILLER

23
24
25 By: /s/ Marci Lerner Miller
26 MARCI LERNER MILLIER
27
28

BROWN GOLDSTEIN LEVY, LLP
EVE L. HILL
ABIGAIL A. GRABER

DATED: September 14, 2020

By: /s/ Thomas M. Madruga
Thomas M. Madruga

Attorneys for Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 September 14, 2020, I served true copies of the following document(s) described as **PLAINTIFFS' OPPOSITION TO DEFENDANTS' EX PARTE APPLICATION FOR STAY OF PRELIMINARY INJUNCTION** 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 September 14, 2020, at Los Angeles, California.

/s/ Rocio Ramirez
Rocio Ramirez

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

Bryan H. Heckenlively, Esq. Andrew Cath Rubenstein, Esq. MUNGER, TOLLES & OLSON LLP 560 Mission Street, 27th Floor San Francisco, CA 94105 (415) 512-4000 Telephone Email: bryan.heckenlively@mto.com Email: andrew.rubenstein@mto.com	Attorneys for Defendants Janet Napolitano, In Her Official Capacity as President of The University of California and The Regents of the University of California
Hailyn J. Chen, Esq. Omar H. Noureldin, Esq. Gina F. Elliott, Esq. MUNGER, TOLLES & OLSON LLP 350 South Grand Avenue, 50th Floor Los Angeles, CA 90071-3426 (213) 683-9100 Telephone (213) 687-3702 Facsimile Email: hailyn.chen@mto.com Email: omar.noureldin@mto.com Email: gina.elliott@mto.com	Attorneys for Defendants Janet Napolitano, In Her Official Capacity as President of The University of California and The Regents of the University of California
Charles F. Robinson, Esq. Margaret L. Wu, Esq. Rhonda S. Goldstein, Esq. UNIVERSITY OF CALIFORNIA OFFICE OF THE GENERAL COUNSEL 1111 Franklin Street, 8th Floor Oakland, CA 94607-5200 (510) 987-9800 Telephone (510) 987-9757 Facsimile Email: charles.robinson@ucop.edu Email: margaret.wu@ucop.edu Email: rhonda.goldstein@ucop.edu	Attorneys for Defendants Janet Napolitano, In Her Official Capacity as President of The University of California and The Regents of the University of California
Mark D. Rosenbaum, Esq. Amanda R. Savage, Esq. PUBLIC COUNSEL 610 South Ardmore Avenue Los Angeles, CA 90005 (213) 385-2977 Telephone (213) 385-9089 Facsimile Email: mrosenbaum@publiccounsel.org Email: asavage@publiccounsel.org	Attorneys for Plaintiffs

1 Eva J. Paterson, Esq. Attorneys for Plaintiffs
Lisa Holder, EJS of Counsel
2 **EQUAL JUSTIC SOCIETY**
1939 Harrison Street, Suite 818
3 Oakland, CA 94612
(415) 288-8700 Telephone
4 (510) 338-3030 Facsimile
Email: epaterson@equaljusticesociety.org
5 Email: lisaholder@yahoo.com

6 Marci L. Miller, Esq. Attorneys for Plaintiffs
MILLER ADVOCACY GROUP
1303 Avocado Avenue, Suite 230
Newport Beach, CA 92660
8 (949) 706-9734 Telephone
(949) 266-8069 Facsimile
9 Email: marci@milleradvocacv.com

10 Thomas M. Madruga, Esq. Attorneys for Plaintiffs
OLIVAREZ MADRUGA LEMIEUX
11 **O'NEILL, LLP**
500 South Grand Avenue, 12th Floor
12 Los Angeles, CA 90071
(213) 744-0099 Telephone
13 (213) 744-0093 Facsimile
Email: tmadruga@omlowlaw.com

14 Eve L. Hill, Esq. Co-Counsel Attorneys for Plaintiffs
15 Abigail A. Graber, Esq.
BROWN GOLDSTEIN LEVY
16 120 East Baltimore Street, Suite 1700
Baltimore, MD 21202
17 (410) 962-1030 Telephone
(410) 385-0869 Facsimile
18 Email: ehill@browngold.com
Email: agraber@browngold.com

19
20
21
22
23
24
25
26
27
28