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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

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Plaintiffs,

vs.

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)

DEFENDANTS THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND JANET NAPOLITANO'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Judge:	Hon. Brad Seligman
Dept.:	23
Hearing date:	August 20, 2020
Time:	3:00 PM
Reservation ID:	R-2193299
Action Filed:	Dec. 10, 2019
Trial Date:	None Set

EXEMPT FROM FEES: GOV. CODE, § 6103

Defendants.

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I. INTRODUCTION

More than three months before the University of California ("UC") begins accepting applications for its next admissions cycle—and more than a year before any Plaintiff with a disability intends to apply to any UC campus—Plaintiffs argue that this Court must rush to issue an extraordinary injunction that would compel UC to disregard its carefully developed plan to phase out use of SAT and ACT scores in admissions and instead immediately require all nine undergraduate campuses to adopt Plaintiffs' preferred new policy. On May 21, UC's Board of Regents suspended the requirement that California residents submit an SAT or ACT score to apply to UC and, for a two-year transitional period, gave campuses the choice either to consider test scores in admissions if students choose to submit them (a so-called "test-optional" policy) or to preclude any consideration of test scores in admissions (a so called "test-blind") policy.[1] The faculty and admissions staff on each campus have been considering this question carefully in the context of their admissions and academic goals, their applicant pools, and other factors. Some of the campuses have decided to adopt a test-blind policy during the transitional period, while others have decided that test-optional best serves their needs.

Plaintiffs seek to interrupt this process and ask the Court to tell the faculty and administrators on each campus that they must adopt a test-blind approach right away, no matter their academic judgments. Although UC recently admitted its most diverse freshman class in history, Plaintiffs ask the Court to override UC faculty and administrators' relevant expertise—and to do so during an unprecedented pandemic that has upended students' high school experiences, affected every admissions criterion, and drastically complicated admissions decision-making.

Plaintiffs' motion rests on a core factual premise that they acknowledge is based on conjecture: that students who do not submit test scores to UC test-optional campuses will be at a competitive disadvantage relative to those who do submit scores. Plaintiffs have produced no evidence supporting such claims. With this submission, however, UC presents competent evidence dispelling that conjectural premise and explaining that UC admissions officers will not

[1] Plaintiffs are California residents whose claims pertain to UC's admissions policies, discussed herein, for California applicants for freshman undergraduate admission.

give negative weight to an application's absence of a test score, or positive weight to an application just because it has a test score.

The evidence before the Court is that UC has every intention and ability to implement its new admissions policy in a lawful, nondiscriminatory manner. The use of test-optional on some campuses for the next two admissions cycles is consistent with that goal. Indeed, Plaintiffs advocated for a test-optional approach in demand letters they sent UC and in their original complaints. What is more, their amended complaint acknowledges that test-optional policies can be implemented lawfully and without discrimination, and experts upon whose work they seek to rely confirm that point. Moreover, the COVID-19 pandemic has disrupted not only test administration but also high school education and all manner of extracurricular and enrichment activities. In this environment, permitting campuses to give students the option to submit test scores provides flexibility for students, including those with disabilities and those who do not come from privileged backgrounds. At the same time, the pandemic drastically minimizes any risk that admissions officers would infer anything negative from non-submission of a score because many applicants are likely to have no score to submit.

Plaintiffs' motion provides no sound basis to supplant UC's ongoing efforts to implement the new policy for which Plaintiffs advocated. Plaintiffs fail to make a threshold showing of irreparable injury or to show a likelihood of success on the merits, and the balance of harms weighs heavily against their motion. The Court should deny the preliminary injunction.

II. STATEMENT OF FACTS

A. UC's Comprehensive Review Process for Undergraduate Admissions

UC annually receives over 100,000 applications for freshman undergraduate admission from California residents, and evaluates each one pursuant to its comprehensive review process. That process uses "multiple measures of achievement and promise, while considering the context in which each student has demonstrated academic accomplishment." (Shaw Decl., Ex. D [Regents Policy 2104].) In so doing, UC takes into account, among other factors, a student's family income, disabilities, first-generation college student status, need to work, social or educational environment, and personal and family circumstances. (Yoon-Wu Decl. ¶13, Ex. B.) UC

recognizes that its core mission of serving the State of California entails seeking to achieve diversity among its student bodies—including by race, ethnicity, disability status, and socioeconomic status—and that UC must be "open to qualified students from all groups, and thus serve[] all parts of the community equitably." (Shaw Decl., Ex. H [Regents Policy 4400].)

UC has carefully evaluated for more than 50 years the admissions factors it considers, including standardized test scores, which UC began considering only after its studies showed that doing so would add to UC's ability to predict students' postsecondary success. (Yoon-Wu Decl., Ex. C.) More recent studies have yielded similar findings. (See, e.g., Yoon-Wu Decl., Ex. D.)

Through its comprehensive review process—frequently reevaluated in a research-based approach—UC has effectively pursued its goals of academic excellence and equitable access. Indeed, this year's admitted freshman class is UC's most diverse ever. (Yoon-Wu Decl. ¶ 22.) In *U.S. News & World Report*'s most recent "social mobility ranking"—assessing how well universities "advanc[e] social mobility by enrolling and graduating large proportions of disadvantaged students awarded with Pell Grants"—UC campuses accounted for the top three, and six of the top ten, national universities in the United States. (Elliott Decl., Ex. E.) At the same time, UC recognizes the need to improve continuously and break down barriers—in June, for example, the Board of Regents voted unanimously to endorse repealing Proposition 209, which prohibits considering race, sex, or ethnicity in admissions.

B. UC Suspends the Testing Requirement Following an Extensive Review.

In response to the impact of COVID-19, the Board of Regents in March suspended for the coming admissions cycle the requirement that freshman applicants submit SAT or ACT scores. Then on May 21, the Board suspended that requirement until 2024. Based on a recommendation from UC President Janet Napolitano, the Board's decision extended the test-optional policy to Fall 2022; adopted a test-blind policy for all campuses for Fall 2023 and Fall 2024; and determined that, by 2025, UC will eliminate consideration of the SAT and ACT and, if feasible, identify or create a new test for use in admissions. (Yoon-Wu Decl. ¶ 40.)

Before voting unanimously to approve President Napolitano's recommendation, individual Regents expressed their own views over hours of debate, and the Regents heard from several

speakers—including Plaintiff Dolores Huerta Foundation's education director, who urged the Regents on behalf of that organization to support President Napolitano's recommendation. (Elliott Decl., Exs. B, C & Ex. B at p. 27:13-28:10 [meeting transcripts].) Two other organizational Plaintiffs (Community Coalition and Chinese for Affirmative Action), and a coalition of which Plaintiff College Access Plan is a member, had signed onto a March 2020 letter to the Regents calling on them to eliminate reliance on the SAT and ACT in admissions "within two to three years." (*Id.* Ex. A.) The executive director of Plaintiff College Seekers, Laura Kazan, has said the trend toward test-optional policies is "great" because while, "yes, standardized test scores do offer useful information to colleges," test-optional policies "will probably benefit a lot of special needs students and improve diversity in higher education" as "studies show that test-optional schools do increase diversity and offer alternatives for students with learning disabilities." (*Id.* Ex. D.)

The Regents' decision in May 2020 was the culmination of a two-year, research-based effort by UC to evaluate the value and use of standardized tests in its admissions process. In an extensive report, the Standardized Testing Task Force ("STTF") convened by UC's Academic Senate found that less-advantaged racial and socioeconomic groups tended to have lower SAT and ACT scores but also that UC's comprehensive review process, by evaluating students in context, avoided translating those differences into differential admissions outcomes. (See Yoon-Wu Decl., Ex. E at 5, 55 [UC Academic Senate, *Report of the UC Academic Council Standardized Testing Task Force* (Jan. 2020) ("STTF Report")].) The STTF also expressed concern that, if test scores were eliminated from UC's admissions process without careful consideration of all relevant factors, including biases in other admissions criteria, it could harm applicants from less-advantaged groups. (See *id.* at pp. 12, 33, 60-62, 69, 85, 96-97.) The STTF noted, for example, that grade inflation tends to be more prevalent in wealthier high schools and is difficult to account for in admissions decisions. (See *id.* at pp. 56-59.) And to the extent that eliminating test scores could result in subjective factors taking on a greater role in admissions decisions, that change could harm less-advantaged students with less access to counseling resources to help them understand what admissions officers look for in evaluating these factors. (See *id.* at pp. 60-62, 97.) While these concerns could be addressed through planning, the potential for changes in

admissions criteria to "result in greater inequities and worse student outcomes" would be particularly significant "if changes were mandated immediately and without adequate consultation with admissions officers on the various campuses." (*Id.* at p. 12.) The STTF did not recommend that UC adopt a test-optional policy, but did recommend that UC adopt other reforms with the goal of reducing reliance on SAT and ACT scores (see *id.* at p. 99), and that it develop a new assessment to replace those tests over a nine-year period (see *id.* at pp. 109-117).

President Napolitano ultimately recommended, and the Board of Regents decided, to go further in minimizing the use of SAT and ACT scores, including by allowing test-optional policies for the next two years. As President Napolitano explained, she was guided by the STTF's high-quality scholarly analysis but modified its recommendations in certain respects. (Elliott Decl., Ex. C at 5:11-12:21.) She emphasized the "need to move in a careful and studied way" and that by allowing campuses to proceed in phases from test-optional to test-blind, UC could "study the effect of each approach." (*Id.* at 9:4-5.) The Regents' May decision, by design, permits UC to transition from the SAT and ACT carefully and thoughtfully, with consideration of relevant factors, data, and input from faculty and admissions officers.

The Regents' decision also acknowledges the likely ongoing impacts of the COVID-19 pandemic, which has affected not only the SAT and ACT but also students' grades, extracurricular activities, interactions with teachers, and most other aspects of their high school experience and criteria on which UC and other universities base admissions decisions. Many high schools, for example, have adopted pass/fail grading systems or awarded everyone "A" grades. (Yoon-Wu Decl., Ex F at 2 [BOARS Guidance]; Hunt Decl. ¶10; Lewis Decl. ¶ 16; Copeland-Morgan Decl. ¶ 20; Brumfield Decl. ¶ 20.) Some students have faced obstacles to remote learning because they lack good internet access or have had to take on childcare responsibilities for siblings. (Yoon-Wu Decl. ¶ 39.) UC's comprehensive review process gives students flexibility in submitting their applications and allows admissions officers to take information about these types of challenges into account when evaluating an application. (Copeland-Morgan Decl. ¶ 17-22; Brumfield Decl. ¶ 10; Hunt Decl. ¶ 11; Lewis Decl. ¶¶ 7-9, 14-15; Saddler Decl. ¶ 6, 13, 16; Yoon-Wu Decl. ¶¶ 13-22, 43; Engelschall Decl. ¶ 18.) Students are encouraged to use the "additional information"

section of the application to discuss any particular impact COVID-19 has had on their experiences and opportunities this year. (Clark Decl. ¶ 14; Yoon-Wu Decl. ¶ 51.)

C. Plaintiffs, Having Advocated for Test-Optional Admissions, Amend Their Lawsuit and Continue to Pursue Litigation.

Plaintiffs' October 2019 demand letter asked UC to adopt a test-optional admission policy and recommended, but did not demand, that UC adopt a test-blind policy. (Ellis Decl., Ex. 1.) Consistent with their earlier demand, when Plaintiffs filed suit in December 2019 to challenge UC's test-required admissions policy, they proposed test-optional admissions as an alternative. Plaintiffs' original complaints touted the "wave of colleges and universities" that had "either ceased requiring applicants to submit SAT and ACT scores (adopting a 'test-optional' policy) or otherwise deemphasized those scores in their admissions processes," and alleged that "[t]he experience of these institutions illustrates that SAT and ACT requirements may be eliminated without disrupting admissions processes." (Smith Compl. ¶ 191; CUSD Compl. ¶ 163.) In particular, Plaintiffs alleged that the University of Chicago had seen improvements in equitable access "[f]ollowing its adoption of a test-optional policy," and that "[t]he experience of U. Chicago and other institutions" showed that adopting such a policy "enables universities to expand access to higher education for traditionally underrepresented students while maintaining the strength and quality of their academic programs." (Smith Compl. ¶ 192; CUSD Compl. ¶ 164.) Plaintiffs also pointed to Wake Forest University's experience with a test-optional policy, and to a study of 28 colleges and universities that had likewise adopted test-optional policies. (*Id.*)

The Court sustained UC's demurrer as to Plaintiffs' Unruh Act claims and certain Plaintiffs' standing, but overruled UC's demurrer as to other claims and granted leave to amend. In their amended complaint, filed on June 15, Plaintiffs continue to acknowledge that test-optional admissions policies may be lawful and non-discriminatory. (Compl. ¶ 274.) Indeed, Plaintiffs continue to assert claims by and on behalf of students whose alleged injury is that they were deterred by UC's since-superseded policy and so decided to apply to universities *with test-optional policies*. (*Id.* ¶¶ 18, 75.) One of those students, Plaintiff Kawika Smith, is enrolling this fall at Morehouse College (Smith Decl. ¶ 1), a historically black college with a test-required policy. (See

Elliott Decl., Ex. F [Morehouse College webpage].) Plaintiffs nevertheless also continue to contend (without citing any authority) that test-optional policies become lawful only if and when a university affirmatively demonstrates that its policy meets four specific criteria. (Compl. ¶ 274.)

D. Current Process and Timeline for Fall 2021 Admissions.

Prospective students may submit applications to UC campuses for Fall 2021 freshman admission beginning on November 1, 2020. (Yoon-Wu Decl. ¶ 24.) The application window closes on November 30, 2020. (*Id.*) Students may opt to submit SAT or ACT test scores for examinations taken as late as December 2020, or they may opt not to submit scores at all. (*Id.* ¶ 41.) Consistent with the Regents' decision and guidance from BOARS, each UC campus has flexibility to design and implement the new policy to best fit its individual needs and processes.

Admissions staff at each campus works with the campus's relevant faculty committee to develop admissions policy and procedures, subject to final approval by the faculty committee. (Hunt Decl. ¶¶ 6, 9, 11; Lewis Decl. ¶ 6; Miller Decl. ¶ 6; Przekop Decl. ¶ 5.) Because each campus has different applicant pools, enrollment goals, and existing procedures—and different faculty—the campuses have made different decisions about Fall 2021 admissions processes. Three campuses have decided that they will not consider SAT or ACT scores in evaluating applications for Fall 2021. (Yoon-Wu Decl. ¶ 45.)

The faculty at other campuses, however, have either decided to follow the phased approach suggested by the Board of Regents and have informed students that they will be test-optional this year, or are in the process of making a final decision. UC San Diego, for example, has updated its website to clearly state that it "will be test-optional" for Fall 2021 and Fall 2022 applicants, and that "[a]pplicants have the option to submit SAT or ACT examination results." (Saddler Decl. ¶ 21.) Test-optional campuses will permit consideration of test scores, if submitted, in varying ways unique to each campus' admissions processes, as described in the declarations accompanying this Opposition and below. At one campus, UC Santa Barbara, the faculty is still considering whether to adopt a test-optional or test-blind policy. (Przekop Decl. ¶¶ 14-15).

E. The Preliminary Injunction Motion.

By the present motion, filed July 22, 2020, Plaintiffs seek preliminary injunctive relief on their disability claims only. (Mot. at pp. 22-23.) Plaintiffs ask this Court to enjoin UC from using SAT or ACT scores "for all purposes" indefinitely. (*Id.* at pp. 3, 11.)

III. LEGAL STANDARD

The purpose of a preliminary injunction is to preserve the status quo until a final determination of the merits of the action. (See *Cont'l Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528; *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1472.) Such relief involves "a delicate power, requiring great caution and sound discretion, and rarely, if ever, should [it] be exercised in a doubtful case." (*Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 355.)

Plaintiffs seeking a preliminary injunction must first show that they will suffer "irreparable injury" unless the Court acts. (*White v. Davis* (2003) 30 Cal.4th 528, 554; see also *Costa Mesa City Employees' Assn. v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 306 [discussing "the threshold requirement of irreparable injury"].) Where a plaintiff seeks a preliminary injunction against a public entity or officer, a "significant showing" of irreparable injury is required to overcome the "general rule against enjoining public officers or agencies from performing their duties." (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471; see also *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 401.) If the plaintiff makes a sufficient showing of irreparable injury, then courts consider "two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*White, supra*, 30 Cal.4th at p. 554.)

Plaintiffs bear the burden of proof and persuasion in establishing all elements necessary to support the issuance of any preliminary injunction. (See *Drakes Bay Oyster Co. v. Cal. Coastal Com.* (2016) 4 Cal.App.5th 1165, 1172; *O'Connell*, *supra*, 141 Cal.App.4th at p. 1481.)

Preliminary mandatory injunctions—injunctions that would change the relative position of the parties by requiring affirmative action (see Civ. Code, § 3367, subd. (2))—are disfavored and require plaintiffs to satisfy an even higher standard. (See, e.g., *People ex rel. Herrera v. Stender*

(2013) 212 Cal.App.4th 614, 630.) Such injunctions are "not permitted except in extreme cases where the right thereto is clearly established." (*City of Corona v. AMG Outdoor Advertising, Inc.* (2016) 244 Cal.App.4th 291, 299.) An injunction that is mandatory in substance or effect is a mandatory injunction, notwithstanding the use of prohibitory language. (See, e.g., *Davenport v. Blue Cross* (1997) 52 Cal.App.4th 435, 446-448 [order "prohibit[ing]" Blue Cross from "denying, refusing, excluding, limiting, or discontinuing coverage and benefits" for certain treatment was mandatory injunction compelling payment]; *Agricultural Labor Bd. v. Superior Court* (1983) 149 Cal.App.3d 709, 713 [injunction restraining employer from "failing or refusing to immediately reinstate" workers was mandatory injunction requiring employer to rehire them].)

IV. ARGUMENT

The Court should deny Plaintiffs' preliminary injunction motion for three independent reasons: First, Plaintiffs have not made the required threshold showing of irreparable injury—which their motion scarcely mentions. Second, Plaintiffs have not shown a likelihood of success on the merits. Third, the balance of harms weighs heavily in UC's favor.

A. Plaintiffs Fail to Show Irreparable Injury.

Under any circumstances, a preliminary injunction is an "extraordinary remedy" that may be granted only upon "a clear showing that the threatened and impending injury is great, and can be averted only by injunction." (*Wilkins v. Oken* (1958) 157 Cal.App.2d 603, 606.) That showing must be made by competent evidence, not allegation or speculation. (See, e.g., *Gray v. Superior Court* (2005) 125 Cal.App.4th 629, 641.) Moreover, a mere possibility of future harm is not sufficient—Plaintiff's irreparable injury must be "impending and so immediately likely as only to be avoided by issuance of the injunction." (*E. Bay Mun. Utility Dist. v. Dept. of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1113, 1126.)

In this case, the showing Plaintiffs must make is doubly heightened. First, to overcome the "general rule against enjoining public officers or agencies from performing their duties," Plaintiffs must make a "significant showing" of irreparable injury. (*Tahoe Keys Prop. Owners' Assn., supra,* 23 Cal.App.4th at p. 1471.) Under Regents Policy, UC's Academic Senate, in consultation with its President and administration, is charged with setting conditions for admission that achieve

the goal of enrolling a diverse student body that is qualified and prepared for college. (See Shaw Decl., Exs. A, B, F [Regents Policies 2101, 2102, 2108].) Plaintiffs' requested injunction would supplant that process, enjoining public officers from performing their duties under the Regents Policies, which have the force and effect of state statutes. (See *De Vries v. Regents of Univ. of Cal.* (2016) 6 Cal.App.5th 574, 584.) Second, Plaintiffs seek a preliminary *mandatory* injunction, asking the Court to require UC to design and implement a new, test-blind policy. Plaintiffs, therefore, must show that this is one of the "extreme cases where the right thereto is clearly established." (*City of Corona, supra*, 244 Cal.App.4th at p. 299.)

Plaintiffs fail to make any showing of irreparable injury—let alone the heightened showing required in this case—and their motion would fail even if the injunction they sought was not mandatory in nature. Indeed, Plaintiffs' motion largely skips over the required threshold showing of irreparable injury, mentioning it only in their Notice of Motion. Substantively, Plaintiffs fail to establish irreparable injury for three reasons.

1. Plaintiffs' Theory of Harm Rests On a Speculative Premise That Students Who Do Not Submit Test Scores Will Be Disadvantaged.

Plaintiffs' claims of harm rest on an unsupported and erroneous factual premise: that "if they apply without submitting a score, they will be at a competitive disadvantage relative to applicants who submit scores." (Mot. at p. 30.) Plaintiffs and their declarants acknowledge that they do not actually know whether this statement is true. (*Id.* at p. 18; Stephen C. Decl. ¶¶ 8-9; Kazan Decl. ¶¶ 28-35; Gary W. Decl. ¶¶ 15-16; Delvo Decl. ¶ 2; Hyman Decl. ¶ 9.) They attribute this to a lack of information from UC and say they have been left to rely on scattered, months-old statements from individual administrators. But this does not make their premise any less speculative. And, in reality, the UC systemwide admissions team and individual campuses have been working diligently to design and implement UC's new policy under unprecedented pandemic conditions. Detailed declarations by UC admissions officials establish that Plaintiffs' fears are unfounded. In fact, at least three and possibly four campuses intend not to consider SAT or ACT scores at all for Fall 2021 admissions—just as Plaintiffs seek through this motion.

Each of the remaining campuses that will—or may—consider SAT and ACT scores in admissions this year is carefully designing its admissions procedures to ensure that absence of a test score is not counted against an applicant. For example, at both UC Los Angeles and UC San Diego, an SAT or ACT score, if submitted, will be considered in the context of a student's entire application, but the absence of a test score will not be a factor at all. (Copeland-Morgan Decl. ¶ 18; Brumfield Decl. ¶¶ 10, 13.) Similarly, as UC Santa Barbara's admissions official explains, the admissions "office will instruct and train readers and admissions officers not to place negative weight on the absence of a test score or positive weight on the presence of a score. In other words, the decision not to submit a test score will not be counted against applicants. All readers and admissions officers will be trained on this point. Readers will also be trained not to assume that applicants tested poorly if they do not submit test scores." (Przekop Decl. ¶ 18.)

Admissions readers will also receive training on the many reasons a student may choose not to submit a test score or may not be able to obtain a test score given the incredible challenges created by COVID-19, and will be trained not to assume an absent test score means the student took a test but performed poorly. (Copeland-Morgan Decl. ¶ 17; Saddler Decl. ¶ 19; Hunt Decl. ¶ 11; Lewis Decl. ¶¶ 15-16; Przekop Decl. ¶¶ 18-20.) Admissions officials know there will likely be many applicants this year without test scores due to COVID-19 and the prevalence of test-optional policies nationwide, just as many applicants this year will not have a full set of letter grades. (Copeland-Morgan Decl. ¶¶ 18-20; Saddler Decl. ¶ 20; Brumfield Decl. ¶ 20; Engelschall Decl. ¶¶ 10, 13, 18; Lewis Decl. ¶¶ 8, 14; Hunt Decl. ¶¶ 10-11; Przekop Decl. ¶¶ 15, 20.) This further decreases the chances that the absence of a test score will be counted against an applicant, according to experts William Hiss and Steve Syverson. (Hiss Decl. ¶ 29; Syverson Decl. ¶¶ 24, 37.)

While UC Riverside uses an algorithmic system for admissions, it has likewise ensured that applications will be given full consideration whether or not they contain test scores. UC Riverside will have two algorithms: one that gives no weight to SAT or ACT scores, and one that does give a score some weight if it is submitted. (Engelschall Decl. ¶ 12.) Students who do not

submit a score will be evaluated using the former algorithm; students who do submit a score will be evaluated using both, and their "final" score will be whichever is higher. (*Id.*)

This evidence highlights the speculative nature of Plaintiffs' claimed injury and defeats their motion. A preliminary injunction "cannot issue in a vacuum based on the proponents' fears about something that may happen in the future," absent "actual evidence" regarding the intentions of the defendant. (*Korean Philadelphia Presbyterian Church v. Cal. Presbytery* (2000) 77 Cal.App.4th 1069, 1084.) Here, Plaintiffs' motion concededly is based on conjecture from what they contend is a "[l]ack[]" of "clear information from UC" about certain questions related to UC's new policy. (Mot. at pp. 18-19.) A preliminary injunction may not issue based on such speculation—but in any event, UC has now provided answers to the "significant questions" that Plaintiffs identify. This actual evidence of UC's plans contradicts Plaintiffs' conjecture and reinforces the conclusion that Plaintiffs have not met their burden to show non-speculative injury.

Moreover, to the extent that Plaintiffs attempt to fall back on a suggestion that test-optional admissions processes inherently harm students who do not submit test scores by placing them at a competitive disadvantage relative to those who do (Mot. at p. 29), any such suggestion—which is contrary to their amended complaint (Compl. ¶ 274)—also is unfounded. Plaintiffs rely entirely on assertions by Dr. Blanck that test-optional schools admit students who do not submit test scores at lower rates—and Dr. Blanck's sole evidence for those assertions is a single study. (Mot. at p. 29; Blanck Decl. ¶¶ 40-43.) Two co-authors of that study, however, have now submitted expert declarations explaining that the conclusion Dr. Blanck draws from their research is incorrect. (Hiss Decl. ¶¶ 47-49, 51-52; Syverson Decl. ¶¶ 17-24.) In particular, while non-submitters had a lower overall admission rate, they also had, on average, lower GPAs. (Syverson Decl. ¶ 20a.) If the correlation in admit rates that the study identified was attributable to negative views toward non-submitters by admissions officers, then one would expect the data to show that non-submitters who *were* admitted overcame those views through higher GPAs—yet the study's data show that admitted non-submitters had a *lower* GPA, on average, than admitted submitters. (*Id.*) The authors conclude that test-optional policies can treat test submitters and non-submitters equally. (Hiss Decl. ¶¶ 17, 47-49, 51-52; Syverson Decl. ¶¶ 14, 17-24.)

2. Plaintiffs Do Not Show *They* Will Be Injured Absent an Injunction.

Even if Plaintiffs' theory of harm were otherwise correct—which it is not—Plaintiffs have failed to establish that *they* will be irreparably injured if an injunction does not issue. Plaintiffs must show "[f]acts concerning the irreparable injury which . . . will result *to the complainant* unless protection is extended." (*City of Torrance v. Transitional Living Centers for L.A., Inc.* (1982) 30 Cal.3d 516, 526, italics added.) Thus, a preliminary injunction may issue only on the basis of evidence sufficient to establish irreparable injury to the Plaintiffs—not purported harms to individuals or entities who are not party to the action. (See Civ. Proc. Code, § 526, subd. (a)(2); e.g., *Loder v. City of Glendale* (1989) 216 Cal.App.3d 777, 783, *modified* (Jan. 4, 1990); see also *Monsanto Co. v. Geertson Seed Farms* (2010) 561 U.S. 139, 163 ["Respondents . . . could not seek [a preliminary injunction] on the ground that it might cause harm to other parties."].)

Here, Plaintiffs do not purport to represent a class, but instead seek preliminary injunctive relief only on their own behalf, so they cannot rely on claimed injuries to other parties. They seek such relief only on the basis of their disability claims, which are pressed by two student Plaintiffs, Gary W. and Stephen C. Since both students apparently plan to apply to UC in the Fall 2022 cycle (Gary W. Decl. ¶ 18; Stephen C. Decl. ¶ 2), their application deadlines are more than a year away. If they do ultimately decide to apply, UC will not hold non-submission of test scores against them—Stephen C., for example, could forgo testing and apply on the basis of his GPA, rigorous college preparatory course load, and athletic accomplishments. (Stephen C. Decl. ¶ 7.) But if he chooses to take the test and submit scores, he has until December 2021 to do so. (Yoon-Wu Decl. ¶ 41.)[2] No individual Plaintiff has shown irreparable injury. To the contrary, the speculative harms they claim—based on unsupported, and now contradicted, conjecture regarding how they might be considered for admissions or scholarships if they do not submit SAT or ACT scores (Stephen C. Decl. ¶¶ 8-9, 20)—are being averted in the meantime by the very planning and

[2] In the event that the College Board or ACT, Inc. fails to provide required accommodations, Stephen C. or Gary W. would have another adequate remedy in the form of a lawsuit against one or both of those organizations, and for that reason also they have not shown irreparable injury here. (See, e.g., *Abrams v. St. John's Hosp. & Health Center* (1994) 25 Cal.App.4th 628, 636 [considering "the inadequacy of other remedies" in evaluating plaintiffs' claimed injury].)

implementation process they seek to enjoin.[3] It is even more speculative that any harm from a test-optional policy would affect Plaintiffs because none claims to be applying only to UC campuses—in this pandemic, nearly all colleges have adopted test-optional policies (Kazan Decl. ¶ 36)—and because several UC campuses have decided to adopt test-blind policies. Plaintiffs' alleged harms plainly are not "impending and so immediately likely as only to be avoided by issuance of the injunction." (*E. Bay Mun. Utility Dist., supra,* 43 Cal.App.4th at p. 1126.)[4]

By the same token, no organizational Plaintiff has shown irreparable injury to itself or any member with a disability. The executive director of Plaintiff College Seekers, Laura Kazan, states that the organization "serves multiple families with high school students who have disabilities," aspire to attend UC, are on track to complete the required coursework, and "intend to apply to UC in the 2021, 2022, or 2023 admissions cycles." (Kazan Decl. ¶ 3.) But as the Court already held, organizations have standing to assert injuries only to themselves or their *members*, not to those they "serve." (Demurrer Order at pp. 10-11.) There is no evidence that any organizational Plaintiff, or any member thereof, would be irreparably injured absent an injunction.

3. Plaintiffs' Motion is Premature.

Plaintiffs also fail to show irreparable harm for an even more basic reason: their motion is premature. Applications for UC freshman undergraduate admission may not be submitted until November 1, 2020, and UC continues to be actively engaged in designing and implementing its new admissions policy. 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. (See Copeland-Morgan Decl.

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[3] Although Plaintiffs also ask the Court to enjoin UC's use of SAT and ACT scores for purposes of post-enrollment course placement, no Plaintiff has standing to assert this request, and Plaintiffs fail to support it with any factual showing.

[4] Plaintiffs seek preliminary injunctive relief only on their disability claims. But even if they had sought such relief as to other claims, Plaintiff Kawika Smith will not be irreparably injured by the absence of such relief because he will be attending Morehouse College, not applying to UC, this fall. (Smith Decl. ¶ 1.) (See *Blumhorst v. Jewish Family Services of L.A.* (2005) 126 Cal.App.4th 993, 1004 ["[F]or standing to seek the prospective relief of an injunction, a plaintiff must show a likelihood he will be harmed in the future if the injunction is not granted."].) Nor does any organizational Plaintiff's declaration establish irreparable injury as to Plaintiffs' other claims.

¶ 17; Brumfield Decl. ¶¶ 8-9; Hunt Decl. ¶¶ 8, 15; Lewis Decl. ¶ 20; Orcutt Decl. ¶ 8; Engelschall Decl. ¶ 19; Przekop Decl. ¶¶ 13-14, 21.) To the extent Plaintiffs claim UC must provide yet more information regarding its implementation plans, such claims provide no basis to enjoin UC from carrying out the planning and implementation process.

B. Plaintiffs Fail to Show Any Reasonable Likelihood of Success on the Merits.

Where a plaintiff seeking a preliminary injunction does show irreparable injury, courts consider the likelihood of success on the merits and the relative balance of harms. (*White, supra*, 30 Cal.4th at p. 554.) Courts generally take a sliding scale approach to these factors, such that a lesser showing as to one requires a greater showing as to the other—but if a plaintiff fails to show at least a "reasonable likelihood" of success on the merits, then the motion must be denied on that basis alone. (*SB Liberty, LLC v. Isla Verde Assn., Inc.* (2013) 217 Cal.App.4th 272, 280–281; see also *Monterossa v. Superior Court* (2015) 237 Cal.App.4th 747, 757; *San Francisco Newspaper Printing Co. v. Superior Court* (1985) 170 Cal.App.3d 438, 442.) Such is the case here.

1. Plaintiffs' Claims Are Not Justiciable.

None of Plaintiffs' claims is justiciable. Because each claim requires a showing of discriminatory disparate impact, which, Plaintiffs acknowledge, depends in turn on the details of how UC administers its test-optional policy, their claims are unripe.

A "controversy is 'ripe' when it has reached . . . the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573.) Key to the inquiry is "whether the dispute is sufficiently concrete": Courts will decline to adjudicate a dispute that would require the court "to speculate about hypothetical future actions." (*Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540.) This doctrine recognizes that "judicial decision-making is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness." (*Pac. Legal Found. v. Cal. Coastal Com.* (1982) 33 Cal.3d 158, 170.)

Plaintiffs have not alleged that test-optional admissions policies are per se unlawful or discriminatory—to the contrary, they acknowledge that such policies *are* lawful if properly implemented. (Compl. ¶ 274.) Plaintiffs thus concede, even in their pleadings, that whether UC's

new policy has a discriminatory disparate impact on students with disabilities—a required element of all of their claims—depends on how the policy is designed and implemented. At this stage, while UC is still developing its policy and there is no evidence that UC's policy is likely to have a disparate impact, adjudication of Plaintiffs' claims necessarily would require the Court to "speculate about hypothetical future actions." (*Stonehouse, supra*, 167 Cal.App.4th at p. 540.)

Adjudication of Plaintiffs' premature and unripe claims would be especially unjustified in this case, as the impact of UC's new, not yet implemented admissions policy is an extraordinarily complex policy question that should be left to UC in the first instance. Courts have long recognized that "issues which, under a regulatory scheme, have been placed within the special competence of an administrative body" should, in the first instance, be resolved by that body. (*Palmer v. Regents of Univ. of Cal.* (2003) 107 Cal.App.4th 899, 906-907; *cf. Maronyan v. Toyota Motor Sales, U.S.A., Inc.* (9th Cir. 2011) 658 F.3d 1038, 1048–1049 [discussing need for judicial deference to agency where "the issue 'involves technical or policy considerations within the agency's particular field of expertise'"].) Permitting agencies to resolve issues before courts rule on related claims "enhances court decisionmaking and efficiency by allowing courts to take advantage of administrative expertise." (*Jonathan Neil & Assocs., Inc. v. Jones* (2004) 33 Cal.4th 917, 932.) "Administrative agency involvement may serve to resolve factual issues or provide a record for subsequent judicial review" and may "conserve judicial and other resources which otherwise would be consumed in litigation of issues that may be resolved by the administrative proceeding." (*Wise v. Pac. Gas & Elec. Co.* (1999) 77 Cal.App.4th 287, 296.) Courts therefore decline to decide otherwise cognizable claims so as to "give the appropriate administrative agency an opportunity to act." (*City & County of S.F. v. Uber Techs., Inc.* (2019) 36 Cal.App.5th 66, 82.) Deferring to UC in the first instance is warranted, especially in light of UC's particular status under California law. (See *Miklosy v. Regents of Univ. of Cal.* (2008) 44 Cal.4th 876, 889.)

Here, there is every reason to believe that UC's new policy will be implemented in a non-discriminatory way. As described above, *supra* Section II, UC has made diligent and conscientious efforts to pursue both equity and excellence in its admissions policies and to address thoughtfully the extent to which all admissions criteria, including test scores, may reflect existing

societal inequalities.[5] Plaintiffs' selective, out-of-context quotation of snippets of statements at the May 2020 Board of Regents meeting by various individual members advocating to reduce UC's reliance on standardized tests does not in any way change or contradict these facts.[6]

As Plaintiffs alleged in their original complaints, test-optional policies "enable[] universities to expand access to higher education for traditionally underrepresented students while maintaining the strength and quality of their academic programs." (Smith Compl. ¶¶ 191-192; CUSD Compl. ¶¶ 163-164.) UC admissions officials have considerable expertise and a successful track record in crafting and implementing admissions policies and procedures that mitigate biases and consider students' applications in the context of their unique circumstances. (See Lewis Decl. ¶¶ 7-8, 14 [discussing holistic review process and increases in the diversity of admitted students this year].) As one official states, "Application readers consider the context of an individual applicant's academic and non-academic circumstances, challenges, and opportunities. For example, we would consider how an applicant's ability to participate in extracurricular activities was affected by the applicant's need to work while in high school. Similarly, if an applicant describes challenges because of a learning or other disability, readers would consider in context that when reviewing, for example, the applicant's high school GPA and/or test score." (*Id.* ¶ 8).

UC staff and faculty are now working to adapt their systems to both the new policy and the world of COVID-19—discussing, for example, how to modify their reader trainings and

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[5] Plaintiffs fault UC for discussing disability status less often than race or class in the STTF report and the May 2020 Regents meeting. (Mot. at p. 9.) But compared to race or class, far less data exist regarding the performance of students with disabilities on the SAT and ACT; and no reliable data exist about the impact of test-optional on students with disabilities. (Hiss Decl. ¶¶ 17, 54-55, 58; Syverson Decl. ¶ 25-28.) Plaintiffs mentioned only race and class in their original complaints' discussion of test-optional, adding disability status only in the amended complaint. (*Compare* Compl. ¶ 274 *with* Smith Compl. ¶¶ 191-193 *and* CUSD Compl. ¶¶ 163-165.)

[6] For example, though it is not relevant to their motion, Plaintiffs repeatedly refer to Regent Estolano's statement that the SAT is a "racist" test. But immediately after this, Regent Estolano said the data showed that UC, even under its prior test-required policy, had done "a tremendous job of working around the reality of this test" to achieve diversity in admissions, and that she supports President Napolitano's recommendation, as an "excellent," "really considered approach that gives us enough time to figure out if we even want to use a test." (Elliott Decl., Ex. C at p. 75:5-18.) No inference of discrimination, intentional or otherwise, can be drawn from this statement or the others that Plaintiffs highlight. (See Demurrer Order at p. 14.)

guidelines to account for changed high school grading systems, fewer available extracurricular activities, and new and severe challenges for many students, in addition to the absence of the previously required test scores. (Saddler Decl. ¶¶ 18-20; Brumfield Decl. ¶ 20; Hunt Decl. ¶ 11; Lewis Decl. ¶¶ 16, 19; Przekop Decl. ¶¶ 18-20.) In adopting test-optional policies, UC is not treading new waters. Many universities and colleges have successfully implemented test-optional policies, and have seen increases in access, diversity, and college success among their students as a result. (Hiss Decl. ¶¶ 17, 21-23, 48; Syverson Decl. ¶ 4.) Addressing Plaintiffs' claims now, before this process has run its course, would be premature.

2. Plaintiffs' Claims Are Meritless as Well as Not Justiciable.

Plaintiffs also cannot show UC's new policy discriminates against them.

A "prima facie case of disparate impact discrimination under section 11135 requires a plaintiff to show: (1) the occurrence of certain outwardly neutral practices; and (2) a significantly adverse or disproportionate impact on minorities produced by the defendant's facially neutral acts or practices." (Demurrer Order at p. 16 [citing *Darensburg v. Metro. Transp. Com.* (N.D. Cal 2009) 611 F.Supp.2d 994, 1042, *aff'd* (9th Cir. 2011) 636 F.3d 511]; see also *ibid.* [in this context, the "substantive coverage" of sections 11135 and 66270 is "coextensive"].) "Causation is established by offering 'statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of . . . [plaintiffs] because of their membership in a protected group.'" (*Darensburg, supra*, 611 F.Supp.2d at p. 1042.) If the plaintiff establishes a prima facie case, then the defendant "must demonstrate a substantial legitimate justification for its actions." (*Ibid.*) Finally, if the defendant does so, the plaintiff "must then show an equally effective alternate practice" that lessens the disparate impact. (*Ibid.*)

Plaintiffs briefly protest (Mot. at p. 28) that they need not "show discriminatory effects through a traditional disparate impact analysis," citing *Y.G. v. Riverside Unified School Dist.* (C.D. Cal. 2011) 774 F.Supp.2d 1055, 1066. But the court in that case, denying the defendants' motion to dismiss, held that the plaintiffs were not required to allege a discriminatory disparate impact because they had adequately alleged a discriminatory *purpose*. (See *ibid.*) Plaintiffs cannot and do not rely on a discriminatory-purpose showing here—indeed, their motion contradicts any claim

of intentional discrimination against students with disabilities. (See Mot. at p. 9.)[7] And the case Plaintiffs cite in arguing that it is enough if a policy "effectuate[s] discrimination against disabled persons" (*id.* at p. 28) relies on a disparate-impact showing. (See *Crowder v. Kitagawa* (9th Cir. 1996) 81 F.3d 1480, 1484-1485.) Plaintiffs offer no authority for their novel and confounding suggestion that they can succeed on the merits of their disability claims without showing either a discriminatory purpose *or* a discriminatory disparate impact.

Plaintiffs cannot succeed on their claims for the straightforward reason that they cannot show that UC's policy will have *any* disparate impact, much less a "significantly adverse or disproportionate impact," on students with disabilities. As explained above, *supra* Section IV.A., Plaintiffs assume that if they do not submit test scores, UC's test-optional policy will place them at a competitive disadvantage relative to applicants who do. But the declarations of UC administrators, as well as those of the experts upon whose research Plaintiffs attempt to rely, show that test-optional policies can and will be implemented in a non-discriminatory way at UC. For example, UC administrators have testified that they will train admissions readers on non-bias towards students who do not submit test scores and non-submission will not be a factor in admissions decisions. (Copeland-Morgan Decl. ¶ 17; Saddler Decl. ¶ 19; Lewis Decl. ¶ 10; Hunt Decl. ¶¶ 11, 13; Engelschall Decl. ¶ 17; Przekop Decl. ¶¶ 18-20.) Plaintiffs cannot bear their burden of proof and persuasion (see *Drakes Bay Oyster Co., supra*, 4 Cal.App.5th at p. 1172), in the face of this competent evidence disproving their central factual premise. And although their expert Dr. Blanck claims based on a correlation identified in a 2018 study that test-optional policies necessarily discriminate against students with disabilities, two authors of that study—experts who, unlike Dr. Blanck, have extensive experience researching test-optional policies and as admissions officers—directly refute his claim and explain that test-optional policies can be implemented without any discriminatory impact. (Hiss Decl. ¶¶ 47-49, 51-52; Syverson Decl. ¶¶ 17-24.)

[7] Plaintiffs also contend the Regents acted "despite" or "notwithstanding" their "aware[ness]" of an alleged disparate impact. (Mot. at pp. 8, 10, 15, 30-31.) The Court has already held that such contentions do not present an intentional-discrimination claim. (Demurrer Order at pp. 13-14.)

Thus, Plaintiffs cannot make even a prima facie case of discrimination. But even if they could, UC has met its burden to provide a substantial legitimate justification for using a test-optional policy. For example, UC Riverside and UC Davis have found that some students from underrepresented groups *benefitted* from use of standardized tests, as some disadvantaged students test well but have low GPAs or lack access to AP courses or extracurricular activities. (Hunt Decl. ¶ 13; Engelschall Decl. ¶ 13.) Furthermore, given that, in the case of UC Davis, test scores would be used only on second-level review to consider additional students for admission (but not to deny a student admission), UC Davis's model simply gives students *more* ways to get admitted. (Lewis Decl. ¶¶ 14, 15; see also *supra* Section II [discussing UC's research findings, and Plaintiffs' admissions, regarding the predictive validity of SAT and ACT scores].) Given UC's substantial legitimate justification, Plaintiffs must show an equally effective alternate practice with less disparate impact (see *Darensburg, supra*, 611 F.Supp.2d at p. 1042), which they also cannot do. Indeed, UC has already substantially adopted an alternative Plaintiffs themselves proposed in their advocacy and original complaints. While Plaintiffs now apparently propose test-blind as their new alternative, in the absence of data comparing test-optional to test-blind policies, they cannot make the required showing. (Hiss Decl. ¶¶ 17, 20, 34-35, 53-54; Syverson Decl. ¶ 28.)

For similar reasons, Plaintiffs' attempts to rely on various California statutes' incorporation of Title II of the Americans with Disabilities Act ("ADA") must also fail. To succeed on those claims, Plaintiffs would have to show that they were "excluded from participation in or denied the benefits of [UC's] services, programs, or activities, or [were] otherwise discriminated against by [UC]" and that such exclusion, denial of benefits, or discrimination was "solely by reason of [their] disabilit[ies]." (*D.K. ex rel. G.M v. Solano County Office of Educ.* (E.D. Cal. 2009) 667 F.Supp.2d 1184, 1190.) Plaintiffs cannot make such any such showing against UC's as-yet-unimplemented admissions policy and will not be able to do so.

At the campuses that currently plan to use test scores this fall, admissions staff are consciously designing their systems to ensure they will not discriminate against any individuals who do not submit test scores, regardless of the reason for the non-submission. They are planning to do this by, for example, training readers not to give negative weight to the absence of a test

score. (Copeland-Morgan Decl. ¶ 17; Saddler Decl. ¶ 19; Lewis Decl. ¶¶ 7-8, 14-16; Hunt Decl. ¶ 11; Engelschall Decl. ¶ 17; Przekop Decl. ¶¶ 18-20.) Admissions officials are aware that many students this year, from all backgrounds and with all types of abilities, will not be able to access the SAT or ACT because of COVID-19. (*Id.*) The SAT or ACT will thus become one of the many elements that are present in some applications and not others—akin to participation in sports, musical instrument lessons, and honors courses. As with all other optional components of the UC application, readers will be trained to consider their inclusion within the context of the opportunities available to the applicant. (*Id.*)

That policy does not deny anyone an equal "opportunity to participate in or benefit from" a government program or to "obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others." (28 C.F.R. § 35.130(b)(1)(i)-(iii).)

Finally, Plaintiffs cannot succeed on any argument that they are "discriminated against by [UC]," (*D.K. ex rel. G.M, supra,* 667 F.Supp.2d at p. 1190) on the basis of their contentions that third-party testing companies have failed to provide reasonable accommodations. (Mot. at pp. 25-27.)[8] Under the regulation they cite, 28 C.F.R. § 35.130(b)(3), a public entity is not liable for the discriminatory practices of private third parties unless "those who actually discriminated acted as *agents of* the defendant public entity." (*Clark v. Colbert* (10th Cir. 2018) 895 F.3d 1258, 1266.) No agency relationship, or anything remotely similar, exists between UC and the College Board or ACT, Inc. And the cases Plaintiffs cite, involving claims against testing entities themselves, do nothing to support Plaintiffs' arguments. It is unsurprising that Plaintiffs offer no authority supporting their sweeping theory of vicarious liability. That theory would make every public university responsible for guaranteeing the reasonableness of the accommodations provided by

[8] Plaintiffs rely on Dr. Blanck's declaration for the proposition that students with disabilities, on average, perform less well on the SAT and ACT even with accommodations—but as Dr. Blanck acknowledges, the data do not show whether the accommodations studied are appropriate or effective. (Mot. at p. 28; Blanck Decl. ¶ 33.) In any event, the law does not require, and Plaintiffs have not shown, that universities must therefore prohibit consideration of test scores for *any* student who *voluntarily* submits information about his or her participation in that activity.

every school district, high school athletic association, and extracurricular implicated in any applicant's materials. Such overbroad theories of liability cannot succeed on the merits.

C. The Balance of Harms Weighs in UC's Favor.

Even if Plaintiffs had met their burden to show irreparable injury and likelihood of success on the merits, the Court should deny the motion because the balance of harms weighs in UC's favor. Plaintiffs' speculative and unsupported claims of harm to one or two potential applicants for Fall 2022 admission are decidedly outweighed by the severe and irreparable harms that would be caused by an order mandating that UC adopt a new admissions policy across all of its campuses for more than 100,000 California applicants.

As with the threshold question of irreparable injury, because Plaintiffs seek relief only on their own behalf, in the balance-of-harms analysis they may assert harms to themselves alone. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528 [the court "balanc[es] the respective equities of the parties" to determine "whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it"].) For the reasons discussed above, *supra* Section IV.A, those harms, if they exist at all, are entitled to little weight.

The harm to UC from a preliminary injunction, however, would be severe and irreparable. As an initial matter, "the ostensibly interim relief" Plaintiffs seek—an indefinite injunction against all consideration of SAT or ACT scores unless and until Defendants make certain showings (including that third parties not under UC's control are timely providing accommodations to every single student with a disability)—"does not maintain the status quo of the litigation, but ends it." (*O'Connell, supra*, 141 Cal.App.4th at p. 1472.)

Even a more limited form of preliminary relief, however, would impinge severely and disruptively on UC's legal autonomy to design and implement admissions policies that best serve its goals of educational excellence and equitable access. "As a university, one of UC's 'essential freedoms' is to determine for itself on academic grounds . . . who may be admitted to study." (*Assn. of Christian Schools Internat. v. Stearns* (9th Cir. 2010) 362 Fed.Appx. 640, 643, alteration in original; see also *Regents of Univ. of Mich. v. Ewing* (1985) 474 U.S. 214, 226 [similar]; *Paulsen v. Golden Gate Univ.* (1979) 25 Cal.3d 803, 808 [discussing the "widely accepted rule of

judicial non-intervention into the academic affairs of schools"].) Especially in light of Plaintiffs' acknowledgment that test-optional policies may be administered lawfully (Compl. ¶ 274), and the speculative and premature nature of their claims, it would represent an extraordinary and unwarranted judicial intrusion on UC's autonomy if the Court were to supplant the ongoing process by which UC plans to do just that.

Relatedly, because Plaintiffs seek to enjoin public officers from performing their assigned duties under policies adopted by the Board of Regents that thereby have the force of state law, the Court must also consider the public's interest in the performance of those duties. (See, e.g., *O'Connell*, *supra,* 141 Cal.App.4th at p. 1471; see also *Miklosy*, *supra*, 44 Cal.4th at p. 889 [addressing the powers granted to The Regents under the California Constitution]; *De Vries, supra,* 6 Cal.App.5th at p. 584 [Regents policies have the force and effect of a state statute].) Here, the public has a strong interest in UC's ability to design and implement its own admissions policy in pursuit of its goals of academic excellence and equitable access. (See *O'Connell*, *supra*, 141 Cal.App.4th at p. 1471; *Williams v. Austin Independent School Dist.* (W.D. Tex. 1992) 796 F.Supp. 251, 255-256 [public interest in leaving educational decisions to relevant state policymakers weighs against preliminary injunction].) Notably, a lack of legal compulsion for UC to change its admissions process does not prevent interested members of the public from lobbying the Regents for a change. (See *Coalition for Econ. Equity v. Wilson* (N.D. Cal. Feb, 7, 1997, No. C 96-4024 THE) 1997 WL 70641, at *3.) Just as Plaintiffs recently lobbied the Regents through public statements and submissions urging them to adopt UC's current admissions policies, they may use those same mechanisms now to seek further change.

The relief Plaintiffs seek also risks harm to UC's own pursuit of diversity (see Shaw Decl., Ex. H [Regents Policy 4400]), a goal Plaintiffs share. A judicial order requiring UC to implement a different admissions policy would be an abrupt change of the sort the STTF warned could disrupt and hinder UC's ability to account for biases in admissions criteria other than test scores and thereby risk harming applicants from underrepresented groups. (See STTF Report at 12, 33, 60-62, 69, 85, 96-97.) Indeed, one of Plaintiffs' experts notes that these students may have less access to learning aids such as computers, field trips, and other resources (Kirkland Decl. ¶ 18)—

disparities that can impact grades and access to extracurricular opportunities. UC admissions officers understand that disparities may show up in those criteria as well as in test scores (which they are trained to evaluate in context), and they take a holistic, data-informed approach to admitting a diverse and well-qualified class in light of these disparities. (Copeland-Morgan Decl. ¶ 12; Brumfield Decl. ¶ 9.) For example, at UC Davis, data have shown that SAT and ACT scores, for some students—including underrepresented minorities and students with disabilities—are a better predictor of college success, defined as student retention and graduation, than high school GPA. (Hunt Decl. ¶ 13.) Given these trends, UC Davis is planning to implement a test-optional policy that does not count non-submission of scores against applicants, but allows for some consideration of optionally submitted scores in a secondary review step. (*Id.*) At UCLA, where data show that each year some underrepresented students are admitted who likely would not have been absent their test score, implementing and studying test-optional in the next two years is "crucial" to developing a test-blind policy that continues to promote equity. (Copeland-Morgan Decl. ¶ 23.) Enjoining campuses from continuing thoughtfully to implement policies based on careful analysis of data could have unintended consequences for underrepresented students.

Additionally, litigation over a preliminary injunction itself, especially if it stretches into the fall, could create disruption and uncertainty that would impose significant hardship and cost on UC and on applicants attempting to decide, *inter alia*, where to apply. (See, e.g., *Grutter v. Bollinger* (6th Cir. 2001) 247 F.3d 631, 633; *Boston's Children First v. City of Boston* (D. Mass. 1999) 62 F.Supp.2d 247, 261, *aff'd* (1st Cir. 2004) 375 F.3d 71.)[9] That is especially true in the context of the COVID-19 pandemic. One UC admissions official notes that, given the pandemic, a test-optional policy will "allow students to use whatever they have at their disposal to put their best foot forward in their application" and that "[f]or some students, including students with disabilities and students who do not come from privileged backgrounds, this will include their test

[9] If the Court were to grant the injunction, it must require that Plaintiffs provide an undertaking sufficient to cover any damages Defendants might sustain by reason of the injunction, if it is ultimately determined that Plaintiffs were not entitled to the injunction. (See Civ. Proc. Code, § 529; *Abba Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 14.) If UC were forced to revamp its admissions process at this stage, it would incur substantial costs and administrative expenses.

scores." (Copeland-Morgan Decl. ¶ 20.) At the same time, an official at UC Santa Barbara notes that the pandemic has "wreaked havoc and complicated almost every decision and process in admissions and financial aid and scholarships" at a time when those offices are short-staffed and cannot hire. (Miller Decl. ¶ 13.) Thus, "it would be burdensome and extremely disruptive for our campus to have to change our current admissions plans for Fall 2021." (*Id.* ¶ 14.)

There is no sound reason for the Court to further complicate, disrupt, and harm UC's admissions process at this stage, where the numerous declarations submitted by UC officials show they are actively and thoughtfully engaged in designing a new process based on myriad relevant factors and based on the unique needs and circumstances of each campus. These issues surely are "within the special competence of" relevant UC officials and should be addressed by them in the first instance. (*Palmer, supra*, 107 Cal.App.4th at pp. 906-907; see also *Wise, supra*, 77 Cal.App.4th at p. 296 ["Administrative agency involvement may serve to resolve factual issues or provide a record for subsequent judicial review" and may "conserve judicial and other resources which otherwise would be consumed in litigation of issues."].) Indeed, separate and apart from this litigation, UC's administrative process has already resulted in a decision by the Board of Regents to transition from standardized test scores, and plans to ensure that, for example, readers do not give negative weight to the absence of a test score. (Copeland-Morgan Decl. ¶ 17; Saddler Decl. ¶ 19; Lewis Decl. ¶ 14; Hunt Decl. ¶ 11; Engelschall Decl. ¶ 17; Przekop Decl. ¶¶ 18-20.) The Court should allow that administrative process to continue and allow UC's faculty and administrators to complete their important work.

V. CONCLUSION

The Court should deny the preliminary injunction motion.

DATED: August 7, 2020

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By: 

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