

PANISH SHEA & BOYLE LLP
11111 Santa Monica Boulevard, Suite 700
Los Angeles, California 90025
310.477.1700 phone • 310.477.1699 fax

1 PANISH SHEA & BOYLE LLP
2 RAHUL RAVIPUDI, State Bar No.
204519
3 *ravipudi@psblaw.com*
4 JESSE MAX CREED, State Bar No.
272595
5 *creed@psblaw.com*
11111 Santa Monica Boulevard, Suite
700
Los Angeles, California 90025
Telephone: 310.477.1700
Facsimile: 310.477.1699

PUBLIC JUSTICE
JENNIFER D. BENNETT, State Bar
No. 296726
jbennett@publicjustice.net
475 14th St., Suite 610
Oakland, CA 94612
Telephone: (510) 622-815

8
9 MILLER ADVOCACY GROUP PC
MARC LERNER MILLER, State Bar No. 162790
10 *marci@milleradvocacy.com*
1303 Avocado Ave., Suite 230
Newport, CA 92660
Telephone: (949) 706-9734

12 Attorneys for Plaintiffs

14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA**
16 **WESTERN DIVISION**

17 HALIE BLOOM, an individual; et al.
18 Plaintiff,
19 v.
20 ACT, INC., a corporation, and DOES 1-
100.
21 Defendant.

Case No. CV 18-6749-GW(SSx)
THIRD AMENDED
NATIONWIDE CLASS ACTION
COMPLAINT FOR VIOLATIONS OF:

1. AMERICANS WITH DISABILITIES ACT – SCORE FLAGGING (42 U.S.C. § 12101, et seq.)
2. UNRUH ACT (California Civil Code §51 et seq.)
3. AMERICANS WITH DISABILITIES ACT – SCORE FLAGGING IN STATE-ADMINISTERED TESTS (42 U.S.C. § 12101, et seq.)
4. CONSTITUTIONAL RIGHT TO PRIVACY (California Constitution,

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Art. I, § 1)

5. UNFAIR COMPETITION LAW
(Business & Professions Code §
17200 et seq.)

6. AMERICANS WITH
DISABILITIES ACT – DENIAL OF
EQUAL OPPORTUNITY IN ACT'S
PROGRAMS BASED ON EOS SEARCH
CRITERIA (42 U.S.C. § 12101, et seq.)

7. DECLARATORY JUDGMENT
ACT (28 U.S.C. § 2201)

8. REHABILITATION ACT (29 U.S.C. §
794) – INTERFERENCE WITH RIGHT TO
BE FREE FROM PREADMISSION
DISABILITY INQUIRIES

9. AMERICANS WITH DISABILITIES
ACT – DENIAL OF EQUAL
OPPORTUNITY IN ACT'S PROGRAMS
BASED ON DISCRIMINATORY
REGISTRATION POLICY (42 U.S.C. §
12101, et seq.)

DEMAND FOR JURY TRIAL

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1 Plaintiffs HALIE BLOOM, an individual, DEVON LINKON, an individual,
2 EMMA L., an individual, JOHN DOE, an individual, SAM M., an individual ;
3 CAROLINE L., an individual; JANE DOE, an individual; M.B., an individual; A. C.,
4 an individual, and JAQUEL PITTS, an individual (“Plaintiffs”), individually and on
5 behalf of all others similarly situated, bring this action against ACT, Inc. ("ACT") and
6 DOES 1-100. Plaintiff's allegations are based on information and belief unless
7 otherwise indicated.¹

8 **I. INTRODUCTION**

9 1. ACT, Inc. ("ACT") administers the ACT Test, a standardized exam
10 required for college admissions. ACT also offers examinees the Equal Opportunity
11 Service ("EOS"). EOS is a service offered to examinees to allow them to be recruited
12 by colleges and offered scholarship and financial aid opportunities. Colleges use EOS
13 to search for ACT examinees along a number of search criteria, identify recruitment
14 pools, and target their recruitment messaging. After identifying recruitment pools
15 through EOS, colleges send those ACT examinees materials to solicit them to apply
16 for admissions, scholarships, and financial aid. Plaintiffs were required to show up at
17 the physical testing centers to sign up for EOS.

18 2. This action challenges three of ACT's policies that discriminate against
19 examinees with disabilities with respect to the ACT Test and EOS program: (a) ACT's
20 policy of identifying examinees, including Plaintiffs, as individuals with disabilities
21 in need of accommodations on college score reports (a practice known as score
22 flagging), (b) ACT's policy of excluding Special Testing examinees (those with the
23 severest disabilities and most intensive accommodations) from the benefits of EOS
24 by virtue of a discriminatory registration policy that denies Special Testing examinees
25

26 ¹ At the time this Third Amended Complaint was filed, the claims of Ms. Bloom, Mr. Linkon,
27 John Doe, and Emma L. had been stayed pending arbitration of their claims and the order staying
28 their claims had been certified for interlocutory appeal under 28 U.S.C. § 1292(b). If those
Plaintiffs are successful on appeal, those Plaintiffs expressly reserve the right to make additional
allegations or claims as necessary.

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1 an equal opportunity to register as other examinees, and (c) its policy of permitting
2 colleges to search for ACT examinees through EOS on the basis of the existence and
3 type of their disabilities, causing their exclusion from college recruitment pools.
4 Plaintiffs seek both an equal opportunity to register for EOS *and* a disability-blind
5 EOS program. At all relevant times, ACT *never* told examinees that the EOS program
6 permitted colleges to search for them on the basis of their disabilities.

7 3. Plaintiffs seek relief to ensure that they and other similarly situated
8 individuals with disabilities have college score reports that look like those without
9 disabilities, equal access and enjoyment of the benefits of the EOS program without
10 facially discriminatory registration barriers, and the opportunity to participate in a
11 disability-blind EOS program. Plaintiffs seek declaratory and injunctive relief,
12 equitable relief, actual damages, treble damages, restitution, reasonable attorneys’
13 fees and costs, as well as other appropriate relief as determined by this court or a jury.

14 4. ACT is a powerful gatekeeper to higher education and employment
15 opportunities because it administers a standardized test widely required for college
16 admissions. ACT exploits its role as gatekeeper by illegally requesting and acquiring
17 the confidential disability status of students and whether those students require
18 accommodations or “special provisions” for their disabilities. ACT collects this
19 information through the online ACT Student Profile Questionnaire that every student
20 fills out when registering for the exam, through its Student Information Form that test
21 takers must respond to on test day without their parents, teachers or counselors
22 present, and through the documentation and information required by ACT for students
23 to obtain their appropriate disabilities accommodations.

24 5. ACT asks every student registering for the ACT Test “Are you an
25 examinee with a disability who needs accommodations and/or an English learner who
26 needs supports to access the ACT?” Students who answer “Yes” to this question are
27 then asked to choose between “National” and “Special” testing. According to ACT,
28 students who need “Special Testing” are exclusively students with “professionally

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1 diagnosed and documented disabilities” who require “test accommodations that
2 cannot be provided at a test center.” Because Special Testing cannot take place at a
3 designated test center, Special Testing must take place at the examinee’s school.
4 Therefore, Special Testing is also referred to by ACT as “School Testing.”

5 6. After ACT asks the two questions about appropriate disability
6 accommodations, ACT asks every student registering for the ACT Test if they have
7 disabilities that require “special provisions from the educational institution [i.e. a
8 college],” and asks them to choose a disability that “most closely describes your
9 situation.” The choices include hearing impairment, visual impairment, learning or
10 cognitive disability, motor impairment, multiple disabilities, or no disability that
11 requires special provisions. This question, unlike the previous disability questions, is
12 separate from the ACT accommodations request process. ACT does not use this
13 information to determine whether to grant a student testing accommodations. It uses
14 this information to make money.

15 7. ACT knowingly uses this data in two impermissible ways. First, ACT
16 reports this detailed disability information in its score reporting services to colleges.
17 In fact, ACT reports whether a student has a disability requiring accommodations and
18 the type of disability on the face of the score reports it sends to colleges. *See Exhibit*
19 *A.* Colleges can also purchase access to student score reports with information about
20 a student's disabilities from ACT more frequently, and in different formats, so that
21 they can sort their applicants in a way that is by definition exclusionary. ACT
22 discloses this student disability information to colleges, even though it knows that
23 colleges are expressly forbidden by the Rehabilitation Act from making pre-
24 admission inquiries into a student's disabilities.

25 8. Second, ACT sells the same private and confidential disability data to
26 colleges to make money. As a result of ACT’s access to private student information,
27 its share in the competitive enrollment services marketplace continues to grow.
28 ACT’s dual role as gatekeeper of students and enrollment manager for colleges allows

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1 it to compete in the enrollment services business by representing to colleges and
2 universities that it will help them “remove the guesswork,” “target their recruiting
3 efforts,” “evaluate incoming students to make sure they have the tools to succeed,”
4 and “retain and graduate more students.”

5 9. As an example, student disabilities, classified by kind of disability, are
6 listed as data elements in the EOS service that ACT sells to colleges as a tool to “find
7 the right students for your institution.” ACT tells colleges in its ACT Information
8 Manager marketing materials that “Looking at ACT scores alone is just the
9 beginning,” and it promises to help colleges “improve targeted enrollment programs,”
10 “ensure [students] have the tools to succeed,” and “retain and graduate more students”
11 by providing “data elements useful for academic support.”

12 10. As another example, through its new ACT Enroll Platform, ACT sells
13 colleges personally identifiable data about students, including detailed student
14 disability data, in a format that allows colleges to create targeted recruiting and
15 enrollment markets for their specific needs. Through this electronic platform,
16 institutions can create markets that intentionally exclude categories of students based
17 upon the data elements provided, including students with disabilities.

18 11. Colleges, scholarship agencies, and other institutions that participate in
19 ACT’s programs receive data about ACT test takers as soon as students provide the
20 data so that it can be used for recruiting and marketing purposes before students apply
21 to college. This data is not only disseminated to those colleges and scholarship
22 agencies that students designate, but is immediately available to the thousands of
23 organizations that participate in ACT’s paid programs. ACT claims that it will provide
24 these thousands of organizations the “right names at the right time” and that “student
25 data [for Educational Opportunity Service (“EOS”)] is updated after information with
26 each test administration has been processed.”

27 12. Through these programs, ACT is not only affecting the opportunities of
28 students with disabilities in the fiercely competitive college admissions process. It is

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1 also affecting their opportunities in future employment. ACT’s WorkKeys
2 assessment, described as a workforce solution that "help[s] measure the workplace
3 skills that can affect job performance," is now offered nationwide and required in 28
4 states, including Colorado and Nevada. Students who take their WorkKeys
5 assessments with accommodations for their disabilities have their disabilities and
6 accommodations data stored in ACT’s database and are classified in the WorkKeys
7 data report as “ADA Candidate.” Tens of thousands of employers nationwide may
8 have access to this private and confidential disabilities data at any given time.

9 13. Students, parents, and their high schools are intentionally kept unaware
10 of ACT’s practice of reporting confidential disability status to colleges, scholarship
11 agencies, and other institutions, because disability information is conspicuously
12 absent from the ACT score reports they receive.

13 14. Students, families and school counselors have every expectation that
14 disability information will remain private. Federal and state laws strictly protect the
15 confidentiality of student disability records. The Individuals with Disabilities
16 Education Act, 20 U.S.C. § *et seq.* ("IDEA"), safeguards the confidentiality of student
17 disability status so rigorously that it regulates its collection, storage, disclosure and
18 destruction and does not allow it to be handled by anyone who is not specifically
19 trained. The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, also
20 protects the confidentiality of information contained in a student’s record and does
21 not allow its disclosure without a parent’s consent. As a further protection, when
22 records are no longer required to provide educational services, parents or students
23 (over 18) can request their destruction. No parent (whose consent is not sought or
24 obtained) or student would have any reason to believe that disability status is being
25 reported to colleges on the ACT score report or sold as enrollment data.

26 15. Even worse, ACT specifically promises students under its confidentiality
27 provision and accommodations policy that it will not report their disability and
28 accommodations information on their college score reports, because they know that

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1 such disclosure is wrong and illegal. ACT’s Policy for Accommodations falsely
2 informs students and parents that their score reports will not contain information about
3 their disabilities or accommodations.

4 16. ACT is alone among high-stakes testing agencies in its discriminatory
5 practices. As the administrator of the SAT, the College Board does not report student
6 disabilities on its score reports. Despite years of disability discrimination lawsuits
7 against testing agencies and legislation forcing them to remove any reference to
8 disabilities in their score reporting, ACT continues to flagrantly violate the rights of
9 students with disabilities under federal and California law.

10 17. ACT is exploiting its privilege of interacting with nearly every college-
11 bound student, the vast majority of whom are minors, by illegally acquiring the
12 students’ disability and school accommodations status and using this information to
13 increase its market share. A significant number of these students have no choice but
14 to take the ACT Test. In at least twenty States, students are required by State law to
15 take the test. And in at least eleven more States, students are required by State law to
16 take some form of examination administered by ACT.

17 18. Once ACT acquires this disability information from students, it uses it to
18 illegally flag student test scores as associated with students who require special
19 provisions due to disabilities, devaluing their test scores on the basis of their
20 disabilities. ACT knows that flagging test scores of students with disabilities and who
21 have tested with accommodations is illegal, and knows full well that colleges have no
22 legitimate reason to see this information. The Rehabilitation Act expressly requires
23 colleges to conduct "disability-blind" admissions and forbids preadmissions inquiries
24 regarding disabilities.

25 19. ACT has intentionally violated the rights of every college-bound student
26 with disabilities, including Plaintiffs, by unnecessarily seeking to collect information
27 about their disability status at registration for the ACT Test, illegally flagging their
28 test scores, and illegally marketing and selling information about their disabilities to

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1 colleges and universities. ACT has announced no plans to cease these violations and
2 will continue to violate the rights of students with disabilities who take the ACT Test
3 in the future, including at the next administration of the exam in September 2018.
4 Absent an injunction, ACT will continue to report students’ disabilities to colleges on
5 their score reports when students begin to apply for college on or after August 1, 2018.
6 ACT is likewise continuing to sell student disability information to colleges and other
7 institutions through its enrollment programs and services.

8 20. After Plaintiffs had already taken their ACT tests and received the scores
9 that are the basis of this action, on July 24, 2018, ACT announced the acquisition of
10 NRCCUA, a “for profit” company engaged in selling student names and data to
11 colleges, so that it can further expand its enrollment management reach. In their joint
12 announcement, ACT and NRCCUA claimed that “together, we are the most skilled,
13 innovative and effective organization in the higher education industry in delivering
14 data science, analytics, research, measurement, and assessments.” Through
15 NRCCUA’s Encoura Data Lab, Edventures, and Omnichannel Enrollment Services,
16 ACT further disseminates students’ confidential data to colleges in ways that
17 Plaintiffs had not anticipated at the time they took their ACT tests. For example, ACT
18 claims that through Encoura Data Lab, it has created an “app ecosystem that helps
19 colleges and universities achieve their goals, from enrollment management, to
20 curriculum planning and beyond.”

21 21. ACT also flagged the score reports of students with disabilities by
22 indicating when students were required to use Special Testing accommodations to
23 access the ACT test. “SCHOOL” is marked at the top of score reports in all caps for
24 those students who need special testing accommodations, and the school testing
25 accommodations are reported in both electronic score reporting and the EOS student
26 record layout. This flag would indicate to any college or scholarship agency that a test
27 taker has “professionally diagnosed and documented disabilities” that “require test
28 accommodations that cannot be provided at a test center.”

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1 22. Until 2002, ACT flagged the scores of students with disabilities using
2 the term “SPECIAL.” In 2002, ACT publicly told examinees it had voluntarily ceased
3 flagging the scores of students with disabilities. But ACT deceived the public, as it
4 kept the flag but merely changed the term from “SPECIAL” to “SCHOOL.” In fact,
5 nearly all the categories of students whose scores were flagged with “SPECIAL”
6 before the policy change in 2002 were the same categories of students whose scores
7 were flagged with “SCHOOL” after the policy change in 2002.

8 23. ACT likewise has established a facially discriminatory policy that
9 excludes Special Testing students from the EOS program and creates an additional
10 burden on them to participate in the program. ACT publicly markets the EOS program
11 as a substantial benefit to examinees, encouraging them to "Say Yes to EOS" and
12 touting the ability of EOS to "broaden your ways to pay for college" and "help you
13 find college opportunities all over the country." According to ACT, EOS students are
14 typically selected by 16 colleges on average simply if they register for the program.
15 EOS students learn about opportunities in higher education, scholarship and financial
16 aid. For example, Harvard uses EOS to identify students to whom it wishes to send
17 letters informing them they have the qualifications to be admitted and describing its
18 no-loan financial aid package.

19 24. Despite ACT's unequivocal claims of the benefits of the EOS program,
20 ACT has a facially discriminatory policy that requires Special Testing students to
21 overcome additional, unreported burdens to participate, in violation of federal and
22 California law. ACT’s website states that “Students can opt into the ACT Educational
23 Opportunity Service (EOS) when they register for the ACT.” This is true for National
24 Testing students, but it is not true for Special Testing students, all of whom are taking
25 the ACT with accommodations for their documented disabilities. Even if Special
26 Testing students opt into EOS when they register for the ACT, they will not be
27 included in the EOS program without taking additional steps required by ACT. ACT
28 has failed to give notice of these additional steps and has in fact made misleading

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1 statements that obfuscate what Special Testing students must do to participate in EOS.
2 25. ACT asks all students reviewing their online ACT accounts or
3 registering to take the exam whether they want to participate in EOS. If a National
4 Testing student opts in to participate in EOS online, the National Testing student is
5 part of the EOS program for every future ACT test until he or she affirmatively opts
6 out of the EOS program. By contrast, if a Special Testing student opts in to participate
7 into EOS during registration or online, the Special Testing student is not part of the
8 EOS program. Instead, a Special Testing student is required to also opt in to
9 participate in a special answer document on test day at the physical ACT test center
10 during every single administration of the test or the student will not be included in
11 EOS for that test administration. The failure of Special Testing students to take steps
12 to affirmatively opt in on test day at the testing center each time they test causes them
13 to be automatically excluded from the EOS program even if they, like National
14 Testing students, had previously expressed an affirmative intent to participate in the
15 same way the National Testing students did. ACT's policy of excluding Special
16 Testing students who do not affirmatively opt in on each test day is directly
17 contradicted by what its *Taking the ACT* booklet told (and tells) Special Testing
18 students on test day: "If you do not respond to this question, your information will not
19 be disclosed through EOS unless you previously authorized release." reported

20 26. As a result, the percentage of National Testing students who opt in to
21 participate in EOS is substantially higher than the percentage of Special Testing
22 students who do so. And this facially discriminatory policy deprives Special Testing
23 students of the benefits of the EOS program that ACT has heavily studied and
24 publicized.

25 27. For the reasons stated below, Plaintiffs and members of the Classes and
26 Subclasses (as defined below) are entitled to injunctive and monetary relief.

27 **II. JURISDICTION AND VENUE**

28 28. This Court has subject matter jurisdiction over this action pursuant to 28

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1 U.S.C. § 1331 because this action arises at least in part under the laws of the United
2 States.

3 29. This Court likewise has subject matter jurisdiction over this action
4 pursuant to 28 U.S.C. §1332 because the amount in controversy exceeds the sum or
5 value of \$5,000,000, exclusive of interest and costs and the action is a class action in
6 which members of the class of plaintiffs are citizens of a State different from ACT.

7 30. Venue with this Court is proper in this district under 28 U.S.C. §1332
8 because Plaintiffs are residents of this district and a substantial portion of the acts or
9 omissions giving rise to the claims herein took place in this district.

10 **III. COMMON FACTUAL ALLEGATIONS**

11 **A. The Value and Challenge of College Degrees for Students with**
12 **Disabilities**

13 31. In today's America, a college degree is considered part of the American
14 dream. It is viewed as a powerful indicator of long-term economic security and social
15 mobility, not to mention a path to active citizenship and informed participation in our
16 democracy. Four decades of research show that Americans with a college degree
17 have higher family incomes than do adults with only a high school diploma. In fact,
18 if a child from the bottom fifth of America's poorest families earns a college degree,
19 that child is remarkably four times more likely to reach the top fifth of America's
20 richest families. Recent studies have shown that these education-based income gaps
21 are widening ever further.²

22 32. Unsurprisingly, these trends extend to Americans with disabilities.
23 College-educated Americans with disabilities have a significantly higher chance of
24 finding employment than those without a college degree. The U.S. Bureau of Labor
25 found that 26% of Americans with disabilities with a bachelor's degree were
26 employed in 2016, compared to 16% of those with no more than a higher school

27 _____
28 ² Ron Haskins, et al., *Promoting Economic Mobility By Increasing Postsecondary Education*, The
Economic Mobility Project 7-10 (2009) ("Economic Mobility").

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1 degree. And the earning potential for college-educated Americans with disabilities is
2 substantially greater. In fact, college-educated Americans with disabilities make
3 twice as much as other Americans with disabilities, and nearly twice as much as their
4 peers who fail to graduate college.³ In short, a college degree is a powerful predictor
5 of economic security and social mobility for Americans with disabilities, too.

6 33. Plaintiffs are all college-bound students, or students who have applied or
7 been admitted to or enrolled in college programs. They took or plan to take the ACT
8 Test for purposes of meeting college admission requirements. Successfully earning a
9 college degree will have a profound effect on their long-term economic security, job
10 prospects, and earning potential, as it does for all Americans. Receiving the necessary
11 financial and scholarship opportunities to pay for college will allow them to be more
12 successful in college and be more likely to complete their college degree on time.

13 34. Many Americans with disabilities have achieved enormous success after
14 obtaining a college degree. Charles Schwab, the founder of the Charles Schwab
15 Corporation and a multi-billionaire, has suffered from dyslexia his entire life, forcing
16 him to communicate in ways other than reading and writing. He is also a graduate of
17 Stanford University. Mr. Schwab is now increasingly vocal about the challenges he
18 has faced as an American with a disability. His recent advocacy is a testament to the
19 struggles he faced with dyslexia, which he describes as "painful."⁴ Other success
20 stories of college-educated Americans with learning disabilities like dyslexia or
21 attention deficit disorder are a sign that Americans with disabilities can succeed too.
22 These Americans includes John Chambers, the former chief executive of Cisco
23 Systems and a graduate of the University of Virginia, who has been open about the
24 years of therapy he underwent to cope with the emotional pain of his dyslexia; David

25 _____
26 ³ Michelle Yin, et al., *An Uneven Playing Field: The Lack of Equal Pay for People with*
Disabilities, American Institutes for Research 7 (2014).

27 ⁴ Rob Turner, *Executive Life; In Learning Hurdles, Lessons for Success*, N.Y. Times, Nov. 23,
28 2003, available at <https://www.nytimes.com/2003/11/23/business/executive-life-in-learning-hurdles-lessons-for-success.html>

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1 Neeleman, the former chief executive of JetBlue Airways, a dyslexic, and a graduate
2 of the University of Utah; and Craig O. McCaw, the founder of McCaw Wireless and
3 Clearwire Corporation, a dyslexic, and a graduate of Stanford University.

4 35. Congress has recognized the importance of a college degree to
5 Americans with disabilities and the persistent discrimination they have faced in
6 education and employment by enacting the Americans with Disabilities Act of 1990
7 ("ADA"), and in the Americans with Disabilities Act Amendments Act of 2008.
8 Congress recognized that "physical or mental disabilities in no way diminish a
9 person's right to fully participate in all aspects of society," yet found that
10 "discrimination against individuals with disabilities persists in such critical areas as
11 ... education." 42 U.S.C. § 12101. Colleges, universities and testing agencies like
12 ACT are obligated under the ADA to ensure their programs and services give full and
13 equal access to students with disabilities, including disability-blind admissions. In
14 1992, the State of California incorporated the ADA into the Unruh Act, with all the
15 remedies available to students thereunder.

16 36. The National Student Clearinghouse Student Research Center reports
17 that as of 2015, one third of students who started college will not finish within six
18 years. For students with disabilities, especially those who do not find a culture of
19 inclusivity or adequate support systems in college, that number could be even higher.
20 ACT knows that the all-powerful rankings of higher education institutions by U.S.
21 News & World Report and other publications take account of student retention and
22 graduation rates. The higher the student retention and graduation rates, the better the
23 school's rankings, leading to more successful student and faculty recruitment and
24 more pride among alumni (and annual giving dollars, too). Because ACT believes
25 students with disabilities are one category of students that perform worse in these
26 areas, ACT sells personalized student disability data to colleges pre-admission to
27 increase its market share in the testing and enrollment services businesses.

28 37. Due to the substantial costs of low retention, as well as the detrimental

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1 effects on their all-important rankings, colleges have turned to outside enrollment
2 managers like ACT and the student data they provide to tell them how to find and
3 choose their students.

4 38. ACT understands the market for detailed student data to predict who will
5 attend and persist once enrolled. Therefore, in addition to objective data such as such
6 as scores and demographics, ACT score reports sent to colleges also include
7 predictions about a student’s “Chances of Success.” Disability status is included in
8 what ACT believes to be an important data element for students’ chances of success.
9 ACT also uses the unlawfully obtained disability status of students to sell “Predictive
10 Modeling” services for colleges to take advantage of their fear of dropping retention
11 rates. The data elements sold to colleges for “retention uses” include the disability
12 status of students.

13 39. However, § 504 of the Rehabilitation Act expressly forbids pre-
14 admissions inquiries about disabilities, screening students based upon disabilities or
15 limiting the number of qualified students they accept based upon disabilities. Labeling
16 students based upon the existence of a disability and type of disability, and then
17 allowing students to be identified, sorted and searched according to the disability is
18 behavior that by definition violates the core purpose of the ADA.

19 40. In a wave of lawsuits over the past several decades, testing agencies and
20 standardized tests have been a battleground for student disability discrimination
21 because of the central role they play in college admissions. ACT believes that college
22 admissions officers want the disability data of Plaintiffs, and so ACT flags their test
23 scores, discloses their otherwise confidential information to colleges pre-admission,
24 and stigmatizes students with disabilities in the admissions process.

25 41. In 2002 the College Board published a study entitled "The Impact of
26 Flagging on the Admission Process." The 2002 study set out to investigate the array
27 of issues with respect to flagging test scores of students with a disability who received
28 an accommodation. The conclusions are crystal clear: College admissions offices

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1 want and use the information in their evaluation, and it is to the disadvantage of
2 students with disabilities. As the study reports:

- 3 • "Among the admission officers who responded to the survey, 79
4 percent are proponents of the flag, expressing the need to maintain
5 the flagging policy."
- 6 • "Some institutions report that they will drop the SAT if the flagging
7 policy is discontinued, while other schools would consider
8 alternatives to the SAT." (By the way, that is exactly what has
9 happened. Since 2002 when the College Board completely
10 eliminated flagging, the ACT Test has become the standardized test
11 of choice in college admissions.)
- 12 • "Although the legality of the following statement is questionable, one
13 [admissions officer] commented that given the finances, 'we have a
14 zero-sum game in which we are often taking resources away from the
15 physically disabled because of the growing number of ADHD and LD
16 students."
- 17 • "The level of disability support services differs across institutions.
18 Some institutions simply cannot accommodate effectively the most
19 severe disabilities. Some institutions have difficulty accommodating
20 mild disabilities" – meaning that college admissions will turn down a
21 student with a disability because the student is too expensive to
22 accommodate.

23 42. Unsurprisingly, disability service providers responding to the College
24 Board survey uniformly condemned the practice of flagging. Fearing disadvantage,
25 disability service providers believed flagging threatened a students' chances of
26 admission because "admission officers are more oriented to rejection than to
27 admission, particularly when it comes to candidates with disabilities." The
28 perspective of high school guidance counselors is an echo of this view. Thirty one
percent of high school guidance counselors felt that the flag decreased a student's
chances for admission.

43. In response to the College Board's 2002 study, both the College Board
and ACT announced that they would stop flagging the test scores of disabled students
who received testing accommodations. The ACT Press Release stated: "Our decision
to stop flagging scores followed an exhaustive analysis of the pros and cons of the

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1 flagging policy.” “Our decision to stop flagging comes after a thorough review,” said
2 Richard Ferguson, Chief Executive Officer of ACT.⁵

3 44. Nonetheless, as described below, ACT blatantly continues to "flag"
4 score reports by disclosing student disabilities and their need for accommodations on
5 their score reports to colleges.

6 45. In 2004, the Office of Civil Rights of the Department of Education
7 ("OCR") investigated a complaint of disability discrimination by SUNY Health
8 Science Center at Brooklyn's College of Medicine ("SUNY"). The student alleged
9 that SUNY supported the unlawful practice by the administrator of the Medical
10 College Admissions Test ("MCAT") of devaluing the student's MCAT scores by
11 reporting that the student received special testing accommodations for a disability.
12 The investigation decisively shows how admissions officers did in fact devalue
13 standardized test scores taken under special disability-related accommodations:

[SUNY's Admission Committee Co-Chair] further stated that he places less
weight on an asterisked MCAT score than on a nonasterisked score. He
informed OCR that he would be wary of a very good asterisked MCAT
score if he came upon it during the screening process and that in the
situation where an applicant had weak grades but strong asterisked MCAT
scores, he would analyze the application more carefully. In addition, Co-
Chair No. 2 stated that in a hypothetical situation where an applicant's
MCAT score is greatly improved when taken under nonstandard conditions,
he would want to know how and which applicant had improved. Co-Chair
No. 2 also informed OCR that if he were reviewing two applicants with the
same "minimally acceptable" MCAT score, one taken under nonstandard
conditions and the other under standard conditions, and if all the other
admissions criteria were in the acceptable range, he would think that the
applicant who took the MCAT under standard conditions probably does not
perform well on standardized tests and, therefore, the score would not be
indicative of the applicant's ability. However, the same beneficial
interpretation would not be afforded the applicant who had taken the
MCAT under nonstandard conditions.

27 _____
28 ⁵ Diverse Issues in Higher Education, “SAT, ACT to Stop Flagging Student Test Scores,” August
15, 2002, available at <http://diverseeducation.com/article/2351/>.

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1 46. As recently as 2014, the U.S. Department of Justice and California
2 Department of Fair Employment and Housing obtained a landmark consent decree
3 permanently ending the Law School Admission Council ("LSAC")'s practice of
4 "flagging" Law School Admissions Test ("LSAT") score reports for test takers with
5 disabilities receiving special accommodations. That dispute centered on the LSAC's
6 reporting and identifying the otherwise confidential information of examinees with
7 disabilities that use testing accommodations to law schools. Like ACT, LSAC
8 reported score reports and disability status on score reports sent to law schools.

9 47. Responding to the LSAC case, the California legislature enacted
10 §99161.5 of the Education Code. That provision makes clear that the disclosure of
11 disability information with a score report is a blatant violation of the ADA as
12 incorporated into the Unruh Act. It says that the reporting of a test score obtained by
13 someone who received accommodations must not indicate in any way (either by
14 disclosing or withholding information) that the score was earned by someone with
15 accommodations: "The test sponsor of the Law School Admission Test shall not
16 notify a test score recipient that the score of any test subject was obtained by a subject
17 who received an accommodation pursuant to this section. The test sponsor of the Law
18 School Admission Test shall not withhold any information that would lead a test score
19 recipient to deduce that a score was earned by a subject who received an
20 accommodation pursuant to this section." Cal. Ed. Code § 99161.5. These provisions
21 are not intended to be an expansion of existing law, but a declaration of what the law
22 already required: "This subdivision does not constitute a change in, but is declaratory
23 of, existing law." *Id.* Accordingly, these provisions apply as much to ACT with
24 respect to the ACT Test as they do to the LSAC.

25 48. In 2015, the U.S. Department of Justice, to which Congress has delegated
26 broad responsibility to enforce the ADA, issued technical assistance on how scores
27 on standardized and other high-stakes tests should be reported for students with
28 disabilities under the ADA. The guidance was as clear as it was strong: "Flagging

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1 policies that impede individuals with disabilities from fairly competing for and
2 pursuing educational and employment opportunities are prohibited by the ADA. . . .
3 Flagging announces to anyone receiving the exam scores that the test-taker has a
4 disability and suggests that the scores are not valid or deserved." See DOJ Technical
5 Assistance on Testing Accommodations Under the ADA (September 8, 2015).

6 **B. ACT's Role as a College Gatekeeper**

7 49. ACT conducts the ACT Test, a standardized college-entrance exam
8 accepted by virtually every four-year college program in the United States. According
9 to ACT, the ACT Test is an assessment of high school students' college readiness.
10 The test covers four skill areas: English, mathematics, reading, and science, and is
11 offered multiple times a year. ACT states that the ACT Test correlates with the
12 probability the student would successfully earn a college degree after admissions.

13 50. ACT has the largest share of standardized test takers in America. For
14 the high school class of 2017, 2.03 million students took the ACT Test, exceeding the
15 number of SAT test takers by over 10%. In fact, ACT has a captured audience for the
16 ACT Test, with a number of States requiring their high school students to take the
17 ACT Test. Roughly 200,000 students per year request testing accommodations from
18 ACT because of a disability, and about 94% of those requests are approved. ACT
19 administers, manages and proctors the ACT Test multiple times each year at high
20 schools across the United States and offers online ACT preparation programs and
21 services, making the ACT a public accommodation within the meaning of the ADA.

22 51. Every student that takes the ACT Test must register for the examination.
23 The fee for taking the exam is \$46 to \$62.50 depending on whether the student elects
24 to take an optional writing test. In addition, the fee for sending a score report to a
25 college is \$16.50 per score report, with each student sending score reports to an
26 average of 8 colleges.

27 52. Each section of the ACT Test is individually scored on a scale of 1 to 36,
28 and then the average of those scores will make up a composite score. The score report

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1 shows how a student's score compares to those in the student's state as well as to those
2 across the United States.

3 **C. ACT's Discriminatory and Illegal Inquiries into Disability Status**

4 53. ACT acquires information regarding a student's disabilities in two ways.
5 First, students provide their disabilities during the online registration for an ACT Test.
6 One component of the registration process is the Student Profile Section. ACT
7 describes the Student Profile Section as designed to "help *you* think about your future
8 education and to help colleges in their planning."

9 54. This component explicitly asks students if they have a disability. The
10 question asks whether the student has "a disability that requires special provisions
11 from the educational institution." The answers are prescribed through a drop-down
12 menu of seven options:

- 13 ■ No disability that requires special provisions
- 14 ■ Hearing impairment
- 15 ■ Motor impairment
- 16 ■ Visual impairment (not correctable)
- 17 ■ Learning or cognitive disability
- 18 ■ Other disability
- 19 ■ Multiple disabilities

20 55. Second, students are asked an identical question on testing day. After
21 students sit down to take the ACT Test, the very first task they perform is the
22 completion of the Student Profile Section. The proctor instructs the students on how
23 to fill out this portion of the exam.

24 56. Uncovering minor disabilities that do not impair a major life activity is
25 clearly not the aim of this question. The aim is to determine whether the student has
26 a disability that "requires special provisions from the educational institution."
27 Knowing that the score reports are sent directly to admissions offices at colleges,
28 ACT seeks information that is of significance to them, including the need to assess

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1 "student fit," the resources required to educate and accommodate that student, and the
2 testing accommodations used by the student to obtain their ACT score.

3 57. The third source of student disability status is the student's request for
4 accommodations. To apply for accommodations, students are required to submit
5 documentation of their disabilities through their school counselors. In order to
6 demonstrate a history of testing accommodations and diagnosed disabilities, school
7 counselors are encouraged by ACT to submit student records electronically through
8 ACT's online system. The records include a student's history of prior testing
9 accommodations in high school, IEP Plans, 504 Plans, and medical evaluations, all of
10 which are highly confidential under federal and state law.

11 58. In cases where ACT contracts with a State, District, School or customer
12 other than the test taker to administer the ACT test, ACT requires its customer to
13 upload student data through a Student Data Upload File ("SDU"). Through the SDU,
14 ACT obtains demographic data for each student, including confidential disabilities
15 and accommodations data, noncognitive data, and responses to "State Use
16 Questions," which can include the test taker's primary disability, the existence of an
17 IEP or 504 Plan, and the type of accommodations used for testing. The SDU is another
18 source of student disability data for ACT.

19 59. Plaintiffs and an overwhelming majority of the members of all
20 Subclasses (as defined below) were under 18 years old when ACT collected their
21 disability information.

22 **D. ACT's Unlawful Policies of Reporting and Using Examinees'**
23 **Disability and Accommodation Information**

24 60. ACT uses student disability information in two primary ways which
25 are both illegal. First, ACT "flags" student score reports by disclosing detailed
26 student disability information and the use of accommodations on the score reports it
27 sends to colleges. Second, ACT sells detailed student disability data to colleges,
28 scholarship organizations, and other third parties who use it for recruitment,

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1 marketing, and other programs related to the admissions process. ACT actively
2 markets and sells these programs for revenue.

3 61. First of all, every score report that goes to a college includes the student’s
4 score and certain "admissions enrollment data," including any "Physical/Learning
5 Disability." The score report also predicts the student's chances of success at the
6 college where the report is sent, comparing the student to control groups with specific
7 characteristics. The score report ranks each student’s chances of earning a "C" or
8 better or a "B" or better in specific disciplines. By disclosing disability data with the
9 ACT score, ACT is suggesting that the score may not accurately reflect the aptitude
10 of the test taker.

11 62. The disclosure of physical or learning disabilities on the score report is
12 intended in context to reflect disabilities that require testing accommodations. This
13 is clear from the language of the disability question itself which explicitly asks
14 whether the student has a disability that "requires special provisions from the
15 educational institution." ACT does not seek information about disabilities that do not
16 need any kind of accommodation, only those that do. The response for a student with
17 no such disability makes this abundantly clear: "No disability that requires special
18 provisions." Based on the question and answer choices, admission officers reviewing
19 this data can reasonably assume that students with reported disabilities will not only
20 need accommodations, but that they had testing accommodations as well. This
21 reporting practice flags and devalues disabled students’ test scores and unfairly and
22 illegally penalizes students with disabilities in the admissions process. ACT
23 misrepresented its intentions to stop the illegal practice of "flagging" test scores in
24 2002, when it only changed its methods of flagging.

25 63. ACT also misrepresents to students that their disability status will not be
26 reported to colleges. The Policy for Accommodations provides: "ACT Score reports
27 do not include any specifics about the disability or accommodations provided."

28 64. As described herein, "flagging" score reports has been the subject of

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1 numerous civil rights lawsuits, government investigations, Technical Assistance
2 documents, and California state legislation. Disclosing a standardized exam score
3 and a student's disability status together are prohibited by law, because this practice
4 interferes with a student's exercise of his or her rights under Title II and Title III of
5 the ADA to seek a testing accommodation.

6 65. Second, ACT unlawfully uses the disability information it obtains by
7 disseminating it to colleges and other postsecondary programs for their recruitment
8 and enrollment purposes through its college reporting services and its EOS Services.

9 66. ACT discloses student data as soon as it is obtained, including
10 disabilities data, through its College Reporting and Research Services, programs
11 designed to aid colleges with admissions, retention, and class placement. Some of
12 these services include the Admissions Service, Class Profile Service,
13 Retention/Attrition Service, Course Placement Service, Chances of Success
14 Predictions, Predictive Modeling, Academic Advising, Interest-Major Fit Predictions,
15 and Institution-Specific Predictions.

16 67. ACT also sells student disabilities data through its Educational
17 Opportunity Service ("EOS"), described by ACT to test-takers as a way to "allow[]
18 you [the student] to learn about educational, scholarship, career, and financial aid
19 opportunities at no charge to you."

20 68. The EOS program sells student disability data to enable colleges to
21 personalize their recruiting efforts. EOS is marketed to colleges as a way to sift
22 through student data (including disability data) and make judgments as to those
23 students worth recruiting. According to ACT's marketing for EOS: "Search millions
24 of Pre-ACT and ACT test takers and easily find the students best suited for your
25 college or university. Pinpoint your direct marketing with expansive data utilizing
26 predictive modeling in the process."

27 69. ACT also offers the ACT Information Manager ("AIM") service which
28 purports to contextualize ACT Test scores. AIM is marketed as a way to enable

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1 colleges to "turn data into actionable information" because "looking at ACT scores
2 alone is just the beginning." Among this actionable information is a student's
3 disability status. The goal of AIM is to help colleges target recruitment to achieve
4 three goals: "assess student fit," "personalize recruitment," and "student retention."
5 According to ACT, colleges can use AIM to recruit "students who have desired
6 characteristics." ACT sells AIM for \$708 for the first year and \$480 every year
7 thereafter.

8 70. ACT also sells individualized student disability data to colleges and
9 other postsecondary institutions as part of its enrollment management services under
10 the brand ACT Enroll. The purpose of ACT Enroll is to help the colleges "remove
11 the guesswork," "target their recruiting efforts," "evaluate incoming students to make
12 sure they have the tools to succeed," and "retain and graduate more students."
13 Through its new ACT Enroll Platform, postsecondary institutions can purchase
14 student names and data, including disability data, in a format that allows them to
15 create targeted recruiting and enrollment markets for their specific needs. Through
16 this electronic platform, institutions can create markets that specifically exclude
17 categories of students based upon the data elements provided, including students with
18 disabilities.

19 71. The 2018 User Guide for ACT Enroll spells out how ACT allows
20 colleges to create exclusionary markets. The following is ACT's description of
21 "creating a market" to target recruitment:

22 23 Creating a Market

24
25 To create a market, select **Markets** on the left side of the screen. The Markets page will appear. Here, you
26 can create student residence and school markets, view markets you created, and view the markets created
27 by other users for your organization.

28 72. Within each market or separate from each market, ACT allows

1 postsecondary programs to sort by demographic characteristics, including student
2 disabilities. The following is ACT's description of "creating a population":

3 4 5 **Creating a Population**

6
7 To create a population, select **Populations** on the left side of the screen. The **Populations** page will
8 appear. Here, you can create populations, view populations you created, and view the populations
9 created by other users for your organization. You can also filter the populations by a market to see all of
10 the populations linked to that market.

11 73. On a later page, ACT allows users to sort by demographic information,
12 including "Physical/Learning Disability." ACT notes that the "more filters you select,
13 the more refined the data set will be."

14	15	16	17	18	19	20	21	22	23	24	25	26	27	28
Step		Action												

- | | |
|---|---|
| 6 | The Demographics page appears. Here, you can select demographic information, such as |
| | ▪ Gender |
| | ▪ Race/Ethnicity |
| | ▪ US Citizenship |
| | ▪ Family Income |
| | ▪ Physical/Learning Disability |
| | ▪ Religion |
| | ▪ Parental Education |

Select demographic information by choosing the appropriate checkboxes under each section. The more filters you select, the more refined the data set will be.

74. Finally, ACT sells schools its Class Profile Service, which helps colleges “summarize cognitive and noncognitive variables at different stages of the enrollment funnel” and includes a data profile of incoming college classes including disabilities

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1 and "special needs."

2 75. While College Board and ACT have discussed the potential for abuse
3 with data-driven student recruitment and admissions, and both have discussed
4 possibly monitoring how this data is used, ACT claims not to monitor the search
5 criteria it sells to its customers. In the article entitled "Micro-Targeting Students:
6 Increasingly sophisticated data slicing tools are changing student recruitment. Who
7 benefits?" written by Ry Rivard on October 24, 2013, Jane Kesserling, a program
8 director for ACT's enrollment management services said, "Pretty much any criteria
9 that is available in the EOS system is pretty fair game; however they want to segregate
10 their data is fine."

11 76. ACT's disclosure of student disability data is a blatant circumvention of
12 the express prohibition on preadmission inquiries by colleges. The Department of
13 Education has warned colleges that any preadmission inquiry into disability status is
14 illegal, except in the rarest of circumstances involving affirmative action programs.
15 OCR has often enforced this prohibition against postsecondary programs.⁶ There is
16 virtually no permissible use of student disability information prior to admission, and
17 ACT is circumventing this prohibition.

18 77. ACT has intentionally violated the rights of Plaintiffs and the class they
19 seek to represent by unnecessarily seeking to collect information about their disability
20 status and accommodations at registration for the ACT Test and illegally flagging
21 their test scores. After this action was originally filed and in direct response to a
22 preliminary injunction, ACT immediately ceased some of the score flagging policies
23 as described herein and stipulated in open court to ceasing such policies pending this
24 litigation. However, ACT has not ceased other policies, including the policy of
25 assigning unique ACT IDs to Special Testing examinees. Moreover, ACT has
26

27 ⁶ See, e.g., Letter from the Office of Civil Rights, U.S. Dep't of Justice to Gonzaga University,
28 dated Nov. 8, 1996 (finding Gonzaga University violated the rule against preadmission disability
inquiries).

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1 indicated no intent to permanently and completely cease all score flagging policies,
2 continues to defend the legality of the score flagging policies, has delegated
3 responsibilities for score reporting and the EOS program to its recently-acquired
4 subsidiary Encoura, and refuses to inform members of the Class that the score
5 flagging policies existed. Furthermore, ACT has told examinees in the past that it did
6 not engage in score flagging and did not report specifics about students' disabilities,
7 even though both statements were false.

8 **E. ACT's Special Statewide Testing Arrangements with the States**

9 78. ACT has over thirty-one special arrangements with States pursuant to
10 which students are required to take the ACT Test or another type of ACT examination
11 for high school student assessment. At least twenty States require students to take the
12 ACT Test, and as a result, every single high school student in twenty States takes the
13 ACT Test.

14 79. For example, beginning in 2016, Nevada's State Board of Education
15 chose the ACT Test as the standardized exam for its College and Career Readiness
16 Assessment. Nevada juniors take the ACT Plus Writing, which consists of a 30-
17 minute writing test and 215 multiple-choice questions in four subject areas: English,
18 mathematics, reading and science. The test is administered at the student's school
19 during a regular school day in either the end of February or early March. A Nevada
20 student may use the score from the statewide administration of the ACT Test for his
21 or her college application. Nevada high school students also take the WorkKeys
22 examination which can certify then for the National Career Readiness Certificate and
23 allow tens of thousands of employers to access their personal information, including
24 disability information.

25 80. Title II of the ADA requires the States to administer their educational
26 programs requiring students to take the ACT Test in compliance with the ADA.
27 Section 12132 of the ADA provides: "[N]o qualified individual with a disability shall,
28 by reason of such disability, be excluded from participation in or be denied the

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1 benefits of services, programs, or activities of a public entity, or be subjected to
2 discrimination by any such entity." The implementing regulations prohibit the States,
3 "directly or through contractual arrangements," from "provid[ing] a qualified
4 individual with a disability with an aid, benefit, or service that is not as effective in
5 affording equal opportunity to obtain the same result, to gain the same benefit, or to
6 reach the same level of achievement as that provided to others." 28 C.F.R.
7 §130(f)(iii). States are required under the ADA to provide students with disabilities
8 taking a state-mandated standardized exam a reasonable accommodation.

9 81. When a State engages a private party like ACT to administer a program,
10 that private party becomes subject to the State's obligations under Title II of the ADA.
11 In 1993, U.S. Department of Justice ("DOJ") published a Technical Assistance
12 Manual ("TAM") pursuant to its responsibility to assist regulated public entities under
13 Title II of the ADA in understanding the scope of their responsibilities under the
14 ADA. *See* 42 U.S.C. § 12206.

15 82. The TAM provides: "In many situations, however, public entities have a
16 close relationship to private entities that are covered by Title III, with the result that
17 certain activities may be at least indirectly affected by both titles." The following are
18 examples of the types of public-private relationships that enmesh both Title II and
19 Title III obligations in joint activities:

- 20 • "ILLUSTRATION 1: A privately owned restaurant in a State park
21 operates for the convenience of park users under a concession
22 agreement with a State department of parks. As a public
23 accommodation, the restaurant is subject to title III and must meet
24 those obligations. The State department of parks, a public entity, is
25 subject to title II. The parks department is obligated to ensure by
26 contract that the restaurant is operated in a manner that enables the
27 parks department to meet its title II obligations, even though the
28 restaurant is not directly subject to title II."
- "ILLUSTRATION 3: A city engages in a joint venture with a private
corporation to build a new professional sports stadium. Where public
and private entities act jointly, the public entity must ensure that the

1 relevant requirements of title II are met; and the private entity must
2 ensure compliance with title III. Consequently, the new stadium
3 would have to be built in compliance with the accessibility guidelines
4 of both titles II and III. In cases where the standards differ, the
5 stadium would have to meet the standard that provides the highest
6 degree of access to individuals with disabilities."

7 TAM II-1.3000.

8 83. Many States and ACT recognize that students with disabilities taking a
9 state-mandated ACT-administered examination have rights under Title II of the ADA.
10 For example, students with disabilities may seek accommodations for mandatory
11 statewide administrations of the ACT test. However, ACT has created two distinct
12 classes of ACT test scores for state-tested students with accommodations. The first
13 class is for "ACT-approved accommodations," resulting in ACT scores that are
14 reportable to colleges, scholarship agencies, and other entities *in addition to* being
15 used for state-testing purposes. To be considered for ACT-approved
16 accommodations, examinee requests must be submitted and reviewed by ACT staff,
17 and if appropriate, by disability consultants. In addition, ACT administers the test to
18 students with disabilities with "non-college reportable accommodations," a second
19 class of examinees who do not meet ACT-approved accommodations eligibility
20 requirements (e.g., English language learners with no disabilities) or whose requested
21 accommodations are denied by ACT. These test results may only be used for state-
22 testing purposes and are not college reportable. If a student with a disability wants an
23 ACT Test score that is fully reportable to colleges, scholarships, and other institutions,
24 the student must obtain approval for the accommodations directly from ACT.

25 84. Registration for students required to take the ACT Test under State law
26 is a process that is typically administered by public schools and other state educational
27 agencies. Students are instructed and directed by State officials to register for the
28 ACT Test online at school during regular school hours. Students with disabilities
complete the same Student Profile Questionnaire as the one described above, with the
same disability-related question. Students taking the ACT Test under a state-

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Los Angeles, California 90025
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1 mandated administration sit for the ACT Test in State facilities, during regular school
2 hours, and under the direction of official State employees.

3 85. Private entities like ACT are strictly forbidden from interfering with a
4 student's exercise of his or her rights under the ADA to secure testing
5 accommodations. The ADA expressly prohibits anybody from "coerc[ing],
6 intimidat[ing], threaten[ing], or interfer[ing] with any individual in the exercise or
7 enjoyment of, or on account of his or her having exercised or enjoyed, or on account
8 of his or her having aided or encouraged any other individual in the exercise or
9 enjoyment of, any right granted or protected by [the ADA]." 42 U.S.C. §12203(b).
10 The implementing regulations of Title II expressly apply this anti-interference
11 provision to private entities like ACT: "(b) No private or public entity shall coerce,
12 intimidate, threaten, or interfere with any individual in the exercise or enjoyment of,
13 or on account of his or her having exercised or enjoyed, or on account of his or her
14 having aided or encouraged any other individual in the exercise or enjoyment of, any
15 right granted or protected by the Act or this part." 42 C.F.R. §35.134. As described
16 above, ACT is blatantly interfering with students' rights to testing accommodations
17 under Title II of the ADA by flagging their scores, acquiring and disclosing disability
18 status on score reports, discriminating between college-reportable and non-college
19 reportable accommodations, and chilling students' exercise of ADA rights under Title
20 II.

21 **F. ACT's Facially Discriminatory Denial of Special Testing Students**
22 **of the Opportunity to Participate in the EOS Program**

23 86. The allegations in this Section are based on evidence produced by ACT
24 in discovery or in prior filings in this action. Plaintiffs had no prior knowledge of
25 these facts, as they were never disclosed to Plaintiffs by ACT and are *nowhere*
26 publicly described.

27 87. ACT has established a facially discriminatory policy that excludes
28 Special Testing students from the EOS program and creates an additional unnecessary

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1 and arbitrary burden on them to participate in the program solely because of their
2 participation in accommodated testing. Special Testing students are students taking
3 the ACT Test with “documented disabilities requiring accommodations that cannot
4 be provided at a test center.” Every single Special Testing student is a student ACT
5 has determined is a person with disabilities.

6 88. A National Testing examinee and a Special Testing examinee may both
7 register to take the ACT exam online. Both examinees will be asked during online
8 registration if they wish to opt in to ACT’s EOS program. ACT claims on its website
9 and its written materials that students can opt into EOS during registration. If the
10 National Testing examinee responds “yes” to this question, this examinee will be
11 automatically included in ACT’s EOS program for every future ACT exam taken. If
12 the Special Testing examinee responds “yes” to this exact same question during this
13 exact same online registration, this Special Testing examinee’s response will be
14 secretly ignored by ACT even though their request to register for EOS is stored in
15 ACT's records. Every single Special Testing Examinee, in order to be included in
16 ACT’s EOS program, must enroll by taking additional steps in person at an ACT test
17 center on exam day in order to be included in the EOS program. The Special Testing
18 examinee’s response during online registration has no significance – each opt in must
19 take place in person at the physical space where the exam is being taken.

20 89. National Testing students are neither required to register for EOS at the
21 physical testing site on test day, nor are they even asked the registration question on
22 test day. ACT provides National Testing and Special Testing students different test
23 booklets and answer folders on test day. The test materials and answer folders of
24 National Testing examinees do not contain the EOS registration question at all. ACT,
25 through its proctors, asks only the Special Testing students the EOS registration
26 question on test day, and only the Special Testing examinees' materials for test day
27 include the EOS registration question.

28 90. As ACT has described the program, “EOS serves as a ‘bridge’ between

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1 postsecondary educational programs or opportunities and students who have
2 particular abilities, needs, plans, goals, or characteristics.” Yet, these Special Testing
3 students (including some of the Plaintiffs) are denied access to this “bridge” by being
4 subjected to an additional burden that National Testing students need not undergo.
5 ACT has touted the benefits of the EOS program to all examinees, as described above,
6 yet denies these benefits to Special Testing students (all of whom are individuals with
7 disabilities) through this facially discriminatory policy that treats Special Testing
8 students different in the registration process.

9 91. Plaintiffs Halie Bloom, Devon Linkon, John Doe, Jane Doe, M.B., and
10 A.C. all responded, "YES" online to the question of whether they wish to participate
11 in the EOS program. If they had only taken their ACT Tests at National Testing
12 Centers, they would have been part of the EOS program for all of their exam scores
13 and would have been given the opportunity to be recruited by colleges and scholarship
14 organizations.

15 92. But they were not. They were Special Testing students. Thus, they were
16 required to show up at the physical testing center on test day and register for EOS,
17 even though they had already told ACT they wished to participate. The answer folders
18 of these Plaintiffs were different than the answer folders for their National Testing
19 counterparts. The answer folders ACT provided them at the physical testing center
20 contained the EOS registration question, while the answer folders of the National
21 Testing examinees at the physical testing sites did not. *Compare* ECF 55-4, pp. 2-9
22 (National Testing Answer Folder) *with* ECF 55-4, pp. 14-17 (Special Testing Answer
23 Folder).

24 93. If a Special Testing student opted in to participate online like a National
25 Testing student, but failed to respond to the EOS release in their answer folders
26 on test day, the Special Testing student is excluded from the EOS program and
27 denied the opportunity to be recruited by colleges and scholarships through the
28 EOS program. ACT's policy is directly contradicted by what its Taking the ACT

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1 booklet tells Special Testing students on test day: "If you do not respond to this
2 question, your information will not be reported through EOS unless you
3 previously authorized release." Thus, ACT not only imposes the additional
4 burden on Special Testing students to opt in to participate in EOS on test day,
5 but also conceals the additional burden from such students.

6 94. Moreover, ACT knows that the discriminatory EOS registration policy
7 requiring Special Testing examinees to register for EOS at the physical testing centers
8 reduces participation of Special Testing examinees in the EOS program. When ACT
9 permits online registration, it asks the examinee directly whether they wish to enroll.
10 ACT *requires* every examinee to complete the EOS registration policy at the time of
11 online registration to complete test registration, guaranteeing a response from the
12 examinee. By contrast, ACT's EOS registration policy for Special Testing examinees
13 depends on proctors or test administrators at the physical testing site to solicit
14 examinee participation. Many proctors do not ask the students the EOS registration
15 question at all. There is no written policy holding proctors or administrators
16 accountable for failing to ask Special Testing examinees about their EOS preference.
17 Special Testing students rely upon a proctor or administrator to tell them about the
18 EOS option on test day, and even if this never comes up, there is no impact whatsoever
19 on any other part of the pre-test activities or the test itself. As a result of ACT's policy,
20 ACT knows that such proctors or administrators never ask the EOS question at all,
21 thereby denying Special Testing students of any opportunity to participate in the
22 program. Moreover, ACT publicly agreed (and continues to agree) to register Special
23 Testing examinees for EOS who opt in at the time of registration while secretly
24 excluding them from the program.

25 95. While school-based Special Testing may be designed to meet the
26 accommodation-related needs of those examinees with respect to the ACT Test, the
27 EOS enrollment policy requiring Special Testing examinees to register for EOS at the
28 physical test site has absolutely nothing to do with meeting their needs. It is an

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1 arbitrary, irrational, and discriminatory policy.

2 96. Plaintiffs Halie Bloom, Devon Linkon, John Doe, Jane Doe, M.B., and
3 A.C. did not respond to the EOS question in their answer documents on any or some
4 test days for tests taken before this suit was filed. Thus, even though they expressed
5 a prior intent to ACT that they would like to participate in the EOS program and be
6 recruited by colleges and scholarship organizations, they were effectively denied this
7 opportunity, *at the physical testing site*, with respect to all or some of their tests in
8 which they participated in Special Testing. And the sole reason they were denied this
9 opportunity was because they were subject to a discriminatory policy applicable
10 solely to Special Testing students, and ACT applied this policy to Special Testing
11 students at the physical testing site. They were required at the physical testing site to
12 register for EOS by answering a question on their answer folder that National Testing
13 students did not have to answer. If they were National Testing students, they would
14 have been participants in the EOS program for all their exams and in fact would never
15 have been required to respond to the EOS registration question again at the physical
16 testing site on test day.

17 97. To be clear, the physical testing site is the exclusive place where ACT
18 offers EOS to Special Testing examinees. Enrollment for Special Testing examinees
19 must occur at the physical testing site. The physical testing site is the location where
20 the discriminatory act occurs.

21 98. Specifically, Special Testing examinees are offered different answer
22 folders, with an EOS question, and receive different instructions from proctors
23 reflecting the different answer folders than National Testing examinees. The testing
24 centers are places of public accommodation that ACT operates for the limited
25 duration. A Special Testing examinee has no opportunity to enroll in EOS prior to
26 test day during online registration even though ACT led all examinees to believe that
27 they were making their EOS option during registration. If a Special Testing examinee
28 does not take additional steps, in person, on test day, at a place of public

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1 accommodation, such examinee will be excluded from the program. The EOS
2 registration question asked at the testing centers for Special Testing students – all of
3 whom need accommodations – differed from those at the National Testing centers.
4 Moreover, as a matter of ACT policy, the proctors at a Special Testing center are
5 instructed to ask students the EOS registration question while proctors at a National
6 Testing center do not. The reason is because while ACT purports to allow both
7 Special Testing and National Testing examinees to register for EOS at the time of
8 online registration, ACT actually bars Special Testing examinees from registering for
9 EOS online through act.org. Thus, ACT discriminates against Special Testing
10 examinees in the full and equal enjoyment of the EOS program, which is a service
11 ACT exclusively offers them at a physical space. There is an additional nexus
12 between the EOS program and the physical testing centers. All examinees must show
13 up, in person, at the physical testing center and take the ACT Test in order for their
14 test results to be included in EOS. To use an analogy, ACT's policy would be like
15 Domino's Pizza barring customers with disabilities from ordering pizza online simply
16 because they asked for disability accommodations. In fact, it is even worse. ACT's
17 policy would be like Domino's Pizza pretending to allow customers with disabilities
18 to order and prepay for pizza online for pick up. When the customers with disabilities
19 show up, they discover that Domino's Pizza faked the prior transaction and required
20 customers with disabilities – and only customers with disabilities – to go into a
21 physical store location and order and pay for the pizza again.

22 99. As a result of ACT's discriminatory EOS registration policy, the
23 percentage of National Testing students who opt in to participate in EOS is
24 substantially higher than the percentage of Special Testing students who do so. The
25 difference is staggering. The ratio of the percentage of Special Test examinees who
26 register for EOS to the percentage of National Test examinees who register for EOS
27 is well below twenty percent, flunking the judicially-accepted 80% rule. And this
28 facially discriminatory policy deprives Special Testing students of the benefits of the

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1 EOS program that ACT has heavily studied and publicized. As ACT has described
2 the program, "EOS serves as a 'bridge' between postsecondary educational programs
3 or opportunities and students who have particular abilities, needs, plans, goals, or
4 characteristics." ACT strongly encourages its examinees to opt in to EOS through the
5 "YES TO EOS" program. The Plaintiffs at issue did say YES to EOS. Yet, these
6 Plaintiffs and other similarly-situated Special Testing students were denied access to
7 the program by being subjected to an additional facially-discriminatory burden that
8 National Testing students need not undergo.

9 100. Plaintiffs challenge the discriminatory EOS registration policy under
10 disparate treatment and disparate impact theories.

11 **G. ACT's Testing Contracts**

12 101. At all relevant times, examinees registered in advance to take the ACT
13 Test. At the time of registration, students entered into a contract with ACT (the
14 "Testing Contract") and paid a registration fee. The registration fee was consideration
15 for the Testing Contract. ACT told examinees that the registration fee, which was,
16 for example, \$62.50 in the 2017-2018 testing year, "Includes reports for you, your
17 high school, and up to four colleges (if codes are provided when you register)." The
18 registration fee also included the right to take the ACT Test at a specified date and
19 time. ACT never told students they would receive additional benefits with the
20 registration fee alone.

21 102. The Testing Contracts contained Terms and Conditions: Testing Rules
22 and Policies for the ACT Test, which likewise contained variations of an arbitration
23 clause. The registration fee was the consideration for the Testing Contracts.

24 103. Nearly all examinees register for the test online and pay the registration
25 fee.

26 104. Nearly all examinees registering for the ACT Test are minors at the time
27 they register. ACT's records reflect the birth dates of all ACT examinees.

28 105. After taking the ACT Test, examinees can purchase Additional Score

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1 Reports (ASRs). ACT offers ASRs as "Additional Services" to students on its
2 website. As of the date of filing this lawsuit, ACT states: "Additional Score Reports
3 – \$13 – You can request additional score reports online or by providing an additional
4 score report form." Students must pay the separate fee for ASRs. ASRs are not
5 included in the registration fee. ASRs can be purchased online, by telephone, or by
6 mail.

7 106. At all relevant times, ACT never told examinees when they ordered the
8 ASRs that they would be bound by the Testing Contracts or otherwise agree to ratify
9 the Testing Contracts. ACT never explicitly mentioned or referenced the Testing
10 Contracts when any Plaintiff ordered ASRs. When Plaintiffs ordered ASRs, they
11 never told ACT they were agreeing to be bound by the Testing Contracts or otherwise
12 agreed to ratify the Testing Contracts. And the Testing Contracts themselves make
13 clear that ASRs are *not* benefits provided by the Testing Contracts—the Contracts
14 expressly state that the only score report benefits they provide are the four reports
15 students may request when they initially register for the exam.

16 107. By filing this lawsuit and/or by making a claim to participate in any
17 settlement or judgment and/or otherwise indicating by conduct or statements an intent
18 to disaffirm in any manner permitted by law, Plaintiffs and the absent Class Members
19 express an intent to disaffirm the Testing Contracts with ACT that contain limitations
20 on their remedies in *this* lawsuit (including statutory penalties and attorney's fees) and
21 applicable arbitration clauses on grounds of minority. The reason the Plaintiffs and
22 the absent Class Members disaffirm those Testing Contracts is that the Testing
23 Contracts purport to waive rights and remedies available to Plaintiffs and the absent
24 Class Members (including statutory penalties under the Unruh Act and attorney's fees
25 under the statutes forming the basis of the claims alleged).

26 **IV. PARTIES**

27 108. Defendant ACT is an Iowa corporation headquartered at 500 ACT Drive,
28 Iowa City, IA 52243. ACT does business throughout the United States.

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1 **A. Halie Bloom**

2 109. Halie Bloom is a 20-year old resident of Newport Beach, California who
3 graduated from a local public high school in 2018. Ms. Bloom has a history of ADHD
4 and a reading disability similar to dyslexia. She had an individual educational plan
5 (IEP) under the IDEA and a 504 Plan under the Rehabilitation Act in middle school
6 and high school, and she currently has a 504 Plan in college. Ms. Bloom's
7 accommodations for her disabilities have included the ability to use a page of notes
8 for exams, extended time on tests and quizzes, a distraction-free setting for tests and
9 quizzes, and exams and quizzes in audio format when necessary to ensure proper
10 comprehension. Ms. Bloom took the ACT Test four times with ACT-approved
11 accommodations consisting of multiple day testing with extended time and a
12 distraction-free setting based upon her IEP Plan. Due to Ms. Bloom's disabilities, she
13 needed to take her ACT tests through “Special” or “School” testing.

14 110. ACT acquired Ms. Bloom's disability status and need for school
15 accommodations through her testing registration and through documents and
16 information provided by her school counselor and annotated her score reports with
17 "learning or cognitive disability" that requires special provisions. ACT reported Ms.
18 Bloom's disabilities on all ACT Test score reports sent on her behalf to colleges to
19 which she applied and thereby flagged her score reports. She had no expectation that
20 ACT would include her disability status with her score reports or otherwise ever report
21 her confidential disability information.

22 111. ACT also reported her disability status through the EOS Program
23 without her permission. Ms. Bloom agreed to participate in the EOS program when
24 she registered to take the ACT. By responding “Yes” to EOS, Ms. Bloom agreed to
25 report her “name, address, gender, high school, email address, date of birth, year of
26 high school graduation, racial/ethnicity background, intended college major, and
27 occupational choice to colleges, universities, financial aid and scholarship agencies,
28 and organizations that offer educational programs.” She did not agree to report her

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1 disability status.

2 112. Without Ms. Bloom’s permission, ACT reported her disability status to
3 colleges, universities, scholarship organizations and other postsecondary
4 organizations by listing Ms. Bloom’s “learning and cognitive disability” as a
5 searchable data element for Specific Advising and Retention Uses. ACT also reported
6 her disability status in its other enrollment management and recruitment services,
7 including the ACT Enroll program, enabling colleges and scholarship organizations
8 to sort and exclude her on the basis of her disability status.

9 113. ACT also indicated to colleges, scholarships and other organizations
10 through her score reports, EOS and other ACT enrollment products that Halie is a
11 student with disabilities that cannot be accommodated in a standard test center by
12 disclosing the special testing location of her ACT exams.

13 114. Ms. Bloom currently attends the University of Arizona with a partial
14 scholarship that must be renewed annually.

15 115. Ms. Bloom is an individual with a disability within the meaning of 42
16 U.S.C. § 12102. Her impairments substantially limit major life activities of reading,
17 writing, learning concentrating, communicating, sitting for long periods, and the
18 operation of major bodily functions of the brain.

19 116. As of the date this Second Amended Complaint was filed, Ms. Bloom's
20 claims were stayed by the Court. Ms. Bloom reserves the right to amend this Second
21 Amended Complaint to assert the additional claims included in this Second Amended
22 Complaint if the stay of her claims is lifted.

23 **B. Devon Linkon**

24 117. Devon Linkon is an 19-year old resident of Newport Beach, CA. Devon
25 L. is a graduate of a local public high school. Mr. Linkon has a history of learning
26 disorders, an auditory processing disorder and dyslexia. In high school, Mr. Linkon
27 had an IEP and 504 Plan beginning in sixth grade. In college, Mr. Linkon has a 504
28 Plan. His accommodations have included extended testing time, distraction-free

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1 testing environments, confirmation of his comprehension of material, and test
2 question clarifications.

3 118. Mr. Linkon took the ACT Test four times with ACT-approved testing
4 accommodations consisting of extended time and multiple-day testing in an
5 alternative setting. ACT denied Mr. Linkon’s first request for accommodations, so
6 he took his first ACT exam without accommodations. ACT eventually granted Mr.
7 Linkon’s request for Special Testing accommodations but denied his request for a
8 proctor to read the questions to him and his request for permission to eat snacks in the
9 test room. Due to Mr. Linkon's disabilities, he needed to take his ACT tests through
10 “Special” or “School” testing. For his last exam, ACT did not provide Mr. Linkon
11 with his approved accommodations.

12 119. ACT acquired Mr. Linkon's disability status and need for
13 accommodations through his registration and through documents and information
14 provided by his school counselor and annotated his score reports with "multiple
15 disabilities" that require special provisions. ACT reported Mr. Linkon's disabilities
16 on all ACT Test score reports sent on his behalf to colleges to which he applied and
17 thereby flagged his score reports. He had no expectation that ACT would report his
18 disabilities with his score reports or otherwise ever report his confidential disability
19 information.

20 120. ACT also indicated to colleges, scholarships and other organizations
21 through his score reports, EOS and other ACT enrollment products that Mr. Linkon
22 is a student with disabilities that cannot be accommodated in a standard test center by
23 disclosing the special testing location of his ACT exams.

24 121. Mr. Linkon currently attends the University of Arizona with a partial
25 scholarship that must be renewed annually.

26 122. Mr. Linkon is an individual with a disability within the meaning of 42
27 U.S.C.. § 12102. His impairments substantially limit major life activities of reading,
28 writing, learning concentrating, communicating, sitting for long periods, and the

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1 operation of major bodily functions of the brain.

2 123. As of the date this Second Amended Complaint was filed, Mr. Linkon's
3 claims were stayed by the Court. Mr. Linkon reserves the right to amend this Second
4 Amended Complaint to assert the additional claims included in this Second Amended
5 Complaint if the stay of his claims is lifted.

6 **C. Emma L.**

7 124. Emma L. is a 21-year old resident of Colorado. Emma L. is a graduate
8 of a public high school in Colorado. Emma L. has a history of ADHD, anxiety,
9 processing speed disorders, and executive functioning disorder. In high school,
10 Emma L. had a 504 Plan that allowed her 50% extended time on tests and exams,
11 preferential seating, a distraction-free environment for test-taking, frequent teacher
12 monitoring and redirection from the teacher when necessary.

13 125. Emma L. took the ACT Test four times, including one time through
14 Colorado's state mandate that every Colorado student must take the ACT to graduate
15 from high school. ACT approved testing accommodations for Emma L. that consisted
16 of 50% extended time. When Emma L. took the state-mandated ACT test, ACT
17 collected information about disabilities requiring school provisions from Emma
18 through her registration and through documents and information ACT required from
19 her school counselor in order for Emma to obtain appropriate testing
20 accommodations. ACT annotated Emma's score reports with "Learning and cognitive
21 disabilities" that require special provisions. ACT reported Emma L's disabilities on
22 all ACT Test score reports sent on her behalf to colleges to which she applied and
23 thereby flagged her score reports. She had no expectation that ACT would report the
24 disabilities and accommodations that ACT acquired with her score reports or
25 otherwise ever report her confidential disability information.

26 126. ACT also reported Emma L.'s disability and accommodations as soon as
27 she registered to test to thousands of colleges and scholarship agencies throughout the
28 United States through the EOS Program without her permission. Emma L. agreed to

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1 participate in the EOS program when she registered to take the ACT. By responding
2 “Yes” to EOS, Emma L. agreed to report her “name, address, gender, high school,
3 email address, date of birth, year of high school graduation, racial/ethnicity
4 background, intended college major, and occupational choice to colleges, universities,
5 financial aid and scholarship agencies, and organizations that offer educational
6 programs.” She did not agree to report her disability status.

7 127. Without Emma L.’s permission, ACT reported her disability status to
8 colleges, universities, scholarship organizations and other postsecondary
9 organizations by listing Emma L.’s “learning and cognitive disability” as a searchable
10 data element for Specific Advising and Retention Uses. ACT also reported her
11 disability status in its other enrollment management and recruitment services,
12 including the ACT Enroll program, enabling colleges and scholarship organizations
13 to sort and exclude her on the basis of her disability status.

14 128. Emma L. currently attends a 4-year liberal arts college with partial
15 financial aid that is renewable annually.

16 129. Emma L. is an individual with a disability within the meaning of 42
17 U.S.C. § 12102. Her impairments substantially limit major life activities of reading,
18 writing, learning concentrating, communicating, sitting for long periods, and the
19 operation of major bodily functions of the brain.

20 130. As of the date this Second Amended Complaint was filed, Emma L.'s
21 claims were stayed by the Court. Emma L. reserves the right to amend this Second
22 Amended Complaint to assert the additional claims included in this Second Amended
23 Complaint if the stay of her claims is lifted.

24 **D. John Doe**

25 131. John Doe is an 18-year old resident of Orange County, California. John
26 Doe is a high school senior. John Doe was diagnosed with Attention Deficit
27 Hyperactivity Disorder (ADHD), written expression disorder and developmental
28 coordination disorder in the third grade. John Doe has received school

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1 accommodations since third grade and received accommodations in high school
2 consisting of extended testing time, a distraction-limited testing environment, and
3 multiple-day testing.

4 132. John Doe took the ACT Test in September 2017 with ACT-approved
5 accommodations consisting of double time and multiple-day testing. John Doe
6 requested accommodations on the basis of his psychoeducational report and his
7 school accommodations plan. Due to John Doe’s disabilities, he needed to take his
8 ACT test through “Special” or “School” testing.

9 133. John Doe scored a perfect 36 out of 36 on the ACT. ACT acquired John
10 Doe's sensitive disability status through his registration – "learning and cognitive
11 disability"- and the resulting need for school provisions, and through documents and
12 information ACT required by ACT in order for John Doe to obtain appropriate testing
13 accommodations, including detailed information about testing and school
14 accommodations. Absent injunctive relief from this Court, ACT will report John
15 Doe’s disability status to colleges. John Doe had no expectation that ACT would
16 report his disability status to colleges or ever report his confidential disability
17 information.

18 134. John Doe is in the process of applying to colleges and plans to
19 matriculate in the Fall of 2019.

20 135. John Doe is an individual with a disability within the meaning of 42
21 U.S.C.. § 12102. His impairments substantially limit major life activities of reading,
22 writing, learning concentrating, communicating, sitting for long periods, and the
23 operation of major bodily functions of the brain.

24 136. As of the date this Second Amended Complaint was filed, Ms. Bloom's
25 claims were stayed by the Court. Ms. Bloom reserves the right to amend this Second
26 Amended Complaint to assert the additional claims included in this Second Amended
27 Complaint if the stay of her claims is lifted.

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E. Sam M.

137. Steven and Molly M. are residents of Las Vegas, Nevada and the legal parents of Sam. M.

138. Sam. M. is an 18-year old resident of Las Vegas, Nevada. He is enrolled in a high school in the Clark County School District in Nevada. Sam M. has a diagnosis of autism for which he has received special education services and accommodations in his Nevada public school. In high school, he has received special education classes and has an IEP pursuant to which he receives testing and educational supports consisting of a small group setting, monitored breaks, and use of an electronic device. Due to Sam’s disabilities, he needed to take his ACT tests through “Special” or “School” testing.

139. Sam. M. took the ACT Test in February 2018 as part of Nevada's state-wide mandate that every Nevada junior take the ACT Test. ACT approved testing accommodations for Sam based upon his IEP submitted by his school counselor. His ACT accommodations consisted of a small group setting, extra time, and the ability to take the exam over the course of a day at his own pace. Sam M. currently has a 3.857 grade point average. He intends to apply to college after graduating high school.

140. Sam M. also took ACT’s WorkKeys assessment as part of Nevada’s state mandate. Sam’s assessment results, his testing accommodations and disability status were reported to his school and the State of Nevada, and his disability accommodations are stored in ACT’s database that is accessible to employers nationwide.

141. Upon information and belief, ACT acquired the disability and accommodations information of Sam M. when he registered for and/or took the ACT Test, through the information necessary for Sam to obtain accommodations, and through the student data upload process required by ACT for State testing students. Upon information and belief, ACT has reported such disability and accommodations

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1 information to colleges, scholarships and other third parties, including in California.
2 142. Sam M. is an individual with a disability within the meaning of 42
3 U.S.C.. § 12102. His impairments substantially limit major life activities of reading,
4 writing, learning concentrating, communicating, sitting for long periods, and the
5 operation of major bodily functions of the brain.

6 143. Sam M. was a minor when he entered into the Testing Contracts with
7 ACT. Sam M. therefore has a right under California law to disaffirm the Testing
8 Contracts. Sam M. has expressly disaffirmed the Testing Contracts.

9 **F. Caroline L.**

10 144. Caroline L. is an 18-year old resident of Colorado and a senior in high
11 school. Caroline has a history of ADHD, anxiety, and a reading disability. Caroline
12 L. has a learning plan that allows her extra time on exams, preferential seating away
13 from distractions, small group settings, a calculator for math, a computer with spell
14 check, the ability to retake exams, copies of notes when requested, frequent breaks,
15 oral assessments, access to audio text, alternative assessments in lieu of exams,
16 multiple sittings, and teacher-approved note cards.

17 145. Caroline L. took the ACT Test three times.. ACT-approved testing
18 accommodations for Caroline L. consisting of double time, a computer for the essay,
19 and multiple-day testing. ACT rejected Caroline's request for triple time. Caroline's
20 school counselor was required by ACT to submit a school accommodations plan and
21 a psychoeducational report to ACT to support her request for accommodations. Due
22 to Caroline's disabilities, she needed to take his ACT tests through "Special" or
23 "School" testing.

24 146. During the registration process, ACT acquired information that
25 Caroline had "multiple disabilities" that require special provisions from her school.
26 Absent injunctive relief from this Court, ACT will report Caroline L.'s disability
27 status to colleges. Caroline L. had no expectation that ACT would report her disability
28 status to colleges or ever report her confidential disability information.

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1 147. Caroline L. is in the process of applying to colleges and plans to
2 matriculate in the Fall of 2019.

3 148. Caroline L. is an individual with a disability within the meaning of 42
4 U.S.C. § 12102. Her impairments substantially limit major life activities of reading,
5 writing, learning concentrating, communicating, sitting for long periods, and the
6 operation of major bodily functions of the brain.

7 149. Caroline L. was a minor when she entered into the Testing Contracts
8 with ACT. Caroline L. therefore has a right under California law to disaffirm the
9 Testing Contracts. Caroline L. has expressly disaffirmed the Testing Contracts.

10 **G. Jane Doe**

11 150. Jane Doe. is an 18-year old resident of California and currently a high
12 school senior at an Orange County public high school who is in the process of
13 applying to college. Jane Doe has a history of ADHD and generalized anxiety
14 disorder. She was first diagnosed in third grade. Jane Doe has a 504 Plan that allows
15 for testing and other accommodations in school due to her disabilities.

16 151. Jane Doe has taken the ACT Test three times, all in California. ACT
17 approved accommodations for Jane Doe with respect to each exam administration on
18 the basis of documentation and information ACT required, including her 504 Plan and
19 her medical diagnosis. Due to Jane Doe’s disabilities, she needed to take her ACT
20 Tests through “Special” or “School” testing.

21 152. ACT acquired information that Jane Doe has a "Learning/Cognitive
22 Disability" that requires special provisions from her school during the registration for
23 and/or administration of the ACT Tests. Absent injunctive relief from this Court,
24 ACT would report Jane Doe’s disability status to colleges on Jane Doe’s ACT score
25 report. Jane Doe had no expectation that ACT would report her disability status on
26 her score report to colleges or ever disclose her confidential disability information.

27 153. Jane Doe is currently applying to colleges, scholarships, and financial
28 aid for the fall of 2019.

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1 154. Jane Doe is an individual with a disability within the meaning of 42
2 U.S.C. § 12102. Her impairments substantially limit major life activities of reading,
3 writing, learning concentrating, communicating, sitting for long periods, and the
4 operation of major bodily functions of the brain.

5 155. Jane Doe opted in to EOS online. Despite this, as a Special Testing
6 student, she did not respond to the EOS authorization on test day. As a result of ACT's
7 facially discriminatory policy, she was not part of the EOS program at all. As a result,
8 she was denied the opportunity to be part of the searches conducted by colleges and
9 scholarship agencies to identify students to whom they want to market or they want
10 to recruit.

11 156. Jane Doe was a minor when she entered into the Testing Contracts with
12 ACT. Jane Doe therefore has a right under California law to disaffirm the Testing
13 Contracts. Jane Doe has expressly disaffirmed the Testing Contracts. Jane Doe
14 ordered ASRs after turning eighteen but before disaffirming the Testing Contract. In
15 doing so, however, Jane Doe did not intend to accept benefits under or ratify the
16 Testing Contracts, which by their terms do not provide ASRs.⁷

17 **H. M. B.**

18 157. M. B. is an 18-year old resident of Orange County, California. M. B. is
19 a high school senior. M. B. was first diagnosed with ADHD in kindergarten, and has
20 received school accommodations for his disabilities, including extended testing time
21 and a distraction-limited testing environment.

22 158. M. B. took the ACT Test three times, all in California. ACT approved
23 accommodations for M. B. with respect to each exam administration on the basis of
24 documentation and information required by ACT, including his school
25

26 ⁷ While this Court has denied Plaintiffs like Jane Doe the ability to disaffirm a
27 Testing Contract when the Plaintiff ordered ASRs after turning 18 years old, Jane
28 Does makes these allegations to the extent the appeal of the Court's order to the U.S.
Court of Appeals for the Ninth Circuit is successful.

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1 accommodations plan and medical information. Due to M.B.’s disabilities, he needed
2 to take his ACT tests through “Special” or “School” testing.

3 159. ACT acquired information that M. B. has a "Learning/Cognitive
4 Disability" that requires school provisions during the registration for and/or
5 administration of the ACT Tests by collecting detailed information about his
6 disability and school accommodations plan. . Absent injunctive relief from this Court,
7 ACT would report M. B.'s disability status to colleges, scholarships, and other third
8 parties. M. B. had no expectation that ACT would report her disability status on her
9 score report to colleges or ever report her confidential disability information to
10 anyone.

11 160. M. B. plans to apply to colleges in the Fall of 2018. M. B. also plans to
12 apply for scholarships and financial aid.

13 161. M. B. is an individual with a disability within the meaning of 42 U.S.C.
14 § 12102. His impairments substantially limit major life activities of reading, writing,
15 learning concentrating, communicating, sitting for long periods, and the operation of
16 major bodily functions of the brain.

17 162. M.B. opted in to EOS at the time he registered to take the ACT Test. As
18 a Special Testing student, he did not respond to the EOS authorization on test day.
19 Despite opting in to EOS online at the time he registered, he was not part of the EOS
20 program at all as a result of ACT's facially discriminatory policy treating Special
21 Testing students differently than National Testing students. As a result, he was denied
22 the opportunity to be part of the searches conducted by colleges and scholarship
23 agencies to identify students to whom they want to market or they want to recruit.

24 163. M.B. was a minor when he entered into the Testing Contracts with ACT.
25 M.B. therefore has a right under California law to disaffirm the Testing Contracts.
26 M.B. has expressly disaffirmed the Testing Contracts.

27 **I. A. C.**

28 164. A. C. is a resident of Orange County, California who graduated from a

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1 local public high school in 2014. A. C. has a diagnosis of ADHD and executive
2 functioning disorder and had special education services through her school district
3 since second grade under the IDEA and Section 504 of the Rehabilitation Act. Her
4 accommodations have including extended time on testing, testing in a distraction-free
5 environment, and a Learning Strategies course in high school. A. C. currently attends
6 community college where she receives accommodations.

7 165. A. C. took the ACT in April, June and October of 2013 with ACT-
8 approved accommodations including multiple-day testing, double time, and a
9 distraction-free environment. Due to A. C.’s disabilities, she needed to take her ACT
10 tests through “Special” or “School” testing. ACT would not assist A.C. with
11 obtaining a qualified Special Testing proctor to administer her ACT exams with the
12 accommodations she needed, so A. C.’s parents had to search themselves for a
13 qualified proctor to administer the ACT exams.

14 166. ACT acquired A. C.’s disability status and school accommodations plan
15 through her testing registration and through documents and information provided by
16 her school counselor and annotated her score reports with "learning or cognitive
17 disability" that requires special provisions. ACT reported A. C.’s disabilities and need
18 for accommodations on all ACT Test score reports sent on her behalf to colleges to
19 which she applied and thereby flagged her score reports. She had no expectation that
20 ACT would include her disability or need for accommodations with her score reports
21 or otherwise ever report her confidential disability-related information.

22 167. ACT also reported her disability and need for accommodations through
23 the EOS Program without her permission. A. C. agreed to participate in the EOS
24 program when she registered to take the ACT. By responding “Yes” to EOS, A. C.
25 agreed to report her “name, address, gender, high school, email address, date of birth,
26 year of high school graduation, racial/ethnicity background, intended college major,
27 and occupational choice to colleges, universities, financial aid and scholarship
28 agencies, and organizations that offer educational programs.” She did not agree to

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1 report her disability status. Despite this, ACT misleadingly reported her disability
2 status.

3 168. Without A. C.’s permission, ACT reported her disability status to
4 colleges, universities, scholarship organizations and other postsecondary
5 organizations by listing A.C’s “learning and cognitive disability” as a searchable data
6 element for Specific Advising and Retention Uses. ACT also reported her disability
7 status in its other enrollment management and recruitment services, including the
8 ACT Enroll program (or its predecessor), enabling colleges and scholarship
9 organizations to sort and exclude her on the basis of her disability status.

10 169. ACT also indicated to colleges, scholarships and other organizations
11 through her score reports, EOS and other ACT enrollment products that A. C. is a
12 student with disabilities that could not be accommodated in a standard test center by
13 disclosing the special testing location of her ACT exams.

14 170. A. C. plans to transfer to a 4-year university with a scholarship and/or
15 financial aid.

16 171. A. C. is an individual with a disability within the meaning of 42 U.S.C.
17 § 12102. Her impairments substantially limit major life activities of reading, writing,
18 learning concentrating, communicating, sitting for long periods, and the operation of
19 major bodily functions of the brain.

20 172. A.C. opted in to EOS before and at the time she registered to take the
21 ACT Test. Despite this, as a Special Testing student, she did not respond to the EOS
22 authorization on test day for two of three of her tests. As a result of ACT's facially
23 discriminatory policy, she was denied the opportunity to be part of the EOS program
24 for her best composite ACT score. Instead, she was part of the EOS program for one
25 of her lower scores. As a result, she was denied the opportunity to be part of the
26 searches conducted by colleges and scholarship agencies to identify students to whom
27 they want to market to or they want to recruit. For the one test administration she did
28 successfully enroll in EOS, she was denied the opportunity to be recruited by colleges

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1 on the basis of her disability because colleges search for examinees with disabilities
2 (e.g. motor impairment) or searched for examinees with A.C.'s disabilities with a
3 higher ACT score value (e.g. learning/cognitive disability with a 32 ACT score,
4 because the college desires a higher cut-off for those with learning disabilities. In any
5 case, A.C. wished to enroll in EOS to have the opportunity to be recruited by colleges
6 and offered scholarships on the basis of her ACT score and other appropriate and
7 lawful *admissions* criteria (e.g. State and academic interests), but did not want such
8 recruitment efforts to be made on the basis of her disability – a flatly illegal
9 admissions criteria.

10 173. A. C. plans to apply for transfer admissions in the 2019-2020 college
11 admissions process. She is currently attending a community college and wishes to
12 complete her Bachelor’s Degree. A.C. She has a firm, definite, and concrete plan to
13 order ACT score reports when she does to qualify for admissions and scholarships,
14 and her ACT score reports will be flagged with information about the existence of
15 accommodations or disability. ACT continues to use unique ACT IDs for examinees,
16 including A.C., and ACT continues to defend its policy of annotating score reports
17 with disabilities in this lawsuit. Upon information and belief, ACT intends to resume
18 the policy of annotating score reports with disabilities if judgment against ACT is not
19 entered in this suit. In fact, after this lawsuit was filed, ACT completely *eliminated*
20 its promise to examinees (including A.C.) that it will *not* report specifics about an
21 examinees' disabilities on college score reports.

22 174. A.C.'s claims (and the claims of all other similarly situated) for
23 retrospective relief based on ACT's discriminatory EOS program have been tolled
24 under the continuing violations doctrine, the discovery rule, equitable estoppel,
25 minor's tolling, and fraudulent concealment. Specifically:

26 (a) ACT asked A.C. each time such Special Testing Class member
27 registered for the ACT Test whether she wished to enroll in EOS. A.C. responded,
28 "Yes" each and every time. Despite indicating an intent to enroll, ACT in fact

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1 secretly excluded A.C. from EOS for her exam administrations for which A.C. did
2 not enroll in EOS on test day in her answer folders. ACT never informed A.C. she
3 would be excluded from EOS against her express intent to the contrary. ACT never
4 informed A.C. that A.C. would need to opt in to EOS in the answer folder on test
5 day in order to actually enroll in EOS. ACT simply misled A.C. into believing that
6 A.C. was enrolled in EOS for the relevant exam administrations when in fact she
7 was not. A.C. had no reason to suspect that ACT excluded her from EOS because
8 A.C. had previously told ACT she wished to enroll and ACT purported to agree to
9 enroll A.C. in EOS. ACT never informed A.C. that her EOS registration would be
10 treated differently due to her testing accommodations and her preference would be
11 ignored.

12 (b) In fact, on test day, ACT purports to tell all Special Testing Class
13 members (including A.C.) that a prior authorization to enroll in EOS is effective for
14 all future exams. Specifically, ACT told all Special Testing Class members
15 (including A.C.) when asked if they wish to enroll in EOS on test day: "If you do
16 not respond, your information will not be sent [to colleges] unless you authorized
17 release when you previously registered for or took the ACT." This statement is
18 false. A.C. authorized ACT to release her information when she she previously
19 registered for the ACT. A.C. did not respond to the EOS questions on test day. Yet,
20 she was not part of the EOS program.

21 (c) ACT never told A.C. or any examinees that ACT would allow colleges
22 to search for them on the basis of their disabilities. At all relevant times, ACT asked
23 examinees, including A.C., to authorize ACT to send the following information to
24 colleges about them: name, address, date of birth, year of
25 high school graduation, gender, high school, e-mail address, racial/ethnic
26 background, and intended college major. ACT never told any examinees that
27 it would permit colleges to search for them on the basis of their disabilities or even
28 on the basis of their ACT scores. In fact, recognizing it did not have authorization

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1 to report or use disability information through EOS, ACT amended its EOS
2 authorization after and in response to this lawsuit to state: "[A]ny information you
3 choose to provide in the Student Profile Section [including disability information],
4 as well as your ACT test score range, may be reported to and used by these
5 organizations to assist in identifying candidates for educational, scholarship, and
6 financial aid opportunities." This language was noticeably absent at the time A.C.
7 enrolled in EOS.

8 (d) A.C. did not discover and did not know that she was not enrolled in
9 EOS for two of three exam administrations (including her strongest exam
10 administration) until ACT filed a declaration in this case stating that Special Testing
11 class members in her situation were not enrolled based on any preference other than
12 that stated in their answer folder at the physical testing center. A.C. knew of no
13 facts that would have caused her to suspect she was excluded from EOS for those
14 two administrations because ACT told her she was in fact enrolled by soliciting and
15 obtaining her express authorization and ACT publicly misrepresented that a prior
16 authorization meant the Special Testing examinee was enrolled even if the Special
17 Testing examinee did not respond to the EOS opt-in on test day.

18 (e) Had A.C. had any notice of her exclusion from the EOS program
19 (which she did not), no amount of investigation would have led A.C. to suspect she
20 was excluded from participation in EOS against her intent. To this day, A.C.'s
21 online profile on ACT indicates she has enrolled in EOS. ACT has no public
22 information about the policies being challenged here with respect to EOS and
23 Special Testing Class members. A.C. had no opportunity to detect or observe the
24 violations at issue here.

25 (f) All EOS searches for disability were private transactions between ACT
26 and colleges/universities. A.C. had no opportunity to detect the EOS searchability
27 policy being challenged here.

28 (g) A.C. was an unsophisticated minor at all relevant times the violations

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1 occurred. She lacked a high school degree.

2 175. A.C.'s claims (and the claims of all other similarly situated) for
3 retrospective relief based on ACT's score flagging policies have been tolled under the
4 continuing violations doctrine, the discovery rule, equitable estoppel, minor's tolling,
5 or fraudulent concealment. Specifically:

6 (a) ACT fraudulently concealed the score flagging policies at issue.
7 At all relevant times, ACT publicly stated a policy that it did not report disabilities
8 or accommodations on college score reports – full stop. This policy was expressed
9 in its Policy on Accommodations and on its webpage for examinees with disabilities
10 under the heading "Confidentiality." This policy was intended to encourage
11 examinees to give their disability information to ACT without fear it would be
12 reported to colleges, and was intended to comply with the law. ACT publicly stated
13 starting in 2002 that it had ceased its policy of annotating score reports with
14 accommodations or disabilities. All relevant Google search results for "ACT test
15 score flagging" or "ACT test disabilities reporting" for the period before the filing of
16 this lawsuit either show ACT's repeated public statements it has ceased annotating
17 score reports with disabilities or accommodations or ACT's statement it does not
18 report specifics about disabilities on college score reports. Against these publicly
19 stated positions, ACT never told A.C. or any examinee that it would report disability
20 or accommodation information on a college score report. And ACT asked for
21 disability information of A.C. (and other similarly situated class members) on
22 countless occasions – at least three times at the time of the standardized registration
23 form, as part of ACT's application for accommodations, and once on test day. ACT
24 never once told A.C. that any of her responses or information would be the basis for
25 flagging her scores. In fact, ACT told A.C. precisely the opposite.

26 (b) The discovery rule tolls the statute of limitations. A.C.
27 discovered the score flagging policies after this lawsuit was filed. She had heard
28 about the lawsuit from her mother, who had heard media reports about the lawsuit.

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1 Before that time, she had no reason to suspect that her college score reports were
2 flagged. As noted above, she had no reason to suspect the score flagging policies
3 because ACT publicly promised all examinees (including A.C.) that it did not report
4 disabilities or accommodations on college score reports. The score flagging policies
5 at issue were difficult, if not impossible, to detect because ACT did not allow any
6 examinee (including A.C.) to receive their *college* score report and did not send
7 such examinees a copy of their college score report. College score reports were
8 *strictly private* communications between the college and ACT. ACT sent A.C. and
9 other examinees a *student* score report without any specific disability information
10 on it, showing an intent to conceal the policy from examinees. A.C. was an
11 unsophisticated minor without a high school degree at the time she provided ACT
12 with her disability information and transacted with ACT. ACT never told A.C. or
13 other examinees that disability information would be part of a *college* score report.
14 By contrast, ACT expressly told examinees the information that would be reported
15 on college score reports. In fact, ACT did not obtain express and specific consent
16 from examinees to report or otherwise use their disability information for purposes
17 other than accommodations. To the extent examinees allowed ACT to permit
18 reporting of examinee information solely to those with a legitimate reason to use it,
19 ACT knew that colleges had no legitimate reason to use disability information pre-
20 admissions, as ACT knew they were (and are) expressly forbidden to do so.

21 (c) No amount of investigation would have reported the college score
22 flagging policies to A.C. Any investigation A.C. could have made would have
23 merely reported ACT's repeated statements that (1) it ceased reporting disability-
24 required accommodations on score reports and (2) it never discloses specifics about
25 an examinee's disabilities. No publicly available source would have shown that
26 A.C.'s college score reports were flagged. Applicable laws and ACT's own policies
27 prohibit the reporting of student disabilities, including ACT's policy for
28 accommodations, the Federal Educational Rights and Privacy Act, and the

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1 Individuals with Disabilities Education Act. To this day, ACT continues to prevent
2 examinees (including A.C.) from easily determining whether their specific score
3 reports were flagged absent joining in this lawsuit. ACT has removed the relevant
4 disability questions from every examinees' online profile, thereby preventing them
5 from detecting whether they were subjected to the score flagging policies, and has
6 refused to permit examinees to inspect their ACT college score records. It does not
7 tell any examinee the information it includes on college score reports and does not
8 send examinees what a college score report looks like or notify examinees where to
9 find a sample college score report.

10 (d) Generally, these score flagging practices were not public until the
11 Department of Education issued a technical bulletin in May 2018. That technical
12 bulletin warned public educational agencies that ACT's collection of student
13 disability information in a manner that indicates "each of the questions requires a
14 response" and the voluntary nature of which was not "well understood" may run
15 afoul of disability laws. Before this bulletin, there was nothing public about these
16 practices other than ACT's public denials of them.

17 (e) A.C. was not aware of score flagging in general and did not suspect that
18 her own scores may have been flagged until October 2018 when her mother made
19 her aware of this lawsuit. She did know that she gave ACT information about her
20 disabilities and accommodations as part of her test registration process and as
21 support for her accommodations. But as alleged above, ACT promised all
22 examinees not to report disabilities or the need for accommodations to colleges.

23 **J. Jaquel Pitts**

24 176. Jaquel Pitts is a citizen of California who graduated from a public high
25 school in 2012. Mr. Pitts has professionally diagnosed disabilities and has received
26 accommodations since middle school. Mr. Pitts was placed in foster care as a youth
27 and had a Court-appointed educational surrogate making all decisions on his behalf.
28 Despite being a ward of the State from a young age, and despite financial challenges,

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1 Mr. Pitts learned to value the need for higher education and currently attends Fullerton
2 College.

3 177. Mr. Pitts took the ACT Test three times – February 2012, September
4 2012, and October 2012. He tested at a Residual and a National Test Center.

5 178. Mr. Pitts took the ACT with the assistance of federal fee waivers such as
6 GEAR UP and TRIO provided to him through federal grants intended specifically for
7 ACT registration fees.

8 179. ACT approved testing accommodations for Mr. Pitts on the basis of his
9 disabilities.

10 180. ACT acquired the disability and accommodations information of Mr.
11 Pitts through his testing registration and documentation submitted by his school and
12 annotated his score reports with a disability that requires special provisions. As Mr.
13 Pitts is a National Test examinee, ACT reported Mr. Pitts' disabilities on all ACT Test
14 score reports sent on his behalf to colleges to which he applied and thereby flagged
15 his score reports.

16 181. Mr. Pitts was a participant in ACT's EOS program. By responding “Yes”
17 to EOS, Mr. Pitts agreed to permit ACT to report his “name, address, gender, high
18 school, email address, date of birth, year of high school graduation, racial/ethnicity
19 background, intended college major, and occupational choice to colleges, universities,
20 financial aid and scholarship agencies, and organizations that offer educational
21 programs.” He did not agree to permit colleges to use her disability as a search
22 criterion or to otherwise receive his disability information.

23 182. Mr. Pitts is an individual with a disability or otherwise an individual
24 regarded as having a disability within the meaning of 42 U.S.C. § 12102. His
25 impairments substantially limit major life activities or are otherwise regarded by ACT
26 as being so. ACT recognizes that Mr. Pitts is an individual with a disability, as ACT
27 approved testing accommodations for his on the basis of his disability and Mr. Pitts
28 informed ACT that he has disabilities requiring special provisions.

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1 183. Mr. Pitts plans to apply for transfer admissions in the Spring 2020
2 college admissions process, as he currently attends a college that offers only
3 associates degrees, and he plans to obtain a Bachelor’s Degree from a four-year
4 college. Mr. Pitts is relying on financial aid to complete his degree, so he plans to
5 order ACT score reports to qualify for scholarships, and when he does, his ACT score
6 reports will be flagged with information about the existence of accommodations or
7 disabilities. ACT continues to defend its policy of annotating score reports with
8 disabilities and accommodations in this lawsuit. Upon information and belief, ACT
9 intends to resume the policy of annotating score reports if judgment against ACT is
10 not entered in this suit. In fact, after this lawsuit was filed, ACT completely
11 *eliminated* its promise to examinees (including Mr. Pitts) that it will *not* report
12 specifics about an examinees' disabilities on college score reports.

13 184. Mr. Pitts did not actually discover ACT's policies at issue until April
14 2019. He first learned about the score flagging policies and the EOS disability policy
15 in early April 2019, when he learned about the lawsuit on social media and began
16 looking into whether he had claims. His claims are nevertheless timely under the
17 continuing violations doctrine, the discovery rule, equitable estoppel, or fraudulent
18 concealment.

19 185. Mr. Pitts's claims (and the claims of all other similarly situated)
20 for retrospective relief based on ACT's discriminatory EOS program have been tolled
21 under the continuing violations doctrine, the discovery rule, equitable estoppel,
22 minor's tolling, and fraudulent concealment. Specifically:

23 (a) All EOS transactions in which a college excluded Mr. Pitts on the basis
24 of his disability were private transactions between ACT and the colleges. Mr. Pitts
25 had no opportunity to learn of these searches and exclusions because they were
26 secretive, confidential, and private. ACT never told Mr. Pitts or any examinees that
27 ACT would allow colleges to search for them on the basis of their disabilities. At
28 all relevant times, ACT asked examinees, including Mr. Pitts, to authorize ACT to

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1 send the following information to colleges about them: name, address, date of birth,
2 year of high school graduation, gender, high school, e-mail address, racial/ethnic
3 background, and intended college major. ACT never told any examinees that it
4 would permit colleges to search for them on the basis of their disabilities or even on
5 the basis of their ACT scores. In fact, recognizing it did not have authorization to
6 report or use disability information through EOS, ACT amended its EOS
7 authorization after and in response to this lawsuit to state: "[A]ny information you
8 choose to provide in the Student Profile Section [including disability information],
9 as well as your ACT test score range, may be reported to and used by these
10 organizations to assist in identifying candidates for educational, scholarship, and
11 financial aid opportunities." This language was noticeably absent at the time Mr.
12 Pitts enrolled in EOS.

13 (b) Mr. Pitts was an unsophisticated minor at all relevant times the
14 violations occurred. He lacked a high school degree.

15 (c) ACT permitted colleges to search for Mr. Pitts on the basis of his
16 disability within the applicable statute of limitations period, resulting in a continuing
17 violation.

18 186. Mr. Pitts' claims (and the claims of all other similarly situated) for
19 retrospective relief based on ACT's score flagging policies have been tolled under the
20 continuing violations doctrine, the discovery rule, equitable estoppel, minor's tolling,
21 or fraudulent concealment. Specifically:

22 (a) ACT fraudulently concealed the score flagging policies at issue.
23 At all relevant times, ACT publicly stated it did not report disabilities or
24 accommodations on college score reports – period. This policy was expressed in its
25 Policy on Accommodations, was intended to encourage examinees to give their
26 disability information to ACT without fear it would be reported to colleges, and was
27 intended to comply with the law. ACT publicly stated starting in 2002 that it had
28 ceased its policy of annotating score reports with accommodations or disabilities.

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1 All relevant Google search results for "ACT test score flagging" or "ACT test
2 disabilities reporting" for the period before the filing of this lawsuit either show
3 ACT's repeated public statements it has ceased annotating score reports with
4 disabilities or accommodations or ACT's statement it does not report specifics about
5 disabilities on college score reports. Against these publicly stated positions, ACT
6 never told Mr. Pitts or any examinee that it would report disability or
7 accommodation information on a college score report.

8 (b) The discovery rule tolls the statute of limitations. Before his
9 discovery of them, the score flagging policies at issue were difficult, if not
10 impossible, to detect because ACT did not allow any examinee to receive a *college*
11 score report. College score reports were *strictly private* communications between
12 the college and ACT. ACT sent Mr. Pitts and other examinees a student score
13 report without any specific disability information on it. Mr. Pitts was an
14 unsophisticated minor without a high school degree at the time he provided ACT
15 with her disability information and transacted with ACT. ACT never told Mr. Pitts
16 or other examinees that disability information would be part of a *college* score
17 report. By contrast, when information was to be reported on college score reports,
18 ACT expressly told examinees that such information (e.g. race) would be reported
19 on college score reports. In fact, ACT did not obtain express and specific consent
20 from examinees to report or otherwise use their disability information for purposes
21 other than accommodations. To the extent examinees allowed ACT to permit
22 reporting of examinee information solely to those with a legitimate reason to use it,
23 ACT knew that colleges had no legitimate reason to use disability information pre-
24 admissions, as ACT knew they were (and are) expressly forbidden to do so.

25 (c) No amount of investigation would have reported the college score
26 flagging policies to Mr. Pitts. Any investigation Mr. Pitts could have made would
27 have merely reported ACT's repeated statements that (1) it ceased reporting
28 disability-required accommodations on score reports and (2) it never reported

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1 specifics about an examinee's disabilities. No publicly available source would have
2 shown that A.C.'s college score reports were flagged. Applicable laws and ACT's
3 own policies prohibit the reporting of student disabilities, including ACT's policy
4 for accommodations, the Federal Educational Rights and Privacy Act, and the
5 Individuals with Disabilities Education Act. To this day, ACT continues to prevent
6 examinees (including A.C.) from easily determining whether their specific score
7 reports were flagged absent joining in this lawsuit. ACT has removed the relevant
8 disability questions from every examinees' online profile, thereby preventing them
9 from detecting whether they were subjected to the score flagging policies, and has
10 refused to permit examinees to inspect their ACT college score records. It did not
11 tell any examinee the information it included on college score reports and did not
12 send examinees what a college score report looks like or notify examinees where to
13 find a sample college score report.

14 (d) Generally, these score flagging practices were not public until the
15 Department of Education issued a technical bulletin in May 2018. That technical
16 bulletin warned public educational agencies that ACT's collection of student
17 disability information in a manner that indicates "each of the questions requires a
18 response" and the voluntary nature of which was not "well understood" may run
19 afoul of disability laws. Before this bulletin, there was nothing public about these
20 practices other than ACT's public denials of them.

21 **V. PERSONAL JURISDICTION ALLEGATIONS**

22 187. The following allegations are made on information and belief.

23 188. As of the date this suit was filed, ACT had systematic and continuous
24 contacts with California. ACT offered the ACT Test, preACT, and the ACT PLAN
25 Test at hundreds of high schools throughout California. ACT offered to send college
26 score reports on behalf of students to hundreds of colleges in California. ACT had
27 ongoing and recurring contractual relationships with California high schools for the
28 testing administrations and with California colleges for the college score reports. All

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1 these offers were available to the general public, so that any individual with an ACT
2 Test score may accept ACT's offer to send score reports to colleges all over the
3 country, including California. ACT had fair warning that it could be haled into court
4 by any student who wishes to take an ACT-administered exam in California or send
5 college score reports to California.

6 189. ACT also delivered student data (including student disability data) to
7 colleges as part of its recruitment and enrollment program and services. ACT has
8 offered its EOS, AIM, and other recruitment and enrollment program and services to
9 California colleges, scholarships, and other third parties.

10 190. ACT delivered these data products (including student disability data and
11 flagged score reports) to California for use by California-based colleges, scholarships,
12 and other third parties. Recruitment, admission, and enrollment decisions were made
13 in California on the basis of ACT's data products.

14 191. ACT delivered college score reports of Caroline L. and Sam M. to
15 California colleges. These college score reports contained the disability information
16 of Caroline L. and Sam M. At the time the original complaint was filed, Caroline L.
17 had knowledge of ACT's score flagging practices and intended to apply to colleges in
18 California, but was deterred from applying to colleges in California as a result of
19 ACT's score flagging practices. This in itself is an injury that the ADA and the Unruh
20 Act seek to prevent. *See Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939 (9th
21 Cir. 2011). Caroline L. wished to accept ACT's offer to send score reports to colleges
22 in California, but failed to do so because of ACT's discriminatory practices.

23 192. ACT administered its PLAN test to Emma L. in California. But for
24 taking the PLAN Test, Emma L. would not have taken the non-State-Mandated ACT
25 Tests. She never took the SAT and chose to take the ACT solely because she had
26 gained familiarity with the test questions, test format, and test conditions through the
27 ACT PLAN Test that she took in California. ACT acquired personal information of
28 Emma L. through the PLAN Test she took. Such personal information became part

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1 of Emma L.'s ACT record.

2 193. ACT required Emma L. to submit medical and other documentation of
3 her disability from her California high schools to ACT for purposes of her
4 accommodation request.

5 **VI. CLASS ACTION ALLEGATIONS**

6 194. Plaintiffs bring this action on behalf of themselves and two "Classes" of
7 similarly situated persons.

8 195. The first Class (the "Score Flagging Class") is defined as individuals
9 meetings the following criteria:

10 All individuals in the United States who, during the Relevant Time
11 Period, (i) had a score report disclosing a disability or a disability
12 accommodation sent by ACT to a third party or (ii) have a reasonable
13 ground to believe that ACT would send a score report disclosing a
14 disability or a disability accommodation to a third party. Disclosure
15 of a disability or an accommodation of a disability can be either (i) a
16 response to Student Profile Question 8 that is reportable on third-party
17 score reports, (ii) the notation "SCHOOL" on the third-party score
18 report, or (iii) a unique ACT ID signaling that the examinee is a
19 Special Testing examinee.

20 196. In addition to the nationwide class, the Score Flagging Class is further
21 divided into two subclasses: (1) individuals who resided in California or ACT sent
22 score reports on their behalf to third parties in California, in each case during the
23 Relevant Time Period (the "California Score Flagging Subclass"), and (2) individuals
24 who became members of the Score Flagging Class as a result of being required to take
25 the ACT Test by State law (the "State Mandate Score Flagging Subclass").

26 197. The second Class (the "EOS Disability Class") is defined as follows:
27 All individuals who, during the Relevant Time Period, were
28 searchable, or had reasonable grounds to believe they would be

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1 searchable, in ACT's Educational Opportunity Service on the basis of
2 a disability. A searchable disability is a response to Student Profile
3 Question 8 that is or was searchable through ACT's EOS program.

4 198. In addition to the nationwide class, the EOS Disability Class is divided
5 into one subclass: individuals who resided in California during the Relevant Time
6 Period or individuals who were searched for or who have reasonable grounds to
7 believe they would be searched for by California colleges and scholarship
8 organizations on the basis of their disability (the "California EOS Subclass").

9 199. The third Class (the "Special Testing EOS Class") is defined as:
10 All Special Testing students who registered for EOS online according
11 to ACT's records, but did not respond to the EOS release question in
12 their answer folders on test day.

13 200. In addition to the nationwide class, the Special Testing Class is divided
14 into one subclass: individuals who resided in California during the Relevant Time
15 Period or individuals who would have been searched for or searchable by California
16 colleges and scholarship organizations had they been part of the EOS program (the
17 "California Special Testing Subclass").

18 201. The Relevant Time Period is defined as the maximum amount of time
19 permitted by applicable law (including application of all equitable tolling and of the
20 discovery rule, in each case on a class-wide basis).

21 202. Numerosity. Each Class and Subclass is so numerous that joinder of all
22 members is impractical. There are over a hundred students in each Class and
23 Subclass. The number and identities of such persons are ascertainable and identifiable
24 based upon the records of the ACT.

25 203. Commonality and Predominance. There are multiple common questions
26 of law and fact, the answers to which are apt to drive resolution of this case, and those
27 common questions of law and fact predominate over any questions affecting only
28 individual members. The common questions of law and fact include but are not

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1 limited to:

2 a) Whether ACT collected disability information from students taking the
3 ACT Test.

4 b) Whether ACT reported such disability information to colleges,
5 scholarships, and other third parties.

6 c) Whether ACT marketed the disability information to colleges as
7 information that is useful to assist colleges with recruitment efforts and admissions.

8 d) Whether ACT is a public accommodation or a person offering
9 examinations related to applications for postsecondary institutions, in each case as
10 defined by the ADA.

11 e) Whether the ACT Test is offered to an individual in a manner
12 accessible to persons with disabilities.

13 f) Whether the ACT Test is selected and administered so as to best ensure
14 that, when the examination is administered to an individual with a disability that
15 impairs sensory, manual, or speaking skills, the examination results accurately
16 reflect the individual's aptitude or achievement level, rather than reflecting the
17 individual's impairment.

18 g) Whether ACT knows or should have known that the disability
19 information it reported to postsecondary institutions is being used to intentionally
20 discriminate against students with disabilities or has a disparate impact on students
21 with disabilities,

22 h) Whether ACT knows or should have known that the disclosure of
23 disability information to postsecondary schools was an illegal preadmission
24 disability inquiry by such school.

25 i) Whether ACT's collection and disclosure of disability information has a
26 disparate impact on the opportunities students with disabilities have to be recruited
27 by postsecondary schools, gain admission to postsecondary schools, or obtain
28 financial aid or merit-based scholarships from postsecondary schools.

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1 j) Whether members of the State Mandate Subclasses take the ACT Test
2 pursuant to a State-sponsored program.

3 k) Whether the provision of accommodations to students in the State
4 Mandate Subclasses is required by Title II of the ADA.

5 l) Whether Title II of the ADA requires States involved in the State
6 Mandate Subclasses to ensure ACT complies with the States' obligations under Title
7 II of the ADA.

8 m) Whether disclosure of disability information with ACT Test scores
9 interferes with a student's exercise of his or her right to testing accommodations or
10 ACT programs and services under the ADA.

11 n) Whether members of each Subclass have incurred out of pocket losses
12 as a direct result of ACT's unlawful practices, including test registration fees, score
13 report delivery fees, and general damages.

14 o) Whether disability information reported by class members was a legally
15 protected privacy interest within the meaning of California's constitutional right to
16 privacy.

17 p) Whether class members had a reasonable expectation of privacy as to
18 the disability information they reported to ACT.

19 q) Whether the disclosure of the disability information by ACT is a
20 serious invasion of the privacy rights of the class members.

21 r) Whether the collection and disclosure of disability information by ACT
22 is an unlawful, unfair, fraudulent, or deceptive business practice under California's
23 Unfair Competition Laws.

24 s) Whether all Special Testing students are individuals with disabilities
25 under the ADA.

26 t) Whether ACT's policy for opting in to EOS for Special Testing
27 students constitutes intentional arbitrary discrimination.

28 u) Whether ACT's policy of permitting users of the EOS program to use

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1 disability as a search criterion represents intentional discrimination.

2 v) Whether ACT is a "business establishment" within the meaning of the

3 Unruh Act.

4 w) Whether ACT's EOS program violates the rights of the EOS Disability

5 Class by allowing members of such Class to be searchable on the basis of their

6 disabilities.

7 x) Whether ACT's registration process for Special Testing examinees to

8 opt in to participate in EOS violate the rights of the Special Testing class by

9 applying a policy to those students that facially discriminates on the basis of

10 disabilities, a policy that screens out or tends to screen out students with disabilities

11 from the EOS program, or a policy that otherwise has a disparate impact on such

12 class members.

13 y) Whether the discover rule applies to toll the statute of limitations for all

14 individuals during all time periods, because ACT failed to inform members of the

15 Classes of, or give meaningful notice to members of the Classes of, any policies or

16 practices at issue.

17 204. Superiority. A class action is superior to other available methods for

18 fairly and efficiently adjudicating this controversy. Joinder of individual claims by

19 all class members is impracticable. Even if every member of each Subclass or Class

20 could afford to sue, the court system would be unnecessarily burdened by the influx

21 of individual suits. The prosecution of individual claims presents the potential for

22 unfairness as a result of inconsistent or contradictory judgments. No litigation

23 concerning this controversy has already begun by any Class or Subclass member. By

24 contrast, the class action will efficiently adjudicate this controversy by resolving

25 common questions of law and fact, supporting economies of scale, and consolidating

26 the claims under the supervision of a single court. Plaintiffs and their counsel are

27 aware of no difficulties in managing a class action. Proper notice to the class is

28 reasonably feasible. Members of each Subclass and each Class are readily identifiable

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1 and can be notified based on available information, including ACT's information.

2 205. Typicality. Plaintiffs' claims are typical of the members of each Class
3 and Subclass.

4 206. All Plaintiffs' claims are typical of the Score Flagging Class because
5 Plaintiffs are individuals in the United States who, during the Relevant Time Period,
6 (i) had a score report disclosing a disability or a disability accommodation sent by
7 ACT to a third party or (ii) have a reasonable ground to believe that ACT would send
8 a score report disclosing a disability or a disability accommodation to a third party.

9 207. All Plaintiffs' claims other than the claims of John Doe, Caroline L., and
10 Sam M. (the "EOS Disability Class Plaintiffs") are typical of the EOS Disability Class
11 because Plaintiffs are individuals who, during the Relevant Time Period, were
12 searchable, or had reasonable grounds to believe they would be searchable, in ACT's
13 Educational Opportunity Service on the basis of a disability.

14 208. The claims of Halie Bloom, Devon Linkon, John Doe, Jane Doe, M.B.,
15 and A.C. (the "Special Testing Class Plaintiffs") are typical of the Special Testing
16 Class because they were Special Testing students who opted in to participate in EOS
17 online but did not respond to the EOS authorization in their answer folders for at least
18 one ACT Test administration.

19 209. John Doe's, Mr. Linkon's, Ms. Bloom's, M. B.'s, Jane Doe's, Caroline
20 L.'s, Sam M.'s, and A. C.'s claims are typical of the California Subclasses for each
21 Class to which they belong

22 210. Sam M.'s and Emma L.'s claims are typical of the State Mandate
23 Subclass for each Class to which they belong.

24 211. Adequacy of Representation. Plaintiffs have no interest that is adverse
25 to, or which conflict with, the interests of the class and each Subclass, and they are
26 able to, and will, adequately and fairly represent the interests of the class members
27 and each Subclass. Moreover, Plaintiffs have retained highly qualified, experienced,
28 and competent counsel to prosecute the claims of each class member, and they intend

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1 to prosecute the claims vigorously. The interests of the members of the class action
2 will be fairly and adequately protected by Plaintiffs and their counsel.

3 212. Rule 23(b)(2) Class. ACT has acted or refused to act on grounds that
4 apply generally to each Class and each Subclass, so that final injunctive or declaratory
5 relief is appropriate respecting each Class as a whole.

6 213. Plaintiffs reserve the right to amend the definitions of the class and each
7 Subclass, to add, divide or further reclassify the Subclasses, and to amend the class
8 action allegations stated herein.

9 **VII. CLAIMS FOR RELIEF**

10 **A. FIRST CAUSE OF ACTION: ADA VIOLATION – SCORE**
11 **FLAGGING**

12 **(42 U.S.C. § 12189 and Implementing Regulations)**
13 **(On Behalf of the Score Flagging Class and EOS Disability Class)**

14 214. Plaintiffs incorporate by reference and reallege all paragraphs previously
15 alleged, as if fully set forth herein.

16 215. Plaintiffs have one or more physical or mental disabilities that
17 substantially limits one or more major life activities, or are regarded as such by ACT.

18 216. ACT offers the ACT Test, which is an examination related to
19 applications for secondary or postsecondary education.

20 217. The ADA requires that any person offering such examinations related
21 "offer such examinations . . . in a place and manner accessible to persons with
22 disabilities." 42 U.S.C. § 12189. Implementing regulations require the testing agency
23 to offer the examination so that "[t]he examination is selected and administered so as
24 to best ensure that, when the examination is administered to an individual with a
25 disability that impairs sensory, manual, or speaking skills, the examination results
26 accurately reflect the individual's aptitude or achievement level or whatever other
27 factor the examination purports to measure, rather than reflecting the individual's
28 impaired sensory, manual, or speaking skills." 28 C.F.R. § 36.309.

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1 218. ACT has violated its obligations under the ADA by maintaining a
2 discriminatory policy of flagging test scores of individuals with disabilities,
3 disclosing the disability status of the members of the Subclasses with each ACT Test
4 score report, revealing to postsecondary programs that each member of the Score
5 Flagging Class may have had a testing accommodation, signaling that the score may
6 not accurately reflect aptitude or achievement, and otherwise disclosing sensitive
7 disability information of Plaintiffs and members of the Score Flagging Class.

8 219. Finally, ACT has violated its obligations under the ADA by permitting
9 colleges and universities to search for ACT scores on the basis of the existence and
10 type of an examinee's disabilities. Accordingly, ACT flags scores through the EOS
11 program and reports scores in a discriminatory manner for examinees with
12 disabilities.

13 220. As a direct result of ACT's unlawful practices, the relevant Class
14 members have incurred or will incur irreparable injury, including lost educational and
15 scholarship opportunities.

16 221. Unless and until ACT is enjoined, ACT will continue to discriminate
17 against Subclass members on the basis of their disability, demonstrating a real and
18 immediate threat of repeated injuries to the members of the relevant Class and
19 violations of their rights to full and equal access to the ACT Test and ACT's programs
20 and services. Members of the relevant Class lack any adequate remedy at law, the
21 balance of hardships favor members of the relevant Class, and the public interest
22 would not be disserved by an injunction.

23 **B. SECOND CAUSE OF ACTION: ADA VIOLATION – SCORE**
24 **FLAGGING AS INTERFERENCE WITH TITLE III ADA**
25 **RIGHTS**

26 **(42 U.S.C. § 12203 and Implementing Regulations)**
27 **(On Behalf of the Score Flagging Class and Special Testing Class)**

28 222. Plaintiffs incorporate by reference and reallege all paragraphs previously

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1 alleged, as if fully set forth herein.

2 223. The ADA makes it unlawful to "coerce, intimidate, threaten, or interfere
3 with any individual in the exercise of enjoyment of, or on account of his or her having
4 exercised or enjoyed, or on account of his or her having aided or encouraged any other
5 individual in the exercise or enjoyment of, any right granted or protected by [the
6 ADA]." 42 U.S.C. § 12203(b).

7 224. ACT's data practices with respect to disability information interferes
8 with the rights of students with disabilities under the ADA to be treated equally in all
9 ACT programs and services. These practices discourage students with disabilities
10 from participating in ACT programs and services and seeking reasonable
11 accommodations. These practices likewise interfere with the rights of students with
12 disabilities to have equal opportunity in college recruitment and admission programs
13 as other students, regardless of disability status.

14 225. ACT's policy of ignoring the online preferences of Special Testing
15 examinees to register for EOS interferes with the rights of those examinees to request
16 accommodations and have an equal opportunity in college recruitment on the basis of
17 their ACT Test scores as other examinees.

18 226. As a direct result of ACT's unlawful practices, the relevant Class
19 members have incurred or will incur irreparable injury, including lost educational and
20 scholarship opportunities.

21 227. Unless and until ACT is enjoined, ACT will continue to coerce and
22 interfere with the rights of the relevant Plaintiffs and the Class under the ADA,
23 demonstrating a real and immediate threat of repeated injuries to the members of the
24 relevant Class and violations of their rights to full and equal access to the ACT Test
25 and ACT's programs and services. The Class lacks any adequate remedy at law, the
26 balance of hardships is in their favor, and the public interest would not be disserved
27 by an injunction.

28 **C. THIRD CAUSE OF ACTION: UNRUH ACT – VIOLATIONS OF**

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THE ADA

**(California Civil Code § 51 et seq.)
(On Behalf of California Subclasses of the Score Flagging Class and EOS
Disability Class)**

228. Plaintiffs incorporate by reference and reallege all paragraphs previously alleged, as if fully set forth herein.

229. The Unruh Act provides: "All persons within the jurisdiction of this state are free and equal, and no matter what their . . . disability . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civil Code § 51(a). The Unruh Act makes liable any person who "denies, aids or incites a denial, or makes any discrimination or distinction" contrary to Section 51.

230. As here alleged, ACT has denied, aided or incited a denial, or made a discrimination or distinction contrary to Section 51 by enabling colleges and scholarship organizations to search for students on the basis of their disabilities (along with other criteria, including ACT score) and thereby exclude such individuals with disabilities or individuals regarded as disabled from the college or scholarship organizations' recruitment pools and the opportunity to be discovered by or learn about colleges or scholarship organizations.

231. As here alleged, ACT has also denied, aided, or incited a denial, or made a discrimination or distinction contrary to Section 51 by flagging the score results of examinees with disabilities and/or accommodations and by facially discriminating against Special Testing examinees in excluding their score results from the curve and standardization of other predictive benchmarks and then reporting score results and other predictors of success on the basis of such discriminatory curve.

232. The Unruh Act provides that a "violation of the right of any individual under the federal Americans with Disabilities Act of 1990 ... shall also constitute a violation of this section." Cal. Civil Code § 51(f).

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11111 Santa Monica Boulevard, Suite 700
Los Angeles, California 90025
310.477.1700 phone • 310.477.1699 fax

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11111 Santa Monica Boulevard, Suite 700
Los Angeles, California 90025
310.477.1700 phone • 310.477.1699 fax

1 233. As here alleged, ACT's disability discrimination is a violation of
2 Plaintiffs' and the Subclass members' ADA rights and is thus a violation of their rights
3 under the Unruh Act.

4 234. As a direct result of ACT's unlawful practices, Plaintiffs and the Subclass
5 members have suffered actual damages in an amount to be determined at a jury trial,
6 plus treble damages, but in any event no less than \$4,000 in statutory damages for
7 each and every offense and an award of attorney's fees.

8 235. As a direct result of ACT's unlawful practices, Plaintiffs and the Subclass
9 members have suffered emotional distress, anxiety, lost opportunity, frustration,
10 humiliation, and loss of dignity and self-esteem, in an amount to be proven at trial.

11 236. Unless and until ACT is enjoined, ACT will continue to violate the rights
12 of the members of the Subclasses under the ADA and the Unruh Act, demonstrating
13 a real and immediate threat of repeated injuries to the members of the relevant
14 Subclasses and violations of their rights to full and equal access to the ACT Test and
15 the ACT's programs and services. Members of the relevant Subclasses lack any
16 adequate remedy at law, the balance of hardships favor members of the relevant
17 Subclasses, and the public interest would not be disserved by an injunction.

18 **D. FOURTH CAUSE OF ACTION: CONSTITUTIONAL RIGHT**
19 **TO PRIVACY**

20 (Cal. Const. § 1)
21 (On Behalf of California Subclasses of the Score Flagging Class and EOS
22 Disability Class)

23 237. Plaintiffs incorporate by reference and reallege all paragraphs previously
24 alleged, as if fully set forth herein.

25 238. Plaintiffs have a legally protected privacy interest in their disabilities and
26 any accommodations they need therefrom.

27 239. Plaintiffs have, or will have, a reasonable expectation of privacy that
28 ACT would not report their disability status in a manner that violates the ADA and
the Unruh Act. There is no permissible use of such information by postsecondary

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1 institutions under existing law in recruitment efforts and admissions decisions, and no
2 parental consent to collect and report such information was ever obtained.

3 240. ACT's reporting of Plaintiffs' disabilities and their accommodations on
4 college score reports is a serious invasion of Plaintiffs' reasonable expectation of
5 privacy. It is an egregious breach of social norms for ACT to assist postsecondary
6 institutions with obtaining disability, health, and medical information about students
7 for the purpose of recruitment or admissions. The breach is especially egregious
8 because ACT never had parental consent to obtain and report this sensitive
9 information.

10 241. Unless and until ACT is enjoined, ACT will continue to violate the
11 privacy rights of the members of the California Subclasses under the California
12 Constitution, demonstrating a real and immediate threat of repeated injuries to the
13 members of the relevant Subclasses. Subclass members lack any adequate remedy at
14 law, the balance of hardships is in their favor, and the public interest would not be
15 disserved by an injunction.

16 **E. FIFTH CAUSE OF ACTION: UNFAIR COMPETITION LAW**
17 **(Business & Professions Code § 17200 et seq.)**
18 **(On Behalf of the California Subclasses of all Classes)**

19 242. Plaintiffs incorporate by reference and reallege all paragraphs previously
20 alleged, as if fully set forth herein.

21 243. California Business & Professions Code § 17200 et seq., also known as
22 the California Unfair Competition Law (“UCL”), prohibits acts of “unfair
23 competition,” including any unlawful, unfair, fraudulent, or deceptive business act or
24 practice as well as “unfair, deceptive, untrue or misleading advertising.”

25 244. By engaging in the unlawful conduct alleged above, ACT has engaged
26 in unlawful business acts and practices in violation of the UCL by violating state and
27 federal laws including but not limited to the ADA, Unruh Act, and the California
28 Constitution's right to privacy.

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1 245. In addition to being unlawful, ACT's acts, conduct and practices as
2 alleged above are unfair. ACT's policy and practice of collecting disability
3 information and marketing and selling it to postsecondary institutions and other
4 organizations as useful, relevant, and appropriate information to use in making
5 recruitment and admissions decisions is a substantial injury to Plaintiffs, has no
6 benefit to Plaintiffs, and could not be avoided by Plaintiffs if Plaintiffs wished to
7 participate in ACT's programs and services on an equal basis as other students.

8 246. In addition to being unlawful and unfair, ACT's acts, conduct and
9 business practices as alleged above are fraudulent and/or deceptive. As stated above,
10 some Plaintiffs specifically agreed to report some information to colleges and
11 scholarship organizations through the EOS service, including their name, address,
12 date of birth, year of high school graduation, email address gender, high school,
13 racial/ethnic background, and intended college major, but they did not agree to report
14 disability or accommodations information through the EOS program. They also did
15 not agree to permit colleges and other third parties to use such disability information
16 as a search criteria. Despite the absence of consent, ACT used such disability data and
17 marketed its programs and services as assisting postsecondary institutions and
18 scholarship programs to identify categories of students and exclude them from their
19 recruitment and admissions efforts for reasons like student fit and desirability.

20 247. Furthermore, ACT's business practices are fraudulent and deceptive
21 because ACT has reported the disability and accommodations information of
22 Plaintiffs to NRCCUA and Encoura to circumvent applicable law described herein.
23 Specifically, ACT bought NRCCUA and Encoura after any Plaintiff gave ACT his or
24 her disability information. NRCCUA and Encoura provide "data, research, and
25 programs that enhance college and university recruiting efforts." ACT bought these
26 entities and has begun co-branding with them. No Plaintiff ever agreed to authorize
27 ACT to provide their information to these two entities, as they were not subsidiaries
28 or affiliates at the time Plaintiffs transacted with ACT. Moreover, ACT is deceptively

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1 using these two entities to circumvent the legal restrictions on ACT's own policies
2 and practices as a testing entity. During this lawsuit, ACT has refused to tell Plaintiffs
3 if ACT has reported the disability data of Plaintiffs to NRCCUA or Encoura and has
4 failed to inform or assure Plaintiffs that ACT has caused these two subsidiaries to
5 comply with the stipulated preliminary injunction or ACT's own legal obligations. In
6 fact, ACT has stated that Encoura's Data Labs product has become ACT's score
7 reporting service, and Encoura's Prospect Data product has become ACT's
8 EOS/college recruitment service. ACT never informed Plaintiffs or this Court of
9 Encoura's involvement in ACT's score reporting and EOS/college recruitment
10 practices. And ACT failed to stipulate for the stipulated preliminary injunction in this
11 case that it will cause any of its subsidiaries, affiliates, or agents not to use ACT's data
12 to engage in the discriminatory practices ACT itself is prohibited from doing. ACT's
13 use of these entities to circumvent its legal obligations is an unfair, deceptive, and
14 fraudulent business practice.

15 248. As a direct and proximate result of ACT's unlawful, unfair and fraudulent
16 business practices, Plaintiffs and the members of the Subclasses have been injured in
17 fact. They participated in the ACT Test or the ACT's programs and services in reliance
18 on ACT's false and misleading advertising and representations to the general public
19 regarding the benefits of those programs and services, and they would not have
20 participated in the ACT Test had they known ACT would seek to collect, use,
21 disclose, and otherwise deny their full and equal participation in ACT's programs and
22 services.

23 249. ACT's unlawful, unfair and fraudulent business practices as alleged
24 above present a continuing threat to Plaintiffs, the Subclasses and members of the
25 public because ACT persists and continues to engage in such practices and will not
26 cease doing so unless enjoined or restrained by this court.

27 250. Under California Business & Profession Code § 17203, Plaintiffs, on
28 behalf of themselves, Subclass members and members of the general public, seeks an

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1 order of this Court:

2 a) Enjoining ACT from continuing to engage, use, or employ any
3 unlawful, unfair and/or deceptive business act or practice and any act prohibited by
4 California Business Code § 17200 et seq.; and

5 b) Restoring all monies that may have been acquired by ACT as a result of
6 such unlawful, unfair or deceptive acts or practices.

7 **F. SIXTH CAUSE OF ACTION: ADA VIOLATION – SCORE**
8 **FLAGGING AS INTERFERENCE WITH TITLE II ADA**
9 **RIGHTS**

10 **(42 U.S.C. § 12203 and Implementing Regulations)**
11 **(On Behalf of Score Flagging State Mandate Subclass)**

12 251. Plaintiffs incorporate by reference and reallege all paragraphs previously
13 alleged, as if fully set forth herein.

14 252. The ADA makes it unlawful to "coerce, intimidate, threaten, or interfere
15 with any individual in the exercise of enjoyment of, or on account of his or her having
16 exercised or enjoyed, or on account of his or her having aided or encouraged any other
17 individual in the exercise or enjoyment of, any right granted or protected by [the
18 ADA]." 42 U.S.C. § 12203(b). Implementing regulations provide: "No private or
19 public entity shall coerce, intimidate, threaten, or interfere with any individual in the
20 exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or
21 on account of his or her having aided or encouraged any other individual in the
22 exercise or enjoyment of, any right granted or protected by the Act or [implementing
23 regulations of Title II of the ADA]." 42 C.F.R. § 35.134(b).

24 253. ACT's practices with respect to disability information interferes with the
25 rights of students with disabilities under the ADA to be treated equally in all programs
26 and services provided by the States. These practices discourage students with
27 disabilities from participating in State programs and services administered by ACT
28 and seeking reasonable accommodations under Title II of the ADA. These practices

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1 likewise interfere with the rights of students with disabilities to have the opportunity
2 to participate in college recruitment and admission programs equal to all other
3 students, regardless of disability status.

4 254. As a direct result of ACT's unlawful practices, members of the State
5 Mandate Subclass have suffered actual damages in an amount to be determined at a
6 jury trial and to the extent permitted by Title II of the ADA, plus an award of attorney's
7 fees.

8 255. As a direct result of ACT's unlawful practices, Plaintiffs and the Subclass
9 members have suffered emotional distress, anxiety, lost opportunity, frustration,
10 humiliation, grief and loss of dignity and self-esteem, in an amount to be proven at
11 trial.

12 256. Unless and until ACT is enjoined, ACT will continue to violate the rights
13 of the members of the State Mandate subclass under the ADA, demonstrating a real
14 and immediate threat of repeated injuries to the members of the relevant Subclasses
15 and violations of their rights to full and equal access to the ACT Test and the ACT's
16 programs and services. Members of the relevant Subclasses lack any adequate
17 remedy at law, the balance of hardships favor members of the relevant Subclasses,
18 and the public interest would not be disserved by an injunction.

19 257. Members of the Statewide Mandate incurred or will incur irreparable
20 injury, including lost educational and scholarship opportunities.

21 258. Unless and until ACT is enjoined, ACT will continue to coerce and
22 interfere with the rights of Plaintiffs and the Subclasses under the ADA,
23 demonstrating a real and immediate threat of repeated injuries to the members of the
24 relevant Subclasses and violations of their rights to full and equal access to the ACT
25 Test and ACT's programs and services. The Subclasses lack any adequate remedy at
26 law, the balance of hardships is in their favor, and the public interest would not be
27 disserved by an injunction.

28 **G. SEVENTH CAUSE OF ACTION: ADA VIOLATION – DENIAL**

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**OF PARTICIPATION IN COLLEGE RECRUITMENT AND
MARKETING**

**(42 U.S.C. § 12182 and Implementing Regulations)
(On Behalf of the EOS Disability Class)**

259. Plaintiffs incorporate by reference and reallege all paragraphs previously alleged, as if fully set forth herein.⁸

260. Plaintiffs have one or more physical or mental disabilities that substantially limit one or more of their major life activities.

261. ACT's services and programs, including the ACT Test, AIM, EOS, and other services that give college-bound students access and opportunities to admissions to postsecondary institutions are public accommodations under the ADA.

262. Under the ADA, "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). The ADA specifically prohibits: (i) "afford[ing] an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals," (ii) "provid[ing] an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals," and (iii) utiliz[ing] standards or criteria or methods of administration—(i) that have the effect of discriminating on the basis of disability."

⁸ While this Cause of Action has been dismissed without leave to amend, Plaintiffs re-assert it in this amended complaint solely to preserve any rights in the event of an appeal.

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1 42 U.S.C. §§ 12182(b)(1)(A)(i), (ii), 12182(b)(1)(D). The implementing regulations
2 prohibit the same categories of activities. 42 C.F.R. §§ 36.202, 36.204. The DOJ's
3 TAM for Title III prohibits public accommodations from making "unnecessary
4 inquiries into the existence of a disability." U.S. D.O.J. ADA Compliance Manual §
5 III-4.1300.

6 263. ACT is violating these provisions through the EOS program by (i)
7 flagging test scores with the disclosure of disability information, (ii) reporting,
8 disclosing, and identifying otherwise confidential information of Plaintiffs and
9 Subclass members to colleges, scholarships, potential employers, and other third party
10 organizations, and (iii) otherwise using or disclosing such confidential information in
11 its programs and services to enable colleges, scholarships, potential employers, and
12 other third parties to exclude students with disabilities from marketing, recruitment,
13 and admissions and employment opportunities.

14 264. As a direct result of ACT's unlawful practices, the relevant Subclass
15 members have incurred or will incur irreparable injury, including lost educational and
16 scholarship opportunities.

17 265. Unless and until ACT is enjoined, ACT will continue to deny members
18 of the relevant Class with the opportunity to participate in and benefit from ACT's
19 programs and services on an equal basis as other students, demonstrating a real and
20 immediate threat of repeated injuries to the members of the the relevant Class and
21 violations of their rights to full and equal access to the ACT Test and ACT's programs
22 and services. Members of the relevant Class lacks any adequate remedy at law, the
23 balance of hardships favor members of the relevant Class, and the public interest
24 would not be disserved by an injunction.

25 **H. EIGHTH CAUSE OF ACTION: DECLARATORY RELIEF**

26 (28 U.S.C. § 2201)
27 (On Behalf of all Classes)

28 266. Plaintiffs incorporate by reference and reallege all paragraphs previously

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1 alleged, as if fully set forth herein.

2 267. An actual controversy now exists between Plaintiffs and ACT. Among
3 other things, Plaintiffs and ACT dispute whether ACT's information sharing policies
4 and practices are violations of Plaintiffs' rights under the ADA, Unruh Act, California
5 Constitution and the UCL. These disputes are definite and concrete and involve the
6 legal relations of parties having adverse legal interests.

7 268. Under California law, people who entered contracts as minors, such as
8 the Testing Contracts here, have the right to disaffirm those contracts: "Except as
9 otherwise provided by statute, a contract of a minor may be disaffirmed by the minor
10 before majority or within a reasonable time afterwards." Cal. Fam. Code § 6710.

11 269. ACT's Testing Contracts with Plaintiffs and members of each Class and
12 Subclasses are voidable in every respect if the Plaintiff and members of the Classes
13 and Subclasses were minors at the time they entered into the Testing Contracts.

14 270. Plaintiffs, on behalf of themselves and the Subclasses, desire to have a
15 judicial determination of the rights and obligations of themselves and ACT. A
16 declaratory judgment is appropriate and in the interests of justice.

17 271. Specifically, Plaintiffs seek a declaration that (a) ACT's acquisition and
18 disclosure of disability information as described herein are violations of the rights of
19 Plaintiffs and the Class and Subclass members under the ADA, Unruh Act, California
20 Constitution and UCL, and (b) contracts between ACT and Plaintiffs and members of
21 each Class and Subclasses are voidable in every respect if the Plaintiffs and members
22 of the Classes and Subclasses were minors at the time they entered into the Testing
23 Contracts.

24 **I. NINTH CAUSE OF ACTION: REHABILITATION ACT –**
25 **INTERFERENCE WITH RIGHT TO BE FREE FROM**
26 **PREADMISSION DISABILITY INQUIRY**

27
28 (28 U.S.C. § 2201)

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(On Behalf of all Subclasses)

272. Plaintiffs incorporate by reference and reallege all paragraphs previously alleged, as if fully set forth herein.

273. At all relevant times, ACT received federal financial assistance. Congress provides federal financial assistance under the ESEA. The purpose of the ESEA is to "provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps." 20 U.S.C. § 6301. The ESEA requires States to administer an assessment in reading/language arts and mathematics in grades 9-12 under Title I, Part A of the ESEA, *see* 20 U.S.C. § 6311(b)(2)(B)(i), (v). Congress appropriates federal grants for the States earmarked for the specific purposes of administering the federally-mandated assessments, *see* 20 U.S.C. § 6302(b). In the ESSA, Congress amended the ESEA to allow educational agencies to select as their federal assessment a "nationally-recognized high school academic assessment that has been approved for use by the State." 20 U.S.C. § 6311. There are only *two* such assessments in the country – ACT and SAT. *See* 34 C.F.R. § 200.3 (defining "nationally-recognized school academic assessment" to be college entrance examinations, i.e. ACT and SAT). ACT receives federal financial assistance when it administers an ACT Test assessment to school children with federal funds earmarked for this *specific purpose*. ACT was in a position to accept or reject Rehabilitation Act obligations when it elected to receive federal financial assistance, acknowledged it was receiving federal funds, and voluntarily agreed to accept those funds in exchange for complying with the Rehabilitation Act, satisfying the Supreme Court's "Accept or Reject" test. The States have ceded controlling authority over the federally-funded program – i.e. the design, development, and administration of federally-mandated ESEA assessments – to ACT. States submit State Plans under the ESEA that explains how the States intend to use ESEA dollars to meet the federal accountability standards. The State Plans explain that the States have delegated their

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1 responsibilities to the ACT for designing, developing, and administering the ESEA
2 assessments. The Department of Education approves the State Plans. ACT is an
3 instrumentality of the States, as the States have delegated their federal responsibilities,
4 paid with federal grants, to ACT.

5 274. ACT receives federal financial assistance through the Defense
6 Activity for Non-Traditional Education Support (DANTES) program as well.
7 Congress has provided for federal financial assistance to all active duty and reserve
8 service members to help military members meet college entrance requirements. *See*
9 10 U.S.C. § 2005 (active duty educational assistance), § 2010 (reserve duty
10 educational assistance). Relying on this statutory authority, the Department of
11 Defense has created the DANTES program to, among other things, provide financial
12 assistance for "managing and facilitating the delivery of a wide variety of
13 examinations including . . . college admissions [exams]," including the ACT and the
14 SAT. 32 C.F.R. § 68.6(f)(3)(V)(A). The DANTES program is part of the "DoD
15 Voluntary Education Program as authorized by 10 U.S.C. 2007 [to] reduce[] through
16 financial support, including [tuition assistance] that is administered uniformly across
17 the Military Services." 32 C.F.R. § 68.4. Under the DANTES program, the
18 Department of Defense makes federal financial assistance available to service
19 members to take the ACT Test. ACT receives federal financial assistance under the
20 DANTES program. Federal funds under the DANTES program are granted to service
21 members to take the ACT Test and then the service members use the funds to take the
22 ACT Test. ACT is likewise an intended recipient of the federal funding of benefits
23 for service members and reserve duty. The DANTES program is a public benefits
24 program, like Medicare or college scholarship grants, that serves a specific class of
25 beneficiaries.

26 275. ACT receives federal financial assistance through veteran benefit
27 programs. Congress has provided for federal financial assistance to veterans entitled
28 to educational assistance under the GI Bill. Specifically, an "individual entitled to

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1 educational assistance . . . shall also be entitled to educational assistance for the
2 following: (1) A national test for admission to an institution of higher learning as
3 described in the last sentence of section 3452(b)." 38 U.S.C. § 3315A(1)(1). Those
4 tests include the SAT and ACT. Congress appropriates funding to the VA to provide
5 this federal financial assistance to veterans. The veterans are the beneficiaries under
6 this program, and the intended recipient of this federal financial assistance includes
7 ACT, Inc. as the administrator of the ACT Test. The VA has defined by regulation
8 "federal financial assistance" for purposes of the Rehabilitation Act to mean any
9 assistance in the form of "funds, including funds . . . extended directly to those
10 students for payment to that entity." 38 C.F.R. § 18.403(h)(1). ACT receives funds
11 extended under the GI Bill directly to students for payment to ACT to take a "national
12 test for admission" under 38 U.S.C. § 3315A(1)(1). When federal funds go directly
13 to the veteran who then uses it to pay ACT for educational expenses, ACT is receiving
14 federal financial assistance.

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276. Finally, ACT receives federal financial assistance in the form of the GEAR UP and UPWARD BOUND programs. GEAR UP and UPWARD BOUND is a discretionary grant program administered by the Department of Education. Under these programs, the Department of Education paid the ACT registration fees of low-income students. In fact, ACT conditioned a fee waiver of students on their participation in these programs, because these programs paid ACT for the registration fees of the low-income students. As recently as a few weeks ago, ACT tweeted:



277. ACT has an entire website dedicated to assisting school districts and students with securing GEAR UP grants so that ACT can receive federal financial

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1 assistance.⁹ ACT recently posted on its website that in 2019, Congress appropriated
2 \$360 million for GEAR UP grants to serve 707,900 underserved students and that
3 “ACT resources can be written into GEAR UP grant applications.” This is exactly the
4 type of program that allowed Mr. Pitts and others similarly situated to take their ACT
5 exams with fee waivers. And, in fact, ACT has acknowledged that the GEAR UP
6 grant program has caused ACT testing (and thus ACT financial assistance and profits)
7 to spike districtwide in Iowa.

8 278. The federal government received no goods or services in exchange for
9 payments to ACT above. As a result, no federal funds were given to ACT pursuant
10 to a "procurement contract" within the meaning of the regulations as the federal
11 agency providing assistance never entered into a contract with ACT pursuant to which
12 ACT provided *the federal government* a service in exchange for compensation.

13 279. ACT is principally engaged in the business of providing education to its
14 customers such that every program and activity it administers is subject to the
15 Rehabilitation Act. In fact, ACT's mission is to "help people achieve education."
16 ACT publicly states its mission is to "advance education by providing programs,
17 services, and conducting research that assists individuals planning and pursuing
18 education and training [and] educators delivering instruction and training." ACT
19 provides education by administering educational assessments to students as a way to
20 benchmark their knowledge and abilities. All the federal financial assistance ACT
21 has received consists of educational benefits provided by the federal government to
22 students, school districts, veterans, and military service members.

23 280. ACT's business was massively subsidized by these federal funds through
24 federally-funded payment of registration fees, a captive market of hundreds of
25 thousands of examinees required by federal law to take the ACT, charging students
26

27 _____
28 ⁹ <http://www.act.org/content/act/en/k12-educators-and-administrators/gearup-toolkit.html>

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1 for score reports, and valuable student data. nearly thirty States have paid ACT with
2 federal funds earmarked for the purpose of administering federally-mandated
3 assessments. In fact, after ACT received these captive markets and the federal
4 financial assistance earmarked to serve them, it surpassed its only rival – the SAT –
5 in number of examinees for the first time in its history.

6 281. Retaliation claims, whether brought pursuant to the ADA or Section 504
7 of the Rehabilitation Act, are analyzed under the same standard. *Douglas v. Cal.*
8 *Dept. of Youth Auth.*, 285 F.3d 1226, 1229 n. 3 (9th Cir.2002).

9 282. ACT is thus prohibited under the Rehabilitation Act from coercing,
10 intimidating, threatening, or interfering with any individual in the exercise or
11 enjoyment of, or on account of his or her having exercised or enjoyed, or on account
12 of his or her having aided or encouraged any other individual in the exercise or
13 enjoyment of, any right granted or protected by the Rehabilitation Act.

14 283. Plaintiffs and members of all Subclasses have a right to be free from
15 colleges and universities subject to the Rehabilitation Act from making any
16 preadmission inquiry as to whether an applicant for admission is a handicapped
17 person. All colleges and universities to which Plaintiffs have applied are subject to
18 the Rehabilitation Act.

19 284. By (1) collecting disability information of Plaintiffs and members of the
20 Subclasses, (2) permitting colleges and universities to make preadmission inquiries
21 as to whether they are a handicapped person within the meaning of the Rehabilitation
22 Act, and (3) permitting colleges and universities to subject handicapped persons
23 within the meaning of the Rehabilitation Act to discrimination in recruitment on the
24 basis of their disabilities, ACT is circumventing the Rehabilitation Act and interfering
25 with the rights thereunder of Plaintiffs and members of the Subclasses.

26 285.

27 286. As a direct result of ACT's unlawful practices, Subclass members have
28 incurred or will incur irreparable injury, including lost educational and scholarship

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1 opportunities, for which a legal remedy is inadequate.

2 287. Unless and until ACT is enjoined, ACT will continue to coerce and
3 interfere with the rights of Plaintiffs and the Subclasses under the Rehabilitation Act,
4 demonstrating a real and immediate threat of repeated injuries to the members of the
5 relevant Subclasses and violations of their rights to full and equal access to the ACT
6 Test and ACT's programs and services. The Subclasses lack any adequate remedy at
7 law, the balance of hardships is in their favor, and the public interest would not be
8 disserved by an injunction.

9 **J. TENTH CAUSE OF ACTION: ADA VIOLATION – DENIAL OF**
10 **PARTICIPATION IN COLLEGE RECRUITMENT PROGRAM**
11 **BASED ON DISABILITIES REQUIRING SPECIAL TESTING**
12 **ACCOMMODATIONS**

13 **(42 U.S.C. § 12182 and Implementing Regulations)**
14 **(On Behalf of the Special Testing Class)**

15 288. Plaintiffs incorporate by reference and reallege all paragraphs previously
16 alleged, as if fully set forth herein.

17 289. Special Testing Class Plaintiffs have one or more physical or mental
18 disabilities that substantially limit one or more of their major life activities.

19 290. At all relevant times, ACT operated places of public accommodations on
20 designated dates throughout the United States each year. Specifically, on those
21 designated dates, ACT operated high schools, colleges, places of education,
22 gymnasiums, auditoriums, and lecture halls. Every Special Testing Plaintiff, like each
23 member of the Special Testing Class, sought ACT's services (including the ACT Test)
24 at one of these places of public accommodation.

25 291. At all relevant times, ACT operated those places of public
26 accommodation by controlling all aspects of the space on test day, including
27 admission of examinees into the test center, issuance of admission tickets, collection
28 of payment for admission into the testing center, payments to proctors during the day

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1 of the exam, control of the proctors during the day of the exam, selection and vetting
2 of the facilities as testing centers, licensing of the facilities from the high schools
3 during the day of the exam, establishment of policies controlling the precise
4 configuration of the places of public accommodation, the schedule (including the time
5 the testing centers open and close), the behavior of examinees and proctors, and
6 regulations for the punishments of examinees and proctors.

7 292. ACT's EOS program is a service of ACT that ACT seeks to offer Special
8 Testing Class members at the physical test centers, which are physical places of public
9 accommodation ACT operates.

10
11 293. Under the ADA, "[n]o individual shall be discriminated against on the
12 basis of disability in the full and equal enjoyment of the goods, services, facilities,
13 privileges, advantages, or accommodations of any place of public accommodation by
14 any person who owns, leases (or leases to), or operates a place of public
15 accommodation." 42 U.S.C. § 12182(a).

16 294. Special Testing Class members have been discriminated against on the
17 basis of disability in the full and equal enjoyment of EOS, which was a service offered
18 to Special Testing Examinees at the testing centers, by ACT during the time ACT
19 operated the testing centers.

20 295. The ADA prohibits not only the denial of physical access to a place of
21 public accommodation, but also the denial of programmatic access to a service
22 provided by a public accommodation. The ADA specifically prohibits: (i)
23 "subject[ing] an individual or class of individuals on the basis of a disability or
24 disabilities of such individual or class, directly, or through contractual, licensing, or
25 other arrangements, to a denial of the opportunity of the individual or class to
26 participate in or benefit from the goods, services, facilities, privileges, advantages, or
27 accommodations of an entity," (ii) "afford[ing] an individual or class of individuals,
28 on the basis of a disability or disabilities of such individual or class, directly, or

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1 through contractual, licensing, or other arrangements with the opportunity to
2 participate in or benefit from a good, service, facility, privilege, advantage, or
3 accommodation that is not equal to that afforded to other individuals," and (iii)
4 "provid[ing] an individual or class of individuals, on the basis of a disability or
5 disabilities of such individual or class, directly, or through contractual, licensing, or
6 other arrangements with a good, service, facility, privilege, advantage, or
7 accommodation that is different or separate from that provided to other individuals."
8 The implementing regulations prohibit the same categories of activities. 42 C.F.R. §§
9 36.202, 36.204.

10 296. The Special Testing Class is a "class of individuals" with disabilities as
11 that term is used in the ADA and its implementing regulations and administrative
12 guidance. Every member of the Special Testing Class is an individual with
13 disabilities.

14 297. ACT subjected Special Testing Class members, who are Special Testing
15 Class Members because of their disabilities, to a denial of the opportunity of such
16 class to participate in or benefit from the EOS service. ACT applied a facially
17 discriminatory policy of requiring Special Testing Class members who registered for
18 EOS online at the time of online registration to also affirmatively register for EOS in
19 their answer folder at the physical place of public accommodation ACT operated on
20 test day. The Special Testing Class members received answer folders at the place of
21 public accommodation operated by ACT that ask about EOS opt-in. By contrast,
22 National Testing students who enrolled in EOS online at the time of online registration
23 received different answer folders which did *not* ask about EOS enrollment. The
24 National Testing and Special Testing answer folders are also different to reflect the
25 different requirements.

26 298. Alternatively, the ADA specifically prohibits ACT from "(i) utiliz[ing]
27 standards or criteria or methods of administration—(i) that have the effect of
28 discriminating on the basis of disability" and (ii) "imposi[ng] or appl[ying] eligibility

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1 criteria that screen out or tend to screen out an individual with a disability or any class
2 of individuals with disabilities from fully and equally enjoying any goods, services,
3 facilities, privileges, advantages, or accommodations, unless such criteria can be
4 shown to be necessary for the provision of the goods, services, facilities, privileges,
5 advantages, or accommodations being offered." 42 U.S.C. §§ 12182(b)(1)(D),
6 (b)(2)(A)(i).

7 299. ACT used criteria and methods of administration that have the effect of
8 discriminating on the basis of disability. ACT's method of administration of the EOS
9 program to Special Testing Class members (i.e. requiring them to register for EOS at
10 the physical testing center) had the effect of discriminating on the basis of their
11 disability by reducing their participation in the program and requiring them to satisfy
12 an additional, unnecessary, and arbitrary burden at the physical testing centers. The
13 use of this criteria or method of administration has had the effect of discriminating on
14 the basis of disability and the use of this eligibility criteria has screened out or tended
15 to screen out the Special Testing Class from fully and equally enjoying ACT's EOS
16 program. National Testing examinees who enrolled in EOS online at the time of
17 online registration are not required to satisfy the same additional burden and are not
18 even asked the EOS opt-in question on test day. As a result, ACT is denying the
19 Special Testing Class members the full and equal enjoyment of the EOS service,
20 which is a service ACT offers Special Testing Class members exclusively at ACT's
21 place of public accommodation.

22 300. As a direct result of ACT's unlawful practices, the Special Testing Class
23 has incurred or will incur irreparable injury, including lost educational and
24 scholarship opportunities, lost opportunities to be recruited by and sought after by
25 colleges, universities and scholarship programs, and lost opportunities to learn and
26 discover colleges they had not previously heard of.

27 301. Unless and until the practice is enjoined, ACT will continue to deny
28 members of the Special Testing Class the opportunity to participate in and benefit

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1 from ACT's programs and services on an equal basis as other students, demonstrating
2 a real and immediate threat of repeated injuries to the members of the Subclasses and
3 violations of their rights to full and equal access to the ACT Test and ACT's programs
4 and services. Members of the Special Testing Class lack any adequate remedy at law,
5 the balance of hardships favor members of the relevant Subclasses, and the public
6 interest would be served by an injunction.

7 **K. ELEVENTH CAUSE OF ACTION: ADA VIOLATION –**
8 **DENIAL OF PARTICIPATION IN COLLEGE RECRUITMENT**
9 **PROGRAM BASED ON DISABILITIES REQUIRING SPECIAL**
10 **TESTING ACCOMMODATIONS**

11 **(42 U.S.C. § 12189 and Implementing Regulations)**
12 **(On Behalf of the Special Testing Class)**

13 302. Plaintiffs incorporate by reference and reallege all paragraphs previously
14 alleged, as if fully set forth herein.

15 303. Special Testing Plaintiffs have one or more physical or mental
16 disabilities that substantially limits one or more major life activities, or are regarded
17 as such by ACT.

18 304. ACT offers the ACT Test, which is an examination related to
19 applications for secondary or postsecondary education.

20 305. The ADA requires that any person offering such examinations related
21 "offer such examinations . . . in a place and manner accessible to persons with
22 disabilities." 42 U.S.C. § 12189. Implementing regulations require the testing agency
23 to offer the examination so that "[t]he examination is selected and administered so as
24 to best ensure that, when the examination is administered to an individual with a
25 disability that impairs sensory, manual, or speaking skills, the examination results
26 accurately reflect the individual's aptitude or achievement level or whatever other
27 factor the examination purports to measure, rather than reflecting the individual's
28 impaired sensory, manual, or speaking skills." 28 C.F.R. § 36.309. This obligation

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1 requires ACT to "report accommodated scores in the same way [ACT] report[s] scores
2 generally. Testing entities must not decline to report scores for test-takers with
3 disabilities receiving accommodations under the ADA."¹⁰

4 306. ACT violated these obligations by declining to report scores of Special
5 Testing Class members through the EOS program and refusing to report scores in the
6 same manner as other examinees. Specifically, ACT reported ACT test scores by
7 permitting colleges and universities to search for examinees on the basis of their ACT
8 test score (e.g. ACT score cut-offs), yet ACT declined to report scores of Special
9 Testing examinees because ACT offered the EOS reporting service to Special Testing
10 examinees on different terms and conditions than to other examinees.

11 307. As a direct result of ACT's unlawful practices, the Special Testing Class
12 members have incurred or will incur irreparable injury, including lost educational and
13 scholarship opportunities.

14 308. Unless and until ACT is enjoined, ACT will continue to discriminate
15 against the Special Testing Class members on the basis of their disability,
16 demonstrating a real and immediate threat of repeated injuries to the members of the
17 relevant Class and violations of their rights to full and equal access to the ACT Test
18 and ACT's programs and services (including EOS). Members of the Special Testing
19 Class lack any adequate remedy at law, the balance of hardships favor members of
20 the relevant Class, and the public interest would not be disserved by an injunction.

21
22 **L. TWELFTH CAUSE OF ACTION: UNRUH ACT – DENIAL OF**
23 **OPPORTUNITIES FOR THE SPECIAL TESTING CLASS**

24
25 **(California Civil Code § 51 et seq.)**
(On Behalf of the Special Testing California Subclass)

26 309. Plaintiffs incorporate by reference and reallege all paragraphs previously
27

28 ¹⁰ https://www.ada.gov/regs2014/testing_accommodations.pdf

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1 alleged, as if fully set forth herein.

2 310. The Unruh Act provides: "All persons within the jurisdiction of this state
3 are free and equal, and no matter what their . . . disability . . . are entitled to the full
4 and equal accommodations, advantages, facilities, privileges, or services in all
5 business establishments of every kind whatsoever."

6 311. ACT is a "business establishment" within the meaning of the Unruh Act.

7 312. ACT has violated the rights of the Special Testing California Subclass
8 by applying a facially discriminatory policy of barring Special Testing students from
9 opting in to participate in EOS online or at the time of registration and requiring the
10 Special Testing California Subclass to overcome an additional unnecessary and
11 arbitrary facially-discriminatory barrier. As a result of this policy, a Special Testing
12 student who opts in to participate in EOS online or at the time of registration, but fails
13 to respond to the EOS release in their answer document on test day is denied the
14 opportunity to participate in ACT's EOS program and be searchable in EOS by
15 California colleges, scholarship organizations, and third parties. By contrast, a
16 National Testing student who opts in to participate in EOS online or at the time of
17 registration is given the opportunity to participate in ACT's EOS program and be
18 searchable in EOS by California colleges, scholarship organizations, and third parties.

19 313. In addition, the Unruh Act provides that a "violation of the right of any
20 individual under the federal Americans with Disabilities Act of 1990 ... shall also
21 constitute a violation of this section." Cal. Civil Code § 51(f).

22 314. As alleged in the Tenth and Eleventh Causes of Action, ACT's disability
23 discrimination is a violation of the Special Testing California Subclass's ADA rights
24 and is thus a violation of their rights under the Unruh Act.

25 315. As a direct result of ACT's unlawful practices, Plaintiffs and the Special
26 Testing California Subclass have suffered actual damages in an amount to be
27 determined at a jury trial, plus treble damages, but in any event no less than \$4,000 in
28 statutory damages for each and every offense and an award of attorney's fees.

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1 316. As a direct result of ACT's unlawful practices, Plaintiffs and the Special
2 Testing California Subclass have suffered emotional distress, anxiety, lost
3 opportunity, frustration, humiliation, and loss of dignity and self-esteem, in an amount
4 to be proven at trial.

5 317. Unless and until this practice is enjoined, ACT will continue to violate
6 the rights of the members of the Special Testing California Subclass under the ADA
7 and the Unruh Act, demonstrating a real and immediate threat of repeated injuries to
8 the members of the Special Testing California Subclass and violations of their rights
9 to full and equal access to the ACT Test and the ACT's programs and services.
10 Members of the Special Testing California Subclass lack any adequate remedy at law,
11 the balance of hardships favor members of the Special Testing California Subclass,
12 and the public interest would be served by an injunction.

13
14 **M. THIRTEENTH CAUSE OF ACTION: REHABILITATION ACT**
15 **VIOLATION – DENIAL OF PARTICIPATION IN COLLEGE**
16 **RECRUITMENT BASED ON DISABILITIES REQUIRING**
17 **SPECIAL TESTING ACCOMMODATIONS**

18 (29 U.S.C. § 794d)
19 (On Behalf of the Special Testing Class and EOS Disability Class)

20 318. Plaintiffs incorporate by reference and reallege all paragraphs previously
21 alleged, as if fully set forth herein.

22 319. As alleged herein, at all relevant times, ACT received federal financial
23 assistance.

24 320. As alleged herein, Special Testing Class Plaintiffs and members have
25 one or more physical or mental disabilities that substantially limit one or more of their
26 major life activities.

27 321. As alleged herein, Special Testing Class Plaintiffs and members are
28 otherwise qualified to receive the benefits of the EOS program. Each of them took

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1 the ACT Test, received ACT scores results, and indicated to ACT an intent to enroll
2 in the EOS program.

3 322. Each Special Testing Class Plaintiff and member was denied the benefits
4 of the EOS program solely by reason of their disabilities.

5 323. ACT is violating the rights of the Special Testing Class under the
6 Rehabilitation Act by applying a facially discriminatory policy of requiring those of
7 the Special Testing Class who affirmatively enrolled in EOS online at the time of
8 online registration to also affirmatively enroll in EOS in their answer folder on test
9 day. By contrast, National Testing students who enrolled in EOS online at the time
10 of online registration receive different answer folders which do *not* ask about EOS
11 enrollment.

12 324. Alternatively, the discriminatory EOS enrollment policy has had a
13 disparate impact on the Special Testing Class. Specifically, the policy requiring
14 Special Testing Class members to enroll in EOS on test day has caused a substantially
15 lower number of Special Testing examinees to enroll in EOS than National Testing
16 examinees.

17 325. As a direct result of ACT's unlawful practices, the Special Testing Class
18 has incurred or will incur irreparable injury, including lost educational and
19 scholarship opportunities, lost opportunities to be recruited by and sought after by
20 colleges, universities and scholarship programs, and lost opportunities to learn and
21 discover colleges they had not previously heard of.

22 326. Unless and until these practices are enjoined, ACT will continue to deny
23 members of the Special Testing Class the opportunity to participate in and benefit
24 from ACT's programs and services on an equal basis as other students, demonstrating
25 a real and immediate threat of repeated injuries to the members of the Special Testing
26 Class and violations of their rights to full and equal access to the ACT Test and ACT's
27 programs and services. Members of the Special Testing Class lack any adequate
28 remedy at law, the balance of hardships favor members of the relevant Subclasses,

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1 and the public interest would be served by an injunction.

2 327. ACT is violating the rights of the EOS Disability Class under the
3 Rehabilitation Act by enabling colleges to search for and exclude examinees on the
4 basis of the existence and type of disability through the EOS program. ACT must
5 *offer* the EOS program to all examinees on an equal basis. The EOS program by itself
6 offers real and substantial benefits to examinees by giving them an opportunity to be
7 recruited by colleges and offered scholarship opportunities. But after offering Special
8 Testing examinees the EOS program on an equal basis, ACT must also *operate* the
9 EOS program on a disability-blind basis. Despite this, ACT operated the EOS
10 program at all relevant times by enabling colleges and universities to search for, and
11 exclude, examinees with specific types of disabilities. ACT's EOS program also
12 enabled colleges and universities to apply higher ACT score cut offs to examinees
13 with disabilities.

14 328. As a direct result of ACT's unlawful practices, the EOS Disability Class
15 has incurred or will incur irreparable injury, including lost educational and
16 scholarship opportunities, lost opportunities to be recruited by and sought after by
17 colleges, universities and scholarship programs, and lost opportunities to learn and
18 discover colleges they had not previously heard of.

19 329. Unless and until these practices are enjoined, ACT will continue to deny
20 members of the EOS Disability Class the opportunity to participate in and benefit
21 from ACT's programs and services on an equal basis as other students, demonstrating
22 a real and immediate threat of repeated injuries to the members of the EOS Disability
23 Class and violations of their rights to full and equal access to the ACT Test and ACT's
24 programs and services. Members of the Special Testing Class lack any adequate
25 remedy at law, the balance of hardships favor members of the relevant Subclasses,
26 and the public interest would be served by an injunction.

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Los Angeles, California 90025
310.477.1700 phone • 310.477.1699 fax

1
2 **VIII. PRAYER FOR RELIEF**

3 Plaintiffs, on their own behalf and on behalf of the each Class and the
4 Subclasses, respectfully pray for judgment against ACT as follows:

5 1. For an Order certifying this action as a class action under Rule 23 of
6 the Federal Rules of Civil Procedure;

7 2. Designate and appoint Plaintiffs as Class Representatives;

8 3. Appoint Plaintiffs' attorneys of record as Class Counsel;

9 4. Enter judgment against ACT and in favor of Plaintiffs and the
10 Subclasses for all causes of action;

11 5. Enter injunctive relief requiring ACT:

12 a) to cease and desist from the collection or disclosure of any
13 disability information of any students to any third party, including postsecondary
14 institutions, from the usage of such information in any manner by ACT, and from
15 the continuing violations of the rights of Plaintiffs and Subclass members under the
16 ADA, Unruh Act, California Constitution, and California's Unfair Competition Law;

17 b) to implement reasonable and appropriate corrective measures to
18 redress injuries to Plaintiffs and Subclass members, including seeking the return
19 and/or destruction of such information from third party organizations that have
20 received disability information of any Plaintiff or member of a Subclass, proof
21 thereof, an accounting of all third parties to whom ACT reported disabilities, and
22 providing notice to all such third party organizations that the collection and
23 disclosure of such information was illegal and that the third parties should not ever
24 use or further disseminate such information;

25 c) to require ACT to take or not take other actions determined to be
26 necessary to remedy or cease violations of the rights of Plaintiffs and members of
27 the Subclasses; and

28 d) to require ACT to permit Special Testing students to opt in to

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1 participate in ACT's EOS program in the same manner and to the same extent as
2 ACT permits National Testing students to do so.

3 6. As to members of the California Subclass of each Class, award treble
4 damages and restitution to Plaintiffs and the class members at least the minimum
5 statutory damages under the Unruh Act of \$4,000 for each and every offense;

6 7. As to the State Mandate Subclass, award damages and restitution to the
7 Plaintiffs and the Subclass according to proof;

8 8. Order ACT to disgorge all amounts that it has improperly received and
9 retained through its misconduct alleged herein;

10 9. Award pre-judgment and post-judgment interest to the extent required
11 by law;

12 10. Award Plaintiff reasonable attorneys' fees and costs to the extent
13 permitted by law;

14 11. Grant appropriate declaratory relief;

15 12. Appoint an ADA monitor to ensure ACT's full compliance with the
16 ADA; and

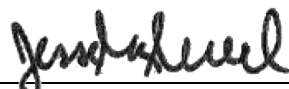
17 13. Grant such further relief as the Court deems appropriate.

18 **JURY TRIAL DEMANDED**

19 Plaintiff demands a trial by jury as to all issues so triable in this matter.
20
21

22 DATED: August 19, 2019

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23
24
25 By: 
26 _____
27 Rahul Ravipudi
28 Jesse Creed
Attorneys for Plaintiffs

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PROOF OF SERVICE

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 11111 Santa Monica Boulevard, Suite 700, Los Angeles, CA 90025.

On August 19, 2019, I served true copies of the following document(s) described as **THIRD AMENDED NATIONWIDE CLASS ACTION COMPLAINT FOR VIOLATIONS OF** on the interested parties in this action as follows:

Eric L. Samore
Albert M. Bower
SMITHAMUNDSEN LLC
150 N. Michigan Avenue, Suite 3300
Chicago, IL 60601
Attorneys for Defendants

BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on August 19, 2019, at Los Angeles, California.



Lucio, Jaqueline

PANISH SHEA & BOYLE LLP
11111 Santa Monica Boulevard, Suite 700
Los Angeles, California 90025
310.477.1700 phone • 310.477.1699 fax