

1 PHILLIP A. BAKER, BAR ID #169571
pbaker@bknlawyers.com
2 JENNIFER L. STONE, BAR ID #325493
jstone@bknlawyers.com
3 BAKER, KEENER & NAHRA, LLP
633 West 5th Street, Suite 5500
4 Los Angeles, California 90071
Telephone: (213) 241-0900/Facsimile: (213) 241-0990

5 MARCI LERNER MILLER, BAR ID # 162790
marci@milleradvocacy.com
6 CHRISTINA N. HOFFMAN, BAR ID #161932
choffman@milleradvocacy.com
7 MILLER ADVOCACY GROUP
1303 Avocado Avenue, Suite 230
8 Newport Beach, California 92660
9 Telephone: (949) 706-9734/Facsimile: (949) 266-8069

10 Attorneys for Plaintiffs
11

12 UNITED STATES DISTRICT COURT

13 CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

14 Plaintiff J.P. on behalf of her minor son
R.P., and all others similarly situated;
15 THE NATIONAL CENTER FOR FAIR
& OPEN TESTING doing business as
16 FAIRTEST, a Massachusetts
corporation; A.K., individually and on
17 behalf of all others similarly situated;
R.G. on behalf of her minor son J.G., and
18 all others similarly situated; Plaintiff
M.S. on behalf of her minor daughter
19 Z.S., and all others similarly situated,

20 Plaintiffs,

21 vs.

22 EDUCATIONAL TESTING SERVICES
(ETS), a New York corporation;
23 THE COLLEGE ENTRANCE
EXAMINATION BOARD, a New York
24 corporation, doing business as THE
COLLEGE BOARD; and
25 DOES 1 through 50, inclusive,

26 Defendants.
27

28 ///

Case No.:

**NATIONWIDE AND
CALIFORNIA CLASS ACTION
COMPLAINT**

DEMAND FOR JURY TRIAL

1 Plaintiffs, Plaintiff J.P. on behalf of her minor son R.P. and all others similarly
2 situated; THE NATIONAL CENTER FOR FAIR & OPEN TESTING (“FairTest”);
3 A.K., individually and on behalf of all others similarly situated; R.G. on behalf of her
4 minor son J.G., and all others similarly situated; Plaintiff M.S. on behalf of her minor
5 daughter Z.S., and all others similarly situated (collectively, “Plaintiffs”), allege and
6 plead as follows:

7 **INTRODUCTION**

8 1. Plaintiffs bring this suit against Defendants to recover the damages owed to
9 them and others similarly situated and for injunctive relief as a result of the Defendants’
10 failure to allow access to and failure to administer its Advanced Placement (“AP”)
11 program properly and without prejudice.

12 2. The College Board is involved at every level of the college preparation,
13 testing, admissions, financial aid, and placement process. It is the leading player in the
14 higher education industry responsible for the fates of millions of high school students
15 every year, deciding who will be recruited, who will apply, who will be accepted, who
16 will receive financial aid, and who will be able to afford college and other
17 postsecondary opportunities. The Educational Testing Service (“ETS”) is responsible
18 for the development, administration, and scoring of College Board’s assessments,
19 including AP exams.

20 3. AP is a program offered by the College Board that offers college-level
21 courses and examinations to high school students. Colleges and universities frequently
22 grant placement and course credit to students who obtain passing scores on their AP
23 examinations. The length of time each student will spend in college, their curriculum,
24 and how much they pay to attend college are factors heavily influenced by College
25 Board and the AP opportunities available to students. The College Board claims that
26 AP courses and examinations also favorably impact college admissions decisions by
27 demonstrating to admissions officers that a student is prepared for college-level work.
28

1 AP courses strengthens a student's high school transcript and help students qualify for
2 scholarships.

3 4. In March of 2020, schools around the world moved to distance learning
4 due to the COVID-19 pandemic. The College Board was faced with the decision of
5 cancelling its popular and profitable AP program for the year, postponing the exams, or
6 offering them at home to students. The College Board made the decision to offer the
7 AP exams to students at home but with significant structural changes.

8 5. The College Board was immediately made aware by numerous sources,
9 including counselors, educators, advocates and families, that there were serious
10 concerns that the at-home AP exams would not be fair to students who have no
11 computer, access to Internet or quiet workspaces from which to work, or to under-
12 resourced students in general. Even as the test began, questions remained about the
13 availability and applicability of legally required accommodations for students with
14 disabilities, the fair access to connectivity for all students, test security, and score
15 comparability.

16 6. Counselors, educators, advocates, and families immediately reached out to
17 The College Board to make them aware of their serious concerns with the at-home AP
18 format's likely impact on students who have no computer, access to Internet or quiet
19 workspaces from which to work, or on under-resourced students in general. Even as the
20 test began, questions remained about the availability and applicability of legally
21 required accommodations for students with disabilities, connectivity, test security, and
22 score comparability.

23 7. The College Board acknowledged that these issues existed, but it did not
24 change its policies to address them. On May 14, 2020, after 3 full days of at-home AP
25 exams, the College Board admitted that there was a measurable failure rate in uploading
26 exams, and it attempted to change its policies going forward. The College Board's
27 President, David Coleman acknowledged in an email that, "we can't control the
28 conditions in students' homes." Technical problems with the digital versions of the AP

1 exams caused and continue to cause tremendous angst for high school students and their
2 parents during this already stressful time.

3 8. Before this year, high school students took their AP exams at school during
4 the regular school day hours in a controlled and regulated environment where they could
5 ask for assistance if necessary. The College Board acknowledged that it knew moving
6 the exams home may exclude some students from testing at all, stating that, “We
7 recognize that the digital divide could prevent some low-income and rural students from
8 participating.” The College Board moved the AP exams to students’ homes under the
9 present conditions despite this acknowledgement. In doing so, the College Board
10 knowingly discriminated against under-resourced students, disabled students, and
11 students in remote locations, and it failed to honor its commitments to students and their
12 families.

13 9. After one day of testing, it became clear that the College Board and ETS
14 had failed to fairly, competently, or equitably administer the AP exams. The students
15 who relied on AP scores for the financial benefits of college placement and credit
16 experienced technical glitches, timing issues, and a heightened level of anxiety and
17 distress. Reports of anywhere between 5% and 20% of examinees were unable to
18 submit their responses through the at-home testing platform during the first three days
19 of AP exams. One AP Coordinator reported a failure rate of 30%. Some students could
20 only submit partial responses, and others could not even log on to take the exams.

21 10. Despite the fact that these are challenging times for families, The College
22 Board offered no acceptable remedies to students whose lack of digital access prevented
23 them from fairly testing. Nor did it offer remedies to students who experienced glitches
24 with the AP platform. On May 15, 2020, The Chronicle of Higher Education reported,
25 “AP Tests During Covid-19: Heartbreak, Technical Glitches, and Anonymous
26
27
28

Intrigue.”¹ On the same day, The Washington Post reported, “College Board Says New AP Test Online Going Well – But Students Report Big Problems.”²

11. The College Board intends to move all of its assessments to an at-home format, including the SAT; however, this year’s AP exam administration makes it perfectly clear that until the technical issues, the digital divide and other inequities are adequately addressed, it cannot not do so.

12. The challenge of the at-home AP exam format is only the final hurdle for many AP students, and it is also one step that many students may never even reach. Some AP students are fully denied access to AP exams and others must overcome additional hurdles to obtain access to AP exams based solely on where they are enrolled in school. Access is particularly challenging for students enrolled in California public charter schools or homeschools.

THE PARTIES

Plaintiffs:

13. Plaintiff J.P. is acting on behalf of her minor son R.P. and all others similarly situated. R.P. is a high school student who is registered to take at-home AP exams. Pseudonyms have been used throughout the complaint in order to protect the identity of the minor Plaintiffs. Further the public has little legitimate interest in knowing the true identity of the Plaintiffs. The Defendants will not be prejudiced by allowing the Plaintiffs to proceed anonymously and in this manner until a protective order is in place.

14. The National Center for Fair & Open Testing (“FairTest”) is a nationwide public charity that operates in California. FairTest’s mission is to advance quality education and equal opportunity by promoting fair, open, valid evaluations of students, teachers, and schools. FairTest works on behalf of examinees to end the misuses of

¹ <https://www.chronicle.com/article/AP-Tests-During-Covid-19-/248792>

² <https://www.washingtonpost.com/education/2020/05/15/college-board-says-new-online-ap-tests-are-going-well-students-report-big-problems/>

1 standardized tests, placing special emphasis on eliminating the racial, class, gender, and
2 cultural barriers to equal opportunity. In pursuit of its mission, FairTest provides
3 information and technical assistance to students and parents as well as advocacy on a
4 broad range of testing concerns, including those relating to the at-home AP exams.

5 15. Plaintiff A.K. is acting individually and on behalf of all others similarly
6 situated. A.K. is a high school student who registered for and took AP exams.

7 16. Plaintiff R.G. is acting on behalf of her minor son J.G and all others
8 similarly situated. J.G. is a high school student who is registered to take at-home AP
9 exams.

10 17. Plaintiff M.S. is acting on behalf of her minor daughter Z.S. and all others
11 similarly situated. Z.S. is a high school student who is registered to take one at-home
12 AP exam.

13 **Defendants:**

14 18. Defendant EDUCATIONAL TESTING SERVICE (“ETS”) is registered as
15 a non-profit organization headquartered in Princeton, New Jersey. ETS has multiple
16 offices in the State of California, including within this jurisdiction. Plaintiffs are
17 informed and believe that ETS administers AP exams on behalf of Defendant College
18 Board.

19 19. Defendant COLLEGE ENTRANCE EXAMINATION BOARD (“The
20 College Board”) is a New York corporation with its principal place of business in New
21 York, New York, which does business in California. Plaintiffs are informed and believe
22 that the AP program is fully owned and operated by The College Board.

23 20. Defendants ETS and College Board are referred to collectively herein as
24 “Defendants.”

25 21. The true names and capacities of defendant DOES 1 through 50, inclusive,
26 whether individual, corporate, associate or otherwise, are unknown to Plaintiff, who
27 therefore sues said defendants by such fictitious names and will amend to allege their
28 true names and capacities when ascertained. Plaintiffs are informed and believe that

1 each of the DOE defendants is responsible for the acts or omissions alleged in this
2 complaint, and that Plaintiffs' injuries and damages were proximately caused by the acts
3 or omissions of these unnamed defendants.

4 22. Plaintiffs are informed and believe, and based thereon allege, that each of
5 the Defendants herein was at all relevant times the principal, agent, alter-ego, joint-
6 venturer, partner, affiliate, manager, subsidiary, servant, employee and/or co-conspirator
7 of each other Defendant, and in performing the acts described in this complaint, was
8 acting in the scope of his, her or its authority with the consent of each other Defendant.
9 Each Defendant ratified and/or authorized the wrongful acts, conduct, omissions, or
10 commissions of each of the other Defendants. At all relevant times, each Defendant
11 acted with full knowledge of the conduct of each of the other Defendants, with the
12 intention to cooperate therewith.

13 23. Plaintiffs do not know the true names and capacities, whether corporate,
14 partnership, associate, individual, or otherwise of Defendant issued herein as DOES 1
15 through 10, inclusive, under the provisions of Central District of California, Local Rule
16 19-1. Defendant DOES 1 through 50, inclusive, are in some manner responsible for the
17 acts, occurrences and transactions set forth herein, and are legally liable to Plaintiff.
18 Plaintiff will seek leave to amend this Complaint to set forth the true names and
19 capacities of the fictitiously named Defendants, together with appropriate charging
20 allegations, when ascertained.

21 24. All acts of corporate employees as alleged were authorized or ratified by an
22 officer, director or managing agent of the corporate employer.

23 **JURISDICTION AND VENUE**

24 25. This Court has subject matter jurisdiction over this action pursuant to the
25 Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), as the proposed class contains
26 more than 100 members, at least one of whom maintains citizenship in a state diverse
27 from the defendant, and seeks in the aggregate more than \$5,000,000, exclusive of costs
28 and interest.

26. Venue is proper pursuant to 28 U.S.C. § 1391(b) & (c) because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district, and because Defendants are subject to the Court's personal jurisdiction in this judicial district.

27. This Court has personal jurisdiction over the parties hereto, because the Defendants are corporations that do business throughout the State of California. The facts underlying this case arise from the State of California and from within this judicial district. Defendants' conduct substantially impacts the State of California and its students. Plaintiffs are informed and believe that each Defendant herein has sufficient contacts with California so as to make proper the exercise of personal jurisdiction over them, and have sufficient minimum contacts so as to render the exercise of personal jurisdiction permissible under traditional notions of fair play and substantial justice.

COMMON FACTUAL ALLEGATIONS

28. The College Board claims that students who score a 3 or higher (out of 5) on an AP Exam typically experience greater academic success in college and are more likely to earn a college degree on time than non-AP students.³ As the only player in the education market with this level of influence over high school curriculum, college admissions, course placement, and financial outcomes, the College Board knows that access to its AP exams must be fair, reliable, and affordable.

29. To ensure that low-income students can access AP Exams at a reduced cost, Every Student Succeeds Act (ESSA) provides funding for AP Exams and courses under the Title IV, Part A block grant.⁴ Additional funding is also available for states and districts to cover AP Exam fees for low-income students. In California, an increasing number of lower income students are enrolling in AP courses. Of the 58.7

³ <https://collegereadiness.collegeboard.org/about/benefits/connect-to-ap>

⁴ <https://professionals.collegeboard.org/testing/states-local-governments/new-education-policies/essa-federal-funding-ap>

1 percent of the state's K–12 students eligible for the free or reduced-price lunch program
2 in the Class of 2017, 45.5 percent took at least one AP exam.⁵

3 30. Each year, millions of high school students take 38 different AP exams at
4 the end of the school year. In 2019, 3.1 million students took a total of 4.9 million AP
5 exams at school. In 2020, 3.4 million students are registered to take over 5 million AP
6 exams. During the first week of testing, students took or attempted to take over 2.2
7 million AP exams. The cost of an AP exam is generally between \$100 and \$150 per test.

8 31. In 2018, the College Board earned over \$480 million dollars from its AP
9 program alone. The College Board collected its exam fees in the Fall of 2019 for the
10 Spring 2020 exams.

11 32. AP exams provide a means for high school students to earn college credit
12 while in high school. Defendant College Board advertises that, “by taking an AP course
13 and scoring successfully on the related AP Exam, [a high school student] can save on
14 college expenses: most colleges and universities nationwide offer college credit,
15 advanced placement, or both, for qualifying AP Exam scores... These credits can allow
16 students to save college tuition, study abroad, or secure a second major.” College Board
17 further advertises that, “[e]arning a qualifying score on the AP Exam can help you
18 advance and avoid required introductory courses – so you can move directly into upper-
19 level classes and focus on the work that interests you most.”

20 33. The AP program is the only widely available high program allowing
21 students to earn college credits. Defendant College Board organizes and administers the
22 AP tests. The AP program is the only means for high school students to test for college
23 credit in dozens of subject matters. In order to obtain college credits, students are
24 required to pass the AP test, as scored and reported by Defendants.

25 34. Passing scores (a 3, 4, or 5) on the AP exams can save students and their
26 parents thousands of dollars in college tuition and costs. A successful student who takes
27

28 ⁵ <https://www.cde.ca.gov/nr/ne/yr18/yr18rel16.asp>

multiple AP exams can potentially finish college a year or more earlier than students who did not earn AP credit during high school. Some students understandably wanted an option to take their AP exams for college credit when COVID-19 forced their schools to convert to distance learning and they could no longer test at school.

35. However, the format of the at-home AP exams is different from the format students are accustomed to and different from the practice AP exams they have taken. The 2020 home-based AP exams are digitally-based instead of on paper as they have always been in the past. The new exams are scheduled to last only 45 minutes (actually 40 minutes with the required 5 minutes to begin uploading answers before the test ends) instead of 3 hours, and all tests in the same subject are given at exactly the same time. This means that some students in one part of the world could be taking an exam in the middle of the night, while others are taking it in the middle of the day. Students in Hawaii begin their first exams each day at 6 a.m., while students in New York begin the same exams at noon. The 2020 exams include material covered until the time of the COVID-19 breakout instead of the entire course curriculum. Most importantly, the exams are taken at home, where the testing environment can be unpredictable and distracting.

36. Some of the issues with the at-home format should have been anticipated. As soon as the College Board announced its plans to administer at-home exams, educators, students, parents, and AP coordinators voiced their concerns over equity and access issues. They also expressed concerns about timing and technical problems with the new format as well as score validity.

37. The College Board announced prior to the administration of the at-home exams that certain disability accommodations that were previously provided would be modified, eliminated, or were deemed “unnecessary” due to the new format.

38. Dozens of educators and counselors wrote an “Open Letter” to the College Board on April 22, 2020 outlining why the exams would not be fair to students who have no computer, access to Internet or quiet work spaces from which to work, or to

1 students with disabilities who would not have their approved accommodations.⁶ Plaintiff
2 FairTest announced that its concerns about the 2020 AP exams included computer
3 equipment and technology, connectivity, the availability of legally required
4 accommodations, security, and score comparability.

5 39. The College Board did not address these issues or change its policies prior
6 to the administration of the at-home AP exams. In fact, on May 14, 2020, after 3 full
7 days of AP exam administration, College Board's President David Coleman
8 acknowledged in an email that, "we can't control the conditions in students' homes." He
9 added, "Students may face technology or internet issues, need to tend to unexpected
10 family obligations, or face other disruptions that will impact their testing experience.
11 Like the virus itself, these disruptions will disproportionately impact low-income and
12 underrepresented students." Instead of changing the testing format to address the
13 disparities among student testing environments, however, Mr. Coleman recommended
14 that students explain their disadvantages to college admissions officers. In an admission
15 that the tests are not valid for all students, Coleman said, "We're working to ensure that
16 students who take the exam in challenging situations can share context with admissions
17 officers about their exam experience."

18 40. The first week of the 2020 AP exams revealed the deep digital divide
19 among AP test-takers, and it became clear how the revised exam format
20 disproportionately impacted certain groups of students, including those who are under-
21 resourced, who lack access to technology or quiet workspaces, students with disabilities,
22 and students testing in non-ideal time zones. A number of students suffered from
23 technical glitches, timing issues, issues with their computer software, disability
24 accommodation issues, and widespread panic due to the inability to reach anyone at the
25 College Board for assistance.

26
27
28 ⁶ <https://www.washingtonpost.com/education/2020/04/22/an-open-letter-college-board-about-online-at-home-ap-tests/>

1 41. After the first week of testing, The College Board reported a failure rate of
2 only 1%, but AP coordinators and students told a different story. Schools estimated that
3 anywhere between 5-20% of their AP test-takers were unable to submit their exam
4 responses through College Board's testing platform during the first week. Other
5 students could not finish their exams or log into the platform at all despite practicing
6 beforehand.

7 42. One AP Calculus teacher reported that 3 out of her 13 students, or 23% of
8 her students, faced technical obstacles submitting their work during the AP Calculus AB
9 examination. This Santa Barbara-area teacher reported that one of her students received
10 an upload error message after the testing time had expired. A second student had issues
11 with her devices, even though she had practiced logging on and taking mock exams with
12 her teacher. A third student in the class reported that her screen froze, then went blank,
13 and then logged the student out upon trying to submit her answers. This student was
14 never able to get back into the exam to upload her submissions.

15 43. Another AP Coordinator reported that, "This whole thing was a mess. It
16 was unprofessional and added more stress to the students, teachers, families, and
17 coordinators." Another AP coordinator reported a 10% failure rate on the AP Calculus
18 exam. These reports from the ground do not square up with the College Board's
19 statement that "the vast majority" of the 2.2 million students who tested last week
20 successfully completed those exams, or its written statement that less than 1% technical
21 of test takers encountered technical difficulties.

22 44. Students who experienced issues with the College Board's platform
23 emailed their time-stamped work to the College Board, but it was not accepted. They
24 were told that their only remedy was to retake the exam over the summer, if they
25 qualified for a retake exam. Students' anxiety continued to grow as the week progressed
26
27
28

1 due to legitimate fears that they would complete their work but not be unable to submit
2 it and would then have no remedy.⁷

3 45. Students have not been able to confirm access to the retake exams despite
4 technical failures. Students have also reported that they have two AP exams scheduled
5 for the same retake day and that they were told by The College Board that they would
6 have to choose only one exam to take.

7 46. FairTest received an influx of reports about at-home AP exam failures and
8 the lack of remedies. One parent reported, “We also had technical issues trying to sign
9 up for a make-up exam. I spent over an hour on phone with CB. They refused to allow
10 me to speak to supervisor and offered no reassurance that the problem would be fixed
11 by a makeup.”

12 47. One student reported that, “Due to a technical malfunction on the College
13 Board's website during the APUSH exam (AP U.S. History), I was unable to submit by
14 work. My dad has been critically ill and hospitalized for the past few weeks and despite
15 this challenge, I persisted in preparing for my AP exams because I wanted to achieve
16 my goals of earning college credits. Now, due to a technical issue on the College
17 Board's website, I am going to have to continue working during this incredibly stressful
18 time in my life to prepare to re-take the exam in June.”

19 48. One parent said, “My son has time stamped images of his Physics AP
20 answers. Why can't college board find a way to accept those? We worry there is no
21 make up for the make-up test. What happens if this glitch happens on the make up?”
22 Another parent reported, “We also had technical issues trying to sign up for make-up
23 exam. I spent over an hour on phone with CB. They refused to allow me to speak to
24 supervisor and offered no reassurance that problem would be fixed by makeup.”
25
26

27 ⁷ <https://www.washingtonpost.com/education/2020/05/15/college-board-says-new-online-ap-tests-are-going-well-students-report-big-problems/>
28 <https://www.insidehighered.com/admissions/article/2020/05/18/students-complain-they-cannot-submit-ap-tests>

1 49. One student described the experience of carefully preparing for the exam
2 but still being unable to submit his responses. “I took all precautions once I heard from
3 some students that there were submission errors. I updated my computer, used chrome
4 because it was recommended by the college board, sent my brother to my dad’s house
5 so I wasn’t distracted during my test, and made my family get off the wifi so I could
6 have the maximum potential my wifi could give me. . . Then, when I took Physics 1, my
7 first answer submitted with no problem, but my second question wouldn’t submit.”

8 50. In response to the complaints, the College Board officials initially claimed
9 that their systems did not malfunction, but the problems were instead caused by
10 students. Students were instructed to update their browsers, disable plug-ins, and make
11 sure their devices were properly set up.

12 51. Ultimately, in response to what some called a “tsunami” of complaints, the
13 College Board made some adjustments to its policies, announcing on May 17, 2020 that
14 it would provide a backup email submission option of browser-based exams for students
15 testing between May 18 and May 22, 2020. Nonetheless, if the student is unable to
16 upload responses through the exam platform or successfully transmit by email at the
17 time of the exam, as in the case of a home connectivity problem, the student would still
18 have to request a makeup exam. In addition, the College Board will not accept email
19 transmissions from students who already tested between May 11 and May 15, 2020.

20 52. Students taking exams between May 18 and May 22, 2020 have an added
21 safeguard, providing a slightly more desirable and less stressful testing environment for
22 these test-takers. Students who experienced technical failures during the first week have
23 still not received any confirmation that they will be eligible to take a makeup exam or
24 that they will receive the added safeguard of email submission, even for their retakes.

25 53. An online petition is circulating, called “Let Students Submit AP Work,”
26 which requests remedies for the students who tested between May 11 and May 15, 2020
27 and could not submit their work.⁸ The Petition states that, “We, along with all our
28

⁸ <https://www.change.org/p/college-board-let-students-re-submit-ap-work?signed=true>
899-5656-0001

1 sisters and brothers in humanity, have already been having a hard time because of
2 COVID and we were already tired and stressed out and a lot of us have been struggling
3 with sadness and mental health issues. This will make all of that worse. Fortunately,
4 there's a solution. Most of us still have our work and answers saved. The college board
5 can give us time to re-submit after they fix their website.” As of the time of filing, the
6 petition had over 20,000 signatures.

7 54. Students who do not wish to retake their exams, and even those who do not
8 wish to test at all, cannot receive a refund of their test fees directly from the College
9 Board. Even though the College Board collected money for the AP exams at least six
10 months ago, it will not directly issue refunds to students. The College Board has stated
11 that after both the regular and makeup testing windows have passed, if students have not
12 taken or attempted to take any exams, their schools will be refunded the cost of their
13 exam fees. It is then up to the students to request fee refunds from their schools. The
14 College Board’s website does not provide any instructions to students about how
15 students can receive fee refunds. Its website says, “[L]ocal school policy determines the
16 amount of the refund.”

17 55. These are challenging times for high school students and their families,
18 emotionally and financially. Students are entitled to the valid and reliable exam they
19 signed up and paid for, absent the severe stress and anxiety associated with the new
20 format. Despite collecting what Plaintiffs believe to be approximately half a billion
21 dollars in exam fees, The College Board has failed to provide students with an AP exam
22 that is similar to the one they purchased.

23 56. One counselor reported that, “For students this was a traumatic experience,
24 especially after all the time they put into salvaging this course/the year/etc. CB should
25 have troubleshooted the "what-ifs" ahead of time and had the policy in place for
26 students to submit answers that did not immediately go. Technology issues are not a
27 new phenomenon! What more can these poor kids be penalized for? CB needs to accept
28 the answers that would not submit last week.”

57. The “digital divide” was not properly managed. Students are entitled to an exam that does not discriminate based on their lack of access to resources or based on their disabilities. The College Board represented that it would provide the necessary technology to all students; however, there is more than one type of device required to take the AP exams this year and different exams require different equipment. For example, all language tests must be taken on a phone or tablet (only specific models), while others are taken on a computer. Although the College Board claimed that it would get a device to everyone who needed one, the method of requesting a device required digital access and was therefore not accessible to the students who needed it.

58. As of the first day of AP testing, the College Board said that it had “connected” with 27,000 students, less than 1% of this year’s AP exam-takers. The distribution of devices to under-resourced students does not fix slow or unavailable internet service, multiple family members using the internet at the same time, or other issues contributing to poor testing environments.

59. Some students have reported that they have nowhere to take their exams at home where they can be free of distraction. It is unrealistic to think that all students have quiet, private spaces at home in which to test. Lower income students are much more likely to face cramped housing, siblings and parents sharing the same workspace, internet connectivity problems, noisy environments, and less comfortable testing spaces. It has been reported that one New Jersey teacher, worried about her star AP English student’s lack of reliable internet at home, inquired with the College Board but was told “have her use the free WiFi at McDonald’s.”⁹

60. Prior to the at-home AP exams, counselors, educators and advocates requested that The College Board provide additional testing time to all students. An Open Letter to the College Board said that students should be provided with a flexible time period, not a fixed time, in which to test. As support for this request, the Letter

⁹ <https://www.nydailynews.com/opinion/ny-oped-taking-an-ap-test-outside-mclds-20200518-pbzbctec4rgnvkhlwrzfsd3poe-story.html>
899-5656-0001

1 stated, “The proposed time limitations have not been tested under these extreme
 2 conditions. With the extra stress associated with this year’s tests, many students fear
 3 they will not be able to complete the tests in the allotted time frames. We expect this to
 4 cause widespread anxiety and panic from minute one. If students know they have
 5 enough time, they may still be stressed, but they will be able to relax a little and may
 6 even complete the tests with a small amount of extra time, time that may be necessary to
 7 accommodate differences in access.”¹⁰

8 61. Students have already reported issues with the time limits imposed by this
 9 year’s AP exams. The exams have not been properly piloted for time limits, and they are
 10 more speeded and abridged than the original versions. The College Board has
 11 acknowledged the timing issues. The 2020 AP Testing Guide states, “Don't worry if you
 12 don't complete all parts of the question before you need to attach and submit your
 13 response. To give students as many different chances to demonstrate what they know as
 14 possible, a question may have more parts than can be answered in the allowed time. You
 15 don't need to complete the entire question to get a score of 5, but you do need to submit
 16 whatever work you've done.” While this could alleviate some students’ despair about
 17 not finishing their exams, it confirms the fears of other students that their scores will be
 18 seen as invalid or meritless.¹¹

19 62. Adding to the perception that the scores on this year’s exam may not be fair
 20 or consistent is the ability of high schools to review students’ scores and request score
 21 increases. The 2020 AP Testing Guide says that “AP teachers will have the chance to
 22 review your score and your exam responses this summer. If you don't receive a score of
 23 3 or higher and your teacher is convinced you should have, your teacher will be able to
 24 engage with the AP Program's college faculty partners to review and confirm your
 25 score, ensuring it's fair and appropriate.” This policy benefits students at schools with
 26

27 ¹⁰ <https://www.washingtonpost.com/education/2020/04/22/an-open-letter-college-board-about-online-at-home-ap-tests/>

28 ¹¹ <https://apcentral.collegeboard.org/pdf/ap-testing-guide-2020.pdf>
 899-5656-0001

1 more resources, and it discriminates against students who are underprivileged or who
2 attend under-resourced schools.¹²

3 63. Moreover, there is no guarantee that the AP exam scores will count for
4 anything in the collegiate landscape. While some colleges have said they will accept the
5 credit, others have remained silent. Some colleges view at-home testing as inherently
6 inequitable.

7 64. Defendants' unlawful conduct has caused and will continue to cause
8 substantial and irreparable damage and injury to Plaintiffs in ways that cannot be
9 compensated with money, and Plaintiffs have no speedy, plain, or adequate remedy at
10 law. Students pay for these AP exams but will have disadvantages due to the College
11 Board's restrictions and practices discussed herein.

12 65. If Defendants' actions are not remedied immediately, Plaintiffs will also
13 suffer injuries, such as the cost of preparing for yet another set of AP exams.

14 **Students with Disabilities**

15 66. When the College Board announced the new at-home testing format, it
16 initially stayed silent on accessibility and accommodations for disabled students. After
17 parents, teachers and counselors repeatedly asked for more details about
18 accommodations, the College Board announced a month before the AP exams were
19 scheduled to begin that all accommodations would be provided on the at-home exams. S
20 Still, no details about how the exams would be delivered to students with disabilities
21 were released at that time.

22 67. On April 27, approximately two weeks before the exams were scheduled to
23 begin, the College Board finally released information regarding disability
24 accommodations.¹³ Students were told that extended time would be provided through
25 the online exam. They were also told that they needed to use their own assistive
26
27

28 ¹² Id.

¹³ https://apcentral.collegeboard.org/pdf/ap-testing-guide-2020.pdf?SFMC_cid=EM305179-&rid=80697368
899-5656-0001

1 technology, such as screen reader software, that was compatible with the at-home AP
2 platform.

3 68. The College Board's announcement regarding test accommodations also
4 stated that "Students approved to use specific devices or aids may use what they have
5 access to at home." In other words, The College Board would not be providing any of
6 these devices or aids, even if the students had access to them during AP exams taken at
7 school.

8 69. Assuming the availability, willingness and ability of students' household
9 members, the College Board stated that students approved for a reader or scribe "may be
10 assisted by a family or household member while testing." These tasks are ordinarily
11 performed by a trained staff member at school during AP exams.

12 70. Some students who were initially approved for 50% extended time were
13 initially told they had their 50% time built into the exams. On May 7, less than one
14 week before the AP exams were scheduled to begin, some, but not all, of those students
15 with the accommodation of 50% extended time were informed they would automatically
16 receive 100% extended time (those with 100% extended time did not get more time).
17 Students with this 50% extended time were informed this would take the place of their
18 breaks. Some students with 50% extended time did not want this additional time,
19 because they have to wait the time for each question of the exam has passed to move to
20 the next question.

21 71. In addition, with the additional time, students who have two exams on one
22 day have little to no break between them. For example, there are exams scheduled at
23 11:00 a.m. and 1:00 p.m. on the same day. So, if a student with extended time has 90
24 minutes to finish the first exam at 11:00 a.m., he or she would have to start the 1:00 p.m.
25 exam immediately thereafter at 12:30 p.m. There is no time to take a break, as the AP
26 instructions specifically require students to log on 30 minutes before their exams
27 commence.
28

72. “Breaks-as-needed” is a common disability accommodation, especially for students with medical issues such as diabetes. These students are generally not given extended testing time, but their breaks do not count as part of their testing time. With the 2020 format, there are no breaks at all.

73. Many disability accommodations offered to the at-home AP examinees are dependent upon access to purchased software. Other accommodations require the availability of an adult who happens to be free during testing time. This available adult must not be working remotely in the home, or outside of the home and must also be qualified to act as a reader or a scribe according to the College Board’s detailed standards. These required circumstances again weigh heavily in favor of wealthier students who have access to purchase software and adults who have the luxury of time to help them take their AP exams.

74. All AP students were told that any disability accommodation requests approved after the conversion to online testing would force them to forfeit their original testing day and have only one opportunity to test. Some students needed to request different or additional accommodations based upon exam’s format change.

75. The at-home AP exams have not been validated for students with disabilities or for students with these accommodations. The inequitable access to available household members and the disparity in technology invalidate the at-home AP exam results.

Public Charter School Students and Homeschool Students

76. The change of the AP exam to the at-home format is only the final hurdle for many students, and it is one hurdle that some students will never even reach. The College Board denies access to students or causes them to incur additional costs to access AP exams based solely on where they are enrolled in school.

77. The College Board decides who will and who will not be able to access its AP program and the associated secondary, postsecondary and financial aid opportunities. The College Board does not allow access on an equal and nonpartisan

1 basis and makes false claims regarding the availability of its programs in its written
2 materials. The College Board has been made aware that it excludes groups of students
3 from its programs and their benefits. However, it has not made any effort to remedy the
4 situation.

5 78. The College Board determines what schools and what types of schools can
6 provide AP courses and administer AP exams. The College Board's Level 1
7 authorization allows schools to provide AP courses to their students and receive their
8 students' AP and other College Board test scores. Schools with Level 1 authorization
9 cannot administer AP or other College Board exams. The College Board's Level 2
10 authorization allows schools to receive scores as well as administer AP Exams to their
11 students.

12 79. The College Board has denied certain classes of schools, including public
13 charter schools, the opportunity to administer AP exams, if their curriculum is partially
14 or entirely non-classroom based. Even after the AP exams moved to an at-home format
15 this year, students who attended Level 1 schools were not permitted to register for AP
16 exams. This policy is discriminatory and deprives students of the financial opportunities
17 that the AP program affords students who pass the exams.

18 80. In California, families have the option of sending their children to local
19 public schools, public charter schools or private schools. As of the 2017–18 school year,
20 the number of California students enrolled in charter schools was approximately
21 628,849, or approximately ten percent of the public school student population
22 in California.¹⁴ Approximately 25% of California charter schools are either partially or
23 exclusively non-classroom-based (independent study).

24 81. There are approximately 120,000 public independent study high school
25 students in California.¹⁵ An estimated 15-20% of these independent study students have
26

27 ¹⁴ <https://www.cde.ca.gov/sp/ch/cefcharterschools.asp>

28 ¹⁵ Id.
899-5656-0001

1 documented disabilities, and this number is on the rise due to the personalized learning
2 opportunities offered through independent study.

3 82. The College Board does not allow public charter schools that offer
4 independent study programs or blended learning to administer AP exams to their own
5 students, even if they are qualified to teach the curriculum. There are countless other
6 small private schools, homeschool and religious schools that are not College Board-
7 approved test centers. Students at these schools have no access to AP exams or
8 additional barriers.

9 83. Families at schools without the College Board's approval to test are
10 required to find willing test centers on their own, without the assistance of the College
11 Board. If asked, the College Board will provide parents with a list of all local schools
12 that are approved to administer the AP exam, and parents can call around hoping to find
13 one that will accept their student. Based on Plaintiffs' experiences, few schools actually
14 accept outside students, and the schools on the College Board's lists may be hundreds of
15 miles away from their homes. Some schools that do agree to test outside students charge
16 exorbitant sums on top of the official test fees. Test centers that accept outside students
17 are generally less willing to accept disabled students with accommodations for AP
18 testing.

19 84. The College Board's policy says that "The AP Program encourages AP
20 coordinators to assist homeschooled students, students from virtual schools, and
21 students whose schools don't offer AP Exams," but there is no requirement that they do
22 so and no alternative if parents cannot locate a willing test center on their own.

23 85. A.K. is a public charter school student with disabilities who resides in Long
24 Beach, California. His high school does not have authorization to administer AP exams.
25 One local high school would not administer A.K.'s AP exams with accommodations,
26 saying that it had a "limited number of proctors and it sounds like [the student] will
27 require a designated proctor because of the specific accommodations from the College
28 Board."

1 86. Z.S. attends a public charter school that offers an independent study
2 curriculum. Z.S. and her siblings have always been educated through homeschooling or
3 through an independent study program due to religious reasons. Her school is not a
4 College Board-approved test center, but she wished to take the AP English exam after
5 having taken the course.

6 87. In the Fall of 2019, Z.S.'s mother called approximately 14 schools in an
7 attempt to register her to take the AP exam. Her neighborhood high school would not
8 accept her for testing, and neither would any of the schools on the list provided to her by
9 the College Board. Z.S.'s mother finally heard of a school near her home that would test
10 outside students for an additional fee of \$150 on top of her exam registration fee.

11 88. Due to the testing difficulties, some Level 1 schools now discourage
12 enrollment in AP courses or have stopped offering them altogether, even though this
13 means that their students may forego the opportunity to earn the college credits (and
14 cost savings) that come along with those courses.

15 **Background of Plaintiffs**

16 **FairTest:**

17 89. The National Center for Fair and Open Testing ("FairTest") is a
18 Massachusetts public charity that operates in California, nationwide, and internationally.
19 FairTest's mission is to advance quality education and equal opportunity by promoting
20 fair, open, and valid evaluations of students, teachers, and schools. FairTest also works
21 to end the testing practices that impede those goals, including standardized testing that
22 negatively impacts students with disabilities, underrepresented minorities, gender bias,
23 and dozens of other issues involving the fair evaluation of students, teachers, and
24 schools.

25 FairTest engages in three main activities:

- 26 **1) Education of the public.** FairTest serves as a unique source of information
27 about testing and alternatives for educators, parents, public officials, journalists
28 and policymakers.

1 **2) Advocacy.** FairTest advocates on behalf of low income families, disabled
 2 students and other marginalized student groups to close the gap in admissions
 3 and outcomes. FairTest coordinates and catalyzes educators, citizen groups and
 4 parents to bring about needed assessment reforms.

5 **3) Strategic Assistance.** FairTest provides training and advice to parents,
 6 educators and a broad range of civil rights organizations about assessments.

7 90. FairTest places special emphasis on eliminating the racial, class, gender,
 8 and cultural barriers to equal opportunity posed by standardized tests. In pursuit of its
 9 mission, FairTest provides information, technical assistance and advocacy on a broad
 10 range of testing concerns, focusing on three main areas: K-12, college and university
 11 admissions, and employment tests.

12 91. Since the College Board announced its changes to the AP exam two
 13 months ago, FairTest has expended significant resources addressing the issues
 14 associated with the at-home exam and advocating for the student groups most affected.
 15 In the past two months, FairTest has repeatedly communicated its concerns about the
 16 2020 AP exams through social media, interviews with journalists, phone calls, and
 17 emails.

18 92. Specifically, FairTest emphasized the potential issues involving computer
 19 equipment and technology, connectivity, the availability of legally required
 20 accommodations, test security and score comparability. In the last week alone, Robert
 21 Schaeffer, FairTests' Interim Executive Director, communicated with dozens of
 22 students, parents, and reporters specifically about the glitches and "snafus" that took
 23 place during the first week of AP exams. Dozens of other queries were sent to FairTest's
 24 general email box and referred for response.

25 93. In the last week, Akil Bello, FairTest's Senior Director of Advocacy and
 26 Advancement, has responded to hundreds of emails about AP issues and recorded close
 27 to 200 accounts of student testing issues. He has spent additional time advocating for
 28 under-resourced students taking the AP exams this year through social media and

1 interviews with reporters. In the last two weeks, nearly all of Mr. Bello's time has been
2 devoted to AP-related issues.

3 94. FairTest addresses multiple testing reform issues involving high stakes
4 testing, college admissions testing, mandatory state testing, K-12 admissions, as well as
5 graduation and promotion tests. Instead of expending its resources on the spectrum of
6 testing issues, FairTest has been forced to allocate a disproportionate amount of
7 resources in recent weeks to address the College Board's AP failures.

8 **R.G. on behalf of J.G.:**

9 95. R.G. is acting on behalf of her minor son J.G, who is a high school junior
10 enrolled in four (4) AP courses this year: AP Calculus AB, AP Chemistry, AP United
11 States History, and AP English Literature and Composition. He paid for and registered
12 to take all four AP exams. On Tuesday, May 12, 2020, J.G. took the AP Calculus AB
13 examination and successfully submitted his work in a JPEG format. The next day,
14 while using the same computer, the same browser, and connected to the same Wi-Fi
15 network in the same room in his home, he took the AP Chemistry exam; however, when
16 he attempted to submit his work in the same JPEG format, he received a message
17 stating: "there was an error, we did not receive your submission."

18 96. J.G. and his mother, R.G., immediately took a picture of his work, emailed
19 the College Board with his test work attached as a JPEG, and called the College Board.
20 They were unable to reach anyone after remaining on hold for 90 minutes.

21 97. As a result, J.G. applied to take a Retake Examination. In the application,
22 he had to explain why he needed the retake. J.G. received a message saying that he be
23 notified the week of May 25, 2020, if he was accepted for a Retake, less than a week
24 before the Retake was scheduled to take place.

25 98. After applying to retake the AP Chemistry exam, J.G. realized he will not
26 be able available to retake this test on the scheduled date because of a scheduling
27 conflict. If the College Board does not accept his work that was photographed, time-
28

1 stamped, and promptly emailed to the College Board on May 13, 2020, he will not have
2 the opportunity to pass the test and receive the benefits of AP credit.

3 **A.K.:**

4 99. Plaintiff A.K. is a graduating senior with learning disabilities including
5 ADHD, sensory motor dysfunction, and a speech and language disorder. When A.K.
6 was in his 9th grade year at a public charter school, his mother contacted the AP
7 Coordinator at the local public school in his district in Long Beach, California, and A.K.
8 was initially approved to take the AP examination at the high school. When A.K.'s
9 mother informed the AP Coordinator that A.K. needed accommodations for his AP
10 Exam, the AP Coordinator told her that the school could no longer administer the test
11 for A.K. because it did not have a proctor or a teacher available to administer his
12 accommodations.

13 100. A.K.'s high counselor contacted the College Board to see if the charter
14 school could administer the examination. The College Board denied the request, and
15 A.K. had to find an alternative location. A.K.'s mother finally made private
16 arrangements for A.K.'s high school counselor to proctor A.K.'s AP test at the local
17 public school. In this case, the student and his family were solely responsible for
18 finding the proctor and ensuring he could even take the examination, making access
19 challenging and unduly burdensome.

20 **M.S. on behalf of Z.S.**

21 101. Plaintiff M.S. is acting on behalf of her minor daughter Z.S., who both
22 reside in the Central District of California. Z.S. is currently enrolled in AP English
23 Literature and Composition, and she took the AP examination on May 13, 2020. Z.S.
24 suffers from severe test anxiety, even under ordinary testing conditions. Z.S.
25 experienced heightened anxiety and fear due to the technical challenges involved with
26 the administration and submission of the exam. Under these rushed and condensed
27 conditions, Z.S. did not have time to complete the AP English exam on May 13th;
28 however, she is not eligible to retake the exam. The College Board's website policy

1 expressly prohibits retakes of the examination when a student runs out of time:
2 “Running out of time to finish and submit your response is NOT an approved reason for
3 requesting a makeup test.”

4 **J.P. on behalf of R.P.**

5 102. Plaintiff J.P., on behalf of her minor son R.P. who is a sophomore at
6 Saugus High School, is currently enrolled in two AP classes, AP Chemistry and AP
7 World History. J.P. and R.P. live in the Central District. The AP Chemistry exam was
8 administered on May 20, 2020, the very day of the six-month anniversary of the tragic
9 Saugus school shooting.

10 103. Already under tremendous amounts of stress and anxiety due to COVID
11 and the anniversary of this horrific school event, R.P. began the AP Chemistry exam
12 and successfully submitted the answer to the first question. After finishing the second
13 of two questions with six minutes remaining, R.P. tried to submit his answer but
14 received an error message that his work would not upload, despite his careful attention
15 to following instructions. He and his mother actually practiced logging in, preparing,
16 and submitting answers the day prior to the real examination.

17 104. His mother J.P., an LAUSD teacher, immediately called the College Board.
18 After waiting on hold and transferring to several different departments, she finally
19 reached a customer service agent. J.P. asked whether College Board was experiencing
20 reports of similar technical problems, and rather than responding honestly, the College
21 Board customer service employee said they had received very few technical problem
22 reports, and blamed the student for using an out of date browser. R.P.’s browser was not
23 out of date.

24 105. J.P. asked if she could help her son R.P. submit the work, and was told no.
25 R.P. as a first week test-taker, does not have the same remedy nor did he have the same
26 test experience as the week two test-takers, who now have the opportunity to submit
27 their work if the College Board rejects submission attempts. R.P. has saved his entire
28

answer, including the unsubmitted portion to question 2, and requests that the College Board accept his work and grade his test answers.

CLASS ACTION ALLEGATIONS

Plaintiffs bring this action on his own behalf, and as a class action on behalf of the Classes defined herein, pursuant to, and properly maintainable under Fed. R. Civ. P. 23(a) and Fed. R. Civ. P. 23(b)(3). The Classes consist of tens of thousands of students victimized by Defendants' unfair and illegal practices. Specifically, Plaintiffs brings this suit on behalf of the following Classes:

The "Nationwide Class": All persons who are or were students who did not have fair and equal access to, or were not able to complete, the 2020 AP exams as a result of the College Board's decisions prior to the administration of the exams. The class excludes counsel representing the class and all persons employed by said counsel.

The Fair Access "California Subclass": All persons who are or were students who did not have fair and equal access to, or were not able to complete, the 2020 AP exams as a result of the College Board decisions prior to the administration of the exams. The class excludes counsel representing the class and all persons employed by said counsel.

The Disabled Students "California Subclass": All persons who are or were disabled students who did not have fair and equal access to the AP exams due to the College Board's decisions. The class excludes counsel representing the class and all persons employed by said counsel.

The Under-Resourced "California Subclass": All persons who are or were under-resourced students who did not have fair and equal access to

the AP exams due to the College Board's decisions. The class excludes counsel representing the class and all persons employed by said counsel.

The Denied Access Students “California Subclass”: All persons who are or were students who were denied access to, faced additional burdens, or were not able to complete, the 2020 AP exams as a result of the College Board decisions prior to the administration of the exams. The class excludes counsel representing the class and all persons employed by said counsel.

Numerosity: The proposed classes are so numerous that individual joinder of all their members is impracticable. While the exact number and identities of the Class Members are unknown at this time, such information can be ascertained through appropriate investigation and discovery. The disposition of the claims of these Class Members in a single class action will provide substantial benefits to all parties and to the Court.

Typicality: Plaintiff’s claims are typical of the claims of his respective Classes in that his claims arise from the same event or practice or course of conduct that gives rise to the claims of other class members, and is based on the same legal theory as their claims.

Adequacy of Representation: Plaintiffs will fairly and adequately represent and protect the interests of the Classes. Undersigned counsel has substantial experience in prosecuting complex lawsuits and class action litigation. Plaintiffs and undersigned counsel are committed to vigorously prosecuting this action on behalf of the Classes, and have the financial resources to do so. Neither Plaintiffs nor their counsel have any interests adverse to the Classes.

Superiority of Class Action and Impracticability of Individual Actions: Plaintiffs and the members of the Classes suffered harm as a result of the College Board

Defendants' unlawful conduct. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. Individual joinder of all members of the Classes is impractical. Even if individual Class Members had the resources to pursue individual litigation, it would be unduly burdensome to the courts in which the individual litigation would proceed. Individual litigation magnifies the delay and expense to all parties in the court system of resolving the controversies engendered by the Defendants' common course of conduct. The class action device allows a single court to provide the benefits of unitary adjudication, judicial economy, and the fair and equitable handling of all Class Members' claims in a single forum. The conduct of this action as a class action conserves the resources of the parties and of the judicial system, and protects the rights of the Class Members. Adjudication of individual Class Members' claims with respect to Defendants would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication, and could substantially impair or impede the ability of other Class Members to protect their interests.

Common Questions of Law and Fact Predominate: In addition, the requirements of Federal Rule of Civil Procedure 23 are satisfied by questions of law and fact common to the claims of Plaintiff and of each member of the Classes and which predominate over any question of law or fact affecting only individual members of the Classes. Common questions of law and fact include, but are not limited to, the following:

- a. The questions of law and fact common to the Nationwide Class include the following: (1) were members of the Nationwide Class entitled to equal access to the AP exams?; (2) did Defendants' practices constitute breach of contract?; (3) did Defendants' practices constitute breach of implied covenant of good faith and fair dealing?; (4) did Defendants' practices constitute negligence?; (5) did Defendants' practices constitute negligent misrepresentation?; (6) did Defendants' practices constitute gross negligence?; (7) did Defendants' practices constitute unjust enrichment?;

(8) did Defendants' practices constitute breach of implied in fact contract?; (9) did Defendants' practices constitute breach of fiduciary duty?; (10) did Defendants' practices constitute violation of Americans with Disabilities Act?; (11) did Defendants' practices constitute violation of Unruh Act?; (12) did Defendants' practices constitute violation of Americans with Disabilities Act Section 794?; (13) did Defendants' practices constitute violation of Americans with Disabilities Act Section 12101?; (14) did Defendants' practices constitute violation of Rehabilitation Act?; (15) did Defendants' practices constitute unfair competition?; (16) did Defendants' practices constitute false advertising?; and (17) are members of the Nationwide Class entitled to damages?

- b. The questions of law and fact common to the California Subclasses include the following: (1) were members of the California SubClass entitled to equal access to the AP exams?; (2) did Defendants' practices constitute breach of contract?; (3) did Defendants' practices constitute breach of implied covenant of good faith and fair dealing?; (4) did Defendants' practices constitute negligence?; (5) did Defendants' practices constitute negligent misrepresentation?; (6) did Defendants' practices constitute gross negligence?; (7) did Defendants' practices constitute unjust enrichment?; (8) did Defendants' practices constitute breach of implied in fact contract?; (9) did Defendants' practices constitute breach of fiduciary duty?; (10) did Defendants' practices constitute violation of Americans with Disabilities Act?; (11) did Defendants' practices constitute violation of Unruh Act?; (12) (12) did Defendants' practices constitute violation of Rehabilitation Act?; (15) did Defendants' practices constitute unfair competition?; (16) did Defendants' practices constitute false advertising?; and (17) are members of the California Sub Class entitled to damages?

1 106. Notice: Notice can be provided via internet publication, published notice
2 and/or through the mail and paid for by the College Board.

3 **FIRST CLAIM FOR RELIEF**

4 **BREACH OF CONTRACT**

5 112. Plaintiffs repeat and incorporates by reference paragraphs 1 to 111 of this
6 Complaint.

7 113. Upon registration for the AP exams, the Class Members entered into an
8 agreement with the College Board wherein the College Board expressly recognizes its
9 obligation to ensure a fair and equitable opportunity to demonstrate college readiness
10 for every student and to prevent anyone from gaining an unfair advantage on the tests.

11 114. Defendants breached the agreement by failing to ensure a fair and equitable
12 testing opportunity and to prevent anyone from gaining an unfair advantage by the
13 College Board's distinctions between what is considered an official test site,
14 accommodations and bars to taking the exams.

15 115. As a direct result of Defendants' breach, Plaintiff and the Class suffered
16 damages.

17 **SECOND CLAIM FOR RELIEF**

18 **BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

19 116. Plaintiffs repeat and incorporates by reference paragraphs 1 to 115 of this
20 Complaint.

21 117. Defendants breached the express contract provision obligating Defendants
22 to ensure a fair and equitable opportunity to demonstrate college readiness for every
23 student and to prevent anyone from gaining an unfair advantage on the AP exams.

24 118. As a direct result of Defendant's breach, Plaintiff and the Class suffered
25 damages.

26 ///

27 ///

28 ///

899-5656-0001

THIRD CLAIM FOR RELIEF

NEGLIGENCE

119. Plaintiffs repeat and incorporates by reference paragraphs 1 to 118 of this Complaint.

120. Defendants, as owners, sponsors, developers and administrators of the AP exams, respectively, had a duty to exercise reasonable care in providing the exams to Plaintiff and the Class. Specifically, Defendants were under a duty to offer and administer the exams in a fair and equitable manner and to safeguard the exams against any foreseeable unfair advantages.

121. Defendants, through an affirmative and/or promised act, undertook to render the exams in a fair and equitable manner, free from impropriety.

122. Defendants breached their duty by negligently offering and administering the exams despite failing to ensure a fair and equitable testing opportunity and access and failing to prevent anyone from gaining an unfair advantage by the College Board's distinctions between what is considered an official test site, accommodations, and bars to taking the exams.

123. Defendants' conduct foreseeably and substantially caused Plaintiff and the Class to suffer damages.

124. Plaintiff and the Class suffered damages as a direct and proximate result of Defendants' breach.

FOURTH CLAIM FOR RELIEF

NEGLIGENT MISREPRESENTATION

125. Plaintiffs repeat and incorporates by reference paragraphs 1 to 124 of this Complaint.

126. Defendants misrepresented to Plaintiff and the Class that the AP exams would be fairly and equitably offered and administered.

127. Based on the history of which types of students took these exams and the College Board's active role in creating rules and barriers to entry to the exams,

1 Defendants should have known that its representations regarding fairness, equity and
2 validity were false.

3 128. Defendants intended to induce Plaintiff and the Class to rely on the
4 misrepresentations in signing up for the exams and in trusting that Defendants were
5 administering the exams fairly.

6 129. Plaintiff and the Class acted in justifiable reliance upon the
7 misrepresentation by registering for and taking or not being able to take the exams,
8 resulting in injury to Plaintiff and the Class.

9 **FIFTH CLAIM FOR RELIEF**

10 **GROSS NEGLIGENCE**

11 130. Plaintiffs repeat and incorporates by reference paragraphs 1 to 129 of this
12 Complaint.

13 131. There is an imminently clear and present danger that the AP exams will be
14 administered unfairly and invalidly as there is no equal access to these exams for all
15 2020 AP exam takers, students with disabilities or under-resourced students, based on
16 fundamental flaws inherent to the College Board's requirements for access to these
17 exams.

18 132. There is also an imminently clear and present danger that the AP exams
19 will be exploited by individuals.

20 133. Defendants have knowledge of and/or awareness of the imminent danger of
21 unfair administration of these exams and the risk of exploitation.

22 134. Therefore, it is indisputably foreseeable that more students like those in this
23 class will be denied an equal opportunity to partake in these tests, which in turn will
24 affect their ability to show college readiness.

25 135. By failing to rectify the obvious flaw—unequal access—Defendants evince
26 a conscious disregard of the consequences.

27 As a result of Defendants gross negligence, Plaintiff and the Class suffered
28 damages.

SIXTH CLAIM FOR RELIEF

UNJUST ENRICHMENT

136. Plaintiffs repeat and incorporates by reference paragraphs 1 to 135 of this Complaint.

137. Plaintiff and the Class conferred benefits to Defendants by registering for, paying for, and taking the exams.

138. Defendants knowingly and willingly retained the registration fees and associated fees conferred in connection with registering for and taking the exams despite knowing of these inequities.

139. Under the circumstances, it would be inequitable for Defendants to retain this monetary benefit at the expense of Plaintiff and the Class.

140. Moreover, no adequate legal remedy exists.

141. As a direct result of Defendants' unjust enrichment, Plaintiff and the Class have suffered injury and are entitled to reimbursement, restitution and disgorgement by Defendants of the benefit conferred by Plaintiff and the Class.

142. Defendants benefited from their unlawful acts, as alleged herein, through payment by Plaintiffs and the Class for the 2020 AP exams, and through the resulting profits enjoyed by Defendants as a direct result of such payments.

143. As a direct and proximate result of Defendants' conduct, they have been and continue to be unjustly enriched at the expense of, and to the detriment of, Plaintiffs and the Class.

144. It would be against equity and good conscience to permit Defendants to retain the benefit of these payments that were conferred by the Plaintiff and the Class and retained by Defendants. The benefit held by Defendants rightly belongs to the Plaintiffs and the Class, as the Plaintiff and the Class have paid for services that Defendants failed and continue to fail to provide.

145. In equity, Defendants should not be allowed to retain the economic benefit from their improper conduct and should be ordered to disgorge profits or pay restitution

1 and pre-judgment interest to the Plaintiff and the Class, or in the alternative, ordered to
2 score the exams that were recorded and time-stamped immediately if the student is
3 unable to take a make-up test without charge on the date unilaterally scheduled by
4 Defendants.

5 **SEVENTH CLAIM FOR RELIEF**

6 **BREACH OF IMPLIED IN FACT CONTRACT**

7 146. Plaintiffs repeat and incorporates by reference paragraphs 1 to 145 of this
8 Complaint.

9 147. Defendants tacitly promised Plaintiff and the Class, as inferred in whole or
10 in part by its conduct, that it would fairly and equitably offer and administer the exams.

11 148. Under the circumstances, Plaintiff and the Class presumed based on
12 Defendants' conduct that the tests would be fairly and equitably offered and
13 administered.

14 149. Defendants breached the implied contract by failing to ensure a fair and
15 equitable testing opportunity for all students.

16 150. As a result of Defendants' breach, Plaintiff and the Class were damaged.

17 **EIGHTH CLAIM FOR RELIEF**

18 **BREACH OF FIDUCIARY DUTY**

19 151. Plaintiffs repeat and incorporates by reference paragraphs 1 to 150 of this
20 Complaint.

21 152. A fiduciary relationship between Plaintiffs and the Class and Defendants
22 exists. Defendants agreed to offer and administer fair and equitable exams for the
23 benefit of Plaintiff and the Class and were thereby granted a high degree of control and
24 discretionary power to do so, evidencing a high level of trust and confidence in and
25 reliance on Defendants to perform their duties.

26 153. Defendants breached their fiduciary duty by failing to administer the exams
27 and allow access to the exams in a fair and equitable manner.
28

1 154. As a proximate result of Defendants' breach, Plaintiff and the Class
2 suffered damages.

3 **NINTH CLAIM FOR RELIEF**

4 **VIOLATION OF AMERICANS WITH DISABILITIES ACT 42**

5 **USC SECTION 12101**

6 155. Plaintiffs repeat and incorporates by reference paragraphs 1 to 154 of this
7 Complaint.

8 156. By creating barriers to access for these exams and failing to provide
9 appropriate accommodations for all students, whether disabled or in need of resources,
10 Defendants failed to prevent an unfair disadvantage for students with disabilities.

11 157. As a result of Defendants' breach of its duty to provide appropriate
12 accommodations and its violation of the ADA, Plaintiff and the Class were damaged.

13 **TENTH CLAIM FOR RELIEF**

14 **VIOLATION OF UNRUH ACT CCC SECTION 51-DENIAL OF**

15 **OPPORTUNITIES FOR DISABLED AND**

16 **UNDERRESOURCED STUDENTS**

17 158. Plaintiffs repeat and incorporates by reference paragraphs 1 to 157 of this
18 Complaint.

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

25 160. The Unruh Act provides that a "violation of the right of any individual
26 under the federal Americans with Disabilities Act of 1990...shall also constitute a
27 violation of this section." Cal. Civil Code Section 51(f).
28

1 161. Defendants have denied students with disabilities the same access other
2 students have to the AP exams. Defendants have therefore denied, aided, or incited a
3 denial, or made a discrimination or distinction contrary to Section 51 in doing so.

4 162. As a result of Defendants' breach of its duty to provide equal access to AP
5 exams and their violations of the Unruh Act, Plaintiff and the Class were damaged.

6 **ELEVENTH CLAIM FOR RELIEF**

7 **VIOLATION OF REHABILITATION ACT**

8 163. Plaintiffs repeat and incorporates by reference paragraphs 1 to 162 of this
9 Complaint.

10 164. By creating barriers to access for these exams and failing to provide
11 appropriate accommodations for disabled students, Defendants failed to ensure that the
12 students with disabilities would have equitable access and opportunity to take these
13 exams and participate equally in college admissions by failing to provide adequate
14 accommodations.

15 165. As a result of Defendants' breach of their duty to ensure that disabled
16 students would have equitable access and opportunity to take the AP exams and its
17 violation of the Rehabilitation Act, Plaintiff and the Class were damaged.

18 **TWELVTH CLAIM FOR RELIEF**

19 **UNFAIR COMPETITION, BUSINESS AND PROFESSIONS**

20 **CODE SECTION 17200**

21 166. Plaintiffs repeat and incorporates by reference paragraphs 1 to 165 of this
22 Complaint.

23 167. California Business & Professions Code Section 17200 *et seq.*, also known
24 as the California Unfair Competition Law ("UCL"), prohibits acts of "unfair
25 competition" including any unlawful, unfair, fraudulent or deceptive business act or
26 practice as well as "unfair, deceptive, untrue or misleading advertising."
27
28

1 168. By engaging in the unlawful conduct alleged above, Defendants have
2 engaged in unlawful business acts and practices in violation of the UCL by violating
3 state and federal laws including but not limited to the ADA and the Unruh Act.

4 169. As a result of Defendants' violation of Business & Professions Code
5 Section 17200, Plaintiff and the Class were damaged.

6 **THIRTEENTH CLAIM FOR RELIEF**

7 **FALSE ADVERTISING, BUSINESS AND PROFESSIONS CODE**

8 **SECTION 17500**

9 170. Plaintiffs repeat and incorporates by reference paragraphs 1 to 169 of this
10 Complaint.

11 171. California Business & Professions Code Section 17500 prohibits acts of
12 “untrue or misleading” advertising.

13 172. By engaging in the unlawful conduct alleged above, including the issuance
14 of false statements regarding the percentage of students who faced technological
15 obstacles with submitting their exam answers, Defendants have engaged in unlawful
16 business acts and practices in violation of Business & Professions Code Section 17500
17 by violating state and federal laws including, but not limited to the prohibition against
18 false advertising.

19 173. As a result of Defendants' violation of Business & Professions Code
20 Section 17500, Plaintiff and the Class were damaged.

21
22 **PRAYER FOR RELIEF**

23 WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

24 86. Plaintiffs seek to recover the following damages and obtain the following
25 relief from Defendants:

26 ///

27 ///

28 ///

899-5656-0001

ON THE CAUSE OF ACTION FOR BREACH OF CONTRACT

1. An Order certifying that the action be maintained as a class action under Rule 23(b)(2) and/or Rule 23(b)(3) of the Federal Rules of Civil Procedure.
2. Economic loss and damages suffered by Plaintiffs.
3. For attorneys' fees incurred herein, to the extent permitted by law.
4. Court costs.
5. For pre and post judgment interest and costs of suit incurred herein.
6. For such other relief to which Plaintiffs may show themselves justly entitled.
7. For injunctive relief requiring injunctive relief the College Board to accept any test answers from last week's test by time stamp, photo and email.

**ON THE CAUSE OF ACTION FOR BREACH OF IMPLIED COVENANT
OF GOOD FAITH AND FAIR DEALING**

1. An Order certifying that the action be maintained as a class action under Rule 23(b)(2) and/or Rule 23(b)(3) of the Federal Rules of Civil Procedure.
2. An injunction precluding the wrongful conduct described herein.
3. For compensatory damages in an amount that exceeds \$500 million, with the exact amount to be proven at trial.
4. For punitive damages in an amount sufficient to punish Defendants and to deter them from engaging in wrongful conduct in the future.
5. For pre and post judgment interest and costs of suit incurred herein.
6. For attorneys' fees incurred herein, to the extent permitted by law.
7. For such other and further relief as the Court may deem just and proper.

///

///

///

///

899-5656-0001

ON THE CAUSE OF ACTION FOR NEGLIGENCE

1. An Order certifying that the action be maintained as a class action under Rule 23(b)(2) and/or Rule 23(b)(3) of the Federal Rules of Civil Procedure.
2. An injunction precluding the wrongful conduct described herein.
3. For compensatory damages in an amount that exceeds \$500 million, with the exact amount to be proven at trial.
4. For punitive damages in an amount sufficient to punish Defendants and to deter them from engaging in wrongful conduct in the future.
5. For pre and post judgment interest and costs of suit incurred herein.
6. For attorneys' fees incurred herein, to the extent permitted by law.
7. For such other and further relief as the Court may deem just and proper.
8. For injunctive relief requiring injunctive relief the College Board to accept any test answers from last week's test by time stamp, photo and email.

ON THE CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION

1. An Order certifying that the action be maintained as a class action under Rule 23(b)(2) and/or Rule 23(b)(3) of the Federal Rules of Civil Procedure.
2. An injunction precluding the wrongful conduct described herein.
3. For compensatory damages in an amount that exceeds \$500 million, with the exact amount to be proven at trial.
4. For punitive damages in an amount sufficient to punish Defendants and to deter them from engaging in wrongful conduct in the future.
5. For pre and post judgment interest and costs of suit incurred herein.
6. For attorneys' fees incurred herein, to the extent permitted by law.
7. For such other and further relief as the Court may deem just and proper.

///

///

///

899-5656-0001

ON THE CAUSE OF ACTION FOR GROSS NEGLIGENCE

1. An Order certifying that the action be maintained as a class action under Rule 23(b)(2) and/or Rule 23(b)(3) of the Federal Rules of Civil Procedure.
2. An injunction precluding the wrongful conduct described herein.
3. For compensatory damages in an amount that exceeds \$500 million, with the exact amount to be proven at trial.
4. For punitive damages in an amount sufficient to punish Defendants and to deter them from engaging in wrongful conduct in the future.
5. For pre and post judgment interest and costs of suit incurred herein.
6. For attorneys' fees incurred herein, to the extent permitted by law.
7. For such other and further relief as the Court may deem just and proper.
8. For injunctive relief requiring injunctive relief the College Board to accept any test answers from last week's test by time stamp, photo and email.

ON THE CAUSE OF ACTION FOR UNJUST ENRICHMENT

1. An Order certifying that the action be maintained as a class action under Rule 23(b)(2) and/or Rule 23(b)(3) of the Federal Rules of Civil Procedure.
2. An injunction precluding the wrongful conduct described herein.
3. For compensatory damages in an amount that exceeds \$500 million, with the exact amount to be proven at trial.
4. For punitive damages in an amount sufficient to punish Defendants and to deter them from engaging in wrongful conduct in the future.
5. For pre and post judgment interest and costs of suit incurred herein.
6. For attorneys' fees incurred herein, to the extent permitted by law.
7. For such other and further relief as the Court may deem just and proper.

///

///

///

899-5656-0001

ON THE CAUSE OF ACTION FOR BREACH OF IMPLIED
IN FACT CONTRACT

1. An Order certifying that the action be maintained as a class action under Rule 23(b)(2) and/or Rule 23(b)(3) of the Federal Rules of Civil Procedure.
2. An injunction precluding the wrongful conduct described herein.
3. For compensatory damages in an amount that exceeds \$500 million, with the exact amount to be proven at trial.
4. For punitive damages in an amount sufficient to punish Defendants and to deter them from engaging in wrongful conduct in the future.
5. For pre and post judgment interest and costs of suit incurred herein.
6. For attorneys' fees incurred herein, to the extent permitted by law.
7. For such other and further relief as the Court may deem just and proper.
8. For injunctive relief requiring injunctive relief the College Board to accept any test answers from last week's test by time stamp, photo and email.

ON THE CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY

1. An Order certifying that the action be maintained as a class action under Rule 23(b)(2) and/or Rule 23(b)(3) of the Federal Rules of Civil Procedure.
2. An injunction precluding the wrongful conduct described herein.
3. For compensatory damages in an amount that exceeds \$500 million, with the exact amount to be proven at trial.
4. For punitive damages in an amount sufficient to punish Defendants and to deter them from engaging in wrongful conduct in the future.
5. For pre and post judgment interest and costs of suit incurred herein.
6. For attorneys' fees incurred herein, to the extent permitted by law.
7. For such other and further relief as the Court may deem just and proper.
8. For injunctive relief requiring injunctive relief the College Board to accept any test answers from last week's test by time stamp, photo and email.

**ON THE CAUSE OF ACTION FOR VIOLATION OF AMERICANS
WITH DISABILITIES ACT 42 USC SECTION 12101**

1. An Order certifying that the action be maintained as a class action under Rule 23(b)(2) and/or Rule 23(b)(3) of the Federal Rules of Civil Procedure.
2. An injunction precluding the wrongful conduct described herein.
3. For compensatory damages in an amount that exceeds \$500 million, with the exact amount to be proven at trial.
4. For punitive damages in an amount sufficient to punish Defendants and to deter them from engaging in wrongful conduct in the future.
5. For pre and post judgment interest and costs of suit incurred herein.
6. For attorneys' fees incurred herein, to the extent permitted by law.
7. For such other and further relief as the Court may deem just and proper.

**ON THE CAUSE OF ACTION FOR VIOLATION OF UNRUH ACT CCC
SECTION 51-DENIAL OF OPPORTUNITIES**

1. An Order certifying that the action be maintained as a class action under Rule 23(b)(2) and/or Rule 23(b)(3) of the Federal Rules of Civil Procedure.
2. An injunction precluding the wrongful conduct described herein.
3. For compensatory damages in an amount that exceeds \$500 million, with the exact amount to be proven at trial.
4. For statutory damages as set forth under the Unruh Act.
5. For punitive damages in an amount sufficient to punish Defendants and to deter them from engaging in wrongful conduct in the future.
6. For pre and post judgment interest and costs of suit incurred herein.
7. For attorneys' fees incurred herein, to the extent permitted by law.
8. For such other and further relief as the Court may deem just and proper.

///

///

899-5656-0001

**ON THE CAUSE OF ACTION FOR UNFAIR COMPETITION, BUSINESS
AND PROFESSIONS CODE SECTION 17200**

1. An Order certifying that the action be maintained as a class action under Rule 23(b)(2) and/or Rule 23(b)(3) of the Federal Rules of Civil Procedure.
2. An injunction precluding the wrongful conduct described herein.
3. For compensatory damages in an amount that exceeds \$500 million, with the exact amount to be proven at trial.
4. For restitution as set forth in Business & Professions Code 17200.
5. For punitive damages in an amount sufficient to punish Defendants and to deter them from engaging in wrongful conduct in the future.
6. For pre and post judgment interest and costs of suit incurred herein.
7. For attorneys' fees incurred herein, to the extent permitted by law.
8. For such other and further relief as the Court may deem just and proper.

**ON THE FIFTEENTH CAUSE OF ACTION FOR FALSE ADVERTISING,
BUSINESS AND PROFESSIONS CODE SECTION 17500**

1. An Order certifying that the action be maintained as a class action under Rule 23(b)(2) and/or Rule 23(b)(3) of the Federal Rules of Civil Procedure.
2. An injunction precluding the wrongful conduct described herein.
3. For compensatory damages in an amount that exceeds \$500 million, with the exact amount to be proven at trial.
4. For restitution as set forth in Business & Professions Code section 17500.
5. For punitive damages in an amount sufficient to punish Defendants and to deter them from engaging in wrongful conduct in the future.
6. For pre and post judgment interest and costs of suit incurred herein.

///

///

///

899-5656-0001

7. For attorneys' fees incurred herein, to the extent permitted by law.

8. For such other and further relief as the Court may deem just and proper.

DATED: May 19, 2020

BAKER, KEENER & NAHRA, LLP

By /s/ PHILLIP A. BAKER

PHILLIP A. BAKER
JENNIFER L. STONE

MILLER ADVOCACY GROUP

By /s/ MARCI LERNER MILLER

MARCI LERNER MILLER
CHRISTINA N. HOFFMAN

Attorneys for Plaintiffs

JURY DEMAND

Plaintiffs hereby demand a trial by jury on all issues so triable.

DATED: May 19, 2020

BAKER, KEENER & NAHRA, LLP

By /s/ PHILLIP A. BAKER

PHILLIP A. BAKER
JENNIFER L. STONE

MILLER ADVOCACY GROUP

By /s/ MARCI LERNER MILLER

MARCI LERNER MILLER
CHRISTINA N. HOFFMAN

Attorneys for Plaintiffs