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12 Attorneys for Plaintiffs

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
15

16 Plaintiff J.P. on behalf of her minor son
R.P., and all others similarly situated;
17 THE NATIONAL CENTER FOR FAIR
& OPEN TESTING doing business as
18 FAIRTEST, a Massachusetts
corporation; A.K., individually and on
19 behalf of all others similarly situated;
R.G. on behalf of her minor son J.G., and
20 all others similarly situated; Plaintiff
M.S. on behalf of her minor daughter
Z.S., and all others similarly situated,
21

22 Plaintiffs,

23 vs.

24 EDUCATIONAL TESTING SERVICES
(ETS), a New York corporation;
25 THE COLLEGE ENTRANCE
EXAMINATION BOARD, a New York
26 corporation, doing business as THE
COLLEGE BOARD; and
27 DOES 1 through 50, inclusive,
28

Defendants.

Case No.:2:20-cv-04502-PSG (PVCx)

**NATIONWIDE AND
CALIFORNIA CLASS ACTION
FIRST AMENDED COMPLAINT**

DEMAND FOR JURY TRIAL

899-5656-0001

1 1. Plaintiff, THE NATIONAL CENTER FOR FAIR & OPEN TESTING
 2 ("FairTest"); Plaintiff L.D. on behalf of her minor son J.D. and all others similarly
 3 situated, Plaintiff D.K., individually and on behalf of all others similarly situated,
 4 Plaintiff S.N. on behalf of her minor daughter C.M. and all others similarly situated,
 5 Plaintiff P.C. on behalf of his minor son N.C. and all others similarly situated, Plaintiff
 6 C.T. on behalf of her minor son S.T. and all others similarly situated, Plaintiff C.W. on
 7 behalf of her minor daughter M.W. and all others similarly situated, Plaintiff D.M. on
 8 behalf of her minor son L.B. and all others similarly situated, Plaintiff J.P. on behalf of
 9 her minor son R.P. and all others similarly situated; Plaintiff A.K., individually and on
 10 behalf of all others similarly situated; Plaintiff R.G. on behalf of her minor son J.G., and
 11 all others similarly situated; Plaintiff M.S. on behalf of her minor daughter Z.S., and all
 12 others similarly situated (collectively the "Plaintiffs"), allege and plead as follows:

INTRODUCTION

14 2. Plaintiffs bring this suit against Defendants EDUCATIONAL TESTING
 15 SERVICES ("ETS") and THE COLLEGE ENTRANCE EXAMINATION BOARD
 16 (the "College Board"), collectively the "Defendants," to recover the damages owed to
 17 them and others similarly situated and for injunctive relief as a result of Defendants'
 18 failure to allow access to and failure to administer its Advanced Placement ("AP")
 19 program properly and without prejudice.

20 3. Defendants are involved at every level of the college preparation, testing,
 21 admissions, financial aid, and placement process. It is the leading player in the higher
 22 education industry responsible for the fates of millions of high school students every
 23 year, deciding who will be recruited, who will apply, who will be accepted, who will
 24 receive financial aid, and who will be able to afford college and other postsecondary
 25 opportunities. ETS is responsible for the development, administration, and scoring of
 26 College Board's assessments and examinations including the Advanced Placement
 27 Examinations ("AP Exams").

1 4. Defendants' AP Program offers college-level courses and examinations to
2 high school students. Colleges and universities frequently grant placement and course
3 credit to students who obtain passing scores on their AP Exams. The length of time
4 each student will spend in college, their curriculum, and how much they pay to attend
5 college are factors heavily influenced by College Board and the AP opportunities
6 available to students. Defendants also claim that AP courses and AP Exams favorably
7 impact college admissions decisions by demonstrating to admissions officers that a
8 student is prepared for college-level work. AP courses strengthen a student's high
9 school transcript and help students qualify for scholarships.

10 5. In March of 2020, schools around the world moved to distance learning
11 due to the COVID-19 pandemic. Defendants were faced with the decision of cancelling
12 its popular and profitable AP program for the year, postponing the exams, or offering
13 them at home to students. The College Board made the decision to offer the AP Exams
14 to students at home but with significant structural changes.

15 6. Defendants were immediately made aware by numerous sources, including
16 counselors, educators, advocates and families, that there were serious concerns that the
17 at-home AP Exams would not be fair to students who have no computer, access to
18 Internet or quiet workspaces from which to work, or to under-resourced students in
19 general. Even as the test began, questions remained about the availability and
20 applicability of legally required accommodations for students with disabilities, the fair
21 access to connectivity for all students, test security, and score comparability.

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

3 8. Prior to administering the at-home AP Exams, Defendants acknowledged
4 that access issues existed, but it still chose to administer the AP Exams at-home and did
5 not change its policies to address these issues. On May 14, 2020, after 3 full days of at-
6 home AP Exams, the College Board admitted that there was a measurable failure rate in
7 uploading exams, and it attempted to change its policies going forward. The College
8 Board's President, David Coleman acknowledged in an email that, "we can't control the
9 conditions in students' homes." Technical problems with the digital versions of the AP
10 Exams caused and continue to cause tremendous angst for high school students and their
11 parents during this already stressful time.

12 9. Before this year, high school students took their AP Exams at school
13 testing sites during the regular school day hours in a controlled and regulated
14 environment where they could ask for assistance if necessary. The College Board
15 acknowledged that it knew moving the exams home may exclude some students from
16 testing at all, stating that, "We recognize that the digital divide could prevent some low-
17 income and rural students from participating." The College Board moved the AP
18 Exams to students' homes under the present conditions despite this acknowledgement.
19 The College Board's tax-exempt status is based on the fact that it "connects students to
20 college success and opportunity" and that it is "increasing opportunities and breaking
21 down barriers to college through expanded access to AP courses." Through its
22 administration of the at-home AP Exams, Defendants knowingly discriminated against
23 under-resourced students, disabled students, and students without digital access, and by
24 doing so, it failed to honor its commitments to students and their families.

25 10. After one day of testing, it became clear that Defendants had failed to
26 fairly, competently, or equitably administer the AP Exams. The students who relied on
27 AP scores for the financial benefits of college placement and credit experienced
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1 technical glitches, timing issues, access issues, and a heightened level of anxiety and
 2 distress. Reports of anywhere between 5% and 20% of examinees were unable to
 3 submit their responses through the at-home testing platform during the first three days
 4 of AP Exams. One AP Coordinator reported a failure rate of 30%. Some students could
 5 only submit partial responses, and others could not even log on to take the exams.

6 11. Despite the fact that these are challenging times for families, Defendants
 7 offered no acceptable remedies to students whose lack of digital access prevented them
 8 from fairly testing or to those who could not access their disability accommodations.
 9 Nor did it offer remedies to students who experienced glitches with the AP platform
 10 preventing them from accessing their AP Exams. On May 15, 2020, The Chronicle of
 11 Higher Education reported the extent of these problems in “AP Tests During Covid-19:
 12 Heartbreak, Technical Glitches, and Anonymous Intrigue.”¹ On the same day, The
 13 Washington Post reported the technology glitches and hardships in “College Board Says
 14 New AP Test Online Going Well – But Students Report Big Problems.”²

15 12. Prior to its faulty administration of the at-home AP Exams, Defendants
 16 had intended to move all of its assessments to an at-home format, including the SAT;
 17 however, this year’s AP exam administration made it perfectly clear that until the
 18 technical issues, the digital divide and other inequities are adequately addressed, it
 19 cannot not do so. On June 2, 2020, the College Board announced that “after gathering
 20 more understanding and evidence over the past weeks and months, we have decided to
 21 delay an at-home digital SAT” and that “the technological challenges of developing an
 22 online test that all students could take has led to the decision to drop it.”³

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

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

27 ³College Board Scraps Plans for SAT at Home,” New York Times, June 2, 2020

28 <https://www.nytimes.com/2020/06/02/us/at-home-sat-coronavirus.html>

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1 16. Plaintiff D.K. is a California resident acting individually and on behalf of
2 all others similarly situated. D.K. is a high school student who registered for and
3 intended to take AP Exams.

4 17. Plaintiff S.N. on behalf of her minor daughter C.M., is a California resident
5 acting individually and on behalf of all others similarly situated. C.M. is a high school
6 student who registered for and intended to take AP Exams.

7 18. Plaintiff P.C., on behalf of his minor son N.C., is a New Hampshire
8 resident acting individually and on behalf of all others similarly situated. N.C. is a high
9 school student who registered for and intended to take AP Exams.

10 19. Plaintiff C.T., on behalf of her minor son S.T., is a South Carolina resident
11 acting individually and on behalf of all others similarly situated. S.T. is a high school
12 student who registered for and intended to take AP Exams.

13 20. Plaintiff C.W., on behalf of her minor daughter M.W., is acting
14 individually and on behalf of all others similarly situated, M.W. is a high school student
15 who registered for and intended to take AP Exams.

16 21. Plaintiff D.M., on behalf of her minor son L.B., is a Pennsylvania resident
17 acting individually and on behalf of all others similarly situated. L.B. is a high school
18 student who registered for and intended to take AP Exams.

19 22. Plaintiff J.P., on behalf of her minor son R.P. and all others similarly
20 situated, is a California resident acting individually and on behalf of all others similarly
21 situated. R.P. is a high school student who registered for and intended to take AP
22 Exams.

23 23. Plaintiff A.K. is a California resident, is acting individually and on behalf
24 of all others similarly situated. A.K. is a high school student who registered for and
25 intended to take AP Exams.

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24. Plaintiff R.G., on behalf of her minor son J.G., is a Pennsylvania resident acting individually and on behalf of all others similarly situated; J.G. is a high school student who registered for and intended to take AP Exams.

25. Plaintiff M.S., on behalf of her minor daughter Z.S., is a California resident acting individually and on behalf of all others similarly situated Z.S. is a high school student who registered for and intended to take AP Exams.

26. Plaintiff L.D., on behalf of her minor son J.D., is a California resident acting individually and on behalf of all others similarly situated. J.D. is a high school student who registered for and intended to take AP Exams.

Defendants:

27. Defendant ETS is registered as a non-profit organization headquartered in Princeton, New Jersey. ETS has multiple offices in the State of California, including within this jurisdiction. Plaintiffs are informed and believe that ETS developed and administered the 2020 AP Exams on behalf of Defendant College Board. ETS derives its non-profit status based on its stated mission “to help advance quality and equity in education by providing fair and valid assessments, research and related services.”⁴

28. Defendant College Board is a New York corporation with its principal place of business in New York, New York. College Board does business in California and has a Western Regional Office in California within this jurisdiction. Plaintiffs are informed and believe that the AP program and the AP Exam are fully owned and operated by College Board.

29. As previously defined above, Defendants ETS and College Board are referred to collectively herein as “Defendants.”

30. The true names and capacities of defendant DOES 1 through 50, inclusive, whether individual, corporate, associate or otherwise, are unknown to Plaintiff, who

⁴ <https://pdf.guidestar.org/PDF/Images/2018/210/634/2018-210634479-111818c6-9.pdf>
ETS Form 990 (2018).
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1 therefore sues said defendants by such fictitious names and will amend to allege their
2 true names and capacities when ascertained. Plaintiffs are informed and believe that
3 each of the DOE defendants is responsible for the acts or omissions alleged in this
4 complaint, and that Plaintiffs' injuries and damages were proximately caused by the acts
5 or omissions of these unnamed defendants.

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

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

25 33. All acts of corporate employees as alleged were authorized or ratified by an
26 officer, director, or managing agent of the corporate employer.

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JURISDICTION AND VENUE

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

35. 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.

36. At least six of the pseudonymously named Plaintiffs are residents of the State of California and Plaintiffs are informed and believe, and thereon allege, that numerous members of the Nationwide Class and the various subclasses, as those classes are defined below, are or were residents of the State of California at all relevant times so as to establish California's vested interest in maintaining jurisdiction over this matter.

37. The College Board's Western Regional Office is located in Los Angeles, California, and more than 402 leading organizations participate as members of the College Board, including higher education institutions, districts, and secondary schools. Last year, 423,124 students in California took 793,695 AP Exams at approximately 2400 California high schools. An estimated 20,500 AP Test scores were sent to UCLA alone last year.⁵

38. ETS maintains offices in the United States and around the world on the assertion that such offices are necessary to fulfill its stated mission of "advancing quality and equity in education for all people worldwide" and further attests that such offices oversee many of its "core operations, such as test development and research and

⁵ State Summary Report – California (2019)
<http://research.collegeboard.org/programs/ap/data/participation/ap-2019>
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development.” ETS maintains three such offices in California, located in Concord, Sacramento, and San Francisco. The Concord offices provide “operational support for ETS’s national and international programs, as well as customized programs for clients in California” and further provides “mail fulfillment, call center, operational, scoring, IT, accounting and program management services,” the San Francisco office “provides assessment development and psychometric and data analysis support for ETS’s assessment programs,” and the Sacramento office is “home to program management and partnership for ETS’s California K-12 programs and the California State University placement tests. In addition, the Sacramento office’s staff includes K-12 and higher education program directors and managers, IT, finance and government, psychometricians, external relations, and thought partners and serves as a “hub for teacher and stakeholder focus groups, assessment content reviews, bias reviews and standard setting.”⁶

39. As such, this Court has personal jurisdiction over the parties hereto, because Defendants are corporations that do extensive business throughout the State of California. The facts underlying this case fundamentally involve the State of California and this judicial district as Defendants’ conduct substantially impacts both the State of California and its students. For the reasons described above Plaintiffs allege 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

40. The common factual allegations set forth below, as well as all factual allegations set forth herein within this Complaint, are all alleged based on presently available information and are therefore all alleged based on said information and

⁶ <https://www.ets.org/about>
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1 reasonable belief arising therefrom. Initial document exchanges, depositions, and other
 2 forms of formal discovery have yet to be commenced, much less completed, and
 3 therefore Plaintiffs expressly reserve the right to amend, modify, change, or remove any
 4 or all of the factual allegations within this Complaint based on subsequently discovered
 5 evidence or subsequently conducted review and/or analysis with respect thereto.

6 41. Defendants claim that students who score a 3 or higher (out of 5) on an AP
 7 Exam typically experience greater academic success in college and are more likely to
 8 earn a college degree on time than non-AP students.⁷ As the only player in the education
 9 market with this level of influence over high school curriculum, college admissions,
 10 course placement, and financial outcomes, Defendants know that access to its AP
 11 Exams must be fair, reliable, and affordable.

12 42. To ensure that low-income students can access AP Exams at a reduced
 13 cost, Every Student Succeeds Act (ESSA) provides funding for AP Exams and courses
 14 under the Title IV, Part A block grant.⁸ Additional public funding is also available for
 15 states and districts to cover AP Exam fees for low-income students. In California, an
 16 increasing number of lower income students are enrolling in AP courses. Of the 58.7
 17 percent of the state's K–12 students eligible for the free or reduced-price lunch program
 18 in the Class of 2017, 45.5 percent took at least one AP exam.⁹

19 43. Each year, millions of high school students take 38 different AP Exams at
 20 the end of the school year. In 2019, 3.1 million students took a total of 4.9 million AP
 21 Exams at school. In 2020, 3.4 million students registered to take over 5 million AP
 22 Exams. During the first week of testing, students attempted to take over 2.2 million AP
 23 Exams. The cost of an AP exam is generally between \$100 and \$150 per test.

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 26 ⁷ <https://collegereadiness.collegeboard.org/about/benefits/connect-to-ap>

27 ⁸ <https://professionals.collegeboard.org/testing/states-local-governments/new-education-policies/essa-federal-funding-ap>

28 ⁹ <https://www.cde.ca.gov/nr/ne/yr18/yr18rel16.asp>

1 44. In 2018, the most recent audit available, the College Board had
2 \$1,152,226,448.00 in Cash and Investments. It holds over 1.15 billion dollars that can
3 be used to finance any College Board related activity. In 2018, the College Board
4 earned over \$480 million dollars from its AP program alone. The College Board
5 collected its exam fees in the Fall of 2019 for the Spring 2020 exams¹⁰

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

15 46. The AP program is the only widely available high school program allowing
16 students to earn college credits. The College Board organizes and administers the AP
17 tests. The AP program is the only means for high school students to test for college
18 credit in dozens of subject matters. In order to obtain college credits, students are
19 required to pass the AP test, as scored and reported by Defendants.

20 47. Passing scores (a 3, 4, or 5) on the AP Exams can save students and their
21 parents thousands of dollars in college tuition and costs. A successful student who takes
22 multiple AP Exams can potentially finish college a year or more earlier than students
23 who did not earn AP credit during high school. Some students understandably wanted
24 an option to take their AP Exams for college credit when COVID-19 forced their
25 schools to convert to distance learning and they could no longer test at school.

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28 ¹⁰ <https://www.totalregistration.net/AP-Exam-Registration-Service/Follow-The-Money-History-of-College-Board-Finances.php>
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48. Students cannot register to take AP Exams. All exam registration is completed by high school AP coordinators that are approved in advance by Defendants. The AP coordinator “enters class sections for all AP classes at their school (and exam only sections, if applicable) and “organizes the exam roster and submits the exam order by the November final exam ordering deadline.” By taking these steps, the AP coordinators have completed the AP Exam registration process for the students at their high schools. Payment is made directly to Defendants through the high school by the AP coordinator, there is no student involvement. Every school has its own method of collecting fees from students for the exams, and some do not require students to pay fees to the school.

49. Defendants do not require students who are registered for the AP Exams by their schools to take any further steps before exam day. The AP coordinator provides the student roster to Defendants and only the AP coordinator can make changes to students’ registration status, including cancellation. AP coordinators are the ultimate decision-makers regarding who registers and stays registered for AP Exams. In some instances, an AP coordinator may even switch registered students from one AP Exam they are registered for to another (ex. AP Calculus BC to AP Calculus AB). The AP coordinator manual states, “Remember that even with the advanced setting, you still have the ability to make final changes to your exam roster, including changes to students’ exam registration as necessary. The AP coordinators are instructed: “[t]eachers should inform students about any changes to their exam registration; the system **doesn’t** send notification to students if a teacher changes their exam registration for a course.”¹¹

50. Defendants do not require students to take an AP course in order to sit for an AP Exam. In order to log into any AP features such as AP Classroom, “Students need access to a computer or mobile device that supports the latest versions of Chrome

¹¹ <https://apcentral.collegeboard.org/pdf/ap-coordinators-manual-part-1-2019-20.pdf>

1 (preferred), Safari (preferred), Firefox, or Internet Explorer and is connected to the
2 internet. Students who are only taking the AP Exam but not the AP course do not have
3 access to AP Classroom.

4 51. In the past, prior to the COVID-19 pandemic, AP coordinators may have
5 distributed a written pamphlet to students entitled, “2019-20 Bulletin for AP Students
6 and Parents” which discussed in-school written exam policies and how to prepare for
7 test day at school, including what could and could not be taken into the test room (all
8 electronics), what materials were necessary to have on test day at school (sharpened
9 pencils, letter to verify any accommodations) and a description of the test format
10 (multiple choice and free response, closed book). In 2020, because high schools were
11 closed by March, Plaintiffs did not receive these materials; nor were they sent home.

12 52. The AP Exam format changed significantly in 2020. Defendants therefore
13 needed to provide detailed instructions about what to expect Exams, including how to
14 log in, what technology that would be needed, what other materials would be needed,
15 and how to ensure the best testing environment at home. This information was provided
16 to students in a haphazard way, all electronically, through social media, emails to
17 students, and word of mouth. During the time period when the AP Exams took place,
18 there were hundreds of tweets from AP Trevor, an account belonging to Trevor Packer,
19 the Senior Vice President of College Board’s AP program. There were also
20 approximately 10-20 tweets per day from College Board’s AP Students account. These
21 tweets contained crucial information about technology updates, changes to test policies,
22 makeup exam registration deadlines, and device and software requirements. For
23 example, on May 11, AP Students tweeted the following: “Students can use two
24 devices, but you can only click your e-ticket and access your exam from one of the
25 devices.” There were hundreds more public tweets from AP Trevor and AP Students
26 directly to students who were struggling with technical, access and other issues. AP
27 Trevor tweeted “If you received a confirmation email for a makeup exam, there were
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1 issues w/ the files you submitted through the exam app. We cannot score your May
2 exam, so you will need to take the makeup” and “No HEIC photo files.” Defendants
3 made hundreds of posts and messages and replies on its Facebook account. Many
4 students and parents reported feeling confused by the constant updates and changes and
5 overwhelmed by what they felt was a responsibility to constantly check social media for
6 AP Exam updates, while others had no ability to access this information at all.

7 53. On test day, students had a maximum of 30-minutes to log into the AP
8 Exam and complete any pre-test requirements. Students had less time if they
9 experienced log in issues or if they had moved directly from one exam to another.
10 Students reported “rushing” through this part of the process, trying to finish quickly so
11 that they did not take time away from the actual Exam. Students also reported that
12 throughout this log in process, they were focused on the material they had learned for
13 the AP exams.¹²

14 54. The format of the at-home AP Exams was significantly different from the
15 format students were accustomed to and different from the practice AP Exams they had
16 taken. The 2020 home-based AP Exams are digitally-based instead of on paper as they
17 have always been in the past. The new exams are scheduled to last only 45 minutes
18 (actually 40 minutes with the required 5 minutes to begin uploading answers before the
19 test ends) instead of 3 hours, and all tests in the same subject are given at exactly the
20 same time. This means that some students in one part of the world could be taking an
21 exam in the middle of the night, while others are taking it in the middle of the day.
22 Students in Hawaii begin their first exams each day at 6 a.m., while students in New
23 York begin the same exams at noon. The 2020 exams include material covered until the
24 time of the COVID-19 breakout instead of the entire course curriculum. Most
25 importantly, the exams are taken at home, where testing environments vary, are
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27 ¹² <https://apcentral.collegeboard.org/pdf/ap-testing-guide-2020.pdf>

1 unpredictable, can be distracting, and are not equal to all students. The at home
2 environment disproportionately impacts low-income and underrepresented students.

3 55. Some, if not all, of the issues with the at-home format should have been
4 anticipated. As soon as Defendants announced its plans to administer at-home exams,
5 educators, students, parents, and AP coordinators voiced their concerns over equity and
6 access issues. They also expressed concerns about timing and technical problems with
7 the new format as well as score validity.

8 56. Defendants announced prior to the administration of the at-home exams
9 that certain disability accommodations that were previously provided would be
10 modified, eliminated, or were deemed “unnecessary” due to the new format.

11 57. Dozens of educators and counselors wrote an “Open Letter” to the College
12 Board on April 22, 2020 outlining why the exams would not be fair to students who
13 have no computer, access to Internet or quiet work spaces from which to work, or to
14 students with disabilities who would not have their approved accommodations.¹³
15 Plaintiff FairTest announced that its concerns about the 2020 AP Exams included
16 computer equipment and technology, connectivity, the availability of legally required
17 accommodations, security, and score comparability.

18 58. The College Board acknowledged in a statement made prior to the
19 administration of the at-home AP Exams that “[w]e recognize that the digital divide
20 could prevent some low-income and rural students from participating.”¹⁴ However,
21 Defendants never addressed these issues or changed their policies prior to the
22 administration of the at-home AP Exams. In fact, on May 14, 2020, after 3 full days of
23 AP exam administration, the College Board’s CEO David Coleman acknowledged in an
24 email that, “we can’t control the conditions in students’ homes.” He added, “Students
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26 ¹³ <https://www.washingtonpost.com/education/2020/04/22/an-open-letter-college-board-about-online-at-home-ap-tests/>

27 ¹⁴ <https://www.washingtonpost.com/education/2020/04/03/home-or-school-may-or-june-advanced-placement-exams-will-go-despite-coronavirus/>
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1 may face technology or internet issues, need to tend to unexpected family obligations, or
 2 face other disruptions that will impact their testing experience. Like the virus itself,
 3 these disruptions will disproportionately impact low-income and underrepresented
 4 students.” Instead of changing the testing format to address the disparities among
 5 student testing environments, however, Mr. Coleman recommended that students
 6 explain their disadvantages to college admissions officers. In an admission that the tests
 7 are not valid for all students, Coleman said, “We’re working to ensure that students who
 8 take the exam in challenging situations can share context with admissions officers about
 9 their exam experience.”

10 59. The first week of the 2020 AP Exams revealed the deep digital divide
 11 among AP test-takers, and it became clear how the revised exam format
 12 disproportionately impacted certain groups of students, including those who are under-
 13 resourced, who lack access to technology or quiet workspaces, students with disabilities,
 14 and students testing in non-ideal time zones. A number of students suffered from
 15 technical glitches, timing issues, issues with their computer software, disability
 16 accommodation issues, and widespread panic due to the inability to reach anyone at the
 17 College Board for assistance.

18 60. After the first week of testing, Defendants reported a failure rate of only
 19 1%,¹⁵ but AP coordinators and students told a different story. Schools estimated that
 20 anywhere between 5-20% of their AP test-takers were unable to submit their exam
 21 responses through College Board’s testing platform during the first week. Other
 22 students could not finish their exams or log into the platform at all despite practicing
 23 beforehand.

24 61. While Defendants later claimed publicly that there was 93% success rate,¹⁶
 25 its own data report published at the same time showed a 20% failure rate. The May 23,
 26

27 ¹⁵ <https://apcentral.collegeboard.org/pdf/2020-ap-exam-data-overview.pdf>

28 ¹⁶ <https://www.collegeboard.org/releases/2020/students-take-more-than-4-million-advanced-placement-exams-online-for-the-first-time>

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2020 data report included 5,335,125 AP Exams that were registered for by the Fall 2019 deadline.¹⁷ It reports that out of these 5,333,125 AP Exams that were registered for and paid for, only 4,633,626 started their exams. It reported 333,768 AP Exams that were started but not completed, and an additional 19,772 additional detected errors. Out of 5,333,125 AP Exams paid and registered for by the early Fall deadline, only 4,280,086 were completed – a 20% failure rate. There is no data reported for AP Exams registered for after the early deadline, and late examinees are more likely to be from lower income families.¹⁸

62. Out of 215,059 AP Spanish and Culture Exams, only 157,388 were completed – only a 73% success rate.¹⁹ On the AP Spanish and Literature exams, 21,613 students out of 31,855 completed the exam – only a 68% success rate. In 2019, 187,133 students completed the AP Spanish Language and Culture exam with an 89% passing rate, and 59,243 students completed the AP Language and Literature exam with a 72% passing rate.²⁰

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

¹⁷ The College Board notes in this data report that the final deadline for registration was March 13, 2019, and that Fall 2019 was only the early registration date.

¹⁸ <https://www.insidehighered.com/admissions/article/2019/03/11/anger-grows-over-changes-ap-registration-deadlines>
https://www.totalregistration.net/AP-Exam-Registration-Service/Concerns_Regarding_Changes_to_AP_Exam_Ordering_Deadlines.php

¹⁹ <https://apcentral.collegeboard.org/pdf/2020-ap-exam-data-overview.pdf>

²⁰ <https://secure-media.collegeboard.org/digitalServices/pdf/research/2019/Student-Score-Distributions-2019.pdf>
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64. Another AP Coordinator reported that, “This whole thing was a mess. It was unprofessional and added more stress to the students, teachers, families, and coordinators.” Yet another AP coordinator reported a 10% failure rate on the AP Calculus exam. These reports from the ground to do not square up with the College Board’s statement that “the vast majority” of the 2.2 million students who tested during the first week in May successfully completed those exams, or its written statement that less than 1% technical of test takers encountered technical difficulties.

65. Students who experienced issues with Defendant’s platform emailed their time-stamped work to the College Board, but it was not accepted. They were told that their only remedy was to retake the exam over the summer, if they qualified for a retake exam. Students’ anxiety continued to grow as the week progressed due to legitimate fears that they would complete their work but not be unable to submit it and would then have no remedy.²¹

66. Students were not able to confirm access to the makeup exams (“Retakes”) despite Defendants’ technical failures. Some students also reported that they had two AP Exams scheduled for the same Retake day and that they were told by The College Board that they would have to choose only one Retake.

67. FairTest has received a barrage of reports about at-home AP exam failures and the lack of remedies. One parent reported technical issues trying to sign up for a make-up exam. She spent over an hour on phone with Defendants but they refused to allow her to speak to a supervisor. She was offered no reassurance that the problem would be fixed by a makeup.

68. One student reported that, “Due to a technical malfunction on the College Board’s website during the APUSH exam (AP U.S. History), I was unable to submit by

²¹ <https://www.washingtonpost.com/education/2020/05/15/college-board-says-new-online-ap-tests-are-going-well-students-report-big-problems/>
<https://www.insidehighered.com/admissions/article/2020/05/18/students-complain-they-cannot-submit-ap-tests>

1 work. My dad has been critically ill and hospitalized for the past few weeks and despite
2 this challenge, I persisted in preparing for my AP Exams because I wanted to achieve
3 my goals of earning college credits. Now, due to a technical issue on the College
4 Board's website, I am going to have to continue working during this incredibly stressful
5 time in my life to prepare to retake the exam in June.”

6 69. One parent said, “My son has time stamped images of his Physics AP
7 answers. Why can’t college board find a way to accept those? We worry there is no
8 make up for the make-up test. What happens if this glitch happens on the make up?”

9 70. One student described the experience of carefully preparing for the exam
10 but still being unable to submit his responses. He took all precautions once he heard
11 from some students that there were submission errors. He updated his computer, used
12 Chrome because it was recommended by Defendants, told his brother to leave the house
13 so that he would not be distracted during his test, and he made his entire family get off
14 of the Wifi so that he would have the “maximum potential” his Wifi could give him.
15 “Then, when I took Physics 1, my first answer submitted with no problem, but my
16 second question wouldn’t submit.”

17 71. Thousands of students described Defendants’ unwillingness to accept time-
18 stamped documents by email when the system would not allow them to submit their
19 responses and the inability to reach anyone who would respond to their questions. One
20 parent was on hold with the College Board for an hour and forty minutes, when a
21 representative finally picked up the line and placed the parent back on hold. Student and
22 parent emails to Defendants were not responded to.

23 72. In response to the complaints, Defendants initially claimed that their
24 systems did not malfunction, but the problems were instead caused by students.
25 Students were instructed to update their browsers, disable plug-ins, and make sure their
26 devices were properly set up.

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

74. Students struggled with the email submissions as well. Unbeknownst to students, if they used an email other than the one used by their schools to register them, Defendants would not accept their submission. If they attempted to submit an email without Defendants’ finding that they suffered from technological difficulties, Defendants would not accept it. No students from the first week of testing were permitted to submit their time-stamped work. If students were unsure as to whether or not their submissions were accepted, and they chose to register for Retakes, they waived their right to have their first tests scored.

75. An online petition is circulating, called “Let Students Submit AP Work,” which requests remedies for the students who tested between May 11 and May 15, 2020 and could not submit their work.²² The Petition states that, “We, along with all our sisters and brothers in humanity, have already been having a hard time because of COVID and we were already tired and stressed out and a lot of us have been struggling with sadness and mental health issues. This will make all of that worse. Fortunately, there's a solution. Most of us still have our work and answers saved. The college board can give us time to re-submit after they fix their website.” As of the time of filing, the petition had over 32,000 signatures.

²² <https://www.change.org/p/college-board-let-students-re-submit-ap-work?signed=true>
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1 76. Students who do not wish to retake their exams, and even those who do not
2 wish to test at all, cannot receive a refund of their test fees directly from Defendants.
3 Even though Defendants collected money for the AP Exams at least six months before
4 their exams, it will not directly issue refunds to students. Defendants have stated that
5 after both the regular and makeup testing windows have passed, if students have not
6 taken or attempted to take any exams, it will refund schools the cost of their exam fees.
7 It is then up to the students to request fee refunds from their schools. The College
8 Board's website does not provide any instructions to students about how students can
9 receive fee refunds. Its website says, "[L]ocal school policy determines the amount of
10 the refund."

11 77. These are challenging times for high school students and their families,
12 emotionally and financially. Students are entitled to the valid and reliable exam they
13 signed up and paid for, absent the severe stress and anxiety associated with the new
14 format. Despite collecting what Plaintiffs believe to be approximately half a billion
15 dollars in exam fees, Defendants failed to provide students with an AP exam that is
16 similar to the one they purchased.

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

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

5 80. California school leaders estimate that approximately one in five students
 6 lacks broadband or computer access. The lack of digital access is particularly bad in
 7 rural areas, where only 34% of California households have an internet service
 8 subscription.²³ One under-resourced high school tried to get mobile hot spots but
 9 experienced delays due to demand as well as technical difficulties. “It’s just hard to
 10 focus and find a place to be by myself,” one underprivileged student reported, adding, “I
 11 don’t know how they expect us to do an AP exam at home.”

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

17 82. Some students have reported that they have nowhere to take their exams at
 18 home where they can be free of distraction. It is unrealistic to think that all students
 19 have quiet, private spaces at home in which to test. Lower income students are much
 20 more likely to face cramped housing, siblings and parents sharing the same workspace,
 21 internet connectivity problems, noisy environments, and less comfortable testing spaces.
 22 It has been reported that one New Jersey teacher, worried about her star AP English
 23 student’s lack of reliable internet at home, inquired with Defendants but was told “have
 24 her use the free WiFi at McDonald’s.”²⁴

25
 26 ²³ <https://edsources.org/2020/more-california-students-are-online-but-digital-divide-runs-deep-with-distance-learning/630456>

27 ²⁴ <https://www.nydailynews.com/opinion/ny-oped-taking-an-ap-test-outside-mcids-20200518-pbzbctec4rgnvkhlwrzfsd3poe-story.html>
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83. 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 stated, “The proposed time limitations have not been tested under these extreme conditions. With the extra stress associated with this year’s tests, many students fear they will not be able to complete the tests in the allotted time frames. We expect this to cause widespread anxiety and panic from minute one. If students know they have enough time, they may still be stressed, but they will be able to relax a little and may even complete the tests with a small amount of extra time, time that may be necessary to accommodate differences in access.”²⁵

84. Students have reported issues with the time limits imposed by this year’s AP Exams. This year’s AP Exams have not been properly piloted for time limits, and they are more speeded and abridged than the original versions. Defendants have acknowledged the timing issues. The 2020 AP Testing Guide states, “Don't worry if you don't complete all parts of the question before you need to attach and submit your response. To give students as many different chances to demonstrate what they know as possible, a question may have more parts than can be answered in the allowed time. You don't need to complete the entire question to get a score of 5, but you do need to submit whatever work you've done.” While this could alleviate some students’ despair about not finishing their exams, it confirms the fears of other students that their scores will be seen as invalid or meritless.²⁶

85. Adding to the perception that the scores on this year’s exam may not be fair or consistent is the ability of high schools to review students’ scores and request score increases. The 2020 AP Testing Guide says that “AP teachers will have the chance to

²⁵ <https://www.washingtonpost.com/education/2020/04/22/an-open-letter-college-board-about-online-at-home-ap-tests/>

²⁶ <https://apcentral.collegeboard.org/pdf/ap-testing-guide-2020.pdf>
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1 review your score and your exam responses this summer. If you don't receive a score of
2 3 or higher and your teacher is convinced you should have, your teacher will be able to
3 engage with the AP Program's college faculty partners to review and confirm your
4 score, ensuring it's fair and appropriate.” This policy benefits students at schools with
5 more resources, and it discriminates against students who are underprivileged or who
6 attend under-resourced schools.²⁷

7 86. Moreover, there is no guarantee that the AP exam scores will count for
8 anything in the collegiate landscape. While some colleges have said they will accept the
9 credit, others have remained silent. Some colleges view at-home testing as inherently
10 inequitable.

11 87. Defendants’ unlawful conduct has caused and will continue to cause
12 substantial and irreparable damage and injury to Plaintiffs in ways that cannot be
13 compensated with money, and Plaintiffs have no speedy, plain, or adequate remedy at
14 law. Students pay for these AP Exams but will have disadvantages due to Defendants’
15 restrictions and practices discussed herein.

16 88. If Defendants’ actions are not remedied immediately, Plaintiffs will also
17 suffer injuries, such as the cost of preparing for yet another set of AP Exams. Students
18 who already requested and took Retakes were required to forego other activities and
19 employment to study, and their families were required to forego access to work and
20 school for a second time. The students forced to do the Retakes even when they
21 completed their first Exams competently and followed all rules for submission, were
22 more nervous about potential technology glitches during the Retake than they were
23 about the actual course content. They were also at a disadvantage because they were
24 multiple weeks away from the course preparation, and many schools had finished for
25 the year so they did not have access to their AP teachers.

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27
28 ²⁷ Id.
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89. Plaintiffs are informed and believe that Defendants attempted and will attempt to enforce a series of different terms and conditions against those who took and those who did not take the AP Exams. Plaintiffs are informed and believe that Defendants will even do so against students who never had the opportunity to register for the tests, those who experienced log in failures or who could not submit their test responses, those who were dropped from AP Exam rosters, and students who were required to test without the accommodations that Defendants had granted them.

Students with Disabilities

90. When Defendants announced the new at-home testing format, it initially stayed silent on accessibility and accommodations for disabled students. After parents, teachers and counselors repeatedly asked for more details about accommodations, Defendants announced a month before the AP Exams were scheduled to begin that all accommodations would be provided on the at-home exams. Still, no details about how the exams would be delivered to students with disabilities were released at that time.

91. On April 27, approximately two weeks before the exams were scheduled to begin, Defendants finally released information regarding disability accommodations.²⁸ Students were told that extended time would be provided through the online exam. They were also told that they needed to use their own assistive technology, such as screen reader software, that was compatible with the at-home AP platform.

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

93. Assuming the availability, willingness and ability of students' household members, Defendants stated that students approved for a reader or scribe "may be

²⁸ https://apcentral.collegeboard.org/pdf/ap-testing-guide-2020.pdf?SFMC_cid=EM305179-&rid=80697368
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1 assisted by a family or household member while testing.” These tasks are ordinarily
2 performed by a trained staff member at school during AP Exams.

3 94. Some students who were initially approved for 50% extended time were
4 initially told they had their 50% time built into the exams. On May 7, less than one
5 week before the AP Exams were scheduled to begin, some, but not all, of those students
6 with the accommodation of 50% extended time were informed they would automatically
7 receive 100% extended time (those with 100% extended time did not get more time).
8 Students with this 50% extended time were informed this would take the place of their
9 breaks. Some students with 50% extended time did not want this additional time,
10 because they have to wait the time for each question of the exam has passed to move to
11 the next question.

12 95. In addition, with the additional time, students who have two exams on one
13 day have little to no break between them. For example, there are exams scheduled at
14 11:00 a.m. and 1:00 p.m. on the same day. So, if a student with extended time has 90
15 minutes to finish the first exam at 11:00 a.m., he or she would have to start the 1:00 p.m.
16 exam immediately thereafter at 12:30 p.m. There is no time to take a break, as the AP
17 instructions specifically require students to log on 30 minutes before their exams
18 commence.

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

23 97. Many disability accommodations offered to the at-home AP examinees are
24 dependent upon access to purchased software. Other accommodations require the
25 availability of an adult who happens to be free during testing time. This available adult
26 must not be working remotely in the home, or outside of the home and must also be
27 qualified to act as a reader or a scribe according to Defendants’ detailed standards.

1 These required circumstances again weigh heavily in favor of wealthier students who
2 have access to purchase software and adults who have the luxury of time to help them
3 take their AP Exams.

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

8 99. The at-home AP Exams have not been validated for students with
9 disabilities or for students with these accommodations. The inequitable access to
10 available household members and the disparity in technology invalidate the at-home AP
11 exam results.

12 100. For example, Plaintiff M.W. was forced to take her AP Exam without the
13 accommodations that Defendants had already approved for her. S.M., another disabled
14 student, believed that the condensed format of her AP Exam made it particularly
15 difficult for students like her to demonstrate her knowledge. Plaintiff L.D. had extreme
16 difficulty with the format of the at-home AP Exams due to his disabilities and was also
17 unable to retake the exam.

18 **Public Charter School Students and Homeschool Students**

19 101. The change of the AP exam to the at-home format is only the final hurdle
20 for many students, and it is one hurdle that some students will never even reach.
21 Defendants deny access to students or causes them to incur additional costs to access
22 AP Exams based solely on where they are enrolled in school.

23 102. Defendants decide who will and who will not be able to access the AP
24 program and the associated secondary, postsecondary and financial aid opportunities.
25 Defendants do not allow access on an equal and nonpartisan basis and makes false
26 claims regarding the availability of its programs in its written materials. Defendants
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1 have been notified that they were excluding groups of students from its programs and
2 their benefits; however, they have not made any effort to remedy the situation.

3 103. Defendants determine what schools and what types of schools can provide
4 AP courses and administer AP Exams. Although Defendants represent that they offer
5 AP opportunities to all students, authorization to administer AP Exams is not granted to
6 all schools, leaving students who have completed the AP curriculum with no place to
7 take AP Exams. The ability to administer AP Exams is routinely denied by Defendants,
8 even to schools that are specifically authorized to provide AP courses by teachers
9 certified by Defendants, and those that are authorized receive their students' AP Exam
10 scores.

11 104. Defendants have denied certain classes of schools, including public charter
12 schools, schools that offer distance learning, and homeschools, the opportunity to
13 administer AP Exams. Students who attend these schools often do so for religious
14 purposes, because they are disabled, or because of their remote location. Authorization
15 is routinely denied to schools whose curriculum is partially or entirely non-classroom
16 based. Even when the AP Exams moved to an at-home format this year, and all students
17 were participating in distance learning, students were unable to take AP Exams if their
18 schools were not authorized to administer them. This policy is discriminatory and
19 deprives students of the financial opportunities that the AP program affords students
20 who pass the exams.

21 105. In California, families have the option of sending their children to local
22 public schools, public charter schools, or private schools. As of the 2017–
23 18 school year, the number of California students enrolled in charter schools was
24 approximately 628,849, or approximately ten percent of the public school
25 student population in California.²⁹ Approximately 25% of California charter schools are
26 either partially or exclusively non-classroom-based (independent study).

27
28 ²⁹ <https://www.cde.ca.gov/sp/ch/cefcharterschools.asp>
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1 106. There are approximately 120,000 public independent study high school
2 students in California.³⁰ An estimated 15-20% of these independent study students have
3 documented disabilities, and this number is on the rise due to the personalized learning
4 opportunities offered through independent study. Following the COVID-19 pandemic,
5 the demand for schools that offer distance learning has sky-rocketed, causing student
6 attendance to double or triple. The rate of students learning through homeschooling
7 programs is also expected to rise dramatically in response to the pandemic.

8 107. Defendants do not allow public charter schools that offer independent study
9 programs or blended learning to administer AP Exams to their own students, even if
10 they are qualified to teach the curriculum. There are countless other small private
11 schools, homeschool and religious schools that are not approved test centers. Students at
12 these schools have no access to AP Exams or additional barriers.

13 108. Families at schools without Defendants' approval to test are required to
14 find willing test centers on their own, without the assistance of Defendants. If asked,
15 Defendants will provide parents with a list of all local schools that are approved to
16 administer the AP exam, and parents must call to plead with the school to accept their
17 student. Based on Plaintiffs' experiences, few schools actually accept outside students,
18 and the schools on Defendants' lists may be hundreds of miles away from their homes.
19 Some schools that do agree to test outside students charge exorbitant sums of money in
20 addition to the official test fees. Test centers that accept outside students are generally
21 less willing to accept disabled students with accommodations for AP testing.

22 109. Defendants' policy says that "The AP Program encourages AP
23 coordinators to assist homeschooled students, students from virtual schools, and
24 students whose schools don't offer AP Exams," but there is no requirement that they do
25 so and no alternative if parents cannot locate a willing test center on their own.
26

27 _____
28 ³⁰ Id.
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1 110. Following Defendants' decision to move AP Exams to an at-home format,
2 students who were successful in locating schools other than their own to administer
3 testing were dropped from the rosters and could not take their AP Exams.

4 111. A.K. is a public charter school student with disabilities who resides in Long
5 Beach, California. His high school does not have authorization to administer AP Exams.
6 One local high school would not administer A.K.'s AP Exams with accommodations,
7 saying that it had a "limited number of proctors and it sounds like [the student] will
8 require a designated proctor because of the specific accommodations from the College
9 Board."

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

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

20 114. L.B. attends a private Catholic school where he was enrolled in AP Latin.
21 At the time he registered to take his AP Exams, L.B.'s school was unable to offer the
22 AP Exam in Latin. Early in the school year, L.B. found another school that was willing
23 to administer the AP Exam for him. However, when that school, along with all other
24 schools in the area, closed due to COVID-19, his access to this test location was
25 cancelled. Defendants advised him to re-register at a different location or to get a
26 refund. L.B. could not find another test site to take the AP Exam. L.B. asked the College
27

1 Board if he could take his test at home like everyone else, now that all exams were
2 being provided in an online format. The College Board repeatedly denied this request.
3

4 115. Due to the testing difficulties, some schools who have not been able to
5 obtain Defendants' approval to administer AP Exams now discourage enrollment in AP
6 courses or have stopped offering them altogether, even though this means that their
7 students may forego the opportunity to earn the college credits (and cost savings) that
8 come along with those courses.

9 **Background of Plaintiffs**

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

18 FairTest engages in three main activities:

- 19 **1) Education of the public.** FairTest serves as a unique source of information
20 about testing and alternatives for educators, parents, public officials, journalists
21 and policymakers.
- 22 **2) Advocacy.** FairTest advocates on behalf of low-income families, disabled
23 students and other marginalized student groups to close the gap in admissions
24 and outcomes. FairTest coordinates and catalyzes educators, citizen groups and
25 parents to bring about needed assessment reforms.
- 26 **3) Strategic Assistance.** FairTest provides training and advice to parents,
27 educators and a broad range of civil rights organizations about assessments.
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1 117. FairTest places special emphasis on eliminating the racial, class, gender,
2 and cultural barriers to equal opportunity posed by standardized tests. In pursuit of its
3 mission, FairTest provides information, technical assistance and advocacy on a broad
4 range of testing concerns, focusing on three main areas: K-12, college and university
5 admissions, and employment tests.

6 118. Since Defendants announced their changes to the AP exam several months
7 ago, FairTest has expended significant resources addressing the issues associated with
8 the at-home exam and advocating for the student groups most affected. In the past two
9 months, FairTest has repeatedly communicated its concerns about the 2020 AP Exams
10 through social media, interviews with journalists, phone calls, and emails.

11 119. Specifically, FairTest emphasized the potential issues involving computer
12 equipment and technology, connectivity, the availability of legally required
13 accommodations, test security, and score comparability. In the last week alone, Robert
14 Schaeffer, FairTests' Interim Executive Director, communicated with dozens of
15 students, parents, and reporters specifically about the glitches and "snafus" that took
16 place during the first week of AP Exams. Dozens of other queries were sent to
17 FairTest's general email box and referred for response.

18 120. In the last month, Akil Bello, FairTest's Senior Director of Advocacy and
19 Advancement, has responded to several hundred emails and as many calls about AP
20 issues, and in the first week of testing alone recorded close to 200 accounts of student
21 testing issues. Mr. Bello has spent additional time advocating for under-resourced
22 students taking the AP Exams this year through social media and interviews with
23 reporters. Since the AP Exams began, FairTest staff has put in hundreds of additional
24 hours communicating with anguished parents, hours it could have spent on other
25 important testing issues, and hours it would not have spent but for the AP Exam failures.

26 121. FairTest addresses multiple testing reform issues involving high stakes
27 testing, college admissions testing, mandatory state testing, K-12 admissions, as well as
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1 graduation and promotion tests. Instead of expending its resources on the spectrum of
2 testing issues, FairTest has been forced to allocate a disproportionate amount of
3 resources in recent weeks to address Defendants' AP failures.

4 122. FairTest has expended significant resources to address the issues resulting
5 from the at-home AP Exams. Immediately prior to the administration of the AP Exams,
6 FairTest spent a high percentage of its time responding to parents, advocates, counselors
7 and educators who were concerned about the format of the AP Exams, the timing of the
8 Exams, and access issues. FairTest advocated for changes to the AP Exam format before
9 the Exams were administered.

10 123. Starting on the first day of the AP Exam administration, FairTest started
11 receiving emails and phone calls from hundreds of students and their parents due to
12 access and technical issues. FairTest had to divert additional resources to issues
13 surrounding the AP Exam failures due to the sheer volume of calls and emails it
14 received. For example, FairTest designated specific staff members and volunteers to
15 answer calls, respond to emails, to otherwise manage the high volume of complaints

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

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

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1 126. As a result, J.G. applied to take a Retake Examination. In the application,
2 he had to explain why he needed the Retake. J.G. received a message saying that he be
3 notified the week of May 25, 2020, if he was accepted for a Retake, less than a week
4 before the Retake was scheduled to take place.

5 127. After applying to retake the AP Chemistry exam, J.G. realized he will not
6 be able available to retake this test on the scheduled date because of a scheduling
7 conflict. If Defendants do not accept his work that was photographed, time-stamped,
8 and promptly emailed to Defendants on May 13, 2020, he will not have the opportunity
9 to pass the test and receive the benefits of AP credit.

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

19 129. A.K.'s high counselor contacted Defendants to see if the charter school
20 could administer the examination. Defendants denied the request, and A.K. had to find
21 an alternative location. A.K.'s mother finally made private arrangements for A.K.'s
22 high school counselor to proctor A.K.'s AP test at the local public school. In this case,
23 the student and his family were solely responsible for finding the proctor and ensuring
24 he could even take the examination, making access challenging and unduly burdensome.

25 130. Plaintiff M.S. is acting on behalf of her minor daughter Z.S., who both
26 reside in the Central District of California. Z.S. is currently enrolled in AP English
27 Literature and Composition, and she took the AP examination on May 13, 2020. Z.S.

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1 suffers from severe test anxiety, even under ordinary testing conditions. Z.S.
2 experienced heightened anxiety and fear due to the technical challenges involved with
3 the administration and submission of the exam. Under these rushed and condensed
4 conditions, Z.S. did not have time to complete the AP English exam on May 13 and
5 Defendants said that the inability to complete an exam alone does not make her eligible
6 for a Retake. The College Board's website policy expressly prohibits Retakes when a
7 student runs out of time: "Running out of time to finish and submit your response is
8 NOT an approved reason for requesting a makeup test."

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

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

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

1 134. J.P. asked if she could help her son R.P. submit the work, and was told no.
2 R.P. as a first week test-taker, does not have the same remedy, nor did he have the same
3 test experience as the week two test-takers, who were given the opportunity to submit
4 their work to Defendants. During week two, after realizing how its database, server,
5 and platform for accepting test data was inadequate, Defendants provided a “unique
6 email address” to students in the middle of the failed exam submission attempts. R.P.
7 has saved his entire answer, including the unsubmitted portion to question 2, and
8 requests that Defendants accept his work and grade his test answers.

9 135. D.K. is a San Diego-area senior headed to a large prestigious public
10 California university located in the Central District this fall. He was counting on passing
11 as many AP exams as possible to receive college credit and to reduce his total college
12 tuition cost. D.K. took the AP Calculus BC exam during the first week of AP testing and
13 completed every question successfully. He did not have the benefit of a “back-up
14 email” to send his completed work to Defendants, a benefit and safety plan for students
15 who took the exam during the second week of AP testing. When D.K. reached the 5-
16 minute warning, he immediately started to upload his handwritten answers. He was
17 never able to upload or submit his answers, which he believed were 100% correct and
18 accurate. He used an updated Firefox browser on an iMac computer. He then tried to
19 upload by taking a picture with his iPhone using the JPEG format, but was still unable
20 to upload or submit that either. He watched the clock hit zero minutes, devastated that
21 after a year of hard work, he was unable to submit his answers and receive full college
22 credit. He immediately called Defendants to find out how to submit his time-stamped
23 work, to no avail. He was left on hold and never heard back from Defendants until a
24 few days before the Retake examination. He was forced to take another exam again on
25 the scheduled Retake, but the exam was more challenging, and he was worried that
26 another technical glitch would occur.

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1 136. S.N. and her minor daughter, C.M. reside in the Los Angeles area and C.M.
 2 attends a public high school in the Long Beach area. As a learning-disabled student, she
 3 received extended time accommodations to take her exams. After a challenging year of
 4 working hard in AP Chemistry, C.M. tried to submit her AP Chemistry test answer, but
 5 it would not upload. C.M. believes that the 45-minute abridged version of this
 6 examination was far too condensed to fairly test an entire year of college level
 7 chemistry, particularly for learning-disabled students.

8 137. M.W. is a student who has a medical diagnosis of migraine with aura that
 9 was complicated by a head injury stemming from a car accident. According to her 504
 10 Plan, M.W. suffers from symptoms resulting from her head injury that limit one or more
 11 major activities. M.W.'s 504 Plan requires that she take a 5-minute break for every 10
 12 minutes of reading she does in class. She is also entitled to additional time to turn in her
 13 assignments.

14 138. Due to her diagnosed disabilities and her school 504 Plan, the College
 15 Board found that M.W. is entitled to "extra breaks" accommodations on all Defendants
 16 exams, including the AP Exams. As such, M.W. expected to have access to breaks
 17 during her at-home AP Biology exam.

18 139. Immediately prior to the AP Exams, Defendants instructed all students with
 19 disabilities who had applied for accommodations to log into to Defendants' "Big
 20 Future" platform to find their accommodation decisions.³¹ Had M.W. not been disabled
 21 and searching for her accommodations, she would not otherwise have been required to
 22 log into Big Future. M.W.'s Defendants accommodations letter states that she is entitled
 23 to "extra breaks."

24 140. However, when changes to the AP Exam format were announced, M.W.
 25 learned that the at-home AP Exam format did not allow for any breaks whatsoever.
 26

27 ³¹ <https://accommodations.collegeboard.org/tips-faqs/faq>

1 Since extended time was not one of her approved accommodations, she attempted to
2 change her accommodations so that she could fit breaks in. Because she did not have a
3 decision from Defendants about her requested accommodations in time, M.W. had to
4 skip the AP Exam. However, Defendants ultimately denied M.W.'s request based on the
5 fact that extended time was not provided in her school 504 Plan. M.W. never needed
6 extended time because she was provided the accommodation of required breaks.

7 141. M.W. had no choice but to take the Retake without any breaks. As a result,
8 M.W. suffered from headaches and vision issues because she could not take any breaks.
9 M.W. is a senior planning to go to college in the fall. She wanted her test score so that
10 she could place out of introductory classes without having to go to summer school. It is
11 likely she will not have her score in time to make a decision about summer school.

12 142. N.C. lives in a remote, rural location in New Hampshire. N.C. took AP
13 Physics and saved his work on a permissible application before trying to upload his
14 responses. He was unable to upload or submit anything for his AP Physics test. N.C.
15 then filled out the paperwork for a Retake examination, but Defendants rejected his
16 request. He is no longer able to take the AP exam for which he was registered or
17 receive the college credit he deserves. Because N.C. colleges are generally unaware of
18 the rigor at his high school, N.C. relied upon his AP Exam scores for his college
19 applications.

20 During the COVID pandemic and stay at home orders, multiple members of
21 S.T.'s family were diagnosed with COVID, including S.T. S.T.'s grandfather passed
22 away from COVID, and everyone was fully quarantined during the AP Testing period in
23 May. Amid this family crisis and mourning, S.T.'s first AP Test would not upload.
24 C.T. reported a "terrible scream, her son running downstairs, crying and screaming."
25 C.T. then called Defendants and was on hold for over an hour. She then sent two
26 emails, to which she received no response. S.T. attempted the Retake exam but again,
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his test answers would not “paste” or upload. He is unavailable for AP “exceptions testing.”

L.B., attends a private Catholic high school where he was enrolled in AP Latin. Because his school did not offer the AP Latin exam, his mother located another school in the area to administer the exam. He was deleted from the new school’s roster when the COVID-19 pandemic forced its closure. Defendants only offered L.B. a refund and would not allow him to test at-home and would not help him secure another location.

CLASS ACTION ALLEGATIONS

Plaintiffs bring this action on their 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 American students, whether living within the United States or abroad, who were unable to register for, complete, or successfully submit, and successfully have scored, answers to the 2020 AP Exams, whether on an initial testing attempt or during subsequent testing attempts (e.g., Retakes or Exceptional testing), as a result of the acts and omissions of Defendants, including, but not limited to, representations and communications, prior to, during, and/or subsequent to the administration of the 2020 AP Exams. The class excludes counsel representing the class and all persons employed by said counsel.

The Fair Access “Subclass”: All members of the Nationwide Class who were unable to register for, complete, or successfully submit answers to the 2020 AP Exams, whether on an initial testing attempt or during subsequent

1 testing attempts (e.g., re-tests or make-up tests), as a result of the acts
2 and/or omissions of Defendants prior to, during, and/or subsequent to the
3 administration of the 2020 AP Exams that deprived members of this
4 Subclass of fair, equal, and reasonable access to the 2020 AP Exams.

5
6 **The Disabled Students “Subclass”:** All disabled members of the
7 Nationwide Class who were unable to register for, complete, or
8 successfully submit answers to the 2020 AP Exams, whether on an initial
9 testing attempt or during subsequent testing attempts (e.g., re-tests or
10 make-up tests), as a result of the acts and/or omissions of Defendants prior
11 to, during, and/or subsequent to the administration of the 2020 AP Exams
12 that resulted in a failure to reasonably accommodate or account for the
13 disabilities of the members of this Subclass, including, but not limited to,
14 providing alternative testing methods, accommodation breaks, or
15 additional time.

16
17 **The Under-Resourced “Subclass”:** All under-resourced members of the
18 Nationwide Class who were unable to register for, complete, or
19 successfully submit answers to the 2020 AP Exams, whether on an initial
20 testing attempt or during subsequent testing attempts (e.g., re-tests or
21 make-up tests), as a result of the acts and/or omissions of Defendants prior
22 to, during, and/or subsequent to the administration of the 2020 AP Exams
23 that resulted in a failure to reasonably accommodate or account for the lack
24 of resources available to the members of this Subclass, including, but not
25 limited to those students with challenging test environments, limited
26 connectivity, or lack of internet access to receive Defendants’ multiple
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1 instructions and guidelines regarding the AP Exams and/or to take the AP
2 Exams.

3
4 **The Denied Access “Subclass”:** All members of the Nationwide Class
5 who were denied the ability to register for, complete, or submit answers to
6 the 2020 AP Exams, whether with respect to an initial testing attempt or
7 subsequent testing attempts (e.g., re-tests or make-up tests), as a result of
8 the acts and/or omissions of Defendants prior to, during, and/or subsequent
9 to the administration of the 2020 AP Exams.

10
11 Numerosity: The proposed classes are so numerous that individual joinder of all
12 their members is impracticable. While the exact number and identities of the Class
13 Members are unknown at this time, such information can be ascertained through
14 appropriate investigation and discovery. The disposition of the claims of these Class
15 Members in a single class action will provide substantial benefits to all parties and to
16 the Court.

17 Typicality: Plaintiffs’ claims are typical of the claims of their respective Classes
18 in that their claims arise from the same event or practice or course of conduct that gives
19 rise to the claims of other class members, and are based on the same legal theory as
20 their claims.

21 Adequacy of Representation: Plaintiffs will fairly and adequately represent and
22 protect the interests of the Classes. Undersigned counsel has substantial experience in
23 prosecuting complex lawsuits and class action litigation. Plaintiffs and undersigned
24 counsel are committed to vigorously prosecuting this action on behalf of the Classes,
25 and have the financial resources to do so. Neither Plaintiffs nor their counsel have any
26 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 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 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 Subclasses include the following: (1) were members of the subclasses 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

1 Act?; (15) did Defendants' practices constitute unfair competition?; (16)
2 did Defendants' practices constitute false advertising?; and (17) are
3 members of the subclasses entitled to damages?

4 143. Notice: Notice can be provided via internet publication, published notice
5 and/or through the mail and paid for by Defendants.

6 **FIRST CLAIM FOR RELIEF**

7 **BREACH OF CONTRACT**

8 144. Plaintiffs repeat and incorporates by reference paragraphs 1 to 143 of this
9 Complaint.

10 145. Upon registration for the AP Exams, the Class Members entered into an
11 agreement with Defendants wherein Defendants expressly recognizes its obligation to
12 ensure a fair and equitable opportunity to demonstrate college readiness for every
13 student and to prevent anyone from gaining an unfair advantage on the tests.

14 146. Defendants breached the agreement by failing to ensure a fair and equitable
15 testing opportunity and to prevent anyone from gaining an unfair advantage by
16 Defendants' distinctions between what is considered an official test site,
17 accommodations and bars to taking the exams.

18 147. As a direct result of Defendants' breach, Plaintiffs and the Class suffered
19 damages.

20 **SECOND CLAIM FOR RELIEF**

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

22 148. Plaintiffs repeat and incorporates by reference paragraphs 1 to 147 of this
23 Complaint.

24 149. Defendants breached the express contract provision obligating Defendants
25 to ensure a fair and equitable opportunity to demonstrate college readiness for every
26 student and to prevent anyone from gaining an unfair advantage on the AP Exams.

1 150. As a direct result of Defendants' breach, Plaintiffs and the Class suffered
2 damages.

3 **THIRD CLAIM FOR RELIEF**

4 **NEGLIGENCE**

5 151. Plaintiffs repeat and incorporates by reference paragraphs 1 to 150 of this
6 Complaint.

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

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

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

19 155. Defendants' conduct foreseeably and substantially caused Plaintiffs and the
20 Class to suffer damages.

21 156. Plaintiffs and the Class suffered damages as a direct and proximate result
22 of Defendants' breach.

23 **FOURTH CLAIM FOR RELIEF**

24 **NEGLIGENT MISREPRESENTATION**

25 157. Plaintiffs repeat and incorporates by reference paragraphs 1 to 156 of this
26 Complaint.

158. Defendants misrepresented to Plaintiffs and the Class that the AP Exams would be fairly and equitably offered and administered.

159. Based on the history of which types of students took these exams and Defendants' active role in creating rules and barriers to entry to the exams, Defendants should have known that its representations regarding fairness, equity and validity were false.

160. Defendants intended to induce Plaintiffs and the Class to rely on the misrepresentations in signing up for the exams and in trusting that Defendants were administering the exams fairly.

161. Plaintiffs and the Class acted in justifiable reliance upon the misrepresentation by registering for and taking or not being able to take the exams, resulting in injury to Plaintiffs and the Class.

FIFTH CLAIM FOR RELIEF

GROSS NEGLIGENCE

162. Plaintiffs repeat and incorporates by reference paragraphs 1 to 161 of this Complaint.

163. There is an imminently clear and present danger that the AP Exams will be administered unfairly and invalidly as there is no equal access to these exams for all 2020 AP exam takers, students with disabilities or under-resourced students, based on fundamental flaws inherent to Defendants' requirements for access to these exams.

164. There is also an imminently clear and present danger that the AP Exams will be exploited by individuals.

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

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

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1 and retained by Defendants. The benefit held by Defendants rightly belongs to the
2 Plaintiffs and the Class, as the Plaintiff and the Class have paid for services that
3 Defendants failed and continue to fail to provide.

4 178. In equity, Defendants should not be allowed to retain the economic benefit
5 from their improper conduct and should be ordered to disgorge profits or pay restitution
6 and pre-judgment interest to the Plaintiffs and the Class, or in the alternative, ordered to
7 score the exams that were recorded and time-stamped immediately if the student is
8 unable to take a make-up test without charge on the date unilaterally scheduled by
9 Defendants.

10 **SEVENTH CLAIM FOR RELIEF**

11 **BREACH OF IMPLIED IN FACT CONTRACT**

12 179. Plaintiffs repeat and incorporates by reference paragraphs 1 to 178 of this
13 Complaint.

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

16 181. Under the circumstances and based upon Defendants' conduct, Plaintiffs
17 and the Class presumed that the tests would be fairly and equitably offered and
18 administered.

19 182. Defendants breached the implied contract by failing to ensure a fair and
20 equitable testing opportunity for all students.

21 183. As a result of Defendants' breach, Plaintiffs and the Class were damaged.

22 **EIGHTH CLAIM FOR RELIEF**

23 **BREACH OF FIDUCIARY DUTY**

24 184. Plaintiffs repeat and incorporates by reference paragraphs 1 to 183 of this
25 Complaint.

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

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

187. As a proximate result of Defendants' breach, Plaintiffs and the Class suffered damages.

NINTH CLAIM FOR RELIEF

VIOLATION OF AMERICANS WITH DISABILITIES ACT 42

USC SECTION 12101

188. Plaintiffs repeat and incorporates by reference paragraphs 1 to 187 of this Complaint.

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

190. As a result of Defendants' breach of its duty to provide appropriate accommodations and its violation of the ADA, Plaintiffs and the Class were damaged.

TENTH CLAIM FOR RELIEF

VIOLATION OF UNRUH ACT CCC SECTION 51-DENIAL OF

OPPORTUNITIES FOR DISABLED AND

UNDERRESOURCED STUDENTS

191. Plaintiffs repeat and incorporates by reference paragraphs 1 to 191 of this Complaint.

192. 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 Section 51(a). The Unruh

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Act makes liable any person who “denies, aids or incites a denial, or makes any discrimination or distinction” contrary to Section 51.

193. 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 Section 51(f).

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

195. As a result of Defendants' breach of its duty to provide equal access to AP Exams and their violations of the Unruh Act, Plaintiffs and the Class were damaged.

ELEVENTH CLAIM FOR RELIEF

VIOLATION OF REHABILITATION ACT

196. Plaintiffs repeat and incorporates by reference paragraphs 1 to 197 of this Complaint.

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

198. As a result of Defendants' breach of their duty to ensure that disabled students would have equitable access and opportunity to take the AP Exams and its violation of the Rehabilitation Act, Plaintiffs and the Class were damaged.

TWELVTH CLAIM FOR RELIEF

UNFAIR COMPETITION, BUSINESS AND PROFESSIONS

CODE SECTION 17200

199. Plaintiffs repeat and incorporates by reference paragraphs 1 to 198 of this Complaint.

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

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

202. As a result of Defendants' violation of Business & Professions Code Section 17200, Plaintiffs and the Class were damaged.

THIRTEENTH CLAIM FOR RELIEF

FALSE ADVERTISING, BUSINESS AND PROFESSIONS CODE SECTION 17500

203. Plaintiffs repeat and incorporates by reference paragraphs 1 to 202 of this Complaint.

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

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

206. As a result of Defendants' violation of Business & Professions Code Section 17500, Plaintiffs and the Class were damaged.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

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 Defendants to accept and score any verifiable test answers for the AP Exams, whether verified by time stamp, photo, video, email, or other reasonable means.

**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.

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 Defendants to accept and score any verifiable test answers for the AP Exams, whether verified by time stamp, photo, video, email, or other reasonable means.

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.

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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 Defendants to accept and score any verifiable test answers for the AP Exams, whether verified by time stamp, photo, video, email, or other reasonable means.

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.

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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 Defendants to accept and score any verifiable test answers for the AP Exams, whether verified by time stamp, photo, video, email, or other reasonable means.

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.

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8. For injunctive relief requiring Defendants to accept and score any verifiable test answers for the AP Exams, whether verified by time stamp, photo, video, email, or other reasonable means.

**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.

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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 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.

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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.

DATED: June 22, 2020

BAKER, KEENER & NAHRA, LLP

By /s/ PHILLIP A. BAKER

PHILLIP A. BAKER
DERRICK S. LOWE
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: June 22, 2020

BAKER, KEENER & NAHRA, LLP

By /s/ PHILLIP A. BAKER

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DERRICK S. LOWE
JENNIFER L. STONE

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