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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

10 DEPARTMENT OF FAIR EMPLOYMENT)
11 AND HOUSING, an agency of the State of)
12 California,)

)
13 Plaintiff,)

14 vs.)

15 LAW SCHOOL ADMISSION COUNCIL, INC.,)
16 _____ Defendant.)

17 UNITED STATES OF AMERICA,)
18 Plaintiff-Intervenor,)

19 vs.)

20 LAW SCHOOL ADMISSION COUNCIL, INC.,)
21 Defendant.)

Case No. CV 12-1830-JCS

**BRIEF OF AMICI CURIAE IN
SUPPORT OF PLAINTIFF’S MOTION
FOR AN ORDER HOLDING
DEFENDANT IN CIVIL CONTEMPT**

Date: December 1, 2017
Time: 9:30 am
Location: Courtroom G (15th Floor)
Hon. Joseph C. Spero

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26 On the brief:
27 Jo Anne Simon, Esq.
28 Mary J. Goodwin-Oquendo, Esq.
JO ANNE SIMON, P.C.



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INTERESTS OF AMICI CURIAE

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2 *Amici* (American Foundation for the Blind, Association on Higher Education And Disability,
3 Association of University Centers on Disabilities, Center for Public Representation, Karen Dahlman
4 Ph.D., Professor Robert Dinerstein, Disability Rights Bar Association, Disability Rights Education &
5 Defense Fund, Disability Rights New York, Everyone Reading, Inc., Professor Paul Grossman,
6 Elizabeth Hennessey-Severson, Jo Anne Simon P.C., Professor Arlene Kanter, Brenda Cheryl Kaplan,
7 Ph.D., Antoinette J. Lynn, Ph.D., Learning Disabilities Association of America, Amy Margolis,
8 Ph.D., National Association of Law Students with Disabilities, National Federation of the Blind,
9 Professor Richard K. Neumann, Professor Michael A. Schwartz, The Judge David L. Bazelon
10 Center for Mental Health Law, Alexandra Tucker, Esq., and Jeanette Wasserstein, Ph.D.) are non-
11 profit organizations, law professors, lawyers and prospective lawyers with disabilities, clinicians,
12 disability rights advocates, policy makers, and researchers who collectively possess extensive
13 personal, public policy, legislative, and litigation experience regarding the Law School Admission
14 Council’s (hereinafter “Defendant” or “LSAC”) pattern or practice of discrimination against
15 individuals with disabilities.
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17

18 *Amici* believe that this Court’s intervention is necessary to enforce the civil rights of
19 individuals with various physical, cognitive, emotional, sensory, and print disabilities, and ensure that
20 individuals with disabilities across the United States are afforded equal access to the educational and
21 economic opportunities afforded by admission to law school and the profession of law. *Amici* submit
22 this brief in support of Plaintiff’s motion in the instant matter and urge this Court to grant Plaintiff’s
23 motion for civil contempt, extend the duration of the Consent Decree, and enforce its orders on a
24 nationwide basis.
25

STATEMENT OF ISSUES AND FACTS

26
27 Disability rights advocacy organizations, bar associations, lawyers, prospective lawyers with
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1 disabilities, law professors, clinicians, and policymakers across the United States share an interest in
2 the elimination of disability bias and discrimination within the legal profession and at entry points to
3 law school and to bar membership, and the integration of the legal profession to include qualified
4 individuals with disabilities. Such interests fall squarely within the contours of the rights conferred
5 by the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.* (hereinafter the “ADA”), and are
6 broadly in the public’s interest.
7

8 The Law School Admission Test (LSAT) is required for Admission to 98.5% of American
9 law schools and is currently comprised of five thirty-five minute multiple-choice sections and a
10 writing sample that tests reading comprehension, analytical reasoning, and logic. *See*,
11 <https://www.lsac.org/jd/lsat/about-the-lsat>. According to the LSAC, the LSAT was created to
12 measure “reading and comprehension of complex texts with accuracy and insight; the organization
13 and management of information and the ability to draw reasonable inferences from it; the ability to
14 think critically; and the analysis and evaluation of the reasoning and arguments of others.” *Id.*
15

16 Many individuals with disabilities require specific accommodations to access the LSAT so as
17 to ensure that the knowledge and abilities that the LSAT purports to test are accurately measured (i.e.,
18 specific amounts of extended test time, specific amounts of break time, a computer with assistive
19 technology, such as a screen reader, a private room, large font materials or a scribe, etc.). Testing
20 accommodations thus do not confer an unfair advantage, but instead provide an equal opportunity to
21 participate and compete at what is, practically speaking, the only entry point to the legal profession.
22

23 **LSAC has a long history of disability discrimination**

24 Had the LSAC complied with all its provisions, this Court’s orders and the Consent Decree
25 would have remedied decades of discrimination by the LSAC. The Consent Decree established a
26 framework of general principles to ensure that documentation requests sought by LSAC are
27 reasonable and limited to the need for the testing accommodation requested.
28



1 Prior to DFEH’s suit against the LSAC, *amici* (both those who were themselves applying for
2 disability accommodations and those representing, treating, and advocating on behalf of those
3 seeking disability accommodations) observed that the LSAC maintained a pattern or practice of
4 arbitrarily awarding fewer accommodations than requested. For example, *amici* observed that
5 applicants requesting 100% extended time for the LSAT were instead likely to be granted 50%
6 extended time, applicants requesting 50% extended time were likely to be granted 25% extended,
7 applicants requesting any amount of extended time might have been granted only breaks instead, and
8 many applicants received no accommodations and were falsely accused – despite having a well-
9 documented history disability and need for accommodation – of having no disability at all.
10

11 *Amici* also observed that the slow processing of requests for accommodation too often
12 resulted in late denials, effectively foreclosing an opportunity to appeal these decisions. Applicants
13 were then forced to re-register for subsequent administrations of the exam (offered only four times
14 each year) and expend substantial financial resources to work with clinicians and/or attorneys to
15 submit supplemental information to what was already a legally sufficient request for accommodation.
16

17 The LSAC’s posture towards disability accommodations was legendary and its discriminatory
18 policies, practices, and procedures had a chilling effect on prospective law students with disabilities’
19 requests for accommodations. Many applicants with disabilities assumed that they would not receive
20 necessary accommodations and either chose to pursue another profession or sat for the LSAT without
21 having the accommodations that they and their clinicians determined were necessary to level the
22 playing field for them. The Court’s granting of Plaintiff’s motion will send a strong message that the
23 LSAC may no longer flaunt the law.
24

25 The LSAC’s pattern or practice of discrimination was so pervasive that in 2012 the American
26 Bar Association (hereinafter “ABA”) – a volunteer organization of more than 400,000 members that
27 accredits law schools and considers itself the national voice of the legal profession – released a report
28



1 on the subject. The ABA called “on the legal profession to eliminate bias and to enhance diversity,
2 including for persons with disabilities” and found that

3 “the testing process for law school admission remains an obstacle to the
4 full and equal participation of individuals with disabilities in the legal
5 profession. Students with disabilities are substantially underrepresented
6 in law schools across the country. [fn. omitted] In part, this is due to the
7 fact that the testing process relied upon by most law schools in the
8 United States does not afford the same benefits to applicants with
9 disabilities that it affords to other applicants”

10 ABA Commission on Disability Rights, Report on Resolution 111. The report also found that
11 “LSAC typically grants at most time-and-a-half, while the College Board (which administers the
12 SAT, PSAT, and Advanced Placement tests)” granted greater than 50% extended time. *Id.*

13 Based upon these findings, the ABA subsequently passed Resolution 111 urging the LSAC to
14 institute policies, practices, and procedures that would provide individuals with disabilities the
15 accommodations that would best ensure that the LSAT measures their reading comprehension, logic,
16 and analytical ability – the skills the LSAT purports to assess – and not the limitations and impacts of
17 their disabilities. American Bar Association, Resolution 111 (2012). The resolution also called for
18 the institution of fair appeals policies and practices for applicants whose requests for
19 accommodations were denied and specifically highlighted the lack of sufficient time to appeal
20 adverse LSAC accommodation decisions as a major barrier. *Id.*

21 The denial of equal access to the LSAT and thus an equal opportunity for individuals with
22 disabilities to compete on a level playing field with individuals without disabilities has far-reaching
23 consequences. LSAT scores “not only help to determine whether an applicant is admitted to law
24 school, but whether an applicant will receive financial support and has access to the nation’s leading
25 law schools... The U.S. Supreme Court recognized the importance of gaining admission to the
26 leading law schools in Grutter v. Bollinger [539 U.S. 306 (2003)].” *Id.*



1 For individuals with disabilities, one of the greatest barriers to access to the legal profession
 2 has been, and continues to be, the LSAC and its discriminatory practices. It has been the *amici*'s
 3 experience that most law schools grant the accommodations needed for individuals with disabilities
 4 to compete on a level playing field. However, it has also been the *amici*'s experience that when
 5 evaluating requests for accommodations, bar examining agencies in various jurisdictions tend to give
 6 great weight to the accommodations decisions of the LSAC, regardless of the accommodations the
 7 candidate's law school provided. For example, a bar applicant's request for 100% extended time is
 8 often denied by bar examiners simply because the LSAC granted only 50% extended time (even if
 9 this applicant had previously received 100% extended time on other standardized exams, such as the
 10 ACT and SAT, and received 100% extended time in school).

12 ARGUMENT

13 **I. THE LSAC'S FAILURE TO COMPLY WITH THE LAW, CONSENT** 14 **DECREE, AND THIS COURT'S ORDERS HAS DENIED INDIVIDUALS WITH** 15 **DISABILITIES ACROSS THE COUNTRY EQUAL ACCESS TO THE LSAT, AND THUS** 16 **TO LAW SCHOOL AND THE LEGAL PROFESSION.**

17 Title III of the ADA states, in part, that testing companies such as the LSAC are public
 18 accommodation that "shall not, directly or through contractual or other arrangements, utilize
 19 standards or criteria or methods of administration -- (i) that have the effect of discriminating on the
 20 basis of disability" 42 U.S.C. § 12182(b)(1)(D). In addition, it is discriminatory to fail "to make
 21 reasonable modifications to policies, practices and procedures when necessary to provide goods and
 22 services... to a person with a disability." 42 U.S.C. § 12182(b)(2)(A)(ii). Title III regulations
 23 specifically provide that accommodating an individual with a disability may require the testing entity
 24 to change the length of the time for an exam and/or the manner in which the examination is given. 28
 25 C.F.R. §36.309 (b)(2).

26 Title III regulations enforcing the ADA's protections in connection with standardized testing
 27 are clear. The individual with a disability is entitled to accommodations that *best ensure* that the test
 28



1 being taken reflects the protected individual’s demonstration of knowledge and/or ability, and not the
 2 limitations of their disabilities. 28 C.F.R. §36.309(b)(1)(i). The regulations further require that
 3 considerable weight be given to prior history of accommodations in similar circumstances, 28 C.F.R.
 4 §36.309 (b)(1)(v), and that an entity may not require unreasonable levels of documentation. 28 C.F.R.
 5 §36.309(b)(1)(iv).

6
 7 In Enyart v. National Conference of Bar Examiners, 630 F.3d 1153, 1162 (9th Cir. 2011),
 8 *cert. denied*, No. 10-1304, 2011 WL 4536525 (U.S. Oct. 3, 2011), the Court held that with reference
 9 to making standardized exams accessible “entities [such as LSAC] must provide disabled people with
 10 an equal opportunity to demonstrate their knowledge or abilities to the same degree as nondisabled
 11 people taking the exam – in other words, the entities must administer the exam “so as to best ensure”
 12 that exam results accurately reflect aptitude rather than disabilities.” *See also*, Elder v. Nat’l
 13 Conference of Bar Examiners, No. C 11-00199 SI, 2011 WL 672662 (N.D. Cal. Feb. 16, 2011),
 14 Bonnette v. District of Columbia Court of Appeals, 796 F.Supp.2d 164 (D.D.C. July 13, 2011), and
 15 Jones v. National Conference of Bar Examiners, 801 F.Supp.2d 270 (D. Vt. Aug. 2, 2011).

16
 17 Indeed, Title III regulations have long required that tests such as the LSAT be administered so
 18 as to “best ensure that [the LSAT]... accurately reflect[s] the individual’s aptitude or achievement
 19 level... rather than reflecting the individual’s [impairment].” 28 C.F.R. §36.309 (b)(1)(i). When
 20 amending the Americans with Disabilities Act in 2008, Congress found that: “the continuing
 21 existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the
 22 opportunity to compete on an equal basis and to pursue those opportunities for which our free society
 23 is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting
 24 from dependency and nonproductivity.” 42 U.S.C. § 12101 (a).

25
 26 The ADA was amended, in part, because due to discriminatory actions previously and
 27 currently taken by LSAC and other standardized testing companies, “[t]oo many individuals with
 28



1 documented learning disabilities...are denied access to easily administered and often low-cost
2 accommodations that would make the critical difference in allowing them to demonstrate their
3 knowledge” on standardized examinations. 154 Cong.Rec. H 8286, 8296 (Sept. 17, 2008).

4 The LSAC’s actions since it entered into the Consent Decree and the issuance of this Court’s
5 orders evidence an intent to continue to discriminate against individuals with disabilities who require
6 specific testing accommodations to compete on equal footing on the LSAT. For example, the
7 LSAC’s creation a “50% email” policy (*See*, Dkt. 249) not only violates the Court’s orders and
8 Consent Decree, but is a deliberate “end run” around the law and a renewal of the very practices that
9 harmed students and caused Plaintiffs to bring suit in the first place. Moreover, it ignores the fact that
10 the law is predicated upon the notion that accommodation decisions are to be made on an
11 individualized basis.
12

13 There is no “one size fits all” under the ADA and the LSAC’s persistence in restricting the
14 rights of test takers with disabilities flaunts the law. The Supreme Court has already held that a
15 modification is not an accommodation unless it is effective. *See* US Airways, Inc. v. Barnett, 535
16 U.S. 391, 400 (2002) (“An *ineffective* “modification” or “adjustment” will not *accommodate* a
17 disabled individual's limitations.”) *See also*, Long v. Howard University, 439 F.Supp.2d 68, 76
18 (D.D.C. 2006) (“[T]he determination of whether a particular modification is ‘reasonable’ involves a
19 fact-specific, case-by-case inquiry” that typically requires jury resolution. *See* Staron v. McDonald's
20 Corp., 51 F.3d 353, 356 (2d Cir.1995); *see also* Hartnett v. Fielding Graduate Inst., 400 F.Supp.2d
21 570, 577 (S.D.N.Y.2005).
22
23

24 The LSAC’s bullying tactics coercing individuals with disabilities to accept inadequate test
25 modifications not only deprive those individuals of the opportunity to equally access the exam and
26 fully demonstrate their mastery of the tested subject matter, it also jeopardizes their admission to law
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1 school, their receipt of financial aid, their subsequent receipt of bar exam accommodations, their
2 entry into the legal profession, and their earning ability.

3 To the extent that the LSAC outright denied applications for accommodations, or delayed
4 decisions sufficiently to have effectively denied the accommodations, without providing a clear,
5 specific explanation for its determination, it deprived applicants and their clinicians the ability to
6 clarify material in violation of this Court's orders. Dkt. 203, 220, and 245. The same is true where
7 the LSAC refused to grant applicants sufficient time to appeal its adverse decisions. *Id.*

9 **II. THIS COURT'S ORDERS ARE PROPERLY ENFORCED**
10 **NATIONWIDE.**

11 Requests for LSAC accommodations affect students in California and nationwide, and
12 uniformity in the accommodation process benefits all students as the policies and procedures are
13 consistently applied. The public's interest is benefitted from the consistent application of LSAC
14 procedures and it is contrary to the public interest not to have nationwide enforcement of a
15 nationwide testing procedure.

16 This Court has personal jurisdiction over both the LSAC and DFEH, and any orders issued by
17 this court will directly impact law school applicants and law schools across the country, and
18 indirectly impacts the nation's economy. Moreover, nationwide orders from this court would not
19 impinge upon the sovereignty of any other courts because the May 19, 2014 consent decree in this
20 case was intended to apply nationally and was subsequently incorporated into federal regulatory
21 guidance. *See*, http://www.ada.gov/regs2014/testing_accommodations.html.

23 **CONCLUSION**

24 For all of the reasons stated herein, this Court should grant Plaintiff DFEH's motion in full.
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Dated: November 3, 2017

Respectfully submitted on behalf of *amici*,

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