IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

LAW SCHOOL ADMISSION COUNCIL, INC., Plaintiff-Respondent, v. THE STATE OF CALIFORNIA; EDMUND G. BROWN JR., in his official capacity as Governor of the State of California; KAMALA HARRIS, in her official capacity as Attorney General of the State of California, Defendants-Appellants.	Case No. C073187

Sacramento County Superior Court, Case No. 34-2013-00135574
The Honorable Raymond M. Cadei (916) 874-7848

APPLICATION OF ASSOCIATION ON HIGHER EDUCATION AND DISABILITY, CALIFORNIA ASSOCIATION FOR POSTSECONDARY EDUCATION AND DISABILITY, CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS CALIFORNIA, DISABILITY RIGHTS EDUCATION & DEFENSE FUND, DISABILITY RIGHTS LEGAL CENTER, EDGE FOUNDATION, EVERYONE READING, INC., LEGAL AID SOCIETY–EMPLOYMENT LAW CENTER, NATIONAL ASSOCIATION OF LAW STUDENTS WITH DISABILITIES, NATIONAL FEDERATION OF THE BLIND, AND MARILYN J. BARTLETT AND RICHARD K. NEUMANN, JR., FOR LEAVE TO FILE *AMICI CURIAE* BRIEFAND *AMICI CURIAE* BRIEF

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CERTIFICATE OF NO INTERESTED ENTITIES OR PERSONS
Rule 8.208

The undersigned represents *amici curiae* non-profit organizations and individuals, as listed, and knows of no other entity or person that must be listed pursuant to Cal. Rule of Ct. 8.208.

LEGAL AID SOCIETY –
EMPLOYMENT LAW CENTER

By: _____
Claudia Center, Counsel for Disability *Amici*

APPLICATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The *amicus* parties joining this application and brief – Association on Higher Education And Disability, California Association for Postsecondary Education and Disability, Civil Rights Education and Enforcement Center, Council of Parent Attorneys and Advocates, Disability Rights Advocates, Disability Rights California, Disability Rights Education & Defense Fund, Disability Rights Legal Center, Edge Foundation, Everyone Reading, Inc., Legal Aid Society–Employment Law Center, National Association of Law Students with Disabilities, National Federation of the Blind, and Marilyn J. Bartlett and Richard K. Neumann, Jr. – are nonprofit organizations and individuals dedicated to advancing and protecting the civil rights of persons with disabilities, and are recognized for their expertise in disability rights law and policy. Collectively, *amici* have extensive legislative, public policy, and litigation experience with the access and discrimination issues raised herein, including the application of disability rights laws to standardized testing. *Amici* include legal organizations with experience in representing individuals with disabilities who seek testing accommodations on the Law School Admission Test (LSAT), and who protest the "flagging" of LSAT scores. Statements of each *amici*'s interest in this matter are set forth below.

These parties respectfully move this Court for leave to file the brief submitted herewith, as *amici curiae* in support of the defendants-appellants State of California *et al*.

Amici urge the Court to uphold the enforcement of section 99161.5 of the Education Code (added by Stats. 2012, ch. 583 (AB 2122)). As set forth in the *amici* brief filed herewith, the Legislature had legitimate rational bases for enacting provisions specifically regulating the administration of the LSAT, consistent with the constitutional guarantee of equal protection. Further, the prohibition on identifying the individuals who receive testing accommodations on the LSAT does not unconstitutionally trammel the free speech rights of the Law School Admission Council (LSAC).

Statements of Interest

The Association on Higher Education And Disability (AHEAD) is a non-profit organization committed to full participation in higher education and equal access to all opportunities for persons with disabilities, including professional licensing and employment. Its membership includes approximately 2,500 institutions (including colleges, universities, not-for-profit service providers and standardized testing organizations), professionals, and college and graduate students planning to enter the field of disability practice. Its members are actively engaged in assuring ADA compliance and in providing testing accommodations to both students and

employees at institutions of higher education and in high-stakes standardized testing, including the Law School Admissions Test. Each year, AHEAD members receive numerous complaints with regard to the Law School Admission Council's (LSAC) handling of accommodation requests and its practice of flagging the scores of individuals with disabilities who have received some measure of accommodation from the LSAC. AHEAD actively supported the passage of the ADA Amendments Act, participated in the subsequent federal rule-making process and supported the passage of AB 2122. AHEAD's general counsel, Jo Anne Simon, served as an expert witness in the hearings leading to the passage of AB 2122.

California Association for Postsecondary Education and Disability (CAPED) is the longest lasting association of professionals serving students with disabilities in postsecondary education. The organization was established unofficially as a grassroots effort in 1974 and formally incorporated as a non-profit organization in April 1975. CAPED became affiliated with the Association on Higher Education and Disability (AHEAD) in 2009. The membership of CAPED consists of staff, faculty and administrators from colleges, universities, and community agencies dedicated to the provision of equal access to higher education for persons with disabilities. The tremendous breadth of knowledge and experience that exists within CAPED's membership enables it to maintain its

reputation as a recognized leader in the field of services and instruction for students with disabilities in postsecondary education. CAPED is often sought out for input and guidance on issues that affect the state of postsecondary education for individuals with disabilities in California, and beyond.

The Civil Rights Education and Enforcement Center (CREEC) is a national non-profit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC's efforts to defend human and civil rights extend to all walks of life, including the provision of professional examinations. A number of disabled CREEC members live in California. CREEC has an interest in ensuring that people with disabilities taking professional examinations are provided with a level playing field, including, where necessary, the provision of accommodations, and that they do so without the stigma resulting from their examination results being flagged.

The Council of Parent Attorneys and Advocates (COPAA) is a non-profit organization for parents of students with disabilities, attorneys, and advocates. COPAA provides training and resources help students obtain the free appropriate public education ("FAPE") and special education services and supports guaranteed by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C § 1400 et seq., and other statutes. The

primary goal of COPAA is to secure appropriate educational services for students with disabilities, echoing a Congressional finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1) (2008). This can only be achieved if all students are given the same opportunities to participate in LSAC-administered testing without discrimination.

The Disability Rights Advocates (DRA) is a non-profit public interest law firm that specializes in class action civil rights litigation on behalf of persons with disabilities throughout the United States. Based in Berkeley, California, DRA strives to protect the civil and human rights of people with disabilities throughout the United States and worldwide. DRA works to end discrimination in areas such as access to public accommodations, employment, transportation, education, and housing. In addition to representing individuals in advocating for accommodations on the LSAT, DRA recently represented the American Council of the Blind (ACB) in negotiations regarding accommodations for people with vision disabilities, who often need additional time, in addition to other accommodations. On behalf of ACB, DRA obtained an agreement from LSAC to offer computer-based accommodations in appropriate situations.

Disability Rights California (DRC) is California's federally

designated protection and advocacy system for people with disabilities. In the last year, DRC provided legal assistance on more than 24,000 matters to people with disabilities, many of whom were experiencing accessibility barriers at places of public accommodation and public services within their communities, despite longstanding federal and state accessibility requirements. The individuals served by DRC include students with disabilities who were attempting to get reasonable accommodations in taking the LSAT or other standardized exams.

The Disability Rights Education & Defense Fund (DREDF), based in Berkeley, California, was founded in 1979 as a national non-profit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. As part of its involvement in the passage process leading up to the Americans with Disabilities Act (ADA) of 1990 and its implementing regulations, DREDF worked to ensure that specific provisions of relevance to professional testing and credentialing appropriately balanced the interests of all involved stakeholders, including the administrative needs of covered entities and the privacy rights of individuals with disabilities.

Disability Rights Legal Center (DRLC) has represented and advised individuals with disabilities seeking testing accommodations in pre-litigation matters with the LSAC, many of whom voiced strong concerns about the LSAC's flagging practice. DRLC also testified on behalf of the

disability rights community in support of AB 2122, and helped shape the provisions of that legislation through legislative advocacy. Paula Pearlman, DRLC's Executive Director, is also a member of the ABA's Commission on Disability Rights, and chairs the Commission's Law Students' Committee. At the hearing on AB 2122 before the California Assembly's Education Subcommittee, Ms. Pearlman presented the testimony of the ABA.

The Edge Foundation is a non-profit organization that provides specialized coaching to students with ADHD and Executive Functioning Challenges, many of whom are college students seeking to attend law school and other graduate programs. Edge maintains a network of over 110 coaches throughout the United States. The Edge Foundation believes in providing a voice for students with ADHD (and their families) and challenging the disability-based discrimination these students face. Edge believes that the application process for students to apply for testing accommodations to take the LSAT is too lengthy, costly, and that it lacks any type of transparency. Furthermore, the practice of flagging the test scores of students is highly discriminatory and nullifies the accommodations that were so difficult for the student to obtain. The Edge Foundation fully supported AB 2122 through the Assembly, Senate and at the gubernatorial level, and fully supports the amici curiae brief filed in this case.

Everyone Reading, Inc. (formerly known as the New York Branch of the International Dyslexia Association) is a not-for-profit organization that provides public information, referrals, training and support to professionals, families and affected individuals regarding the impacts to and treatment of people with dyslexia and related learning disorders. Its members believe in targeted educational interventions and the provision of accommodations for students with dyslexia at all levels of education, including full and equal access to standardized testing, including the Law School Admissions Test (LSAT), and the cessation of unequal treatment of individuals with dyslexia and related learning disorders.

Legal Aid Society – Employment Law Center (LAS-ELC) is a public interest legal organization that advocates to improve the working lives of disadvantaged people. LAS-ELC has represented, and continues to represent, clients faced with discrimination on the basis of their disabilities, including those with claims brought under the ADA and the Fair Employment and Housing Act (FEHA). LAS-ELC has received requests for legal assistance from individuals with disabilities who are seeking to take the Law School Admissions Test (LSAT) with testing accommodations, and has represented or advised such individuals. LAS-ELC was counsel of record in *Davidson v. LSAC*, Case No. C 04-4855-CW (N.D. Cal.), a case brought on behalf of Joshua Davidson, an individual (and now lawyer) with quadriplegia due to spinal cord injuries who sought

testing accommodations on the LSAT, including additional time and the use of assistive technology. LAS-ELC has represented additional individuals seeking testing accommodations in pre-litigation matters. LAS-ELC is currently counsel of record on behalf of three individual plaintiff-intervenors in *DFEH v. LSAC*, Case No. CV 12-1830-EMC, a class action brought by California's Department of Fair Employment and Housing and joined via intervention by the United States. On May 8, 2013, LAS-ELC filed an amended complaint referring to the standards and requirements of Education Code section 99161.5.

National Association of Law Students with Disabilities (NALSWD) is a national student organization representing the interests of law students with disabilities. Currently, NALSWD has more than 400 members and alumni. As an organization, NALSWD has supported efforts to increase access to legal education for individuals with disabilities by opposing the LSAC's flagging practice and arguing for the LSAC to better meet testing accommodation requests made by individuals with disabilities taking the LSAT. NALSWD worked closely with Assemblymember Lara's office in support of AB 2122. Individual members and executive board officers of NALSWD drafted letters and testified in support of AB 2122 during the legislative process.

The National Federation of the Blind (NFB) is the largest national non-profit membership organization of blind people in the United States.

With more than 50,000 members, and affiliates in all fifty states, the District of Columbia, and in Puerto Rico, and over 700 local chapters in most major cities, the ultimate purpose of the NFB is the complete integration of the blind into society on an equal basis. Founded in 1940, the NFB advocates for the civil rights and equality of blind Americans, and develops innovative education, technology, and training programs to provide the blind and those who are losing vision with the tools they need to become independent and successful. The NFB has long advocated for an end to discriminatory testing practices on the basis of disability, including against the LSAC. In 1996, the NFB filed a lawsuit against the LSAC on behalf of three blind LSAT test-takers challenging the LSAC's discriminatory flagging practices and failure to provide appropriate testing accommodations. The NFB continues, however, to receive complaints every year from its members regarding the LSAC's discriminatory testing practices.

Marilyn J. Bartlett, Ph.D., J.D., a professor of law and policy at Texas A&M University Kingsville, Texas, is a person of interest to this issue. In 2001, Dr. Bartlett was the successful plaintiff in the case of *Bartlett v. New York State Board of Law Examiners*, in which she fought for her right to testing accommodations on the bar exam. Dr. Bartlett is an adult with dyslexia who experiences significant difficulties with processing the written word fluently and accurately. Since prevailing in her case, she

has strongly advocated for the right to accommodations as well as the right of privacy for individuals with disabilities. As a professor, credentialing and professional testing within the letter and intent of the ADA is particularly important to her, especially where it is necessary to balance the interests of all stakeholders. Thus, her interest in the outcome of this matter is substantial.

Richard K. Neumann, Jr., is a professor of law at Hofstra University in Hempstead, New York. He has authored several law school textbooks, and teaches courses on contracts and transactional lawyering skills. In addition, he works individually with law students who have Attention Deficit Hyperactivity Disorder (ADHD) and is often consulted by law school teachers nationally on that topic. ADHD is frequently at issue in LSAT accommodations requests made by law school applicants to the LSAC. Professor Neumann submitted written comments in support of AB 2122 while it was being considered in the California Assembly.

Respectfully submitted,

LEGAL AID SOCIETY –
EMPLOYMENT LAW CENTER

Date: August 22, 2013 By: _____
Claudia Center, Counsel for Disability *Amici*

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AMICI CURIAE BRIEF

INTRODUCTION

California policymakers, bar associations, lawyers and prospective lawyers with disabilities, and disability rights advocates share an interest in the elimination of disability bias within the legal profession and at entry points to law school and to bar membership. A legal profession that is more accessible and integrated to include qualified individuals with disabilities is better equipped to serve the diverse persons and communities who live and work in our State.

For some individuals with a broad range of disabilities who seek to enter law school, accommodations on the required Law School Admissions Test (LSAT), such as additional time, are essential to an accurate assessment of their aptitude and abilities. Without such modifications, the resulting scores are not valid, as they reflect the effects of disability rather than aptitude or ability. Testing accommodations thus do not confer an unfair advantage, but instead provide an equal opportunity to participate and compete at a key entry point to the legal profession.

Despite this accepted understanding, many persons with disabilities who seek testing accommodations on the LSAT report that their requests are denied in whole or in part without a legitimate basis. Such denials occur even after candidates submit to the Law School Admission Council

(LSAC), the administrator of the LSAT, the results of detailed neuropsychological, psychoeducational, and other testing – testing that typically costs the student thousands of dollars. Often, denials occur shortly before the scheduled exam, with no opportunity for reconsideration. Those who receive testing accommodations on the LSAT are subject to "flagging" – their scores are reported to law schools in a manner that discloses the fact that they received accommodations for a disability. With their disability status exposed, candidates fear that they will be less competitive during the competitive law school admissions process. As well, annotated score reports include the statement that "LSAC research indicates that scores earned under nonstandard time conditions do not have the same meaning as scores earned under standard time conditions," and are thus potentially perceived as less credible by law schools. As a result, some are deterred from seeking accommodations.

In recent years, bar associations and law student organizations have launched initiatives to improve the diversity of the legal profession with respect to disability. These efforts have identified the LSAT as an entry point to the profession which often functions as a barrier to the inclusion of persons with disabilities. In 2012, the American Bar Association (ABA) adopted Resolution 111, urging that the LSAC change its practices to make

the required LSAT more accessible to candidates with disabilities.[1] Also in 2012, the Department of Fair Employment and Housing (DFEH)[2] brought a pattern and practice class action litigation against the LSAC, alleging that its actions and inactions violate existing California laws.

In a rational response to these concerns, and consistent with a large body of law that specifically regulates the legal profession, the Legislature adopted and the Governor signed AB 2122. The statute does not violate the LSAC's equal protection or free speech rights, and should be upheld. The trial court's ruling on the preliminary injunction should be reversed.

ARGUMENT

California's public policy against discrimination on the basis of disability is fundamental. (*City of Moorpark v. Superior Court of Ventura Cty*. (1998) 18 Cal.4th 1143, 1161 ["[D]iscrimination based on disability,

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[1] For the Court's convenience, a copy of ABA Resolution 111 and its supporting documents are attached to this brief as Exhibit A. See also <http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/2011nov11_cdr_resolution.authcheckdam.pdf> (as of August 21, 2013).

[2] The DFEH's statutory mandate is to protect the people of California from employment, housing and public accommodations discrimination and hate violence pursuant to the California Fair Employment and Housing Act (FEHA), Unruh Civil Rights Act, Disabled Persons Act, and Ralph Civil Rights Act. The Department has jurisdiction over both private and public entities operating within the State of California, including corporate entities, private sector contracts granted by the State of California, and all State departments and local governments. The DFEH is the largest state civil rights agency in the country. California Department of Fair Employment and Housing, About Us, at <http://dfeh.ca.gov/About.htm> (as of August 21, 2013).

like sex and age discrimination, violates a 'substantial and fundamental' public policy[.]"]; *see also* Gov. Code, §§ 12920 ["It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of … physical disability [or] mental disability[.]"]; 12921(a) ["The opportunity to seek, obtain and hold employment without discrimination because of … physical disability [or] mental disability … is hereby recognized as and declared to be a civil right."].)

This public policy incorporates as a minimum floor of protection the standards of the ADA, as amended. To "assure that persons with disabilities are not foreclosed from educational, professional, or trade opportunities,"[3] the ADA and the Unruh Civil Rights Act require the provision of testing accommodations during professional examinations such as the LSAT. (Civ. Code § 51(f);[4] Cal. Code Regs., tit. 2, § 7293.5(b); 42 U.S.C. §§ 12182 (b)(2)(A)(ii), 12189; 28 C.F.R. §§ 36.302(a), 36.309(b)(1)(i).) Test providers must administer such examinations to

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[3] H.R.Rep. No. 101-485(III), at 68-69 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 491-92.

[4] Cf. *Turner v. Assn. of American Medical Colleges* (2008) 167 Cal.App.4th 1401, 1410 ["The Unruh Act *does* indirectly penalize a failure to grant reasonable accommodations in Civil Code section 51, subdivision (f), which incorporates otherwise relevant ADA standards as a 'floor' under state law …. The ADA requires reasonable accommodations on standardized tests for those with qualifying disabilities[.]"].

persons with disabilities so as to best ensure that the results accurately reflect aptitude or achievement level rather than disability. 28 C.F.R. § 36.309(b)(1)(i). These laws further prohibit public accommodations from using "eligibility criteria that screen out or tend to screen out" individuals with disabilities from equal enjoyment of the services and privileges offered, and from providing individuals with disabilities an "unequal benefit" compared to individuals without disabilities. 42 U.S.C. § 12182(b)(1)(A)(ii), (b)(2)(A)(i). Also barred is retaliation against or interference with any individual who has sought to exercise or enjoy their rights under the Act. 42 U.S.C. § 12203(a), (b).

As reviewed by the Legislature in enacting AB 2122, disabled candidates for law school and their advocates report that the LSAC violates these existing state and federal nondiscrimination laws by requiring excessive and expensive medical and psychological documentation, by improperly denying requests for testing accommodations, and by discriminating and retaliating[5] against test-takers with disabilities who

[5] Requests for accommodations constitute protected activity for the purposes of a claim for retaliation or interference. (*Jolliffe v. First Nat. Bank and Trust*, (S.D. Ind., Nov. 27, 2000, No. IP 00-0305-C-T/G) 2000 WL 1911882 at *4; *Heisler v. Metropolitan Council* (8th Cir. 2003) 339 F.3d 622, 632; *Shellenberger v. Summit Bancorp, Inc.* (3d Cir. 2003) 318 F.3d 183, 191 ["The right to request an accommodation in good faith is no less a guarantee under the ADA than the right to file a complaint with the EEOC."]; *Larkin v. Methacton Sch. Dist.* (E.D. Pa. 2011) 773 F.Supp.2d 508, 529-30; *Freadman v. Metropolitan Prop. & Cas. Ins. Co.*, (1st Cir. 2007) 484 F.3d 91, 106; *Valle-Arce v. Puerto Rico Ports Authority* (1st

receive testing accommodations by issuing flagged score reports.[6] The legislation enacted responds to this testimony by delineating the minimum standards for disability nondiscrimination in the context of the law school admission exam.

Related to the prohibition on disability discrimination, the state constitutional right to privacy protects individuals from the unnecessary disclosure of disability-related information. (Cal. Const. art. I, § 1; *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 438-48; *Norman-Bloodsaw v. Lawrence Berkeley Lab.* (9th Cir. 1998) 135 F.3d 1260, 1270-71.) Analogous personal privacy rights are found in other provisions of state and federal law, including the federal constitutional right to privacy, the Family

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Cir. 2011) 651 F.3d 190, 198; *Wright v. CompUSA, Inc.* (1st Cir. 2003) 352 F.3d 472, 477-78; *Weixel v. Board of Education of the City of New York* (2nd Cir. 2002) 287 F.3d 138, 149.

[6] The LSAC contends that no law prior to California's enactment of section 99161.5 prohibits it from providing law schools with flagged LSAT scores that identify the candidate as having received accommodations for a disability. Brief for Respondent, pp. 9-10, 42, citing *Doe v. National Bd. of Medical Examiners* (3d Cir. 1999) 199 F.3d 146, 155-57. But subsequent rulings from courts within the Ninth Circuit distinguish or narrow the reasoning in *Doe*. Recently, the Northern District of California has permitted the DFEH to pursue its claim that annotated LSAT score reports violate the ADA. (*Dep't of Fair Employ. & Hous. v. Law School Admissions Council* (N.D. Cal. 2012) 896 F.Supp.2d 849, 867-70 [discussing *Doe* and denying motion to dismiss DFEH's claims that flagged LSAT test scores violate sections 12189 and 12203 of title 42]; see also *Breimhorst v. Educational Testing Service* (N.D. Cal. Mar. 27, 2000) Case No. C-99-CV-3387, 2000 WL 34510621, at *5 [finding that whether annotated SAT scores violate Title III of the ADA was a question of fact].)

Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, 34 C.F.R. § 99, the privacy regulations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 C.F.R. §§ 160, 164, Subparts A and E, and the Confidentiality of Medical Information Act (CMIA), Civ. Code, § 56 et seq. The Legislature is entitled to take steps to protect the privacy of law school candidates with disabilities requiring testing accommodations.

Given these interconnected principles of law, and in light of the unique role of the legal profession coupled with recent LSAT-specific developments, described herein, the Legislature did not violate the equal protection rights of the LSAC in adopting a provision regulating the LSAT in particular. For similar reasons, the prohibition upon the disclosure of individualized accommodation-related information does not unlawfully infringe upon the free speech rights of the LSAC. The State's appeal from the trial court's ruling should be granted.

I. The Legislature's Enactment of AB 2122 to Advance Disability Diversity Within the Legal Profession Is Supported by Rational Bases and Is Entitled to Deference.

The legal profession plays a unique and pivotal role in our civil society. The Legislature has long adopted laws specifically tailored to advance its interests in promoting and maintaining a diverse and competent bar that serves all populations within the State, including underrepresented communities. These legal profession-specific provisions are myriad and

include the State Bar Act, Bus. & Prof. Code § 6000, et seq., a chapter detailing rules of membership, discipline, professional duties, and continuing legal education; the IOLTA Trust Fund program, providing legal services to indigent and disabled persons, Bus. & Prof. Code § 6211, et seq.; the requirement that civil and criminal court proceedings provide communication access for participants who are deaf and hard of hearing, Civ. Code § 54.8; and diversity goals for the profession's judicial applicants, nominees, and appointees, Bus. & Prof. Code § 6079.1(b), Gov. Code § 12011.5.

The Legislature's exercise of its ability to regulate professions with particularity – as it did in enacting AB 2122 – does not violate the LSAC's equal protection rights or other constitutional guarantees. Rather, the "authority to determine a party's fitness to engage in a business or profession derives from the state's inherent power to regulate the use of property to preserve the public health, morals, comfort, order, and safety. … The state has the power to regulate professions. The state may regulate different professions differently or it may resolve identical problems with respect to different professions in the same manner." (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 768, 776 ["This court pays great deference to legislative judgments about enforcing professional discipline"], 779.)

Contrary to the LSAC's position, the Legislature may choose, as it did in the early 1980s, to adopt certain generic provisions that apply to all standardized post-secondary admissions tests, but it also has the authority to subsequently adopt specific provisions in response to particular matters of interest to the legal profession, including disability diversity. Where, as here, the statute's classification is supported by rational bases, the Legislature's judgment is entitled to deference.

A. The Legislature Acted Rationally in Adopting a Provision Specifically Regulating the LSAT: There Are Unique Social Interests Served by Policies that Enhance Disability Diversity Within the Legal Profession.

The integration of the legal profession to include qualified individuals with disabilities, and the elimination of disability bias within the profession and at entry points to law school and to bar membership, are key equality goals. As well, they are long-term strategies for bringing disability awareness and competency to all members of our legal system. At the state, local, and national levels, bar associations and related entities have long grappled with the need to create and support diversity, including disability diversity, within the legal profession.

These efforts, which have included the development of model policies and practices and the collection of demographic and survey data,[7]

[7] See, e.g., State Bar of California, "Challenges to Employment and the Practice of Law Continue to Face Attorneys with Disabilities" (2004) at <http://www.calbar.ca.gov/portals/0/documents/publicComment/2004/

Disability-Survey-Report.pdf> (as of August 21, 2013); Judicial Council and State Bar of California, *Continuing a Legacy of Excellence: A Summit on Achieving Diversity in the Judiciary* (Final Report and Recommendation) (Aug. 1, 2012), at <http://www.courts.ca.gov/documents/jc-20121026-item1.pdf> (as of August 21, 2013); Bar Association of San Francisco, "BASF Hosts Disability Conference" (July 25, 2007), at <http://www.sfbar.org/newsroom/ 20070725.aspx> (as of August 21, 2013); American Bar Association (ABA), Commission on Disability Rights (CDR), "3rd National Conference on the Employment of Lawyers with Disabilities," (2012) at <http://www.americanbar.org/content/dam/aba/events/ mental_physical_disability/2012_conference_program.authcheckdam.pdf> (as of August 21, 2013); ABA, Commission on Mental and Physical Disability Law, *The Second National Conference on the Employment of Lawyers with Disabilities: A Report From the American Bar Association for the Legal Profession* (John W. Parry and William J. Phelan IV, eds., 2009), at <http://www.americanbar.org/content/dam/aba/migrated/disability/PublicDocuments/ 09report.authcheckdam.pdf> (as of August 21, 2013); ABA, CDR, *Goal III Report: An Annual Report on the Participation of Persons with Disabilities in ABA Leadership Positions* (2013), at <http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/ 2013_goaliii_cdr.authcheckdam.pdf> (as of August 21, 2013); ABA, CDR, *Goal III Report: An Annual Report on the Participation of Persons with Disabilities in ABA Leadership Positions* (2012), at <http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/ 2012_GoalIII_Report.authcheckdam.pdf> (as of August 21, 2013); ABA, Commission on Mental and Physical Disability Law, *Goal III Report: A report on the status of the participation of persons with disabilities in the ABA and its divisions, sections, and forums* (2011) at <http://www.americanbar.org/content/dam/aba/migrated/2011_build/mental_physical_disability/2011_CMPDL_goal_3_ report.authcheckdam.pdf> (as of August 21, 2013); ABA, Commission on Mental and Physical Disability Law, "Inclusion of Persons with Disabilities in the Legal Profession: Issues and Commission Response" (presentation to the ABA Board of Governors, June 2011), at <http://www.slideshare.net/lasalle00/commission-presentation-to-aba-board-of-governors> (as of August 21, 2013); Judicial Council of California, Access and Fairness Advisory Committee, *Disability Etiquette: Interacting with Persons with Disabilities* (pamphlet) (2009), at <http://www.courts.ca.gov/documents/access-fairness-etiquette-2009.pdf> (as of August 21, 2013); Judicial Council of California, Access and Fairness Advisory Committee, *Questions and Answers About Rule of Court 1.100 for Court Users* (pamphlet) (2007), at

were and are well known to the Legislature that enacted AB 2122. As discussed in greater detail in section B, *infra*, the ABA testified in support of the legislation, noting that its provisions "mirror" Resolution 111. The ABA's official report accompanying Resolution 111 articulates the connection between the diversification of the legal profession and the standards at issue here:

> The ABA's Goal III calls on the legal profession to eliminate bias and to enhance diversity, including for persons with disabilities. In spite of these assurances, the testing process for law school admission remains an obstacle to the full and equal participation of individuals with disabilities in the legal profession. Students with disabilities are substantially underrepresented in law schools across the country. [fn. omitted] In part, this is due to the fact that the testing process relied upon by most law schools in the United States does not afford the same benefits to applicants with disabilities that it affords to other applicants. [¶]…[¶]
>
> Making law schools accessible to individuals with disabilities can help ensure that the legal profession is more open to persons with disabilities than it is now.

Report at 1, 7. Moreover, the same Legislature reviewed diversity data from the Judicial Council of California, Administrative Office of the Courts, in enacting SB 182 and AB 126.[8] This year the Legislature again reviewed such data in passing AB 1005.[9]

<http://www.courts.ca.gov/ documents/access-fairness-QandA-for-persons-with-disabilities.pdf> (as of August 21, 2013).

[8] Stats. 2011, ch. 720 (SB 182); Stats. 2011, ch. 667 (AB 126); Senate Judiciary Committee, Report on SB 182 (April 5, 2011), 4-5 (citing AOC diversity data on race, ethnicity, and sex of justices and judges, and quoting author: "The California Judiciary suffers from a substantial lack of

While all professions may benefit from disability diversity, it is the legal profession that uniquely assists persons, including individuals with disabilities and members of other underrepresented communities, in navigating the institutions and systems of civil society. Moreover, the Legislature is empowered to address problems incrementally. (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 261 ["The Legislature … has the power to adopt a partial remedy for a perceived evil, or to accomplish a partial reform of a larger field of law ….

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diversity."), at <http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0151-0200/ sb_182_cfa_20110404_133643_sen_comm.html> (as of August 21, 2013); Assembly Committee on Judiciary, Hearing on SB 182 (June 21, 2011), 3 (citing AOC data: "The California Judiciary suffers from a substantial lack of diversity."), at <http://www.leginfo.ca.gov/pub/11-12/bill/sen/ sb_0151-0200/sb_182_cfa_20110620_105647_ asm_comm.html> (as of August 21, 2013); see also Senate Judiciary Committee, Hearing on AB 126 (June 14, 2011), 2-3 (citing AOC data), at <http:// www.leginfo.ca.gov/pub/11-12/bill/asm/ab_01010150/ ab_126_cfa_20110613_141440_sen_comm. html> (as of August 21, 2013).

[9] Stats. 2013, ch. 113 (AB 1005) (enrolled); Assembly Committee on Judiciary, Hearing on AB 1005 (Apr. 23, 2013), 5 ("The State Bar, the Governor's Office, and the Administrative Office of the Courts are all required to prepare and issue reports on the diversity of the judicial applicant pool and of the existing judiciary. Reports by these three entities over the past several years demonstrate that some progress has been made in addressing the lack of diversity in the judiciary – but much more work remains to be done. Recently, the California State Bar, in conjunction with the California Judicial Council, recommended that the 'Governor's Office should appreciate and recognize the contributions of lawyers with disabilities and endeavor to include more of such lawyers among the Governor's appointees.' [citing to *Continuing a Legacy of Excellence*, *supra*, n. 7]"), at <http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1001-1050/ ab_1005_cfa_20130422_120424_asm_comm.html> (as of August 21, 2013).

'[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'"] [rejecting equal protection challenge, citation omitted]; *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 488 [finding that step-by-step approach to restrictions on assault rifles, including a list of particular models subject to regulation, does not violate principles of equal protection.]; *City of New Orleans v. Dukes* (1976) 427 U.S. 297, 303 ["Legislatures may ... adopt[ ] regulations that only partially ameliorate a perceived evil[,] deferring complete elimination of the evil to future regulations."].)

B. The American Bar Association – the Accrediting Agency for Law Schools – Sought and Supported the Requirements of AB 2122; No Other Post-Secondary Standardized Test Is Similarly Situated.

The American Bar Association (ABA) is the world's largest professional association of lawyers, with nearly 400,000 members.[10] Through the Council and the Accreditation Committee of its Section of Legal Education and Admissions to the Bar, the ABA is recognized by the federal Department of Education as the accrediting agency for programs that lead to the J.D. degree.[11] An individual who wishes to attend an ABA-

[10] "About the ABA," at <http://www.americanbar.org/about_the_aba.html> (as of August 21, 2013).

[11] American Bar Association, Section of Legal Education and Admissions to the Bar, *The Law School Accreditation Process* (Oct. 2010) 3, at <http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2012_accreditation_brochure_web.authcheckdam.pdf> (as of August 21, 2013).

accredited law school *must* take an admissions test before entry.[12] Presently, the *only* nationally administered test available for such a purpose is the LSAT.[13] In regulating the legal profession, the California codes repeatedly cite to and incorporate the standards of the ABA. (See, e.g., Bus. & Prof. Code §§ 6046.7, 6060, 6070, 6402.1, 6450; Ed. Code § 94874, Gov. Code § 68603; Welf. & Inst. Code § 4712.)

On February 6, 2012, the ABA House of Delegates adopted Resolution 111, urging all entities that administer a law school admission test "to provide appropriate accommodations for a test taker with a disability," and "to establish procedures to ensure that … the reporting of test scores is consistent for all applicants and does not differentiate on the basis that an applicant received an accommodation for a disability." Resolution at 2.[14]

The LSAC contains its discussion of the recently adopted official position of the ABA in a single paragraph on page 26 of its opposition brief. In an apparent effort to discredit the Resolution, the LSAC notes that it "was the result of efforts initiated by disability rights advocates." Indeed, the Resolution was sponsored by the ABA's Commission on Disability

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[12] ABA Commission on Disability Rights, Report to House of Delegates (2012), Report at 2.

[13] *Ibid.*

[14] See also Resolution 111 Summary (noting that Resolution urges removal of the "unfair practice of 'flagging.'"), Exhibit A.

Rights (CDR),[15] and co-sponsored by numerous other ABA entities and bar associations.[16] Its stated basis was to advance the ABA's goal of eliminating bias and enhancing diversity in the legal profession.[17] These

[15] The ABA recognizes four goals, including to "Eliminate Bias and Enhance Diversity." The ABA seeks to achieve this goal through two objectives: to "[p]romote full and equal participation in the association, our profession, and the justice system by all persons," and to "[e]liminate bias in the legal profession and the justice system." ABA, "ABA Mission and Goals," at <http:// www.americanbar.org/utility/about_the_aba/aba-mission-goals.html> (as of August 21, 2013). With respect to persons with disabilities, the ABA's efforts to eliminate bias are led by its Commission on Disability Rights. ABA Commission on Disability Rights, "About Us," at <http:// www.americanbar.org/groups/disabilityrights/about_us.html> (as of August 21, 2013).

[16] In addition to the Commission on Disability Rights, co-sponsors of Resolution 111 included: Criminal Justice Section; General Practice, Solo and Small Firm Division; Section of Individual Rights and Responsibilities; Commission on Sexual Orientation and Gender Identity; Council for Racial and Ethnic Diversity in the Educational Pipeline; Standing Committee on the Delivery of Legal Services; Utah State Bar; Bar Association of Baltimore City; National Native American Bar Association; Commission on Lawyer Assistance Programs; State Bar of Wisconsin; Commission on Women in the Profession; Section of Real Property, Trust and Estate Law; Senior Lawyers Division; Multnomah Bar Association; Oregon State Bar; Philadelphia Bar Association; National Conference of Women's Bar Associations; Section of Intellectual Property Law; Atlanta Bar Association; Hispanic National Bar Association; King County Bar Association; Michael S. Greco; National LGBT Bar Association; National Asian Pacific American Bar Association; National Association of Women Judges; Bar Association of San Francisco; Washington State Bar Association; Delaware State Bar Association; Young Lawyers Division; Law Student Division; Tort Trial and Insurance Practice Section; Government and Public Sector Lawyers Division; Bar Association of the District of Columbia; National Bar Association; H. Thomas Wells, Jr. See Exhibit A at 2.

[17] ABA Commission on Disability Rights, Report to House of Delegates, Report at 1, 7.

characteristics do not detract from but rather underscore the Resolution's legitimate role as a rational basis for the Legislature's action.

The LSAC further avers on page 26, without citation, that the ABA Resolution "did not purport to reflect a careful analysis of LSAC's accommodation policies relative to the accommodation policies of other test sponsors, and provides no basis for upholding Section 99161.5's disparate treatment of LSAC." Of course, the level of empirical "proof" the LSAC seeks to require is inconsistent with the rational basis standard of review at issue here, under which a regulation is unconstitutional only if it is "purely arbitrary and capricious, resting on no reasonable or substantial difference between the classes when considered in relation to the object of the regulation." (*Blumenthal v. Board of Medical Examiners* (1962) 57 Cal.2d 228, 233, citation omitted.)

In any event, the official Report accompanying the ABA Resolution includes a review of the extensive data contradicting the practice of "flagging" the scores achieved with testing accommodations,[18] and explains its harms to persons with disabilities:

[18] Pursuant to a federal case challenging the flagging of SAT scores, *Breimhorst v. Educational Testing Service* (N.D. Cal. Mar. 27, 2000) 2000 WL 34510621, a Blue Ribbon Panel of experts was convened to study whether SAT scores achieved under accommodated testing conditions were comparable to, and as valid as, scores achieved under non-accommodated conditions. The Panel's majority concluded that the accommodated scores were equivalent. Noel Gregg, *et al*., *The Flagging Test Scores of Individuals with Disabilities Who are Granted the Accommodation of Extra*

> [W]hen an accommodated score is labeled as "nonstandard" or when a testing agency tells the academic program that the score does not conform to the scores of students who were not given accommodations, the student with the accommodated score is placed at a serious disadvantage. There are serious policy, ethical, and social problems involved with flagged scores, including disregard for an applicant's desire not to have his or her disability revealed and the potential attachment of stigma during the admission process. If scores are to be flagged, it should be done with the consent of the applicant.

Report at 4.[19]

Time: A Report of the Majority Opinion of the Blue Ribbon Panel on Flagging (2002), at <http://dralegal.org/sites/dralegal.org/files/casefiles/majorityreport.pdf> (as of August 21, 2013). The College Board, sponsor of the SAT, reached the same conclusion, and ceased its practice of flagging in 2003. Shortly thereafter, American College Testing, Inc., also stopped its practice of flagging on the ACT. See The College Board, *Predictive Validity of SAT I: Reasoning Test for Test-Takers with Learning Disabilities and Extended Time Accommodations* (2002) 9, at <http://research.collegeboard.org/sites/default/files/publications/2012/7/researchreport-2002-5-predictive-validity-sat-test-takers-learning-disabilities-accomodations.pdf> (as of August 21, 2013); ABA Commission on Disability Rights, Report to House of Delegates, Report at 3-4 (reviewing these and other reports and developments).

[19] The ABA report cites the findings of the *Breimhorst* Blue Ribbon Panel. The Panel report similarly reviewed the harms of flagging, including its chilling effect upon test takers who need accommodations. *The Flagging Test Scores of Individuals with Disabilities Who are Granted the Accommodation of Extra Time, supra*, n.18, at 10 ["In addition to the strong scientific reasons for stopping flagging are societal and ethical reasons. Many students are reluctant to request extended time on the SAT I because the presence of the flag forces them to reveal a disability. Since the overwhelming majority of students who request extended time demonstrate learning disabilities, the presence of a flag denotes a specific personal characteristic of the examinee – a learning disability. The detrimental effect of such a designation is further supported by findings that students with learning disabilities with flagged scores are under admitted to colleges. Thus, flagging appears to single out and treat the group with learning disabilities unequally, to diminish fair chances for college

Consistently, the ABA supported and submitted testimony in favor of AB 2122,[20] the language of which closely tracks the substantive content of the Resolution and its accompanying report. In her public letters of support directed to bill author Assembly Member Ricardo Lara and to Governor Edmund G. Brown Jr., then-President Laurel G. Bellows wrote:

> On behalf of the American Bar Association (ABA), which has nearly 400,000 members, including over 50,000 members in California, I write to express support for AB 2122, legislation that will ensure that individuals with disabilities are provided appropriate accommodations when taking law school admission tests. AB 2122 mirrors official ABA policy and is essential to ensuring that persons with disabilities have equal access to the legal profession.

April 5, 2012 Letter of ABA; *accord* Sept. 5, 2012 Letter of ABA. The LSAC's suggestion that the Legislature did not really consider the ABA

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admission, and to discourage the use of a mandated ADA accommodation; together, these scientific and ethical factors speak to the necessity of removing the flag."]. Nancy Mather, Ph.D., a co-author of the Blue Ribbon Panel report and an author of the Woodcock-Johnson III, a widely used and extensively validated psychoeducational battery, testified in favor of AB 2122. See Letter of Nancy Mather (Sept. 5, 2012) (on file with author).

[20] Senate Rules Committee, Bill Analysis (AB 2122), (June 26, 2012) at 6 (listing ABA as supporter of legislation) at <http://www.leginfo.ca.gov/ pub/11-12/bill/asm/ ab_2101-2150/ ab_2122_cfa_20120626_ 133114_sen_floor.html> (as of August 21, 2013); American Bar Association, Letter to Assemblymember Lara in Support of AB 2122 (April 5, 2012) at <http://www.americanbar.org/ content/dam/aba/ uncategorized/GAO/ 2012apr5_ab2122_l.authcheckdam.pdf> (as of August 21, 2013); American Bar Association, Letter to Governor Brown in Support of AB 2122 (Sept. 5, 2012), at <http://www.americanbar.org/ content/dam/aba/administrative/ mental_physical_disability/ letter_gov_brown.authcheckdam.pdf> (as of August 21, 2013); Jo Anne Simon, Letter to Governor Brown in Support of AB 2122 (Sept. 9, 2012) at 2 (discussing role of ABA) (on file with author).

Resolution ("To the extent the ABA resolution was even considered by the Legislature …") can only be explained by wishful thinking.

Given the State's legitimate interest in eliminating disability bias from the legal profession, and in promoting disability diversity in accordance with the guidance of the ABA – the national accrediting body for law schools – the Legislature had a rational basis for enacting a provision regulating the LSAT in particular, as opposed to a more general law applicable to all professional admissions testing.

C. Additional Developments and Testimony Provide Rational Bases for the Challenged Law.

The ABA's actions are not the only recent, LSAT-specific developments that constitute rational bases for the challenged classification. On March 15, 2012, the DFEH filed a class action complaint against the LSAC in Alameda County Superior Court, Case No. RG 12621749. (The matter was subsequently removed by the defendant to federal court.) In its 76-page pleading, the DFEH describes its investigation over several years into the complaints of 17 individuals seeking to take the LSAT with testing accommodations, and its conclusion that the LSAC was violating the rights of a class of individuals, including individuals who were granted certain accommodations and then subjected to the LSAC's policy of having their scores "flagged." The findings of the DFEH – and the decision of the

United States to intervene in the DFEH litigation – were considered by the Legislature.[21]

Also presented to the Legislature were reviews critiquing the specific policies and procedures used by the LSAC in administering the LSAT,[22] and testimony detailing the particular experiences of the membership of the National Association of Law Students with Disabilities (NALSWD).[23] For all of the reasons stated herein, the Legislature was justified in adopting a provision specifically tailored to the LSAT.

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[21] Assembly Committee on Higher Education, Hearing on AB 2122 (March 27, 2012), at 5 ("Committee staff understands the [DFEH] is currently investigating at least one discrimination complaint against the LSAC.") at <http:// www.leginfo.ca.gov/pub/11-12/bill/asm/ab_2101-2150/ ab_2122_cfa_20120326_111139_asm_comm.html> (as of August 21, 2013); Assembly Committee on Higher Education, Bill Analysis (AB 2122 Lara) (2012) at 3 ("The [DFEH] is currently investigating at least one discrimination complaint against the LSAC.") <http:// www.leginfo.ca.gov/ pub/11-12/bill/asm/ab_2101-2150/ ab_2122_cfa_20120404_145612_ asm_floor.html> (as of August 21, 2013); Jo Anne Simon, Letter to Governor Brown in Support of AB 2122 (Sept. 9, 2012) at 1, 2 & n.1 (noting that author Assemblymember Lara worked with stakeholder DFEH, and referencing DFEH litigation against the LSAC and the motion of the United States to intervene).

[22] See Jo Anne Simon, Letter to California State Assembly in Support of AB 2122 (Apr. 17, 2012) at 1 and Letter to Governor Brown in Support of AB 2122 (Sept. 9, 2012) at 2 & n. 2 (discussing, *inter alia*, Ruth Colker, "Extra Time as an Accommodation," 69 U. Pitt. L. Rev. 413 (2008) (article reviewing and focused on disability access issues with respect to the LSAT) (on file with author).

[23] Senate Rules Committee, Bill Analysis (AB 2122), (June 26, 2012) *supra*, n. 20 (listing NALSWD as supporter of legislation); National Association of Law Students with Disabilities, "California Legislature bill with significance for students with disabilities entering law school," (April 6, 2012) (describing NALSWD's testimony in support of AB 2122;

D. *Walgreen Co. v. City and County of San Francisco* Does Not Govern.

The trial court's issuance of a preliminary injunction, subsequently stayed, in reliance upon *Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, was in error. In *Walgreen Co.*, the parties conceded that the retailers of identical tobacco products were similarly situated. But the providers of other professional standardized tests cited by the LSAC are *not* similarly situated to the LSAT like purveyors of identical tobacco products. Here, only the LSAT constitutes an entry point to the legal profession. Moreover, only the LSAT is the subject of a resolution adopted by the relevant national accrediting body. There is no analogous policy guidance from accrediting institutions as to the other professional tests cited by the LSAC. Thus, the Legislature has a legitimate interest in promoting diversity in the legal profession which is rationally advanced by legislation specifically regulating the LSAT. The enactment is constitutional under rational basis review.

NALSWD's vice-president Nora Devine testified that prospective law students are often deterred from seeking testing accommodations based on the LSAC's flagging policy, and thus denied an equal opportunity to enter law school <http://blog.nalswd.org/2012/04/06/california-legislature-bill-with-significance-for-students-with-disabilities-entering-law-school/> (as of August 21, 2013).

II. The Challenged Provision Properly Balances the LSAC's Free Speech Rights with the Test Taker's Rights to Disability Non-Discrimination and Privacy.

This Court should also reject the LSAC's assertion that the prohibition on identifying test takers who received testing accommodations violates its state constitutional right to free speech. The law properly balances the LSAC's constitutional right to free speech and the test takers' constitutional right to privacy.[24]

The LSAC dramatically overstates the scope and impact of the State's prohibition on flagging, contending that the rule prohibits it from stating its view that "extra testing time can affect the predictive validity of the resulting scores." Brief for Respondent, at 43.[25] Indeed, the LSAC remains free under section 99161.5 to articulate to recipients of test results or to anyone else its contention – disputed by the ABA and by many

[24] The LSAC has acknowledged that the identities of test takers with disabilities who have received testing accommodations on the LSAT are protected by the state constitutional right to privacy. See Order Granting in Part Petition to Compel Compliance with Investigative Discovery (May 25, 2011), in *DFEH v. LSAC* (Super. Ct. Alameda County, 2011, No. RG 11567996) [requiring that documents regarding testing accommodations on the LSAT be redacted to remove identifying information pending written consent of test takers in light of third party privacy protections asserted by LSAC].

[25] On the other hand, the LSAC minimizes the privacy interests of the typically young adults who wish to apply to law school without disclosure of their disability status, averring that "[h]aving a disability is neither uncommon nor highly confidential…." Brief for Respondent at 41.

scholars and experts[26] – that the accommodation of extra time may affect the "validity" of a score, and to publish redacted score reports or research discussing accommodated test results. It is only prohibited from identifying which test takers have received testing accommodations.[27] Of course, the LSAC is also free to articulate to score recipients and the public that it is prohibited by California state law from identifying such test takers.

In light of the competing state constitutional right to privacy, together with the State's fundamental policy against disability discrimination, the modest regulation upon the LSAC's "speech" – the act's prohibition on the act of disclosing those individuals with disabilities receiving testing accommodations – is justified, and consistent with existing caselaw assessing analogous privacy laws. (*U.S. v. Miami University* (S.D. Ohio 2000) 91 F.Supp.2d 1132, 1158 [upholding FERPA protection of student disciplinary records against First Amendment

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[26] See nn. 1, 16, 18-20, 22, *supra*.

[27] Taking the LSAC's own research on its face, this outcome has the additional advantage of being more accurate when compared to the LSAC's current practice of annotating individual score reports. Arlene Amodeo, *et al.*, LSAC Research Report Series, "Predictive Validity of Accommodated LSAT Scores for the 2002–2006 Entering Law School Classes" (March 2009) 1 ("While considering the results of this study, the reader should keep in mind that they refer only to subgroup results and not to individuals. For example, while results may suggest that FYAs [first-year averages] tend to be overpredicted for those accommodated with extra testing time, the performance of an individual who received an extra-time accommodation may actually be underpredicted."). Cf. Civ. Code § 45 (libel includes false publication by writing which has a tendency to injure any person in his occupation).

challenge: "It is a legislative decision as to where the balance between access and privacy must be struck."], aff'd (6th Cir. 2002) 294 F.3d 797, 823-24 [noting that the FERPA permitted the release of redacted records thereby granting the newspaper "access to student disciplinary records and crime related statistics, just not the unfettered access it hoped to secure."];[28] *South Carolina Medical Ass'n v. Thompson* (4th Cir. 2003) 327 F.3d 346, 355, footnote 4 ["We summarily dispense with appellants' argument that the [HIPAA] Privacy Rule will chill patients' rights of free speech, as we find this claim to be without merit."]; cf. *Citizens for Health v. Leavitt* (3d Cir. 2005) 428 F.3d 167, 184 ["We believe that a First Amendment claim is an ill-suited challenge to the Amended [HIPAA] Rule."].)

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[28] Two district courts found that a prior version of the FERPA, which arguably prohibited the release of student criminal records in response to media requests, violated the First Amendment given the right of access to information about crime and criminal trials. (*Student Press Law Center v. Alexander* (D.D.C. 1991) 778 F.Supp. 1227, 1234; *Bauer v. Kincaid* (W.D. Mo. 1991) 759 F.Supp. 575, 594-95.) A subsequent version of the rule clarified that criminal records were not protected by the FERPA. (*U.S. v. Miami University* (6th Cir. 2002) 294 F.3d 797, 815, fn.15 ["[T]he subsequent amendments to the FERPA and its regulations were likely designed to bring the *Bauer* documents clearly within the law enforcement unit records exception [citation omitted].…It goes without saying, however, that the records sought in *Bauer*, incident and criminal investigation reports gathered and maintained by a campus safety and security department, are entirely different than the records sought by *The Chronicle* in this case, *to wit*, copies of records of all disciplinary proceedings handled by the university's internal judicial system[,]" 823 "[W]e decline to evaluate student disciplinary proceedings with the same deferential eye toward First Amendment access as we would government criminal proceedings."].) In any event, the LSAC's claim does not implicate such a category of unprotected information.

As well, in a context that did not include a competing state constitutional right to privacy, the state Supreme Court has upheld restrictions on private speech that had been found to constitute unlawful harassment in violation of the FEHA. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 141-42, 144-45.)

As the provision properly balances competing constitutional rights, and only prohibits the act of identifying individuals with disabilities who received testing accommodations, the LSAC's assertion that it is likely to prevail on its free speech claim must be rejected.

III. The LSAC's Remaining Contentions Must Be Rejected.

For the same reasons as stated above with respect to its equal protection claim, the LSAC's claim of special legislation should be rejected. (*Los Angeles County v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 388-89 [Equal protection and special legislation constitutional guarantees "do not prevent classification by the Legislature, nor do they require that statutes operate uniformly with respect to persons or things which are in fact different.…[¶] If it may reasonably be so assumed the legislation must be upheld, for it is well settled that to warrant a court in adjudging legislation void on this ground it must clearly appear that there was no sufficient reason to warrant the legislative department in finding a difference and making the discrimination. Every presumption is in favor of

the validity of an act of the legislature[.]"] [upholding code sections applying specifically to telegraph and telephone corporations].)

Nor is the provision an unconstitutional bill of attainder. Section 99161.5 of the Education Code does not impose criminal penalties, and its terms and legislative history do not evince the requisite intent to single out and punish for past misconduct. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 527 [upholding term limits initiative against bill of attainder challenge, where no intent to single out and punish could be found].) Moreover, the law regulates the administration of the LSAT rather than the LSAC. Should another entity offer the LSAT, it would be similarly regulated.

Given the foregoing, there is no irreparable harm to the LSAC. Rather, the ongoing harm is to Californians with disabilities who seek to enter the legal profession, but face unnecessary hurdles in obtaining testing accommodations, followed by the unwarranted disclosure of their testing accommodations, due to the LSAC's policies.

CONCLUSION

For all of the reasons stated herein, the Legislature acted constitutionally in adopting AB 2122. The trial court's ruling should be reversed, and the challenged statute should be upheld.

Respectfully submitted,

THE LEGAL AID SOCIETY –
EMPLOYMENT LAW CENTER

Date: August 22, 2013 By: _____
Claudia Center, Counsel for Disability *Amici*

CERTIFICATE OF COMPLIANCE

Cal. Rule of Ct. 8.204

I certify that, pursuant to CRC 8.204, this brief has a typeface of 13 points or more and contains 9,661 words, including footnotes.

Date: August 22, 2013 By: _____
Claudia Center, Counsel for Disability *Amici*

PROOF OF SERVICE

I, Pamela Mitchell, declare:

I am a citizen of the United States, over 18 years of age, employed in the County of San Francisco, and not a party to or interested in the within entitled action. I am an employee of THE LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER, and my business address is 180 Montgomery Street, Suite 600, San Francisco, California 94104.

I am familiar with this company's practices for mail, whereby the mail, after being placed in a designated area, is given the appropriate postage and labeling and is deposited in a U.S. mailbox in the City of San Francisco, California, and, during the normal course of business on the same day is placed in its designated area for delivery.

On August 22, 2013, I served the within:

APPLICATION OF ASSOCIATION ON HIGHER EDUCATION AND DISABILITY, CALIFORNIA ASSOCIATION FOR POSTSECONDARY EDUCATION AND DISABILITY, CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS CALIFORNIA, DISABILITY RIGHTS EDUCATION & DEFENSE FUND, DISABILITY RIGHTS LEGAL CENTER, EDGE FOUNDATION, EVERYONE READING, INC., LEGAL AID SOCIETY–EMPLOYMENT LAW CENTER, NATIONAL ASSOCIATION OF LAW STUDENTS WITH DISABILITIES, NATIONAL FEDERATION OF THE BLIND, AND MARILYN J. BARTLETT AND RICHARD K. NEUMANN, JR., FOR LEAVE TO FILE *AMICI CURIAE* BRIEFAND *AMICI CURIAE* BRIEF

on parties in said action, by causing to be delivered one true and correct copy thereof to the person(s) and at the addresses set forth below by U.S. Mail:

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I declare under penalty of perjury under the laws of the State of California and of the United States of America that the foregoing is true and correct. Executed on August 22, 2013, in San Francisco, California.

____/s/ *Pamela Mitchell*_____
Pamela Mitchell