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# RIVERSIDE LAWYER

## IN THIS ISSUE



The Official Publication of the Riverside County Bar Association

# RIZIO LIPINSKY
PERSONAL INJURY & EMPLOYMENT LAWYERS

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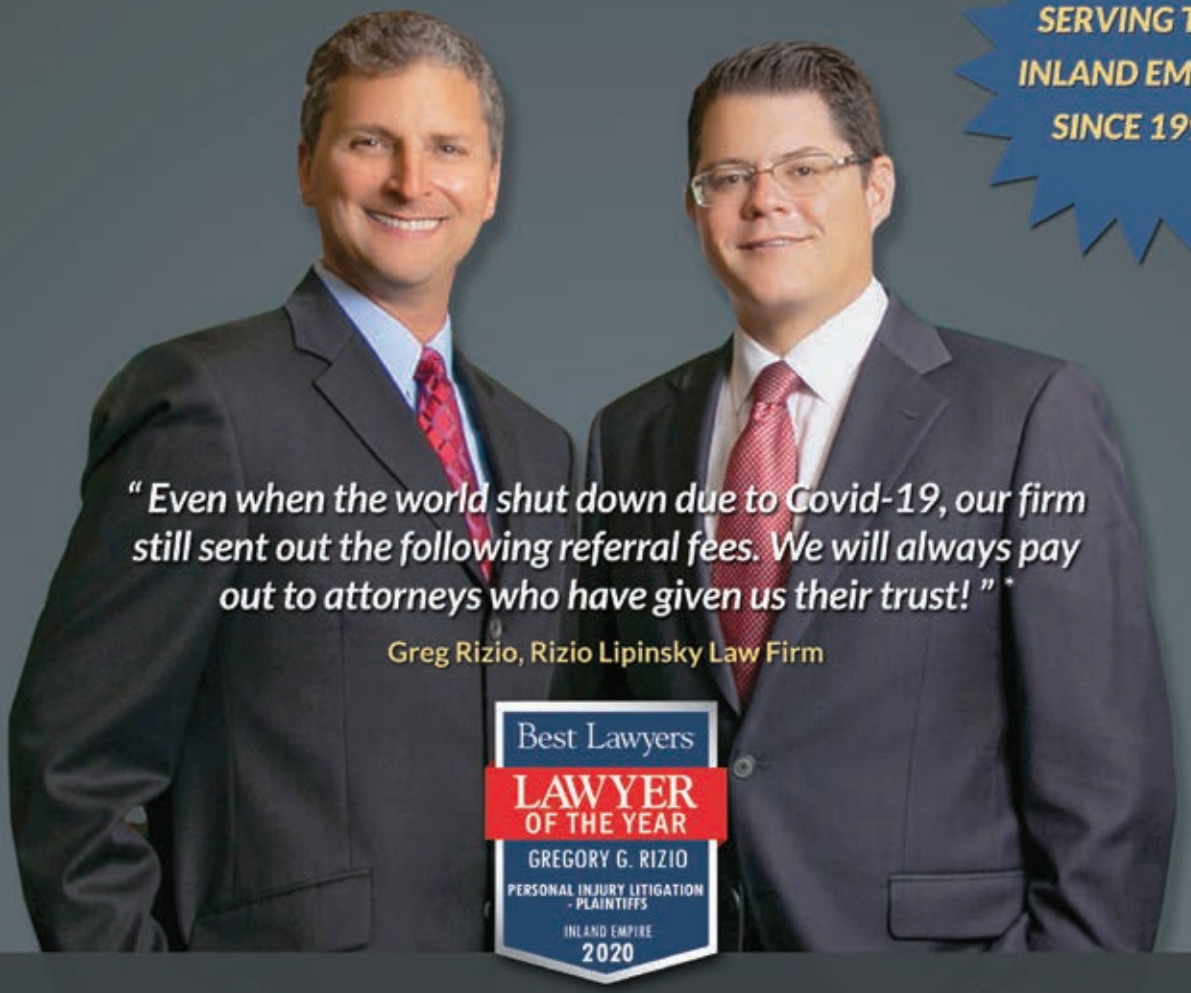

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RIVERSIDE LAWYER
MAGAZINE


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# CALENDAR

## SAVE THE DATE

### Annual Installation Dinner

HONORING
President Kelly A. Moran,
the Officers of the RCBA and
Barristers for 2023-2024

Thursday, September 14, 2023
Social Hour 5:30 p.m.
Dinner 6:30 p.m.

Mission Inn Hotel
3649 Mission Inn Avenue
Riverside, California

## AUGUST

**13** Civil Litigation Section
Noon – Zoom - MCLE
Speaker: Nathan Miller, Founder & CEO Miller Ink
Topic: "Principles of Crisis Communication"
MCLE

## SEPTEMBER

**5** Juvenile Law Section Meeting
12:15 p.m. – Zoom
Speaker: Angela Zuspan, Regional Manager, DPSS-CSD
Topic: "The Resource Family Approval Program in Riverside County"

**Events Subject To Change**
For the latest calendar information please visit the RCBA's website at
**riversidecountybar.com**

The Riverside Lawyer is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are $30.00 and single copies are $3.50.

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# MISSION STATEMENT

## Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

## RCBA Statement

The mission of the Riverside County Bar Association is: To serve our members, our communities, and our legal system.

## Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Riverside Legal Aid, Fee Arbitration, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Mock Trial, State Bar Conference of Delegates, Bridging the Gap, the RCBA - Riverside Superior Court New Attorney Academy and the Riverside Bar Foundation.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of *Riverside Lawyer* published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication, and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, Reading Day and other special activities, Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

# PRESIDENT'S Message

by Lori Myers


The time has come – this is my final president's message. It has been an absolute pleasure to serve as the RCBA president for the last year and it has been nice to see some plans come together which were implemented in the beginning of the year. We have most definitely enjoyed the RCBA quick surveys and the response rate. It is excellent to see so many of our members engaging with our surveys so we can tailor our trainings, networking and assistance in the direction that our members need. We are so grateful for your responses. We have also updated the look of our RCBA magazine. Our social media handles are active on a more regular basis. We are upgrading our RCBA logo and working with our branding manager, Geoff Goacher, who has an excellent grasp of the work RCBA does with our local legal community. He has worked with several other prominent local attorneys, including Greg Rizio and Reid & Hellyer. A little fun fact – Geoff and I grew up together and used to be next door neighbors from elementary school through high school. We lost contact and have now reconnected through our local legal community and working with RCBA.

I want to give a huge shout out to the past RCBA presidents that have personally guided me through this journey: Steve Harmon, Neil Okazaki, Sophia Choi, Judge Chad Firetag, and Robyn Lewis. This organization is such a collaborative group and it is always nice to know that everyone is so dedicated and willing to help their fellow colleagues.

I hope everyone is able to make this year's big celebration and installation on September 14 at 5:30 p.m. at the Mission Inn. Kelly Moran will be our next RCBA president. She is the Chief Deputy County Counsel for the County of Riverside in the Public Safety & Litigation Services Division. Mark Easter will be our president-elect. The Barristers new board will be installed as well. A few pictures of last year's photo booth are shown here. I look forward to seeing you all again this year.

Thank you to everyone in the RCBA legal community; there are so many of you that I have only met because of this organization and my life is so much better because of it.

Last but certainly not least – thank you to our Executive Director, Charlene Nelson, who stands by the president, each and every year, and guides us with our journey. She makes us look good and she continues to educate all of us with her abundance of knowledge and passion for the history of this organization – I could not have gotten through this year without her by my side and the fabulous women who work in the office and keep the organization going on a day to day basis. I love you. I mean it.

*Lori Myers is a local private criminal defense attorney and founder of the Warrior Attorney Academy©.*

# BARRISTERS
# President's Message

by Lauren Vogt

## Coming to a Close

As my term comes to a close, I can't help but sit back and reflect on what an amazing year the Barristers have had! This year we set out to hold monthly happy hour events to allow our members an opportunity to relax and network. We also planned to find a way to get more involved in the community and give back through community service. Lastly, we invested a ton of time and energy into bringing back our Annual Judicial Reception. I am so proud to say, that with the support of my amazing board, we accomplished each and every one of those amazing tasks.

Every month, thanks to the generosity of our sponsors, we held a Barristers Happy Hour Event, and we haven't stopped yet. In fact, on August 11, 2023, we will be hosting our final Happy Hour of the term, sponsored by Varner & Brandt.

Additionally, many of our members teamed up with Inland Counties Legal Services this year to mentor college and law students trying to break their way into the legal profession. As well as teaming up with RCBA for the Annual Elves Event, where we spent hours wrapping presents for families in the community.

And as if all of that were not enough, we also brought back our Annual Judicial Reception and had an unprecedented turnout! The event went off without a hitch and we had the privilege of honoring some amazing members of our legal community!

There is no doubt we have had a remarkable year and while I couldn't have done it without my amazing board, we as a team, couldn't have done it without the generosity of our sponsors and the support of all of you. So, for myself, and on behalf of my team, we thank you!

## Election Results

As we all know, when one person leaves office another enters and in this case, my exit will be David Rivera's entrance and I know that he will do an amazing job leading this great group of people. Now, while I will still be around in the background for support, with the wonderful group that was elected, I doubt they will need me. On that note, the following individuals will be your 2023-2024 Barristers Board:

| | |
|---|---|
| Immediate Past-President | Lauren M. Vogt |
| President | David Rivera |
| President-Elect | Summer DeVore |
| Treasurer | Kevin Collins |
| Secretary | Priscilla George |
| Members-At-Large | Sharon Ramirez |
| | Jack Rafter |
| | Sandra Lattouf |
| | Alex Barraza |
| | Nolan Kistler |

Congratulations to all of those who were elected!

## Closing Remarks:

As a reminder, anyone interested in joining us, is more than welcome and I encourage you to reach out to me at 951-781-6500, or shoot me an email, lvogt@riziolawfirm.com. I would love to chat with you! ■

## Follow us!

**For upcoming events and updates:**

### Website:
RiversideBarristers.org

### Facebook:
/RCBABarristers

### Instagram:
@RCBABarristers

*Lauren M. Vogt is an associate with Rizio Lipinsky Law Firm.*

# *Siegel v. Fitzgerald*: U.S. Trustee's Fees and the Uniformity Requirement of the U.S. Constitution's Bankruptcy Clause

by Misty Perry Isaacson

Last term, the U.S. Supreme Court held in *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (2022) that the 2018 increase in fees paid by chapter 11 debtors to the U.S. Trustee Fund system was unconstitutional. To grasp the full implication of the Siegel v. Fitzgerald decision, a general understanding of the creation of the U.S. Trustee Program (the "Program") is required. Under the 1898 Bankruptcy Act, bankruptcy referees/judges appointed and supervised bankruptcy trustees. This relationship between trustees and judges created an appearance of improper bias and generated concern about the bankruptcy system.[1] The Program was created by the Bankruptcy Reform Act of 1978, as a pilot program, to remedy this appearance and to transfer certain administrative functions of the bankruptcy system handled by bankruptcy judges to U.S. Trustees.[2] It was expanded to 21 Regions nationwide by the enactment of the Bankruptcy Judges, U.S. Trustees, and Family Farmer Bankruptcy Act of 1986.[3] Based primarily on concerns that placing bankruptcy trustees under the supervision of the executive branch would create a conflict of interest, Congress allowed for Alabama and North Carolina to opt out of the Program.[4] Unlike the Program, the bankruptcy administrator program ("Administrator Program") in Alabama and North Carolina is administered by the Administrative Office of the United States Courts.

Although the Program and the Administrator Program handle the same core administrative functions, they have different funding sources. *Id*. at 1772. The Program was designed to be self-funding from fees paid by parties and businesses in chapter 11 matters.[5] Chapter 11 debtors pay a quarterly fee to the Program, which amount is determined by Congress and varies based on disbursements made by the debtor's estate each quarter. *Id*. at 1773.

Initially, the major financial distinction between the two programs was that the Administrator Program was funded through the Judiciary's general budget and chapter 11 debtors were not required to pay fees equal to those imposed by the Program. *Id.* However, after the Ninth Circuit held that the dual system was unconstitutional given the disparate fees,[6] Congress provided that "the Judicial Conference of the United States may require the debtor in a case under chapter 11 [filed in an Administrator Program district] to pay fees equal to those imposed" in Program districts. *Id*. at 1776. From 2001 to 2017, quarterly fees were the same for both the Program and Administrator Program districts.

However, due to concerns about a shortfall in the Programs' Fund, in 2017 Congress enacted a temporary increase in the quarterly fee rates for chapter 11 cases (the "2017 Act"). The increase in fees became effective in the first quarter of 2018, would last through 2022, and applied to both pending and newly filed chapter 11 cases. The Judicial Conference adopted the same fee increase for the Administrator Program, however, the application of the increase became effective on October 1, 2018, and only on newly filed cases. Accordingly, for existing cases and newly filed cases during part of 2018, the quarterly fees were different for chapter 11 debtors depending on whether they were within the jurisdiction of the Program or the Administrator Program.

The facts that gave rise to *Siegel* began with the 2008 chapter 11 bankruptcy filing of Circuit City Stores, Inc. in the U.S. Bankruptcy Court for the Eastern District of Virginia, (a Program district). Circuit City's confirmed liquidation plan was being administered by Trustee Alfred H. Siegel ("Siegel") and was ongoing when the 2017 Act became effective. In the first three quarters of 2018, Siegel paid $632,542 in fees, but prior to the 2017 Act he would have paid only $56,000. *Id*. at 1778. Siegel filed for relief against John P. Fitzgerald, III, Acting United States Trustee for Region 4 ("Fitzgerald"), claiming that the 2017 Act fee increase was not uniform across the Program and Administrator Program districts and therefore was in violation of the U.S. Constitution's Bankruptcy Clause. *Id*. The Bankruptcy Court agreed and directed that the fees due from January 1, 2018, onward should be paid at the rate in effect before the 2017 Act. *Id.* A divided panel of the Fourth Circuit reversed agreeing that the uniformity requirement of the Bankruptcy Clause applied to the 2017 Act but interpreted it to forbid only "arbitrary" geographic differences. *Id*. The U.S. Supreme Court granted *certiorari*, 142 S. Ct. 752 (2022), to resolve a split regarding the constitutionality of the 2017 Act.

The Bankruptcy Clause grants Congress the power to establish "uniform Laws on the subject of Bankruptcies through the United States." U.S. Const., Art. 1, §8, cl. 4. This clause was included in the Constitution to provide a centralized and uniform system for handling bankruptcy cases, ensuring that individuals and businesses facing financial distress are treated fairly and consistently. Fitzgerald argued that the 2017 Act was not a law "on the subject of Bankruptcies" which requires uniformity, but rather a law auxiliary to substantive bankruptcy law. *Siegel,* 142 S. Ct. at 1778-79.

Justice Sotomayor, writing for a unanimous Court, said "[N]othing in the language of the Bankruptcy Clause itself, however, suggests a distinction between substantive and administrative laws. This Court has repeatedly emphasized that the Bankruptcy Clause's language, embracing 'laws on

1 Dan J. Schulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and Bankruptcy Administrator Programs,* Neb. L. Rev., Vol. 74, Issue 1 (1995).
2 The Program originally encompassed 18 districts. https://www.justice.gov/ust/about-program.
3 Congress allowed the six judicial districts in North Carolina and Alabama to opt out of the Trustee Program. In these six districts, bankruptcy courts continue to appoint bankruptcy administrators under a system called the Administrator Program. *Siegel v. Fitzgerald,* 142 S. Ct. at 1772.
4 U.S. Congressional Research Service, *Siegel v. Fitzgerald: Supreme Court Makes Rare Comment on the Bankruptcy Clause's Uniformity Requirement*, July 1, 2022, Michael D. Contino, https://crsreports.congress.gov/product/pdf/LSB/LSB10782.
5 U.S. Department of Justice, United States Trustee Program, FY 2022 Performance Budget Congressional Submission.
6 *St. Angelo v. Vict. Farms*, 38 F.3d 1525 (9th Cir. 1994), amended 46 F.3d 969 (1995).

the subject of Bankruptcies,' is broad." *Id.* at 1779. "Moreover" the 2017 Act affects the "substance of debtor-creditor relations" because the increase in quarterly fees decreases the available funds for payment to creditors. *Id.* Since the 2017 Act exempts debtors in Alabama and North Carolina from a fee increase that applies to the other 48 states without identifying any material difference between the debtors across those states, the Court found that the 2017 Act was subject to Bankruptcy Clause.

Having found that the 2017 Act fell within the ambit of the Bankruptcy Clause, the Court was required to determine whether it was a permissible exercise of the Clause. While the Bankruptcy Clause confers broad discretion to Congress, it also imposes limitations on its authority by requiring that the bankruptcy laws enacted be "uniform." In her opinion, Justice Sotomayor discussed three prior Supreme Court cases that dealt with the meaning of the Clause indicating that "[t]aken together, they stand for the proposition that the Bankruptcy Clause offers Congress flexibility, but does not permit arbitrary geographically disparate treatment of debtors." *Id.* at 1780. The Court further opined that the funding disparities between the Program and Administrator Program districts arose not out of region-specific problems like the law at issue in the *Regional Rail Reorganization Act Cases*,[7] but out of Congress's own "arbitrary" decisions to separate the districts into two different systems. The decision to separate the districts was derived not from geographical needs, but from a desire of the federal districts in two states to avoid participating in the Program. As a result, Justice Sotomayor held that "the Clause does not permit Congress to treat identical debtors differently based on an artificial distinction that Congress itself created."

In conclusion, Justice Sotomayor identified the limits of the Court's decision and declined to address the constitutionality of the dual administrative bankruptcy system and remanded the matter back to the Fourth Circuit to consider the proper remedy due to the debtor.

Since the decision in *Siegel,* three circuits[8] have now held that chapter 11 debtors in Program districts are entitled to refunds for paying more in quarterly fees between 2018 and 2021 than those in the Administrator Program districts. With no split of circuits, the Eleventh Circuit's recent decision in *United States Tr. Region 21 v. Bast Amron LLP* (*In re Mosaic Mgmt. Grp., Inc.*), No. 20-12547, 2023 U.S. App. LEXIS 15862 (11th Cir. June 23, 2023) reduced the odds that the Supreme Court will grant *certiorari* on this issue.

*Misty Perry Isaacson is with the firm of Pagter and Perry Isaacson in Santa Ana, CA and is a California Certified Specialist in Bankruptcy Law.*

7 In 1974, the Court upheld a railroad reorganization law that only applied to railrods in the Northeast and Midwest. Based on flexibility in the Bankruptcy Clause, the Court upheld the law that addressed "geographically isolated problems." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974).

8 The Second in *Clinton Nurseries Inc. v. Harrington* (*In re Clinton Nurseries Inc.*), 53 F.4th 15, 29 (2nd Cir. 2022), amending and reinstating 998 F.3d 56, 69-70 (3nd Cir. 2021); the Tenth in *John Hammons Fall 2006 LLC v. U.S. Trustee* (*In re John Q. Hammons Fall 2006 LLC*), 20-3203, 2022 WL 3354682 (10th Cir. Aug. 15, 2022), reinstating 15 F.4th 1011, 1026-26 (10th Cir. 2021); and the Eleventh Circuit in *United States Tr. Region 21 v. Bast Amron LLP* ( *In re Mosaic Mgmt. Grp., Inc.*), No. 20-12547, 2023 U.S. App. LEXIS 15862 (11th Cir. June 23, 2023).

# From Flag Painting To Flag Burning

by Abram S. Feuerstein

Just as artists have captured -- and celebrated -- the powerful symbolism of the American flag, its imagery also has been at the center of the American time-honored tradition of protest. And, it was on June 21, 1989, that a deeply divided 5-4 Supreme Court in *Texas v. Johnson*[1] ruled that flag burning is a form of "symbolic speech" that is protected by the First Amendment.

Traveling from his home in Atlanta, Georgia and joining about 100 demonstrators outside the 1984 Republican National Convention in Dallas, Texas, Gregory Lee Johnson poured kerosene on an American flag and set it on fire. At a young age he had aligned himself with leftist movements in the United States and now, nearly 30 years old, he stood over the burning flag and purportedly chanted slogans like: "Red, white and blue, we spit on you;" and "Reagan, Mondale, which will it be? Either one means World War III."[2]

Unimpressed, Dallas police arrested Johnson, and he was charged with the desecration of a venerated object in a manner likely to incite anger in others. His conviction by the trial court was affirmed by a State appellate court; however, the Texas Court of Criminal Appeals overturned the decision, holding that the State, consistent with the First Amendment, could not punish Johnson. Texas appealed to the Supreme Court.

The Supreme Court's flag cases go back to its 1907 decision in *Halter v. Nebraska*,[3] when it affirmed the conviction of two businessmen who tried to peddle their wares and increase beer sales by placing a flag label on the bottles. The Vietnam years saw the passage of the Federal Flag Desecration Law, which prohibited knowingly casting contempt on "any flag of the United States by publicly mutilating, defacing, defiling, burning or trampling upon it."

In 1974, however, the Court ruled that taping a peace sign on the flag was not illegal.[4] That decision, along with earlier precedents protecting the rights of Jehovah's Witnesses to refuse to salute the flag,[5] set the stage for Johnson, in which the justices with nearly unparalleled eloquence, discussed the meaning of free speech in the context of the unique place the flag holds as a national symbol and Johnson's "expressive conduct" in burning it.

For the majority, Justice Brennan: "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." And: "(t)he flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today" in that the "decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength."

Kennedy, concurring: "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."

Chief Justice Rehnquist in dissent: "(t)he flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas." He wrote, "For more than 200 years, the American flag has occupied a unique position as the symbol of our nation, a uniqueness that justifies a governmental prohibition against flag burning."

Johnson was not the last word on flag desecration. In response, Congress passed the Flag Protection Act of 1989, which the Court then struck down in *United States v. Eichman*, 496 U.S. 310 (1990). In 2006, the Senate fell one vote short of the 67 votes needed to send a proposed flag protection constitutional amendment to the states for ratification.

Recently, a proposal to build the world's largest flagpole – which at 1461 feet would be taller than the Empire State Building – and holding a football field sized flag has divided Columbia Falls, the small Maine town closest to the proposed site.[6] The $1 billion construction plan for

1 491 U.S. 397 (1989).
2 *Id.*; see also https://en.wikipedia.org/wiki/Gregory_Lee_Johnson
3 205 U.S. 34 (1907).
4 *Spence v. Washington,* 418 U.S. 405 (1974). By hanging from his apartment window an upside-down flag with peace symbols taped to it, college student Harold Spence said his purpose was to associate the American flag with peace instead of war and violence.
5 *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943). Four years earlier, the Court in *Minersville School District v. Gobitis,* 310 U.S. 586 (1940) had taken the exact opposite position in permitting a Pennsylvanian school district to expel Lillian and William Gobitis, ages 10 and 12, for refusing to stand up in their classrooms and recite the pledge of allegiance. As members of the Jehovah's Witnesses, the children's family adhered to the belief that saluting the flag was the equivalent of worshipping a graven image. This was particularly true because at the time, the flag salute, also known as the "Bellamy Salute" for the pledge's original author, actually resembled the "heil Hitler!" salute. The out-stretched arm salute was replaced in 1942 with the current hand over heart tribute. See Robert Longley, "Why Americans Once Gave the 'Bellamy Salute,'" October 3, 2020, retrieved at https://www.thoughtco.com/why-americans-gave-the-bellamy-salute-3322328
6 Patrick Reilly, "Plan to build world's tallest flagpole – bigger than the Empire State Building – with massive American flag divides tiny

the "Flagpole of Freedom Park" includes observations decks, restaurants, hotels, and a 4000-foot amphitheater. Aside from the project's impact on an area known for its wildlife, some residents have voiced concerns that the park is an attempt to impose a particular vision of America on the town's residents. Reacting to criticism of the flag at a town meeting, one resident observed: "To say that the flagpole with the United States flag on it is an eyesore, I don't particularly like it." "They don't mind looking out the window at cellphone towers or the windmills," he said.

Main town," New York Post, July 1, 2023, retrieved at https://nypost.com/2023/07/01/plan-for-worlds-tallest-flagpole-with-massive-american-flag-divides-maine-town/.

The flag and the strong emotional reactions it stirs will continue to be the subject both of political discourse and art.

*Abram Feuerstein is employed as an Assistant United States Trustee by the Department of Justice. The mission of the United States Trustee Program is to help protect the integrity of the bankruptcy system for all its constituents. The views, if any, expressed in the article belong solely to the author and do not represent in any way the views of the United States Trustee, the United States Trustee Program, or the US Department of Justice.*

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# A Review of the Momentous 2022 Term of the United States Supreme Court

by Dean Erwin Chemerinsky

It is impossible to think about the current Supreme Court except in ideological terms. The Court's composition — six conservative and three liberal justices – is its defining feature. No one denies for an instant how different it would be if Hillary Clinton had picked three justices instead of Donald Trump and the composition were reversed.

There is no doubt that the conservative position prevailed in some of the most important cases of October Term 2022. But unlike a year ago, there were some notable liberal victories. In the last days of October Term 2022, the Court, again in a series of 6-3 decisions, moved the law significantly to the right in ending affirmative action by colleges and universities, creating a First Amendment exception to state anti-discrimination laws for those engaged in expressive activities, and invalidating President Joe Biden's student loan forgiveness program. But unlike the prior term, there were some significant surprises from the conservative Court, including finding that Alabama violated the Voting Rights Act in its drawing of congressional districts, rejecting the "independent state legislature" theory, which would have precluded state courts from enforcing state constitutions in elections for Congress, and in upholding the Indian Child Welfare Act. Overall, the conservative position prevailed in the most high-profile cases, but less uniformly than the year before.

The numbers about the term confirm that the Court was less deeply divided than the term before. The Supreme Court decided 58 cases with signed opinions after briefing and oral arguments. This number is exactly the same as last year and slightly more than the 54 from two terms earlier or 52 the year before that, which was the smallest number since 1862. It is notable that the Court's docket seems to have stabilized in the 50s range, which is significantly less than even several years ago and radically fewer than the more than 150 cases decided a year in the 1980s. In William Rehnquist's last term as Chief Justice, October Term 2004, the Court decided 80 cases. It has not gotten close to that since John Roberts became Chief Justice.

This year, 47 percent of the cases were decided unanimously, compared with just 29 percent the year before. That, of course, could be a function of the justices consciously trying to achieve consensus, or it may just reflect what matters were on the docket this term. There also were fewer 6-3 decisions this year, 11, compared to 18 the year before. There were another seven that were decided 5-4.

Justice Kavanaugh was the justice most often in the majority, followed by Chief Justice Roberts. In the non-unanimous cases, Kavanaugh was in the majority 90 percent of the time, and Roberts was in the majority of these cases 86 percent of the time.

It was also a term where it again seemed to be the John Roberts Court. A year ago, when five justices voted to overrule *Roe v. Wade* without Roberts, some speculated that he had "lost' his Court. But that was generalizing too much for one case, albeit an enormously important one. This term, Chief Justice Roberts wrote the majority opinion in a disproportionate share of the most high-profile cases, including affirmative action, the Voting Rights Act, the independent state legislature theory, and the Biden student loan forgiveness program. He was in the majority in every major case.

In looking to the future, the most important conservative rulings of the term are likely to lead to a great deal of litigation in the years ahead. In ending affirmative action in *Students for Fair Admission v. President and Trustees of Harvard College*, the Court left open many questions about what is permissible. Can colleges and universities engage in targeted outreach and recruitment? Are proxies – race neutral criteria that would enhance diversity – constitutional? Even Chief Justice Roberts' conclusion leaves doubt, when he declared: "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But . . . universities may not simply establish through application essays or other means the regime we hold unlawful today." It is unclear what this will mean in practice and for courts having to decide what is permissible or forbidden.

In *303 Creative LLC v. Elenis*, the Court ruled that it violated the First Amendment to apply Colorado's anti-discrimination law to a web designer who did not want to design websites for same-sex couples. Does this mean that anyone engaged in expressive activity can refuse service whether it be based on race or religion or sex or sexual orientation? What constitutes expressive activity? In the majority opinion, Justice Gorsuch simply said: "Doubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions. But this case presents no complication of that kind." But that hardly provides much guidance to the lower courts.

Finally, the term's context cannot be ignored in thinking about it. The Court has its lowest approval ratings in history. In June 2023, a Quinnipiac University poll asked 1,800 United States adults about their views on the Supreme Court. The poll showed 35 percent expressing approval of the Supreme Court and 57 percent voicing disapproval. There were serious allegations of ethical improprieties by three justices: Thomas, Gorsuch, and Alito. Despite substantial pressure from various bills, the Court still has not adopted an ethics code. It is inexplicable why all other judges in the country must abide by an ethics code, but not the most powerful and important ones. This matter should not be a partisan issue: an ethics code and an enforcement mechanism would apply to all justices, liberal and conservative.

Simply stated, it was another momentous term in the Court and at a time that may be pivotal in its long history.

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# An Unforgiving Supreme Court Decision

by Allan Fong

In 2002, the Higher Education Relief Opportunities for Students Act (HEROES Act) was signed into law as a response to 9/11. This law allowed the U.S. Secretary of Education to "waive or modify any statutory or regulatory provision" to prevent debtors from being negatively impacted by the terrorist attack or in other times of national emergency.[1]

The HEROES Act was utilized again in 2020 by then-Secretary of Education Betsy DeVos, after President Trump declared the Coronavirus Pandemic to be a national emergency. Secretary DeVos used her authority to halt the accrual of interest on federal student loans and pause repayment requirements on student loan debtors. The Biden administration took the same steps, and in 2022 went a step further when Secretary of Education Miguel Cardona announced that he would cancel up to $20,000 of federal student loan debt for borrowers who were below income threshold requirements.[2]

The Biden administration's cancellation of student loan debt has led to two legal challenges in the U.S. Supreme Court. The first is *Biden v. Nebraska,* in which the plaintiffs are states; the second is *Department of Education v. Brown,* in which the plaintiffs are individual student loan borrowers. In the case of *Department of Education v. Brown,* it was unanimously decided that the plaintiffs lacked standing to challenge the cancellation program.

In the more contentious case of *Biden v. Nebraska*, the first issue addressed in the SCOTUS opinion, similarly, was standing. The Court held that at least Missouri, one of the plaintiffs, had standing through the Higher Education Loan Authority of Missouri (MOHELA).[3] MOHELA was labeled an "instrumentality" of the state that was created by the state, is supervised by the state, and serves a public function. It was conceded that the Federal government's plan would cost MOHELA an estimated $44 million dollars in annual fees, therefore, injury exists for Missouri to have standing.[4]

After addressing the issue of standing, the Court turned to arguments on the merits. The Secretary of Education claimed that he had authority under the Education Act to cancel $430 billion of student loan principal as a "modification or waiver" of existing statutory or regulatory provisions. The plaintiff States argued that to "waive or modify" laws and regulations is an entirely different action from cancelling debt.[5] Justice Kagan retorted that the Secretary's power included the ability to waive or modify existing provisions and to add new ones in their place, which is exactly what has been done by the Secretary in the present case.[6]

The conservative majority of Court justices were less convinced by the Secretary's arguments. They claimed that the verbiage of "waive" or "modify" suggests power of limited scope. The Court majority even suggested that the loan-forgiveness program might fail under the "major questions doctrine," which establishes that if Congress wants to give an administrative agency the power to make decisions of vast economic and political significance, it must be explicit in doing so.[7]

Ultimately, SCOTUS held that the text of the HEROES Act does not authorize the Secretary of Education's loan forgiveness on such a broad scale. Chief Justice Roberts' opinion focuses on the language of the HEROES Act, stating that the power to "'modify' does not permit 'basic and fundamental changes in the scheme' designed by Congress." Furthermore, the Secretary's purported invocation of the power to "waive" provisions "does not remotely resemble how it has been used on prior occasions," says Roberts. The Chief Justice concluded that the Secretary's acts amount to "draft[ing] a new section of the Education Act from scratch by 'waiving' provisions root and branch and then filling the empty space with radically new text."[8]

Since the Supreme Court's decision, President Biden has spoken publicly about developing a new student loan forgiveness plan under different legal authority. According to the Higher Education Act of 1965, the Secretary of Education has authority "compromise, waive, or release any right, title, claim, lien or demand, however acquired, including any equity or any right of redemption."[9]

If President Biden follows through on his new plan, he will undoubtedly face new semantic legal challenges. And it will presumably be left to the same justices to determine whether the Higher Education Act is ironclad in granting the Secretary of Education such power to forgive. But if one can't be bothered to hold their breath, here's a shameless plug suggesting they join a public defender's office to get their student loans forgiven through the Public Service Loan Forgiveness Program.

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1 HEROES Act, 20 U.S.C. § 1098bb(a)(2) (2003)
2 Congressional Research Service, Student Loan Cancellation Under the HEROES Act (2023)
3 *Biden v. Nebraska*, No. 22-506, at *8 (U.S. June 30, 2023)
4 *Id.*
5 Brief for Petitioner at 44, *Biden v. Nebraska*, No. 22-506 (U.S. June 30, 2023)
6 *Biden v. Nebraska,* No. 22-506 at *57 (U.S. June 30, 2023) (Kagan, J., dissenting)
7 *Biden v. Nebraska* at *21
8 *Id.* at *17
9 Higher Education Act, 20 U.S.C. § 1082(a)(6) (2022)

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# Oh, Say Have You Seen, The Flag Paintings Of Childe Hassam

by Abram S. Feuerstein

As contestants are eliminated episodically on the fashion show Project Runway, model Heidi Klum delivers the bad news, observing: "One day you're in. The next day you're out." For America's leading impressionist painter Childe Hassam, who died in 1935 at age 75, in truth he had been out of fashion not for days but for a couple of decades, overrun by Cubism, Surrealism and a bunch of other early-20th century avant-garde "isms." Indeed, at the time of his death and almost heralding a new direction in American art, the drip action painter Jackson Pollack was painting WPA depression murals.[1]

Sure enough, Hassam had been cranky about his growing disfavor, calling admirers of current art trends "art boobys."[2] He told an interviewer in 1927 that he was not impressed by canvasses that displayed "one eye in the top of the head and the other in the chin," contending that such novelties or "absurdities (were) an attempt to attract attention."[3] Hassam noted: "The average American still fails to appreciate the beauty of his own country and goes on thinking that anything bearing a Paris label, whether a hat, a dress, a painting, or a building, is the highest expression of Dame art."[4]

Hassam's rants about modernists went further as he rejected foreign influences on American art and its art market, and touted the virtues of American art.[5] And, as for his own art, Hassam became adamant that notwithstanding his early formative trips to Paris -- and the unmistakable influence of such painters as Monet or Pissarro on his work -- the French Impressionists had nothing to do with his own "self-invention" as an artist.[6] Hassam declared: "It is my opinion, that in America they usually have painted better than in Europe in the last one hundred years, only Europe doesn't know it."[7]

*Allies Day, May 1917*

Born Frederick Childe Hassam (middle name pronounced like "child;" last name HASS'm with the accent on the first syllable) in the Boston suburb of Dorchester in 1859, Hassam's family traced its New England lineage to the 1600s.[8] After the 1872 Boston Fire devastated his father's cutlery business, Hassam left high school and went to work in the accounting department of publisher Little, Brown & Co.[9] Ill-suited for accounting and soon fired from his job, Hassam's sketching skills led him to find employment in Boston first with a wood engraver, and

1 The contrast between the emerging Pollack and the out-of-fashion Hassam was made by a *New York Times* art critic, Michael Kimmelman, in reviewing a 2004 retrospective of Hassam's work at the Metropolitan Museum of Art. See M. Kimmelman, "Art Review; America's Star-Spangled Impressionist," *New York Times*, June 11, 2004. The show took place while Republicans were scheduled to hold their presidential convention in the city and possibly for that reason Kimmelman's review seems to be influenced by his own politics. Acknowledging that Hassam was a "technical virtuoso," Kimmelman nonetheless took offense at Hassam's "sunny" pictures in which it always seems to be "morning in American even when the painting is about Paris after a spring shower."

2 Ulrich W. Hiesinger, *Childe Hassam: American Impressionist*, p. 171 (Prestel Publishing 1994) ("Hiesinger), also cited at https://en.wikipedia.org/wiki/Childe_Hassam ("Hassam Wikipedia").

3 Warren Adelson, Jay E. Cantor, and William H. Gerdts, *Childe Hassam: Impressionist*, p. 102 (Abbeville Press 1999) (hereafter, "Adelson et al.").

4 Adelson et al., p.7.

5 Adelson et al., pp. 99-103.

6 Adelson et al., p. 96.

7 Adelson et al., p. 96

8 Adelson et al., p. 7. To his delight, Hassam's last name caused people to believe he was of Arabian heritage -- he even added a crescent moon shape to his painter's signature – but somewhere along the way and long before his birth the ancestral name of "Horsham" had evolved into Hassam. See generally, https://www.theartstory.org/artist/hassam-childe/#:~:text=Childe%20%22Muley%22%20Hassam%20enjoyed%20the,appears%20in%20Washington%20Irving's%20writings.

9 Adelson et al., p. 7.

*American painter Childe Hassam (1859-1935).*

then as a free-lance magazine illustrator.[10] He took some formal art classes. He also found time to paint, achieving early commercial success with watercolors that he sold at local galleries.[11] Some of these featured country landscapes; others coastal scenes. In 1883, he took his first trip to Europe to obtain more experience, returning to exhibit in Boston a year later approximately 70 works that he painted during his Continental travels.[12] In February 1884, he married his fiancée, Kathleen Maude Doan, and together they settled in Boston's back bay.

As Boston rebuilt, it provided new subject matter for Hassam – just as Paris' cityscapes had done for his French counterparts. The energy and architecture of Boston's urban street scenes animated his work. Back to Paris for three years, Hassam returned to America with a brushwork that was alive with color and light, and he covered numerous canvasses with garden scenes dominated by young women among beautiful flowers.[13] But Hassam continued to paint street scenes, this time of Manhattan where he and his wife had moved to the comforts of a Fifth Avenue apartment.[14] "I was always interested in the movements of humanity in the street," he said.[15] To be sure, he was not very interested in lower class neighborhoods.[16] These paintings are not images of arriving immigrants and "huddled masses," but of the well-to-do dressed in their Sunday best going about their doings amidst the rising New York skyline. Not much dirt there; and certainly, none that could be seen by the artist looking down from his Fifth Avenue window.

Hassam also continued to travel for his painting ("I am the Marco Polo of the painters"),[17] spending his summers at an art colony on Appledore Island, where he produced an important body of work relating to Appledore and the other coastal Isles of Shoals located a few miles east of Portsmouth, New Hampshire.[18] Along the way, he painted numerous New England churches, asserting that they had the "same kind of beauty as Greek temples."[19]

By the turn of the century, Hassam had matured as a painter, absorbing impressionist and neo-impressionist styles yet Americanizing the subject matter. His paintings were decorative and easily accessible. He worked quickly and had a large output. He achieved critical and financial success, and by decade's end his work was being collected by museums and wealthy Americans.[20] Impressionism was no longer novel in Europe, but Americans were eager to have Hassam's work hanging above their sofas. At the time, a good-sized Hassam could set you back by some $6,000,[21] or more than $200,000 in today's dollars. Hassam, too, had become something of an elder statesman of American art. Indeed, although only in his mid-fifties, he was the oldest living painter included in the famous 1913 Armory Show.[22]

## WORLD WAR I AND THE FLAG SERIES

In May 1916, on the eve of America's involvement in World War I, an enormous parade had been organized to celebrate the creation and training of the American forces soon to depart for Europe.[23] The "Preparedness Day" parade down New York's Fifth Avenue would last 13 hours and include 137,000 participants.[24] Hassam lived a few short blocks from the parade route.[25] Later, he recounted that the parade had inspired his flag series: "I looked up the Avenue and saw these wonderful flags waving, and I painted the series of flag paintings after that."[26]

Subsequently, in approximately 30 flag paintings created during and shortly after the war, Hassam would

10 Adelson et al., p. 8.
11 Adelson et al., pp. 8-9.
12 Adelson et al., p. 10.
13 Adelson et al., pp. 27-29.
14 Adelson et al., p. 32.
15 Adelson et al., p. 12.
16 Ilene Susan Fort, *The Flag Paintings of Childe Hassam* (Los Angeles County Museum of Art 1988) ("Fort"), p. 100.
17 Adelson et al., p. 49.
18 Adelson et al., pp. 37-41.
19 Adelson et al., p. 50.
20 Adelson et al., p. 56.
21 Hassam Wikipedia, quoting Hiesinger, p. 141. The childless Hassams left most of their estate and remaining artwork to the American Academy of Arts and Letters so that the money could be used by museums to purchase for their collections work by lesser-known living American artists. Adelson et al., p. 115.
22 Adelson et al., p. 65. The Armory Show, held in New York, Chicago, and Boston, was the first major exhibit of modern art in America. Hassam had six paintings displayed at the show. Hassam Wikipedia, referencing Hiesinger, p. 153.
23 Fort, p. 8.
24 Fort, p. 9.
25 Fort, p. 9.
26 Adelson et al., p. 65; Fort, p. 8.

employ his talents to not only express his patriotism and support for the war but to create some of art history's most stirring impressionist images.

New York artists, Hassam included, had an affinity generally for the French and a dislike of Germany.[27] But unlike their European counterparts who were located "over there" and could document the war through their art, American artists simply were not needed to create a record of the war.[28] Instead, artists were employed purposefully in government publicity efforts, which used images of Uncle Sam, Miss Liberty, and Old Glory to encourage support for the war and to raise money for it.[29] Home front poster art exhorted Americans to "Buy Liberty Bonds." Hassam and other New York artists also engaged more directly in fund-raising activities. They donated art for relief-effort auctions, and lent their work to adorn the shop windows along Fifth Avenue during the frequent parades held on New York's "main street."[30]

The flags in Hassam's flag paintings of course are the main focus, although in a few – such as Flags on the Friar's Club or Early Morning on the Avenue in May 1917 – they dangle barely noticeable above a street scene consisting mostly of people going about their business. The flags usually are American, but Hassam used flags of other nations to commemorate occasions when dignitaries visited New York and to symbolize the unity of purpose among the Allies.[31] In some paintings, the flags flutter from flagpoles affixed to well-known, recognizable buildings (i.e., Flags on the Waldorf, 1916); but at other times the flags simply hang motionless in mid-air. Some of the flag paintings contain a handful of flags; others mountains of them, such as the Frank Sinatra previously owned The Fourth of July, 1916.[32] The paintings contain realist elements, but in the best of them the flags blur together and almost appear as floating abstract color fields. Hassam's vantage point varied from the street level to the rooftop line, but mostly he chose a second or third floor elevation where flags seemingly fly above and below the viewer. He also changed seasons and weather conditions, which allowed Hassam to play with the intensity of the colors, lighting, and application of paint. The most effective of these includes the snow scene in Flags on Fifty Seventh Street, the Winter of 1918; and the opalescent The Avenue in the Rain, 1917, which is owned by the White House and has been displayed in the Oval Office since the Obama administration.

Hassam's flag paintings were shown as a group six times during his life, but they would not be assembled again for a major show until LACMA exhibited the series in 1988.[33] Hassam had hoped to be able to sell the paintings as a group, confidently exclaiming "Sell a flag picture! I will sell the set!"[34] When no buyer emerged, the paintings eventually were sold to individual collectors. For sure, keeping the group intact would have showcased one of the great achievements in American art; but the dismantling of the series does not diminish the patriotic spirit and pride and love of country conveyed by Hassam through his deep understanding and accomplished interpretation of a flag's powerful symbolism.

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27 Fort, p. 9.
28 Fort, pp. 10, 15.
29 Fort, p. 11.
30 Fort, p. 11.
31 For instance, in the Hassam flag painting at the Los Angeles County Museum of Art (LACMA), Avenue of the Allies: Brazil, Belgium, 1918, a large New Zealand flag is in the forefront behind which are groupings of Brazilian flags, with the plight of the Belgian nation represented by single smaller flag at the center of the canvas. The American flags in the painting barely attract attention. During the museum's current renovations and based on a recent visit by the author, the LACMA Hassam is not on display. The painting had been one of the earliest flag paintings sold by Hassam, and its Los Angeles purchaser donated it to LACMA in 1929. Fort, pp. 78-79.
32 The painting's subtitle says it all: "The Greatest Display of the American Flag Ever Seen in New York, Climax of the Preparedness Parade in May." See Fort, p. 34. The painting is currently owned by the New York Historical Society.
33 Fort, p. 6.
34 Fort, p. 113.

# Presidential Records Belong to the President... Right?

by Krystal N. Lyons

In late 2020, President Donald Trump's administrative team began having conversations with National Archives and Records Administration (National Archives) staff about transferring presidential records to the National Archives, as required by the Presidential Records Act (PRA).[1] The timeline of events following those initial discussions ultimately culminated in the U.S. Department of Justice charging President Trump with multiple felonies, including 31 felony counts under the Espionage Act.[2] But before these unprecedented events became the subject of daily news, few Americans were familiar with the decades-old law governing presidential records. This article describes the evolution of the country's efforts to preserve and maintain records that are created and received during a presidential administration.

## Background

The PRA is a federal law that governs management and preservation of records created or received by the president, vice-president, and their immediate aides (presidential records).[3] The PRA ensures that presidential records are adequately maintained and made accessible to the public for historical and research purposes. Before the PRA was enacted, presidential records were considered the personal property of the president, who could dispose of or destroy these records at his discretion.

The Watergate scandal[4] of the early 1970s led to concerns about the preservation of historically significant presidential records. When President Richard Nixon resigned amid the 1974 scandal, he wanted to take his documents—including his infamous tape recordings—with him.[5] Fearing the materials would be destroyed or otherwise made unavailable, Congress passed the Presidential Recordings and Materials Preservation Act (PRMPA), which made all of President Nixon's material public property.[6] While the PRMPA was a crucial step in record preservation, it was limited in scope since it primarily focused on the Nixon administration.

In 1978, Congress passed the more sweeping PRA to establish a comprehensive framework for managing and preserving presidential records. The PRA, which superseded the PRMPA, was signed into law by President Jimmy Carter on November 4, 1978, and it has applied to every president since Ronald Reagan. The primary objectives of the PRA were to ensure the preservation of presidential records, facilitate public access, and balance the interests of privacy and historical accountability.[7]

## Statutory Implementation

During a presidency, the incumbent president has responsibility over custody, control and access to presidential records.[8] The PRA requires a departing president to separate personal documents from official records before leaving office, but it does not give a president sole discretion in determining what is and is not a personal record.[9] Records that must be preserved include documents relating to certain political activities and information relating to a president's constitutional, statutory, or other official or ceremonial duties,[10] including emails, text messages and phone records.[11] But excluded from the Act's requirements for preservation are a president's personal records, or documents of a "purely private or nonpublic character."[12] Before destroying a document, a president must first receive permission from the National Archives.[13]

At the end of a president's term, the National Archives becomes the legal custodian of presidential records and is responsible for maintaining them.[14] Congress established the National Archives in 1934 to preserve and maintain federal records.[15] Before then, federal records were kept in various basements, attics, abandoned buildings, and other storage places with little security or concern for storage conditions.[16]

The National Archives must make a former president's documents available to the public "as rapidly and as com-

1 (44 U.S.C. §§ 2201–2209.)
2 (50 U.S.C. §§ 31-42.)
3 (44 U.S.C. §§ 2201(2).)
4 The Watergate scandal was a series of interconnected political scandals that occurred during President Richard M. Nixon's administration. The scandal included a break-in at the Democratic National Committee headquarters in the Watergate complex in Washington, D.C., on June 17, 1972, and subsequent cover-up by people who worked for or with the White House, and by Nixon himself who planned to destroy or conceal presidential records in connection with the scandal. (Perlstein, Watergate scandal (Jun 16, 2023) Encyclopedia Britannica https://www.britannica.com/event/Watergate-Scandal [as of Jun. 22, 2023.])
5 *Id.*
6 (Pub.L. No. 93–526 (Dec. 19, 1974), 88 Stat. 1695.)
7 (Pub. L. No. 95–591 (Nov. 4, 1978).
8 (44 U.S.C. §§2203(f).)
9 (44 U.S.C. §§2203.)
10 (44 U.S.C. §§2201(2)(A).)
11 (44 U.S.C. §§2201(1).)
12 (44 U.S.C. §§2201(3).)
13 (44 U.S.C. §§2203(c).)
14 (44 U.S.C. §§2203(g)(1).)
15 (Pub.L. No. 73-431 (Jun. 19, 1934), 48 Stat. 1122.)
16 (*National Archives History* (Mar. 22, 2023) https://www.archives.gov/about/history[as of Jun. 22, 2023])

pletely as possible."[17] This often happens through Freedom of Information Act requests, starting five years after the end of a presidential administration.[18] However, certain categories of records can be restricted for reasons such as national security or personal privacy. Additionally, a former president can restrict access to certain information for up to 12 years after leaving office.[19] Another common way for the public to access presidential records is by visiting presidential libraries, but since presidential records are U.S. government property,[20] a former president has to receive permission from the National Archives to display them, and the libraries are operated and maintained by the National Archives.[21] The National Archives can dispose of presidential records that are "determined to have insufficient administrative, historical, informational, or evidentiary value to warrant their continued preservation."[22]

Over the years, the PRA has undergone several amendments to address various issues. Notable amendments include the Electronic Freedom of Information Act Amendments of 1996, which expanded the definition of presidential records to include electronic formats, and the Presidential and Federal Records Act Amendments of 2014, which clarified the responsibilities of federal employees with respect to personal email accounts.[23]

17 (44 U.S.C. §§2203(g)(1).)
18 (44 U.S.C. §§2204(b)(2).)
19 (44 U.S.C. §§2204(a).)
20 (44 U.S.C. §§2202.)
21 (44 U.S.C. §§2203(g)(2).)
22 (44 U.S.C. §§2203(g)(4).)
23 (44 U.S.C. §§2209.)

## Conclusion

While the PRA establishes specific provisions to govern the management of presidential records, it lacks an enforcement mechanism, and no president has ever been punished for violating the law. There are, however, penalties under different statutes for destroying federal records. For example, anyone found to have "willfully and unlawfully" concealed, removed, mutilated, obliterated or destroyed any record faces a fine and imprisonment for up to three years.[24] A person convicted of this offense can be disqualified from holding future federal office.[25]

The Department of Justice is not relying on the PRA to bring charges against President Trump. He is instead charged with retaining national defense information under the Espionage Act, another little-known statute enacted in 1917 and used to prosecute cases related to the retention or dissemination of classified information.

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24 (18 U.S. Code § 2071)
25 *Id.*

# It's Time for a New Federal Courthouse to Serve the Growing Judicial Needs of the Inland Empire

by Daniel S. Roberts

Recognizing that the federal government has the responsibility "to provide quality services which are readily accessible to the people it serves" and that the combination of population growth in the Inland Empire and the inability of freeway connections to keep pace rendered "Federal offices along the coast [] no longer accessible to the residents of Riverside and San Bernardino counties." Congress in 1992 divided the Central District of California into three divisions "to provide for the delivery of judicial services to all areas and all residents of the Central Judicial District of California." The Eastern Division of the Court, to cover Riverside and San Bernardino counties, was thus born on August 26, 1992, when the president signed what became P.L. 102-357. In September 1994, we received our first district judge in the Eastern Division with the appointment of the Honorable Robert Timlin. The following year, we received our first U.S. magistrate judge when the court appointed the Honorable Virginia Phillips to the position.

At that time there was no federal district courthouse in the Eastern Division in which they could sit. While a new district courthouse was constructed, the Riverside Superior Court provided a small space within the Hall of Justice in downtown Riverside. Judge Timlin held court there while Judge Phillips commuted to the Spring Street courthouse in downtown Los Angeles.

Finally in 2001, the George E. Brown Jr. Federal Building and United States Courthouse was dedicated and our Eastern Division finally had a home. The new facility had four courtrooms and accompanying judicial chambers, along with a clerk's office, jury assembly area, and additional space for the U.S. Marshals and Probation and pretrial services.

By that time, however, our Division had already grown. Judge Phillips had been elevated to district judge and her magistrate judge seat was filled by Stephen G. Larson. On the day it opened, our new four-courtroom district courthouse already had three judges seated there.

The growth of the Inland Empire did not stop in 2001, of course. Our population is now roughly 4.6 million spread over an astonishing 27,408 square miles. The case filings arising in our area also continued to grow. With that growth, the size of judicial contingent also grew, though always far more slowly than the case filings warranted – resulting in a substantial number of Eastern Division cases being reassigned to the very "federal offices along the coast" that Congress deemed inaccessible to us in establishing the Eastern Division in the first place. In 2006, we received our second magistrate judge position, bringing our judicial population to four and filling our last available courtroom. In 2011, the Central District Court appointed a third magistrate judge to serve our growing needs. This of course presented the problem of where to seat our newest judge. The solution was to have our three Magistrate Judges share two courtrooms and to sacrifice the jury room for one of the courtrooms and a portion of one of the other judicial chambers to create a chambers for the fifth judge. The result was not only far smaller chambers for the judges, but also that only three of the four courtrooms could be used for jury trials. Nevertheless, our court has made that arrangement work now for more than a decade.

The caseload has continued to grow, however, and cases continue to be reassigned out of Division. As a stark example, I have a case presently arising just outside Twentynine Palms that was assigned to a District Judge in Los Angeles due to the limited number of district judges in Riverside. The need for more judges in the Eastern Division to serve the people of the Inland Empire continues. Many groups and individuals have repeatedly pressed our Senators and administrations of both parties to address this situation. The good news is that those efforts have finally started to bear fruit. In 2020, President Trump appointed John Holcomb as District Judge, who then promptly set up in Riverside to fill the vacancy left with Judge Phillips's move to Los Angeles five years earlier to become the Chief Judge. In 2021, President Biden nominated Judges Sunshine Sykes and Kenly Kiya Kato to be District Judges.

As necessary as these additions to our bench are, however, they have exposed the shortcomings in our existing courthouse. When the Senate finally confirmed Judge Sykes in 2022, there was not space for her in the Eastern Division courthouse. To free up space for her, Judge Holcomb moved to the Southern Division in Santa Ana. Thus, in order to gain one new District Judge, we lost one who we had just gotten less than two years prior. As of this writing, Judge Kato's nomination still awaits a floor vote by the full Senate, and while she already has a chambers in the Eastern Division courthouse as a sitting Magistrate Judge, upon her confirmation her Magistrate seat will need to be filled, bringing a sixth judge to our courthouse.

While plans have already been approved to build a sixth judicial chambers by again repurposing existing space (albeit on a separate floor from the courtrooms), even when that is completed we will still have only four courtrooms for the six judges. More importantly, at that point our court will be completely root bound – there will be no space for any additional judges to address our growing needs. Based on present case-filing statistics, the Central District Court's administration estimates that the Eastern Division presently needs four to five District Judges, and will need approximately 10 District Judges 10 years from now.

The solution is obvious – a new, larger, federal courthouse is desperately needed. The Administrative Office of the U.S. Courts has determined a new courthouse here to be number two

overall nationwide on the priority list for courthouse construction. The next step is for the General Services Administration (GSA) to conduct a feasibility study. Unfortunately, GSA is presently working on such studies for several other courthouses ahead of our project, and the expected timeline for completion – just of the feasibility study – is roughly four years. After that study is completed, Congress will need to appropriate funds, space will need to be acquired, the building will need to be designed, and then ultimately constructed. GSA estimates this process will take roughly 20 years to complete, based on the current and historical pace of such projects.

Our current space is insufficient for our needs now (and has been for more than a decade). We do not have 20 years to allow the current and historical pace to play out. The process needs to be expedited in any way it can. Our judges know this and are doing what they can to push the project. GSA and the Administrative Office of the Courts are aware of our extreme need, but still come up with the 20-year estimate. Bureaucratic inertia in Washington, D.C. is a powerful force, and we need to do everything possible to accelerate the process. Our area is blessed with powerful senior members of Congress, on both sides of the aisle, and they have expressed their support for the project, but we in the community need to keep this issue on their radar and press them to take whatever action they can. Otherwise we will find ourselves decades from now with case filings warranting 10 District Judges, but only three to hear them, and be right back to two-thirds of our cases being re-assigned to judges in Los Angeles or Santa Ana. We've been there for too long in our history as a Division and only now are digging ourselves out of that predicament by getting the political appointments we need. We need to act now so we don't revert to the same situation for lack of adequate physical space in the courthouse.

*Dan Roberts is the office managing partner of Cole Huber LLP's Southern California office in Ontario. He is also a member of the Board, and past Chapter President, of the Inland Empire Chapter of the Federal Bar Association.*

# **Judicial Profile:** Judge Wayne Johnson

by Michel Gouveia

For the last twelve years, the Honorable Wayne Johnson has been one of the United States Bankruptcy Judges for the Riverside Division of the Central District of California.

Recently I asked him a few questions.

## What is the best part of being a bankruptcy judge?

*First, I enjoy and am thankful for our community. I appreciate the group of lawyers in Riverside who appear at the bankruptcy court. They regularly know what they are doing, and take a keen interest in their profession and case. Most bring knowledge, wisdom and pragmatism to their cases.*

*I am also very thankful for our court staff. I am blessed to serve in the best division anywhere. We have a great team of court clerks. Unfortunately, with the funding cuts, the team has shrunk but they are still a fantastic group.*

*I also really enjoy working with my fellow judges in Riverside. They have much experience and wisdom. I consider myself fortunate to know them and serve with them.*

*Like so many things, if you journey through life with pleasant, capable colleagues, it makes a huge difference. When I worked in large law firms before becoming a judge, some people made the job very easy while others could bring great challenges or strife. I have not found the latter to be true in Riverside. The bankruptcy bar and all my colleagues have been a blessing to me.*

*Second, as a bankruptcy judge, I have the responsibility to follow the law and the facts wherever they take you. I do not have to please a client or obtain a particular outcome for a client. My duty, to the best of my ability, is to apply the law to the facts as required. Following the law has a tendency to lead us to the best possible version of justice in a particular case and the best possible version of justice overall.*

## With artificial intelligence coming into the legal world, what impact will that have on your role?

*I have no idea. I doubt it will be significant. But I could be wrong.*

*I do not think AI will replace judges or lawyers. And the anecdotal evidence of lawyers using AI so far does not seem promising. Some instances of lawyers using AI to draft briefs have been spectacular failures. I also have doubts about judges using AI for writing opinions. We need judges who continue to use their own good skills, judgment and wisdom when researching and writing opinions. AI cannot replace that process.*

## What have you learned being a Judge?

*I have been reminded that a judge must listen well. That process has two components. First, judges need to read briefs and properly prepare for matters. Everybody wants their judge to be knowledgeable about the dispute in front of them and familiar with the pleadings. Likewise, judges want lawyers to appear in court knowing their cases and expressing familiarity with the law, case authority, facts and legal issues related their matters. People obviously expect that of the judges as well. So, listening well means reviewing pleadings and having a firm grasp on the matter before conducting a hearing.*

*The other component, obviously, involves listening carefully to arguments in court and managing them as well as possible. Oral arguments in court can drift at times into tangents and issues well beyond the scope of the matter at times. Emotions can also run high and larger than life personalities can introduce a level of excessive conflict or theater.*

*A key aspect of my role involves attempting, as much as possible, to focus the oral arguments as precisely as possible on the heart of the matter involved and minimize heightened emotions. That requires careful listening and, at times, diffusing emotions. It is not easy at times and I am still learning.*

*Another lesson I have learned is the importance of administering and following the law, even when the outcome is not ideal. Most bankruptcy cases conclude without conflict or rancor. In most cases, debtors obtain the debt relief they seek.*

*In some cases, however, the law requires holding people accountable for misconduct. It is never pleasant when a debtor loses their discharge. The culture seems to want judges to make the hard decisions – hold people accountable when the law requires – but also have empathy. A tension can exist between these two goals. A judge who lacks empathy will fashion harsh rulings, but a judge overcome by empathy will have great difficulty following the law. I have seen both.*

*Over time, I think I have developed a better understanding of what a healthy balance should look like. I am not saying I have arrived fully, but I think I understand better how to empathize while still ruling in the way the law requires even when the outcomes are unpleasant.*

## What do you do for fun?

*I coach junior high and high school students in speech and debate. I have done so for a dozen years now. I find it immensely satisfying encouraging young minds to think clearly and to communicate articulately. We live in a culture which needs more clear thinking about all kinds of issues that impact people. Working with these bright young minds gives me hope for the future.*

## Thank you, Judge Johnson.

*Michael Gouveia is a Riverside sole practitioner bankruptcy attorney helping families with debt.*


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# Enhancing Digital Accessibility:
## Navigating the Landscape of ADA Website Compliance

by Mary Shafidazeh

In today's digital age, the internet and a diverse array of digital properties have intricately intertwined into our daily lives — placing the world at our fingertips and creating unparallel access to information, products, services, relationships, and opportunities. One in four adults in the United States, however, has some form of disability.[1] Subsequently, not everyone can fully access the digital world due to various challenges. Individuals with visual impairments may struggle seeing the screen. Those with hearing impairments may encounter difficulties hearing the audio. Persons with motor disabilities may face obstacles using a mouse or navigating websites. Additionally, individuals with cognitive barriers may find it challenging comprehending confusing content and digital interfaces.

Significant laws addressing website accessibility include the Americans with Disabilities Act (ADA), Sections 508 of the Rehabilitation Act, the California Unruh Act, the California Consumer Privacy Act (CCPA), and a new California Assembly Bill, AB 1757.

Plaintiffs who file lawsuits for ADA violations are not eligible to receive monetary damages under the ADA, as it primarily offers injunctive relief and reasonable attorney's fees. (42 U.S.C. § 12188(a)(2).) The ADA and Section 508, however, empower the Attorney General to take legal action on behalf of the public's interest, which can result in civil penalties of up to $75,000 for the first violation and up to $150,000 for each subsequent violation. (28 CFR § 36.504(a).) In contrast, the California Unruh Act and the CCPA offer avenues for plaintiffs to seek monetary damages, injunctive or declaratory relief, and any other appropriate remedies when denied equal access or accommodation. Under the Unruh Act, a plaintiff may be awarded a maximum of three times the amount of actual damages, but no less than $4,000. (Cal. Civ. Code § 52.) The CCPA allows for statutory damages of $100 to $750 per consumer, per incident—or the collection of actual damages—whichever amount is greater. (Cal. Civ. Code § 1798.150.) It is within this context that a surge in website accessibility lawsuits has emerged.

### Americans with Disabilities Act (ADA)

Under the ADA, a federal civil rights law enacted in 1990 and enforced by the Department of Justice (DOJ), discrimination is prohibited against individuals with disabilities. Its purpose is to eliminate barriers and achieve an inclusive society where individuals with disabilities can fully participate, access essential services, and enjoy equal rights, opportunities, and accessibility in everyday life. The ADA consists of five Titles. Title I focuses on employment, prohibiting discrimination in workplaces with 15 or more employees. Title II covers public services provided by state and local governments, including public transit, ensuring accessibility to services, programs, and activities. Title III extends to public accommodations (businesses open to the public) and commercial facilities, requiring businesses to make their goods, services, and facilities accessible to individuals with disabilities. Title IV focuses on telecommunications, ensuring that individuals with hearing and speech disabilities have access to telecommunication services. Title V provides additional requirements on implementing the law effectively.[2]

On March 18, 2022, the DOJ published guidance on web accessibility and the ADA. This guidance specifically addresses the obligations of state and local governments under Title II and public accommodations under Title III — to ensure their websites are accessible to people with disabilities. According to the DOJ, governments and businesses have flexibility in determining how they will comply with the ADA's accessibility requirements for their online programs, services, and goods. Although there currently is no mandated standard specified in the ADA itself, the guidance suggests that entities can find valuable guidance from the Web Content Accessibility Guidelines (WCAG) and the Section 508 Standards of the Rehabilitation Act in making web content more accessible to people with disabilities.[3]

### Section 508 of the Rehabilitation Act

While the ADA primarily applies to state and local governments and public accommodations, the Rehabilitation Act of 1973 applies to federal agencies, programs receiving federal financial assistance, federal employment, and employment practices of federal contractors. Section 508 requires federal agencies to make their electronic and information technology, including websites, accessible to individuals with disabilities.[4] The Section 508 Standards were revised on January 18, 2018, to require websites that must comply with Section 508 to conform to WCAG version 2.0 Level AA (further details on WCAG forthcoming).[5]

1 According to the Centers for Disease Control and Prevention (CDC), up to 1 in 4 (27%) adults in the United States have some type of disability — e.g., cognitive, mobility, hearing, or visual disabilities. For more information on how disability impacts US, see https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html.

2 Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101 et. seq.

3 *Guidance on Web Accessibility and the ADA*. ADA.gov, 18 Mar. 2022, www.ada.gov/resources/web-guidance. Accessed 28 June 2023.

4 Section 508 of the Rehabilitation Act of 1973, as amended 29 U.S.C. § 794d

5 Section508.gov, *Accessibility News: The Section 508 Update,* Section508.gov (last visited June 27, 2023), available at https://www.section508.gov/blog/accessibility-news-the-section-508-update.

## California Unruh Act (Unruh Act)

The California Unruh Act (Cal. Civ. Code § 51) provides that "[a]ll persons within the jurisdiction of this state . . . 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."

To establish a violation under the Unruh Act, there are two methods: (1) proving intentional discrimination, or (2) proving a violation under the federal ADA (CACI No. 3060).[6] Courts have interpreted the Unruh Act to encompass website accessibility, extending its coverage to websites accessed by residents of California, regardless of the location of the website's company. To navigate unfavorable legal precedents in the Ninth Circuit, plaintiffs in California have initiated numerous lawsuits each year in state courts, alleging standalone violations of state laws, such as the Unruh Act.

## California Consumer Privacy Act (CCPA)

The CCPA grants California residents specific rights regarding their personal data. Its purpose is to empower individuals by giving them the right to know what personal data is being collected about them, information about whether their data is sold or disclosed to third parties and to whom, the ability to opt out and say no to the sale of their personal data, and the right to access the personal information collected about them and request its deletion. Furthermore, the CCPA aims to ensure that consumers with disabilities have equal access to privacy-related details, opt-out mechanisms, and information regarding the collection of their personal data. This includes providing notices in an easily understandable format and making them accessible to individuals with disabilities, in accordance with accessibility standards such as WCAG 2.1. (Cal. Civ. Code § 1798.185(a)(6).)

## California Assembly Bill, AB 1757

AB 1757 is a bill, that if enacted into law, could have significant implications for website developers and designers. This legislation would introduce the possibility of lawsuits against third-party developers and designers who create websites and mobile apps that are not in compliance with accessibility standards, specifically WCAG 2.1 AA. If approved, AB 1757 would grant individuals with disabilities, as well as business establishments, the right to take legal action against designers and developers who fail to ensure that their websites and mobile apps are accessible to all users — further highlighting the growing importance of web accessibility and emphasizing the need for web designers and developers to prioritize inclusivity in their digital creations.[7]

## Surge in Website Accessibility Lawsuits

As reported by Seyfarth Shaw LLP, there were 3,225 website accessibility lawsuits filed in federal court in 2022, representing a 12% increase from 2021 and accounting for 37% of Americans with Disabilities Act (ADA) Title III lawsuits filed. New York, Florida, Pennsylvania, and California witnessed the highest number of cases. Notably, New York is leading the way, with 2,560 lawsuits filed in 2022, while California saw 126 cases.[8]

The discrepancy in the number of lawsuits filed in New York versus California, is likely due to federal courts holding differing views regarding whether businesses operating exclusively online, without a physical building, are considered "places of public accommodation" under the ADA.

## Landmark Cases in Web Accessibility Claims

Web accessibility lawsuits often arise from serial litigants claiming encountering barriers when attempting to access a website. These cases involve various allegations, such as the absence of alternative text for images, lack of captioning for videos or audio files, insufficient color contrast, limited keyboard accessibility, illegible resized text, inadequate labeling of forms, improper labeling of link text or empty links, and/or the absence of other assistive technology interfaces. Many of these technological shortcomings can be addressed during the website's development or updates.

Currently, courts are divided as to whether Title III extends to nonphysical spaces, such as websites. The U.S. Courts of Appeals for the First, Second, and Seventh Circuits have generally held that websites can be deemed places of public accommodation, making it more favorable for plaintiffs to file lawsuits. Conversely, the U.S. Courts of Appeals for the Third, Sixth, and Ninth Circuits have ruled that places of public accommodation refers to physical premises — thus requiring a nexus standard that limits ADA coverage to only websites connected to a physical place of public accommodation. Accordingly, California, which falls under the Ninth Circuit, maintains that online-only businesses do not qualify as places of public accommodation within the meaning of ADA Title III, § 36.104, thus favoring defendants.

### *National Federation of the Blind (NFB) v. Target Corporation*

NFB sued Target Corporation,[9] alleging violations of the ADA, Unruh Act, and California Disabled Persons Act (DPA) (California Civil Code § 54 et. seq.) — claiming the Target website was inaccessible to individuals who are blind, as it lacked alternative texts to enable screen readers to vocalize the site's content to consumers and enable them to navigate the links using a keyboard instead of a mouse. Target attempted to dismiss the case, arguing ADA Title III, the Unruh Act, and the DPA applied only to physical places of public accommodation and their services, and therefore did not extend to Target.com as an online entity. The court, however, rejected their argument — finding a nexus between the website and physical store, thus holding their inaccessibility hindered the full and equal enjoyment of goods and services. Plaintiff's claims, however, were dismissed to the extent it was based on Target.com features not connected to the physical store. Target ultimately settled the class-action lawsuit in 2018 and was required to pay $6,000,000 in damages, remediate its website and make it accessible to people with

6 Judicial Council of California Civil Jury Instructions (2023)

7 Accessibility: Internet Websites, Assembly Bill 1757, Cal. 2023, available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB1757

8 Launey, Kristina M., and Minh N. Vu. "Plaintiffs Set a New Record for Website Accessibility Lawsuit Filings in 2022." Seyfarth Shaw LLP, 23 Jan. 2023, www.adatitleiii.com/2023/01/plaintiffs-set-a-new-record-for-website-accessibility-lawsuit-filings-in-2022/. Accessed 27 Jun. 2023.

9 *Natal Fed'n of the Blind v. Target Corp.*, 452 F.Supp.2d 946 (N.D. Cal. 2006)

disabilities, agree to allow the National Federation of the Blind to monitor its site's accessibility for three years, and train their web developers.[10]

### *Robles v. Domino's Pizza, LLC*

Robles, a visually impaired customer, filed a lawsuit against Domino's Pizza, alleging their website and mobile application were inaccessible. The Ninth Circuit Court of Appeals determined that Title III of the ADA can apply to the internet, if a connection or nexus exists between the online service and physical business location. The court stated, "[Title III] applies to the services of a place of public accommodation, not services in a place of public accommodation."[11] The ruling, however, did not address whether the statute applies to other forms of internet activity lacking a sufficient nexus with the traditional brick-and-mortar physical location. Based on the finding that Domino's website and app facilitated customers' access to the goods and services of its physical restaurants, it was concluded that the ADA applied. Consequently, Domino's was required to bring its website into compliance with WCAG 2.0, compensate the plaintiff $4,000 for the violation, and cover plaintiff's attorney fees.[12]

### *Gil v. Winn-Dixie Stores, Inc.*

The Ninth Circuit, in the case of *Robles v. Domino's Pizza,* held that a website can be subject to the ADA if it has a sufficient connection to a physical place. The Eleventh Circuit, in *Gil v. Winn-Dixie Stores, Inc.,*[13] however, took a different stance. In Gil, the plaintiff, a visually impaired customer, sued Winn-Dixie for their inaccessible website, as it was not compatible with screen reader software. The Eleventh Circuit reversed the lower court's decision, ruling that websites are not public accommodations under Title III of the ADA. The court emphasized that the text of Title III refers to tangible, physical locations as public accommodations. As the website in question had limited functionality and did not serve as a point of sale, the court concluded that it did not constitute an intangible barrier to accessing the goods or services of Winn-Dixie's physical stores. Despite the ruling, Winn-Dixie agreed to make its website compliant with WCAG 2.0 AA standards and set aside $250,000 for remediation. Winn-Dixie was also required to provide annual training for their employees on website accessibility, ensure third-party content on the site is accessible, and adopt a web accessibility policy.[14]

### *National Association of the Deaf (NAD) v. Harvard and NAD v. Netflix*

These cases focused on providing closed captioning for online videos and ensuring accessibility for individuals with hearing impairments. Ultimately, they were ordered to provide closed captioning. In *Harvard*, Harvard was found liable and ordered to pay $1,575,000 in attorneys' costs and fees.[15] In *Netflix,* Netflix was obliged to pay $755,000 in legal fees and another $40,000 to NAD for monitoring.[16]

### *National Federation of the Blind (NFB) v. HRB Digital LLC and HRB Tax Group, Inc.*

NFB filed a lawsuit against H&R Block, accusing the global tax preparation company of discriminating against individuals with disabilities by impeding their full and equal enjoyment of its website's goods and services, thus violating Title III of the ADA. The DOJ intervened. Subsequently, H&R Block reached a consent decree with the DOJ and the plaintiffs. As part of the settlement, H&R Block agreed to pay $100,000 in damages and committed to making its website accessible according to the standards set by WCAG 2.0 AA.[17]

### *Martinez v. Cot'n Wash Inc.*

In *Martinez v. Cot'n Wash, Inc.,*[18] a plaintiff who is visually impaired, sued a cleaning products company that exclusively sold through their website. The plaintiff alleged that the website intentionally was inaccessible to individuals with visual impairments and users of screen reader technology, thereby violating the Unruh Act. The California Court of Appeal, nevertheless, followed Ninth Circuit precedent and held that online-only businesses do not fall under the ADA, Title III's meaning of "public accommodations." Due to the Ninth Circuit's stance on online-only businesses, California plaintiffs generally preferred filing lawsuits in state court, as opposed to California federal court, as judges previously allowed lawsuits against online-only businesses and recognized that an inaccessible website could be deemed intentional discrimination under the Unruh Act. This ruling, however, is expected to significantly decrease the number of lawsuits filed in California state and federal courts. It's important to note, that websites with a nexus to physical establishments providing goods and services to the public would still be subject to Title III's non-discrimination requirements.

## Web Content Accessibility Guidelines (WCAG)

To achieve website accessibility, designers and developers should prioritize inclusivity and adopt a proactive approach by considering the needs of individuals with disabilities and following such recognized standards as WCAG.[19] WCAG, developed by the World Wide Web Consortium (W3C), serves as the leading standard for web accessibility and provides a comprehensive framework for creating accessible digital content. WCAG is organized into four principles: Perceivable, Operable, Understandable, and Robust (POUR). It also includes multiple success criteria and conformance levels (A, AA, and AAA).

The Perceivable principle establishes how information presented should be designed to enable people to perceive content through their senses of touch, sight, and sound. The Operable principle establishes that a website should be navigable using only a keyboard

10 *Natal Fed'n of the Blind v. Target Corp.* (2018). Class Settlement Agreement and Release. Retrieved from https://dralegal.org/wp-content/uploads/2012/09/settlementagreement_2.pdf

11 *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 904-05 (2019)

12 *Guillermo Robles v. Domino's Pizza LLC.* (2021). Order. Retrieved from https://www.bclplaw.com/a/web/251042/Dominos-MSJ-Order.pdf

13 *Gil v. Winn-Dixie Stores, Inc.,* 993 F.3d 1266 (C.A.11 (Fla.), 2021) Ricardo Alvarado, *Online Businesses Beware: ADA Lawsuits Demand Website Accessibility for Blind Plaintiffs,* 21 SMU SCI. & TECH. L. REV. 259 (2020) https://scholar.smu.edu/scitech/vol21/iss2/6

14 Ricardo Alvarado, *Online Businesses Beware: ADA Lawsuits Demand Website Accessibility for Blind Plaintiffs,* 21 SMU SCI. & TECH. L. REV. 259 (2020) https://scholar.smu.edu/scitech/vol21/iss2/6

15 *NAD v. Harvard.* (2019). Consent Decree. Retrieved from https://creeclaw.org/wp-content/uploads/2019/11/NAD-v-Harvard-Consent-Decree.pdf

16 *NAD v. Netflix.* (2012). Consent Decree. Retrieved from https://dredf.org/wp-content/uploads/2011/06/netflix-consent-decree-10-10-12.pdf

17 *NFB v. H&R Block.* (2014). Consent Decree. Retrieved from https://archive.ada.gov/hrb-cd.htm

18 *Martinez v. Cot'n Wash, Inc.,* 81 Cal. App. 5th 1026 (2022).

19 WCAG 2.1 began in 2017 and was updated in 2018, with the latest update (as of this writing) published in June 2018. WCAG 2.2 is scheduled to be released this year. (Web Content Accessibility Guidelines 2.1, W3C World Wide Web Consortium Recommendation 05 June 2018 (Latest version at https://www.w3.org/TR/WCAG21/).)

and that its content should not cause seizures or other physical reactions. The Understandable principle establishes how websites should feature readable and understandable text, avoiding complex jargon or instructions, and its content should appear and function in predictable ways to enhance user understanding and navigation. Finally, under the Robust principle, websites should employ proper HTML and CSS code, ensuring their content is compatible with a diverse array of present and future assistive technologies.

In respect to the conformance levels, Level A establishes the lowest level of compliance, addressing the most critical barriers to accessibility and achieving basic accessibility for most users. Level AA builds upon Level A requirements and provides a higher level of accessibility compliance, including a broader range of guidelines and addressing more advanced barriers to accessibility. Level AAA establishes the highest level of compliance, offering the most comprehensive set of guidelines and addressing a wide range of accessibility barriers. Generally, Level AA conformance is the standard to follow for most websites and legal and regulatory frameworks.

## Web Compliance Strategies

Some of those most common ADA website compliance violations include: (1) Lack of descriptive alt text for meaningful images, that would help individuals with low vision understand the image's content and context; (2) Not offering captions for videos or audio, thus making it difficult for those with partial or complete hearing loss to access the content; (3) Poor color contrast between text and its background, making it difficult for people with color blindness or low vision to be able to read the text; (4) Not providing an ability to magnify content; (5) Not offering keyboard navigation.

Adhering to WCAG 2.1, nevertheless, helps ensure that websites are accessible to individuals with different disabilities, such as visual impairments, hearing impairments, mobility limitations, and cognitive disabilities.

Accordingly, to achieve a more accessible website:

1. Provide descriptive, alternative text (alt text) that conveys the meaning or purpose of images for users who cannot see it, but hide images displayed for only decorative purposes.
2. Provide closed captions and transcripts for video and audio content to make them accessible to users with hearing impairments.
3. Use sufficient color contrast between text and background to make it readable for people with low vision or color blindness.
4. Write content in a clear, concise, and easy-to-understand manner, using simple language and avoiding jargon or complex terminology.
5. Use proper heading structure (h1, h2, h3, etc.) to create a logical hierarchy and assist screen reader users in understanding the content structure.
6. Make sure hyperlink texts are meaningful and describe the destination or purpose of the link, as opposed to such generic phrases as "click here."
7. Provide keyboard accessibility by ensuring all functionality and interactive elements on the website can be accessed and operated using a keyboard alone and without relying on a mouse or other pointing device.
8. Make forms accessible by using clear labels, instructions, and error messages in forms.
9. Allow users to increase or decrease text size without causing layout or functionality issues.

Regular testing and updates are vital for maintaining WCAG compliance and improving the user experience for individuals with disabilities. Testing methods include automated tools, manual audits, assistive technology testing, and user testing. Automated tools scan for issues, manual audits involve human reviewers, assistive technology testing checks for barriers using specific tools (e.g., screen readers, keyboard navigation, magnification tools, voice recognition software, and other assistive technologies), and user testing gathers real-world feedback from individuals with disabilities. These methods help identify and address potential accessibility barriers, ensuring an inclusive website experience.

In conclusion, many individuals with disabilities, such as those with visual impairments, hearing limitations, motor disabilities, or cognitive difficulties, face challenges when attempting to access online content. Subsequently, such barriers have resulted in numerous lawsuits under the ADA, Section 508 of the Rehabilitation Act, Unruh Act, and/or CCPA — with California currently holding the fourth highest number of lawsuits. Landmark cases shaping the legal landscape, demonstrate that Courts' hold differing interpretations of Title III of the ADA and therefore the favorability of the outcome varies for plaintiffs and defendants, depending on where the lawsuit is filed. By prioritizing accessibility and following such standards as WCAG, businesses can create a more inclusive online experience, demonstrating their commitment to inclusivity and accessibility, meeting the needs of individuals with disabilities, and promoting a more equitable online experience — not to forget to mention potentially having a positive impact for the website's search engine optimization (SEO).

*Mary Shafizadeh, of the Law Office of Maryam Shafizadeh, specializes in family law and intellectual property. Committed to helping individuals and entrepreneurs embark on new chapters in their lives or businesses, she guides families through family law matters and empowers creative entrepreneurs and digital ventures in the realms of copyright, trademark, and website compliance.*

# NOTICE

Notice is hereby given that the RCBA Board of Directors has scheduled a "business meeting" to allow members an opportunity to address the proposed budget for 2024. The budget will be available after August 7. If you would like a copy of the budget, a copy will be available at the RCBA office.

**Wednesday, August 9**
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Business law firm with offices in Corona and Temecula, CA and Las Vegas, NV is looking for a Senior Litigation Associate or Junior Litigation Partner with a transferable book of business. The firm's clients are primarily in southern California and the firm generally handles business litigation, real property litigation, and employment litigation. The candidate should have 5 or more years of litigation experience, including first chair trial/arbitration experience. The candidate is expected to be in the office for meetings, depositions, hearings, trial, and other matters, but there is flexibility to work remotely. Compensation is commensurate with experience ranging between $150,000.00 - $200,000.00. Monthly bonuses are available for Associates based on performance. The firm also provides a comprehensive benefits package including 401K (with matching), medical, dental and vision. Please email resumé to lowrance@lp-attorneys.com.

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To take over office lease and well-established probate and estate planning practice in Yucca Valley, California. Interested candidates should email a cover letter with employment history and resume to: ificaralaw@gmail.com.

### Office Space – RCBA Building
4129 Main Street, Riverside. Next to Family Law Court, across the street from Hall of Justice and Historic Courthouse. Office suites available. Contact Charlene Nelson at the RCBA, (951) 682-1015 or rcba@riverside-countybar.com.

### Conference Rooms Available
Conference rooms, small offices and the Gabbert Gallery meeting room at the RCBA building are available for rent on a half-day or full-day basis. Please call for pricing information, and reserve rooms in advance, by contacting Charlene or Lisa at the RCBA office, (951) 682-1015 or rcba@riversidecountybar.com.

# MEMBERSHIP

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective July 30, 2023.

**Jason E. Barth –** Barth Law, Temecula

**Jacquelyn Jamie Covington –** Law Student, Temecula

**Nada Dhahbi –** Solo Practitioner, Riverside

**John Joseph Hyland, IV –** Rizio Lipinsky, Santa Ana

**Alexandria M. Jaquay –** Cullen Family Law Group, Riverside

**Michael S. Johnson –** Varner & Brandt, Riverside

**Patrick Benjamin Lewis –** Phelps Law, Huntington Beach

**Moonazza S. Naqvi –** Cullen Family Law Group, Riverside

**Adrienne Z. Satchell –** Aarvig & Associates, San Bernardino

**Kelly Sedochenkoff –** Law Offices of Kelly Sedochenkoff, Colton

**Daniela Ulloa (A) –** Law Offices of Michelanne Hrubic, Riverside

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