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Message from the Editor-in-Chief

Cosmos Eubany

There have been a lot of discussions in the last few years on Diversity, Equity, and Inclusion and the lack thereof. These discussions have ranged from framing the problem, identifying causes of the problem, and trying to put forth solutions to the problem. Issue 4, dedicated to the principles of diversity, equity and inclusion ("Diversity"), discusses historical barriers to entry in real estate in general as well some changes that have been made to increase access. While one of the fundamental mandates of this Journal is to educate, this Issue is not just for pedagogical purposes but also serves as a way to open discussions and to begin the process of understanding the past so that it is never forgotten but used to chart a path forward that is mindful of inclusiveness.

The Editorial Board is very excited about the pieces presented herein. Nicholson and Kent's "Equal Access…," talks about laws that ensure equal access for the disabled so that they can live independently and still feel like a member of the community. Next, Lexi Howard's "California Swings for the Fences to Strike Racially Restrictive Covenants from the Public Record," discusses the history of racially restrictive covenants in California and efforts to remove said covenants from the record. Then, Maria Sager's "One Woman's Perspective on Increasing the Percentage of Women of Color Equity Law Partners," describes a triumph of the human spirit over adversity and proposes a blueprint for increasing diversity in law firms. I had the pleasure of meeting Maria Sager when we served on the CLA Diversity Committee and upon hearing her story, I knew this was a piece to be shared with the readership. Thereafter, Agbai, Butler, and Pearlman's "40 Acres and a Mule…," discusses barriers that have prevented African Americans from owning homes and the resulting wealth disparities. Lastly, Nunn and Feller's, "California's Board Diversity Law...," discusses historical barriers to entry onto corporate boards which affected women and people of color and California's landmark law designed to remove some of the barriers.

I would like to say a special thank you to the Diversity Committee of the Executive Committee of the Real Property Law Section where the idea for a themed edition on Diversity came to fruition. Also, thank you to the Journal Committee for its support in reaching out to potential authors and helping to frame the Diversity Issue. As always, thank you to the Editorial Board and the whole team for their incessant dedication to creating such polished editions; especially to Issue Editor Brian Jacobs and Executive Editor Jonathan August for their tireless dedication to reviewing and editing the pieces that comprised Issue 4. Most importantly, I want to say thank you to the authors who never cease to amaze me with their breathe of knowledge and the time they take to draft these pieces.

I have been truly humbled by the trust bestowed upon me to shepherd such a worthy publication. I leave the publication in great hands. Our new Editor-In-Chief, Norman Chernin, rises from the Managing Editor position and has been my right hand throughout this year. He has already demonstrated his leadership in taking the reins and planning for Volume 40. He will be seconded by Bryan Payne, his new Managing Editor, who has significant experience on the Editorial Board and is ready to step into the position. In an effort to create a uniform look and feel to all CLA publications, there will be some changes to the lay out of the Journal next year. However, suffice it to say that the quality of the content and the dedication of the team will remain unchanged.

As always we welcome your feedback, ideas, and your pieces. Please keep them coming and if there is an interest in joining this highly professional and highly capable editorial board please reach out to Norman Chernin.

Cheers,

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MCLE Self-Study Article: Equal Access – Including Persons of Disabilities Under the ADA

Check the end of this article for information on how to access one MCLE self-study ethics credit.

Marty J. Nicholson, Esq. and Janis Kent, FAIA CASp

Marty J. Nicholson was an associate attorney for Calhoun & Associates representing disabled individuals with visual impairments filing numerous ADA complaints on their behalf. She has been an advocate for the visually impaired having two parents who became blind later in life. Currently, her private practice includes land use entitlements. She can be reached at marty@nicholson-law.com.

Janis Kent, FAIA CASp is a licensed California Architect, has been involved in the world of Accessibility since the mid-1980's. She is the Founding President of the Certified Access Specialist Institute (CASI), is a Certified Access Specialist, and designated as a Subject Matter Expert by the California Division of the State Architect. Additionally she has provided training seminars and authored books on Accessibility, with the latest published by Wiley, which are compilations of architectural details for ADA and California Building Code used by architects, designers, building officials, and facility managers.

I. INTRODUCTION

Jay was standing on the corner outside of his apartment and was checking his phone constantly because he was due in court and had ordered a Lyft ride thirty minutes earlier. The ride should have picked him up fifteen minutes ago. Little did Jay know that the Lyft driver drove up to the curb, saw his guide dog, and immediately left not wanting the dog in the car, leaving Jay without a ride. Trudy's family was going to dinner to celebrate her grandmother's birthday. The restaurant was highly regarded for its food and views, so she was looking forward to the occasion. Years earlier Trudy had been in a car accident that left her partially paralyzed and so she used a motorized wheelchair to get around. When Trudy and her family got to the restaurant, she faced a set of stairs with no ramp or elevator. Long story short, Trudy's family could not enjoy their planned dinner because there were no options for getting Trudy to the reserved table. It was either dine without Trudy or go someplace else. These are but some of the many discrimination experiences of people with disabilities that occur every day.

The heart of discrimination for the disabled population is about accessibility because the lack of accessibility denies and prevents people with disabilities from participation in society and living independently. It has been thirty-one years since former President George W. Bush signed the Americans with Disabilities Act (ADA) into law on July 26, 1990.[1] The ADA is a civil rights law that prohibits discrimination against individuals with disabilities in all areas of public life, including "employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."[2] Interestingly enough, the ADA does not include religious institutions or private clubs. The ADA's purpose is to provide a comprehensive national mandate for eliminating discrimination against people with disabilities; provide consistent enforceable standards; prevent the isolation of disabled persons; provide legal recourse to address ongoing discrimination; and assure *equal opportunity*, *full participation,* and *independent living* for the disabled population.[3] In short, the law was designed to eliminate discrimination by requiring full and equal access. While the ADA was adopted to address those issues, years later many government buildings and private businesses are still not accessible.

California has long been a leader in enacting anti-discrimination laws and ahead of the nation when it comes to protecting the interests of people with disabilities against discrimination. Laws like the Unruh Civil Rights Act and the California Disabled Persons Act were enacted long before the ADA. Like the ADA, California's disability laws require enforcement through private lawsuits by the disabled person. "Extortionist," "vexatious litigant," and "serial litigant" are some of the repeatable names attached to disabled people who attempt to enforce their civil rights under these anti-discrimination laws. While most people may respect and admire attorneys who represent and protect the civil rights of people based upon sex, race, color, religion, and ancestry, the same is not always true for attorneys representing the disabled population.

In this article, Section II will discuss the disabled population; Section III will discuss the ADA and California laws relating to disability discrimination; Section IV will discuss real property and business owners' responsibilities under the laws; and Section V will discuss steps real property and business owners can take to become compliant with existing laws.

II. THE DISABLED POPULATION

Before discussing the civil rights laws enacted to prevent discrimination against disabled persons, it will be helpful to understand who is disabled and how the law defines disability. A disabled litigant or their companion may only bring a lawsuit to enforce his/her civil rights under the ADA if that person has a disability or is with a person with a disability. While this may seem straightforward, this threshold question can be a challenge under Title I of the ADA. Under Title III of the ADA, this element is usually not at issue.

A. How Does the Law Define "Disability"?

An individual has a disability for purposes of the ADA if he or she meets any of the following: 1) a physical or mental impairment that substantially limits one or more major life activities of such individual; 2) a record of such impairment; or 3) is regarded as having such an impairment.[4] While there has been significant litigation over what constitutes a disability in the area of employment discrimination, under Title III the plaintiff's disability is many times readily apparent and easy to prove and therefore less likely to become an issue.[5]

In the past, some courts have incorrectly ruled that if a physical or mental impairment that substantially limits one or more major life activities can be mitigated through the use of aids, then the individual can no longer be classified as disabled. In 2016, the ADA Amendments Act clarified that "the definition of 'disability' shall be construed broadly."[6] The ADA Amendment went on to clarify a number of exclusions in the definition of disability, including, but not limited to, temporary disabilities, transvestites, and illegal drug users (if not currently in a supervised rehabilitation program) which are not covered within the definition of disability.[7] Much more has been said about the third prong of "is regarded as having such impairment" but since most lawsuits dealing with the third prong of the disability definition are mostly under employment cases, Title I of the ADA, this article will not delve into it.[8]

B. America's Disabled Population

The most recent statistics on disability numbers from the Centers for Disease Control and Prevention (CDC) are from an August 2018 report which states that "[o]ne in 4 U.S. adults have a disability that impacts major life activities."[9] This equates to roughly sixty-one million Americans having some form of disability. The CDC classifies disabilities into six types including (1) mobility; (2) cognitive (mental); (3) hearing; (4) vision; (5) independent living; and (6) self-care (i.e., dressing, bathing, etc.).[10] The most common disability is mobility, with cognition running second. The 2020 Annual Disability Statistics Supplement compiled by the American Community Survey states that 13.2% of the total U.S. population had a disability in 2019, of which 12.7% live in the community (non-institutionalized).[11] Moreover, it is estimated that 49% of the population 75 years and older have a disability.[12] It should be noted that approximately 71.5 million baby boomers (sometimes referred to as the "silver tsunami") will reach age 65 by the year 2030.[13]

Today we know that people with disabilities are more actively participating in their communities and are determined to live more independently; they (and their families) are actively patronizing businesses. Moreover, older Americans suffer from all types of disabilities, yet they are consumers who will be demanding products and services. Recent studies have found that people with disabilities tend to shop or acquire services when the environment is accessible and friendly.[14] Most of us have lived long enough to see how the hotel industry went from "no pets allowed" to "pet-friendly" to increase their clientele. The disabled population is a consumer population, and those businesses who have made shopping, dining, and recreating accessible for the disabled by complying with disability construction standards and regulations will find new customers and larger profits. The disability market has 1.2 trillion dollars in

disposable income.[15] Companies that embrace and welcome people with disabilities are "four times more likely to have shareholder returns that outperform their peers."[16]

C. Disability Discrimination

"Ableism" is a term for discrimination and social prejudice against people with disabilities or those that are perceived to be disabled. This idea is that able-bodied individuals are somehow superior and people with disabilities are considered inferior. Disability discrimination, at times, is difficult for businesses and even legal personnel to understand because service to people with disabilities has not been considered. Some property and business owners believe the "injury-in-fact" must mean an actual physical injury and their attorneys waste time propounding discovery attempting to identify a physical injury that occurred when the person experienced discrimination. The "injury-in-fact" is when a disabled person is treated less well or put at a disadvantage because of their disability. Exclusion, segregation, unequal treatment, and even the failure to modify a business policy are injuries-in-fact to a disabled person. For example, while attending the National ADA Symposium, I and twenty other attendees wanted to dine together. Our group included the president of the organization who uses an assistive device, namely a wheelchair. We had been given a recommendation for a restaurant at the top of a hill, which required a ride on a railway lift car to get us there. Unfortunately, the platform at the top was uneven, and a wheelchair would have to be manually lifted to get to the pathway to the restaurant. None of us being physically able to lift an occupied wheelchair, the president insisted we go without him. That is exclusion and isolation and an injury-in-fact under the disability laws. That is what barriers do to people with a disability: they make them feel disadvantaged and treated less well than other people. Of course, the group decided to go to another restaurant that was accessible, rather than exclude the president of the organization.

The ADA spells out public accommodations discrimination within the statute. The general rule is no disabled person shall be denied "full and equal" enjoyment of goods, services, facilities, privileges, advantages, or accommodations by a place of public accommodation.[17] Under the ADA, discrimination is defined as the imposition or application of criteria that screens out disabled people; failure to make reasonable modifications to policies, practices, or procedures necessary for the disabled; failure to ensure the disabled are not denied services, segregated, or treated differently; failure to remove architectural and communication barriers in existing buildings when removal is readily achievable; and failure to provide alternative methods when removing a barrier is not readily achievable.[18] Additionally, for new construction, it is discrimination to fail to design and construct the building so it is accessible, which means it conforms to stated disability standards.[19]

People with disabilities do not want to be pitied; they want to be able to live independent lives.[20] When businesses remove barriers that prevent access, people with disabilities can, in fact, live successful lives. The goal of anti-discrimination laws relating to disabled persons is all about inclusion and participation. As we have learned from COVID-19 in 2020, isolation is not good for one's physical or mental health. As one familiar Barbara Streisand song lyrics stated, "People who need people are the luckiest people in the world."[21] People need to be included in community life: it is essential for good mental health.

III. OVERVIEW OF THE ADA AND CALIFORNIA LAWS RELATED TO DISABILITY DISCRIMINATION

In California, the best-known laws, both federal and state, governing discrimination on the basis of disability include the ADA, section 504 of the Rehabilitation Act of 1973, California Fair Employment and Housing Act, California's Unruh Civil Rights Act ("Unruh Act"), California Disabled Persons Act (CDPA), and Division 13, Part 5.5 of California's Health and Safety Code. Most plaintiffs filing cases in California under Title III do so under the ADA in conjunction with either the Unruh Act or CDPA or both. These three major laws are designed to prevent disability discrimination but have nuances.

A. Federal Law—The ADA

The ADA consists of five titles including: (1) Title I which deals with Employment; (2) Title II which deals with State and Local Government; (3) Title III which deals with Public Accommodations in the Private Sector; (4) Title IV which deals with Telecommunication; and (5) Title V which deals with Miscellaneous Provisions.[22] This article will only discuss Title III "Public Accommodations in the Private Sector" and the focus shall be on constructed-related violations and barriers.

(1) Title III. To achieve the goals of the ADA, the ADA established requirements for businesses that provide goods or services to the public which the ADA defines as "public accommodations."[23] The ADA established twelve categories of public accommodations, which includes

stores, restaurants, bars, social service center establishments, theaters, hotels, recreational facilities, private museums and schools, doctors' and dentists' offices, shopping malls, and other businesses.[24] The ADA includes virtually all businesses that serve the public in the twelve categories, regardless of the age of their buildings or the size of the business, excluding religious institutions and private clubs.

To meet the stated goals "to provide consistent enforceable standards," the Department of Justice prepared design standards after the ADA's enactment.[25] In 1991, the first design standards for places of public accommodations were adopted but did not go into effect until January 26, 1992. The standards stated that public accommodations must: (1) modify policies and practices that discriminate against people with disabilities; (2) comply with accessible design standards when constructing or altering facilities; (3) remove barriers in existing facilities where readily achievable; and (4) provide auxiliary aids and services when needed to ensure effective communication with people who have hearing, vision, or speech impairments.[26] Most of the recently filed ADA litigation involves failing to meet the requirement that businesses[27] remove architectural barriers in existing buildings and make sure that newly built or altered facilities are constructed to be accessible to individuals with disabilities. Many owners of existing buildings, those buildings built before the ADA was enacted, believe they fall into a "grandfather provision"[28] that is often found in state and local building codes. However, "grandfather provisions" do not exempt property owners from their obligations under the ADA because the ADA requires that existing buildings remove barriers where readily achievable.

The ADA design standards set out three categories of accessibility requirements: new construction provisions which apply to public accommodations built after January 26, 1993; alterations provisions which apply to post January 26, 1992 (i.e. alterations to buildings that already exist); and the "readily achievable" provisions which apply to unaltered portions of buildings constructed before January 26, 1993.[29] These classifications are extremely important, heavily litigated, and often misunderstood.

(2) The 1991 ADA Accessibility Guidelines. The ADA's first design standards, the ADA for Accessible Guidelines (the "1991 Guidelines"), sometimes referred to as ADAAG, was originally published on July 26, 1991, by the Department of Justice (DOJ).[30] The 1991 Guidelines set standards for accessibility for all public accommodation facilities by setting standardized heights of services counters and requirements for restrooms and accessible routes, to name a few. Unfortunately, the 1991 Guidelines did not mention recreation facilities such as swimming pools, play areas, exercise machines, miniature golf facilities, and bowling alleys. Moreover, the DOJ revised some of the standards set by the 1991 Guidelines to achieve better accessibility. For example, the 1991 Guidelines required detectable warnings[31] for all accessible pathways that cross into a vehicular way. The DOJ eliminated that requirement in the 2010 ADA Standards, except for train platforms, determining that more research was needed on detectable warnings. However, there is an intent to add detectable warnings in the Public Right of Way Accessibility Guidelines, which have yet to be implemented.[32] The reason Californians see detectable warnings is because they are required under Title 24 of the California Code of Regulations, commonly known as the California Building Code (CBC).[33]

(3) The 2010 ADA Standards. The Department of Justice updated the 1991 Guidelines in 2010, which were enacted on March 15, 2012, as the 2010 ADA Standards (the "2010 Standards") and referred to as the ADAS.[34] Today, the 2010 Standards serve as the central document for determining if a business building is accessible under the ADA. While the 2010 Standards retained many of the original provisions in the 1991 Standards, they did incorporate some significant differences. For instance, the 2010 Standards added standards for recreational public accommodations and amended previous standards to better accommodate persons with disabilities. Another change from 1991 Standards to 2010 Standards included van-accessible spaces from one for every eight accessible spaces to one for every six spaces. It is important that a property owner know which ADA standards apply to his/her facility.

(4) Readily Achievable Provision. One of the most highly litigated provision under the ADA is the "readily achievable" provision.[35] Property owners who own buildings built prior to the enactment of the ADA must make changes to their facilities to accommodate disabled people when it is "readily achievable." Readily achievable means "easily accomplishable without much difficulty or expense."[36] Factors the court considers in determining readily achievable include the nature of the cost, financial resources of the facility, number of employees, effect on the facility's resources, impact on the operation, overall finances, type, and location of the facility, to name a few.[37] While the statute is not clear who bears the burden of proof, courts view "readily achievable" as a defense, and ultimately the defendant would need to prove that barrier removal is not readily achievable. In sum, businesses with more resources are expected to remove more barriers than businesses with fewer resources. Readily achievable barrier

removal may include installing an entrance ramp, installing accessible door hardware, widening a doorway, providing an accessible route from a parking lot to the business's entrance, repositioning shelves, or simply moving tables, chairs, display racks, vending machines, or other furniture. Businesses must comply with the adopted standards when removing barriers. When barrier removal cannot be accomplished pursuant to the standards due to space limitations, such as installing a ramp, then proposed deviations must not pose a significant safety risk. Readily achievable barrier removal should be addressed annually or on an ongoing basis by public accommodations. Not doing anything or doing very little does not provide protection from litigation.

Obviously, what is readily achievable varies from business to business based upon economic costs and revenues. Economic downturns, such as the recent COVID-19 pandemic, may force many public accommodations to postpone removing some barriers. However, barrier removal on existing buildings is a continuing obligation until all barriers have been removed. The ADA regulations have recommended the following priorities for barrier removal:

1. Providing accessible route from the business to public sidewalks, parking areas, and public transportation;
2. Providing access to the goods and services the business offers;
3. Providing access to public restrooms; and
4. Removing barriers to any other measures necessary to provide access to goods, services, and facilities.

The lack of an accessible route from the business to sidewalks, parking, and public transportation is a common barrier found at businesses. An accessible route is the path a person with a disability takes to arrive, enter, and move through a business. Pursuant to the standards, the route must be at least three feet wide, must remain accessible, and may not be blocked, either in width or height, or by display racks, planters, stacks of product, filing cabinets, or other items.[38] When one considers that this is the route that clients/customers must use to avail themselves of a business' goods and services, it makes more sense to ensure it is accessible and not full of barriers that deny access.

(5) Existing Building—Safe Harbor.[39] If the business building was built or altered in the past twenty years in compliance with the 1991 Standards, or barriers were removed in compliance with the 1991 Standards, the building does not have to comply with the 2010 Standards as long as there have been no additional alterations or construction on these elements or the path of travel itself does not support an altered element since that time. Thus, businesses may find it increasingly more difficult to take advantage of the safe harbor under the ADA unless the business has remained unchanged and the building has stood the test of time without alterations or construction. As buildings age and require alterations, the ability to use a safe harbor under the 1991 Standards decreases.

For example, the 2010 Standards lowered the mounting height for light switches from 54 inches to 48 inches. If the light switch was installed and compliant with the 1991 Standards (and there has been no alteration or new construction to the building) then the light switch is compliant. If there have been any plumbing renovations (a common alteration), then the building owner is required to make its facility, or portions of the facility, accessible. It should be noted that routine maintenance is not considered an "alteration" for ADA purposes. Therefore, reroofing, painting, and electrical repairs would not trigger compliance with the 2010 Standards.[40] However, if a parking lot is restriped or an ATM machine relocated, those alterations trigger compliance with the ADA.[41] Moreover, the 1991 Standards did not include recreation facilities such as swimming pools, play areas, exercise machines, miniature golf facilities, and bowling alleys. Therefore, the safe harbor provision does not apply for those facilities, and barrier removal is applied.

(6) Title III ADA Claim. Private lawsuits are the primary method to enforce the provisions of the ADA and get compliance with the ADA.[42] The ADA only allows for injunctive relief and attorney fees; no damage awards for plaintiffs.[43] For a plaintiff to prevail in a Title III, ADA claim, "a plaintiff must show that (1) he is disabled within the meaning of the ADA; (2) the defendants are private entities that own, lease, or operate a place of public accommodation; and (3) the plaintiff was denied public accommodations by the defendant because of his disability."[44] The first prong of a Title III ADA lawsuit is normally not up for debate. A plaintiff's disability is normally either well-documented or easily apparent.[45] The second prong equally is not normally an issue up for debate. The third prong is satisfied when there is/are violation(s) of the applicable standards at the business and the plaintiff encountered the violation which prevented him full and equal access.[46]

(7) Standing. Pursuant to the United States Constitution, the federal court may only adjudicate cases in which the plaintiff has demonstrated he/she has standing.[47] To show standing, a plaintiff must demonstrate "that he or she has

suffered or is threatened with an injury that is both 'concrete and particularized,' and 'actual or imminent, not conjectural or hypothetical;' that … the injury is 'fairly traceable' to the challenged conduct; and … likely to be redressed by a favorable decision."[48] To meet the standing requirement, an ADA plaintiff must prove he actually encountered the barrier or he was deterred from encountering.[49] The requirement is an "injury-in-fact," and that injury must relate to the plaintiff's disability. For instance, disabled people who use a wheelchair cannot litigate violations of barriers that affect blind people unless the barrier also affects the use of wheelchairs.[50]

B. California Laws: The Unruh Civil Rights Act and California Disabled Persons Act

Prior to the adoption of the ADA, California enacted several statutes prohibiting disability discrimination, two of the more well-known laws are the Unruh Act and the CDPA. The Unruh Act's scope is broader than the CDPA because it protects more than just disabled persons. Both statutes prohibit the denial of "full and equal access to services, facilities, and advantages or public accommodation."[51] California amended both the Unruh Act and CDPA to provide a violation of the ADA is a *per se* violation of both statutes.[52] Both laws consider a violation of the CBC to constitute a violation of the Unruh Act and the CDPA.[53] However, unlike the ADA which only allows for injunctive relief and attorney's fees, the Unruh Act and CDPA allow a plaintiff to recover attorney's fees and damages.[54] While the two California laws are similar, there are unique differences.

(1) The Unruh Act. The Unruh Act was enacted in 1959 and was named for its author, California Assemblyman Jesse M. Unruh. The Act is codified at California Civil Code section 51. The Unruh Act specifically states that the perception that the person has a protected characteristic is enough to trigger the law.[55] Under the Unruh Act, a plaintiff must plead and prove intentional discrimination to prevail. However, an ADA violation pled under the Unruh Act does not require a finding of "intentional discrimination;" a CBC violation does require a plaintiff to plead and prove intentional discrimination.[56]

When the California Legislature amended the Unruh Act to add violations of the ADA as *per se* violations of the Unruh Act, the court concluded that intentional discrimination was not a required element for the ADA and therefore would not be required under the Unruh Act.[57] The Unruh Act provides for a *minimum* statutory damage award at $4,000 per occurrence.[58] More importantly, the Unruh Act attorney's fees award is unilateral, and only the plaintiff can recover attorney's fees but the defendant cannot.[59] It is these key features that make an ADA claim under the Unruh Act desirable for a filing plaintiff.

(2) The CDPA. In 1968, the State Legislature passed the CDPA, codified at California Civil Code section 54. The CDPA in its earliest form expressly prohibited discrimination against those with physical and visual disabilities and asserted the equal right of individuals with disabilities or medical conditions "to the full and free use of the streets, highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians' offices, public facilities, and other public places."[60] Under the CDPA, the standard is that a statutory penalty can be assessed based on the number of "particular occasions" an individual "actually" encountered a barrier to accessibility and was either deterred from access or suffered embarrassment and harassment because of the barrier.[61] This standard has increased litigation, as defendants have been successful in asserting that while a violation may have existed, it did not deter the plaintiff or cause him or her any embarrassment or harassment.

One of the key features of the CDPA is that attorney's fees are unilateral to the "prevailing party."[62] However, when a plaintiff establishes even a technical violation of the access laws, the defendant can and will be held liable for plaintiff's attorneys' fees regardless of whether statutory damages are appropriate. The minimum damage award under the CDPA is set at $1,000, which is much less than the Unruh Act.

Even with the new defenses available to businesses, the cost-benefit analysis still does not typically favor defending a case to trial. The primary deterrent is attorney's fees. Even if no statutory damages are awarded, if there are violations of the ADA or other applicable California accessibility laws in a business requiring remediation, the plaintiff can still be the "prevailing party" and be awarded his or her attorney's fees.

To prove standing under the CDPA, a plaintiff must show that he or she actually presented himself or herself to a business or public place with the intent of purchasing its products or services and was actually denied equal access on a particular occasion.[63] If a plaintiff is only aware of the barrier or had a reasonable belief the building was not accessible, then under CDPA only injunctive relief is awardable (no damages).[64]

(3) Construction-Related Accessibility Standards Compliance Act.

In 2008, California attempted to give businesses some relief from ADA litigation by adopting the Construction-Related

Accessibility Standards Compliance Act (CRASCA).[65] This section of law is extremely difficult to interpret, and it is debatable whether it provided the intended relief. In short, if a "qualified defendant" had a Certified Access Specialist (CASp) inspection and the CASp designation was either "meets applicable standards" or "inspected by a CASp" *and* the defendant adhered to the schedule of remediation, then the defendant can take advantage of a stay of the proceedings and possible reduction in damages.[66]

The law gives relief to facilities that have been CASp inspected by reducing damages for a "qualified defendant." The benefit of the stay of proceedings is two-fold. First, it gives time for the parties to settle the case before the defendant must file a response. Secondly, the law requires an early evaluation conference in which the judge can mediate a settlement early on, reducing the costs of litigation.[67] Additionally, municipalities responsible for permit inspections now must have a CASp plan checker on staff so that compliance with disability standards is incorporated into permit review processes.[68]

IV. IMPACT OF TITLE III OF THE ADA AND CALIFORNIA DISABILITY LAWS ON REAL PROPERTY AND BUSINESS OWNERS

Disabled plaintiffs suing businesses in California for alleged disability access violations most commonly assert claims under the ADA, the Unruh Act,[69] and the CDPA.[70] Too many real property owners and private businesses have simply ignored or are ignorant of their responsibilities under the disability discrimination laws. This coupled with disabled people becoming more active and assertive in their desires to live independently created the perfect setting for an increase in disability discrimination lawsuits.

A. Disability Discrimination Lawsuits

Attorneys must submit their complaints, pre-litigation letters, and case outcome reports to the California Commission on Disability Access (CCDA) within five business days of filing the complaint or mailing the letter.[71] This gives the CCDA an ability to track litigation and file annual reports. For instance, 3,522 complaints alleging access discrimination were filed in California in 2019.[72] According to the CCDA, 2019 saw a 16.8% decrease in complaints, down from 4,221 complaints filed in 2018.[73] Of the complaints filed in 2019, 3,213 were filed in federal court and 309 were filed in state court. Of the 3,522 complaints filed, 7,507 construction-related access violations were alleged.[74] Of the 7,507 construction-related access violations alleged, accessible parking violations were mentioned in some fashion in the top five categories.[75] Additionally, failures to comply with counter and bar heights were alleged in 1,207 complaints. The numbers cited by the CCDA do not reflect complaints filed by *pro se* litigants who are unaware of the reporting requirements or attorneys who simply did not comply with the CCDA requirements.

Plaintiffs can file accessibility claims in both state and federal courts. Therefore, a property or business owner should obtain knowledgeable legal counsel quickly, regardless of where the matter is filed. Finding an experienced ADA or disability defense attorney is crucial because quick action can result in a reduction of potential damage awards. It only takes *one* valid ADA violation for the plaintiff to succeed on the lawsuit. An experienced ADA defense attorney will know if the complaint is legally sufficient and whether efforts to settle the case prior to defendant filing a response are more cost effective. If the complaint has merit, a case can be settled for much less than what a defendant's attorney will charge to litigate the case. Even if the defendant wins the case, attorney's fees are not recoverable under the Unruh Act. Less experienced defensive attorneys will advise their clients to litigate while charging much more in fees when settlement would have been financially prudent.

The complaint needs to be evaluated as to its merits within thirty days of receiving the complaint. Experienced disability defense attorneys will contact plaintiff's counsel and request an extension of time to respond to the complaint to allow proper evaluation and discussion.

The complaint should be evaluated on the following three categories mentioned in Section III(A)(1) paragraph 3: is the building new construction (built after January 26, 1993); were alterations made to the building after January 26, 1992 (check local government for list of building permits); or does the "readily achievable" provision apply (buildings constructed before January 26, 1993, and no alterations). If the building was built after January 26, 1993 (new construction), then it should comply with either the 1991 Standards or the 2010 Standards, depending on the date it was built or altered.

If the alleged violations have merit, determinations on remediation should be discussed as soon as possible. Not every case requires a defendant to wait until the matter is resolved before making necessary changes, even if the matter ultimately goes to trial.

B. Landlord/Tenant Issues

The real property owner (landlord) leases his property to a public accommodation (tenant) who may or may not be named in a disability discrimination lawsuit, or vice versa. Many savvy landlords are now placing provisions within their leases to make compliance with the ADA a tenant's responsibility. Where a business location is leased, the business must check its lease carefully to see who is responsible—the landlord or the tenant. Many ADA complaints allege parking lot violations in common areas which are not under the purview of the tenant. Where the property owner (landlord) is responsible, the business may wish to assert a claim against the landlord for indemnity and/or defense as to those allegations. A claim for indemnity and/or defense is mandatory where the lease precludes the business from making structural changes to the exterior of the building. Such structural changes include, for example, making curb-cuts or re-stripping the parking lot. When the lease precludes those activities or places those responsibilities on the landlord, then the landlord or lessor becomes a necessary party in the lawsuit.

Regardless of what a lease may contain, "[b]oth the landlord and the tenant are public accommodations and have full responsibility for complying with all ADA Title III requirements applicable to that place of public accommodation."[76] It is clear that a lease agreement cannot relieve a landlord of its ADA obligations, but it may allocate the costs associated between the landlord and the tenant.[77] Additionally, the 2010 Standards have provided that if the alterations are made by the tenant, then landlord obligations under the ADA may not be triggered.[78]

V. MAKING PUBLIC ACCOMMODATIONS COMPLIANT WITH THE ADA

A business can now take steps to protect itself prior to being served with a disability discrimination lawsuit by knowing which ADA regulations apply to its facility(ies), having its facility(ies) inspected for compliance with ADA and CBC regulations, and having a barrier elimination plan and an ongoing maintenance plan.

A. Which Regulations Apply to the Facility

One of the first steps a property or business owner should take is to determine what year the building/facility was built so the proper ADA and CBC regulations can be applied. If the building was built and approved for occupancy on or after January 26, 1993 (new construction), it is required to meet the ADA standards.[79] There is an exception for new construction if the property or business owner can prove it is technically infeasible to meet the requirements; then mitigation measures must be identified.[80] But note that this is only an exception if it means altering a load-bearing member that is an essential part of the structural frame or other existing physical or site constraints. Otherwise, if the building was built before January 26, 1993, then the "alteration provisions" or the "readily achievable" provisions would apply.

If the building cannot be classified as "new construction," the property or business owner can check building and planning permits approved for the property and building. Building permits from 1991 to present can be found at the local governmental building and safety department and/or planning department. If the property is located in a city that was incorporated after 1991, then both the city and county records must be reviewed. If there have been any alterations completed on the building/property after January 26, 1992, then the altered portion and its supporting path of travel is required to be "readily accessible to and usable by" disabled persons to the maximum extent feasible.[81]

Any building built before January 26, 1993, and completely unaltered, the "readily achievable" provision is applied, and the property or business owner should have a barrier removal plan. As already discussed, this provision requires all property owners to take action to make their businesses accessible to the disabled.

B. Facility Inspections

One of the more prudent steps a property or business owner can take is to have a CASp conduct an inspection of the facility. A CASp is a person who has special knowledge in accessibility laws and is certified by the State of California.[82] While an inspection by a CASp is not inexpensive, it can make a huge difference in any litigation, particularly in state courts, depending on the follow-up by the property or business owner. During the CASp inspection, the CASp will review the facility for non-compliance with the ADA standards and the CBC regulations. After a property/business has been inspected, the CASp can provide a certificate of inspection and identify the violations in a written report. If the business/property receives a certificate, the business can display it as a deterrent to potential plaintiffs. More importantly, a CASp certificate can provide the property or business owner with certain rights if the property or business owner is sued in state court, such as a stay of proceedings until an early evaluation hearing can be conducted by the

court and/or a reduction in the amounts of damages from $4,000 to $2,000 or $1,000.[83] These measures are meant to minimize the cost of litigation to a property or business owner that has had a CASp inspection performed and has adhered to their schedule of remediation. Unfortunately, a CASp certificate still cannot make a property or business owner completely immune from a disability discrimination lawsuit.

It should be mentioned that not all CASp's are created equal as not all CASp's are licensed architects or engineers. When a property or business owner hires a CASp, they should confirm that the CASp certification is valid by checking the list at the State of California's Division of the State Architect.[84] Additionally, the property or business owner should ask a prospective CASp for an example of the report that will be produced at the end of the inspection. The CASp report should have photos showing violations, identification of the ADA laws, identification of the CBC violations, descriptions of how to fix the violation, and a list of priorities based upon ADA priorities.[85] Some CASp's will also include an estimate of costs. While CASp inspections may be expensive, they are a valuable tool to any property or business owner desiring to be compliant with federal and state disability laws while providing protection from future lawsuits. If the property or business owner receives a sample report that is difficult to read or understand, they can find another CASp to do the inspection.

C. Barrier Elimination and Ongoing Maintenance Plan

For buildings built before the ADA was enacted, after an inspection by a CASp, the report will provide a list of the violations and barriers that might need to be removed. The property or business owner uses the list to identify those which can be completed immediately, those which will require time to plan and those that may fall under the technically infeasible, as well as those that prohibit access to their facility and services. The property or business owner and CASp prepare a plan to remove readily achievable barriers and identify dates to complete the plan to make the property accessible to disabled persons. Since passing the ADA, Congress has also passed tax incentives to assist property owners in becoming fully accessible. Property or business owners can get tax credits and tax deductions for monies paid to make their public accommodations accessible.[86]

Lastly, ADA compliant parking spaces, signs, and pathways require ongoing maintenance. Many property and business owners find themselves facing litigation because they allowed the paint to fade, the signs to become illegible, or pathways to have large cracks and/or potholes. All property and business owners should have an ongoing maintenance plan to make sure the accessible features maintain their integrity.

VI. CONCLUSION

When a property or business owner is served with a summons for violating the ADA/Unruh Act/Disabled Persons Act, it should be a warning that their place of business is not meeting the needs of all its customers or potential customers. Instead of reacting with negativity towards the person with the disability who has been denied access from patronizing the business, there should be concern about failing to meet the needs of an ever-growing consumer population.

The ADA and other disability laws prohibiting discrimination against disabled people can be a wakeup call to become more service-friendly to all consumers, not just abled-bodied consumers. Eleanor Roosevelt, whose husband had a disability, summed it up best when she said, "It's better for everybody, when it gets better for everyone."

Endnotes

1 42 U.S.C. §§ 12101, *et seq.*
2 *Id.* § 12101(a)(3).
3 *Id.* § 12101(b).
4 *Id.* § 12102.
5 *Reycraft v. Lee*, 177 Cal. App. 4th 1211, 1215 (2009); *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1038 (2008).
6 28 C.F.R. pt. 35, app. C.
7 28 C.F.R. § 35.108.
8 42 U.S.C. §§ 12111-12117, known as Title I of the ADA.

9 Centers for Disease Control and Prevention Weekly, Aug. 17, 2018, https://www.cdc.gov/brfssprevalence/index.html, last visited July 25, 2021.

10 *Id.*

11 Nat'l Inst. of Disability, Annual Disability Statistics Compendium, 2020 Annual Report on People with Disabilities in America 3 (2020), https://disabilitycompendium.org/ (last visited Aug. 10, 2021).

12 U.S. Dep't of Health and Human Servs., Office on Aging, 2019 Profile of Older Americans (2020), https://acl.gov/aging-and-disability-in-america/data-and-research/profile-older-americans (last visited Aug. 5, 2021).

13 Baby boomers refer to people born between 1946-1964. By the year 2030, all baby boomers will have reached 65 or older.

14 Nat'l Org. on Disability, Disability Inclusion Data—Where Does Your Company Stand (2020), https://www.nod.org/resources/data (Aug. 15, 2021).

15 *Id.*

16 *Id.*

17 *See generally*, 42 U.S.C. § 12182(a).

18 *Id.*

19 42 U.S.C. § 12183.

20 Joseph P. Shapiro, No Pity, ch. 1 (Three Rivers Press, 1st ed. 1993).

21 The song "People" written by songwriter Jule Styne and performed by Barbara Streisand in 1964.

22 42 U.S.C. §§ 12101, *et seq.*

23 "Public accommodations" and the term "business" or "businesses" is used interchangeably.

24 42 U.S.C. § 12181(7).

25 *Id.*

26 *Id.* § 12100(b)(2).

27 The terms "business(es)" and "property owners" are used interchangeably with regard to ADA compliance responsibilities, though often times business(es) are tenants and not property owners.

28 Will Kenton, Investopedia (Dec. 2020), https://www.investopedia.com/terms/g/grandfatherclause.asp (last visited Aug. 14, 2021) (definition of grandfather clause: "A grandfather clause is an exemption that allows persons or entities to continue with activities or operations that were approved before the implementation of new rules, regulations, or laws. Such allowances can be permanent, temporary, or instituted with limits.").

29 *Moeller v. Taco Bell*, 816 F. Supp. 2d 831, 847 (N.D. Cal. 2011).

30 ADA Standards for Accessible Design, 28 C.F.R. app. A, pt. 36, https://www.ada.gov/2010_regs.htm (last visited Aug. 14, 2021).

31 Detectable warnings, sometimes referred to as truncated domes, are the patch of yellow bumps installed in walkways to warn visually impaired individuals that they are nearing a vehicular path.

32 U.S. Access Bd., Proposed Public Rights-of-Way Accessibility Guidelines, https://www.access-board.gov/prowag (last visited Sept. 29, 2021).

33 Cal. Code Regs. tit. 24, § 11B-247.1.2.5.

34 2010 ADA Standards, 28 C.F.R. pt. 36, https://www.ada.gov/2010_regs.htm.

35 42 U.S.C. § 12182(b)(2)(A)(iv).

36 *Id.* §§ 12181(9), 12182(b)(2)(A)(iv).

37 *See id.* § 12181(9).

38 2010 ADA Standards, 28 C.F.R. pt. 36.

39 *Id.* § 36.304(d)(2)(i).

40 28 C.F.R. pt. 36, § 36.402(b)(1).

41 *Id.* (Alterations that alter the path of travel must make path of travel accessible).

42 See *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039 (9th Cir. 2008) (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 93 S. Ct. 364 (1972)).

43 42 U.S.C §§ 12205, 12188.

44 *Arizona ex rel, Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 670 (9th Cir. 2010).

45 *Reycraft v. Lee*, 177 Cal. App. 4th 1211, 1215 (2009); *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1038 (2008) (plaintiffs' disability was not at issue).

46 *See Chapman v. Pier 1 Imports (U.S.), Inc.*, 631 F.3d 939, 945 (9th Cir. 2011).

47 U.S. Const. Art. III, § 2, cl.1; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130.

48 *Bates v. United Parcel Serv., Inc.,* 511 F.3d 974, 985 (9th Cir. 2007) (quoting *Lujan*, 504 U.S. at 560-61).

49 42 U.S.C. § 12188(a)(1).

50 *Chapman*, 631 F.3d at 947 ("[A]n encountered barrier must interfere with the particular plaintiff's full and equal enjoyment . . . to constitute an injury-in-fact").

51 *Moeller v. Taco Bell*, 816 F. Supp. 2d 831, 848 (N.D. Cal. 2011).

52 The Unruh Act was amended in 1992 to add the ADA; the CDPA was amended in 1996. (*See* California Civil Code sections 51(f) and 54(c), respectively).

53 Since December 31, 1981 (forty years ago), California's Building Code has incorporated physical accessibility standards for public accommodations.
54 *See* Cal. Civ. Code §§ 52(a), 54.3.
55 Cal. Civ. Code § 51.5(a).
56 *Munson v. Del Taco, Inc.,* 46 Cal. 4th 661, 690 (2009).
57 *Id.*
58 Cal. Civ. Code § 52(a).
59 *Molski*, 164 Cal. App. 4th 786, 791.
60 Cal. Civ. Code § 54(a).
61 *Id.* § 55.56.
62 *See Flowers v. Prasad*, 238 Cal. App. 4th 930, 939.
63 Cal. Civ. Code § 54.3; *Reycraft v. Lee*, 177 Cal. App. 4th 1211, 1224 (2009).
64 *Reycraft*, 177 Cal. App. 4th at 1225.
65 Cal. Civ. Code §§ 55.51 *et seq*.
66 *Id.* § 55.52(a)(8).
67 *Id.* § 55.54.
68 *Id.* § 55.53(d)(1).
69 *Id.* §§ 51 *et seq*.
70 *Id.* §§ 54 *et seq*.
71 *Id.* § 55.32.
72 2019 California Commission on Access Annual Report 32.
73 *Id.*
74 *Id.* at 34.
75 *Id.*
76 *Yates v. Delano Retail Partners, LLC*, 2012 WL 1094444 (quoting Dep't of Justice, Technical Assistance Manuel on the American with Disabilities Act § III-1.2000, 833-34 (1994)).
77 *See Botosan v. Paul McNally Realty,* 216 F.3d 827, 834 (9th Cir. 2000).
78 28 C.F.R. pt. 36 § 36.403(d).
79 28 C.F.R. pt. 36, app. A; *see* 42 U.S.C. § 12183(a)(1); *Moeller v. Taco Bell*, 816 F. Supp. 2d 831, 847 (N.D. Cal. 2011).
80 42 U.S.C. § 12182(b).
81 *Id.* § 12183(a)(2); *Moeller*, 816 F. Supp. 2d at 847.
82 The State of California maintains a list of CASp inspectors.
83 Cal. Civ. Code §§ 55 *et seq.*
84 Dep't of Gen. Servs. of the State of Cal., Div. of the State Architect, https://www.dgs.ca.gov/DSA/Services/Page-Content/Division-of-the-State-Architect-Services-List/CASp.
85 28 C.F.R. pt. 36.304.
86 I.R.C. §§ 40, 170.

California Swings for the Fences to Strike Racially Restrictive Covenants from the Public Record

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I. INTRODUCTION

When Nathaniel Colley and Jerlean Colley tried to purchase their first home in Sacramento in 1955, they were unable to find a real estate agent to assist them with their purchase and were unable to themselves purchase the property they chose. The Colleys were African American.[1] Though racially restrictive covenants ("RRCs") were already unconstitutional and unenforceable, the effects of segregation and discrimination continued to make impossible, or nearly so, the purchase of homes by African Americans and other non-Whites. White friends of the Colleys, Leland Anderson and Virginia Anderson, purchased an undeveloped lot for them in the South Land Park Terrace neighborhood of Sacramento[2] and transferred the property to the Colleys,[3] who then built the home where they would live for four decades.[4]

The experience of the Colleys was not unique. Many African Americans throughout California and the United States had long been prohibited from buying a home, by circumstances both *de jure* and *de facto*.[5] This was a direct result not only of recorded RRCs, but also other factors, such as private agreements and government programs, including federally funded home financing programs. Those programs made and underwrote loans primarily in neighborhoods that were predominantly White or that otherwise intentionally excluded African Americans, limiting not only their housing opportunities but also their future economic success.[6]

Even after other federal and state legislative and judicial decisions held RRCs to be unconstitutional and unenforceable, RRCs continued their drumbeat of exclusion, sending messages to non-White,[7] prospective homeowners that they were not welcome in predominantly White neighborhoods. Even today, homebuyers, often while purchasing a home and sometimes long after their purchase, discover that RRCs were recorded in the chain of title of the documents for their home. RRCs can be a continuing and often painful reminder of past racial exclusion, violence, injury, and injustice.

Several states, including California, have tried over the years to identify and enact solutions for the redaction and removal of RRCs from the public record. Many RRCs are embedded in documents that include other covenants, conditions, and restrictions ("CC&Rs"). Redacting or removing RRCs requires methods to identify and extract the RRCs with surgical precision from CC&Rs that may otherwise lawfully proscribe other property uses, such as historical prohibitions on the use of the residence as a laundry, a boardinghouse, or a distillery. More modern covenants or prohibitions include parking restrictions, exterior home colors, landscaping requirements, and setbacks. Typically, CC&Rs were intended, among other purposes, to maintain consistency and uniformity for the purpose of increasing the desirability, marketability, and value of the affected property.

While scholars may debate the practical enforceability challenges of provisions in CC&Rs (not including RRCs), restrictions that do not contain racial prohibitions have

generally been found to be enforceable. The challenge in removing RRCs from the public record is complex; while removing RRCs may be a remedy, remaining CC&Rs should be retained. Removing RRCs from the public record also requires balancing practical considerations of workload and costs with public policy questions of who should be responsible for identifying RRCs, and how to effectively accomplish the contemplated RRC removal.

Responsible policymaking requires both public policy decisions and private efforts that are sustainable, equitable, and efficient, and that recognize the harms of exclusionary RRCs, programs, and practices. Over the years, the California Legislature has enacted and modified statutory structures in attempts to modify or eliminate RRCs, with limited effects. In 2021, partly as a result of increased individual and institutional introspection and discussions about race across our country and our state, the California Legislature again took up the task of eliminating RRCs from the public record, attempting to finally answer the questions of whether RRCs can and should be entirely removed from the public record, whether RRCs should remain as a historic reminder, and if efforts to eliminate RRCs can be accomplished in ways that are effective and efficient and will serve to advance equitable solutions for California. This article will discuss California's history of RRCs, its past legislative efforts to remove RRCs from the public record, and the recently enacted process for doing so.

II. RACIALLY RESTRICTIVE COVENANTS—AN AMERICAN TRADITION

> *"The past is a foreign country: they do things differently there."*[8]

A. Racially Restrictive Covenants Defined

RRCs are recorded documents or private agreements that "have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property."[9] A typical RRC states the exclusion explicitly, though some allow an exception for servants and employees of a White owner. The goal of RRCs was to prohibit occupancy and ownership by non-Whites, either by creating enforceable covenants that ran with the land that, if violated, could result in reversionary rights and evictions, or alternatively, by creating contractual rights that, if violated, could result in injunctions and awards of money damages.

B. Examples of Racially Restrictive Covenants

The first reported RRC is thought to have been in Brookline, Massachusetts in 1843, where subdivision deeds included provisions prohibiting the sale of homes to "any Negro or native of Ireland."[10] RRCs were often included in purchase and sale contracts and were recorded in the public records, most often by way of deed restrictions in individual grant deeds or by the recording of blanket CC&Rs by a housing developer, affecting entire neighborhoods.

In Sacramento County, the restriction for the Colleys' home and neighborhood provided:

> No persons of any race other than the White or Caucasian race shall use or occupy any structure or any lot except that this provision shall not prevent occupancy by domestic servants of a different race domiciled with an owner or tenant.[11]

Advertisements for developments referred to homes and neighborhoods as "restricted," "highly restricted," and as "secure investments,"[12] all of which signaled to potential buyers, real estate salespersons, and lenders that exclusionary RRCs were in place.

In Fresno, a RRC recorded in November 1947 provided:

> No part of said subdivision, nor any building thereon, shall be sold, conveyed or leased by Deed or otherwise, to any Negro, Chinese, Japanese, Hindu, Armenian, Malayan, Asiatic, or Native of the Turkish Empire, or any person not of the Caucasian race, or any descendent of any one or more of said persons … provided, however, that such person may be employed as a servant by a resident upon such property.[13]

In Los Angeles, a RRC recorded in 1944 stated that:

> No part of this said real property, described therein, should ever at any time be used or occupied by any person or persons not wholly of the white or Caucasian race, and also … that this restriction should be incorporated in all papers and transfers of lots or parcels of land hereinabove referred to; provided, however, that said restrictions should not prevent the employment by the owners or tenants of said real property of domestic servants or other employees who are not wholly of the white or Caucasian race; provided, further, however, that such employees shall be permitted to occupy said real property only when actively engaged in such

> employment. That said Agreement was agreed to be a covenant running with the land. That each provision in said Agreement was for the benefit for all the lots therein described.[14]

These RRCs are illustrative of the numerous RRCs that are prevalent in cities across the country. A 2019 study of deeds in the City of Philadelphia revealed nearly 4,000 RRCs in deeds from 1920 to 1932 alone.[15]

It is important to note that despite the pervasiveness of RRCs in the public record, not all developers and property owners used or relied upon RRCs. Joseph Eichler and Ned Eichler were father and son developers of approximately 11,000 homes in Northern and Southern California and deliberately did not use RRCs in their developments. In 1958, Joseph Eichler resigned from the National Association of Home Builders when the association refused to support a nondiscrimination policy. He was said to have offered to buy back homes if anyone was unhappy with their neighbors, saying "[i]f, as you claim, this will destroy property values, I could lose millions…. You should be ashamed of yourselves for wasting your time and mine with such pettiness."[16]

C. Racially Restrictive Covenants in the Context of Other Exclusionary Policies

RRCs were not the only method used to systematically exclude non-Whites from purchasing and occupying residences. Other race-based practices functioned in similarly exclusionary ways. Racial zoning ordinances and financing programs funded, insured, or underwritten by the federal government are examples of such other race-based practices and are briefly discussed here for context. These exclusionary policies, and the processes created by them, were lawful at the time and were for years upheld by the courts.

In some older areas where African Americans might have been able to purchase a home that was not subject to RRCs, or in neighborhoods that were less desirable for Whites because of the age and condition of the homes, cities were more likely to try to acquire neighborhoods using eminent domain proceedings for freeways, shopping malls, and office buildings, in the name of "urban renewal." Such forced relocation displaced African Americans and other non-Whites from the very neighborhoods that were often the only place they could live or purchase a home.[17] These practices were layered on top of unlawful, extra-judicial activities including harassment, threats, intimidation, and violence by Whites against non-Whites, particularly African Americans. In California, homes were targets of vandalism, arson, and gunfire.[18]

1. Racial Zoning Ordinances

RRCs were increasingly introduced into California real estate sales agreements and recorded documents in the early twentieth century after exclusionary zoning laws, prohibiting use and occupancy by non-Whites, were struck down in 1917 by the United States Supreme Court in *Buchanan v. Warley.*[19] This case involved a Louisville, Kentucky racial zoning ordinance, which the Court found unconstitutional as an unlawful interference with property rights by the state, in violation of the Fourteenth Amendment of the Constitution.[20] Refusing to recognize *Buchanan,* cities including Atlanta, Georgia; Richmond, Virginia; Birmingham, Alabama; West Palm Beach, Florida; and Austin, Texas continued to adopt and enforce racial zoning ordinances by claiming they involved different facts than those of *Buchanan*.[21]

In jurisdictions, including California, which followed *Buchanan,* RRCs became a way around that law and a method of denying access to homeownership by non-Whites. A 1926 United States Supreme Court decision, *Corrigan v. Buckley*,[22] may even have facilitated the use of RRCs. The Court in *Corrigan* held that the "prohibitions of the Fourteenth Amendment have reference to State action exclusively, and not to any action of private individuals,"[23] and thus that while states could not engage in race-based zoning, private individuals were not prohibited from entering into race-based agreements not to sell to others.[24]

2. Federal Housing Finance Programs

To encourage homeownership, New Deal-era agencies were established to make or guarantee loans. The Home Owners Loan Corporation ("HOLC") was established in 1933, and the Federal Housing Administration ("FHA") was established in 1934. HOLC programs refinanced existing loans, and FHA programs insured lenders making new loans that were all for the first time fully amortized and required low down payments. The HOLC program systematically identified neighborhoods that were primarily White, resulting in color-coded maps that identified areas most and least favorable for the security of the loans. This process was known as redlining, in reference to the delineation in red ink of neighborhoods that were predominantly African American. HOLC maps were later used by FHA and G.I. Bill-related Veterans Administration ("VA") loan programs, under the guise of protecting the public fisc by

decreasing the risk of insured loans and lending in only predominantly White and newer neighborhoods. FHA and VA loan programs required a review or appraisal to assess the risk of default. The appraisal was often done by local real estate salespersons and involved several factors, including the age and condition of the house, as well as the racial composition of the neighborhood.[25] Because loans in redlined neighborhoods were deemed to be at a significantly higher risk of nonpayment and loss to those agencies, these government programs often encouraged developers to use RRCs.[26] The FHA's *Underwriting Manual* even recommended the use of deed restrictions that included "prohibition of the occupancy of properties except by the race for which they are intended"[27] and gave favorable underwriting treatment to loans in developments that were subject to RRCs. These discriminatory practices facilitated a boom in homeownership by Whites, but resulted in very few favorable loans being made to African Americans, which led to the denial of homeownership to generations of non-Whites.

D. Court Decisions and Fair Housing Legislation

RRCs have been the subject of cases in the superior and appellate courts of California, other states, federal courts, and the United States Supreme Court, as well as the topic of federal and state legislation and regulations. RRCs have a complex and varied history of judicial, legislative, and regulatory actions. The following abridged version is intended as a partial, foundational primer for this article.

1. Title Guarantee & Trust Company v. Garrott

As early as 1919, California courts considered the enforceability of RRCs. In *Garrott,*[28] the plaintiff was the former owner of 127 lots subject to a RRC which stated that a property owner shall not:

> Lease or sell any portion of said premises to any person of African, Chinese, or Japanese descent, and that if at any time the said party of the second part, her heirs, assigns, or successors in interest, or those holding or claiming thereunder, shall violate any of the provisions herein named, whether directly or under some evasive guise, thereupon the title hereby granted shall revert to and be vested in the said party of the first part, its successors and assigns, and its successors and assigns shall be entitled to the immediate possession thereof, which covenants shall be construed to be covenants running with the land, but shall cease and terminate, at option of the owner for the time being, after January 1, 1925.[29]

The purchaser of one of the lots subject to this restriction was African American, and the plaintiff sought judicial enforcement of its asserted right of reversion, to return the property to the plaintiff as the remedy for the RRC violation. In what appears to have been a case of first impression in California, the Court declined to follow two earlier cases from Louisiana and Missouri, both of which held "that a condition in a deed providing for forfeiture in case the premises should be sold or leased to a negro is not an unlawful restraint upon the power of alienation."[30] The Court considered the limited nature of the RRC affecting a particular class of persons and the temporal nature of the RRC with an expiration date. After a detailed discussion of common law principles of alienation and forfeiture, and considering the rule of perpetuities, the Court commented that the case law on such partial restraints on alienation was "in a state of conflict and hopeless confusion."[31] Ultimately, the Court held that the restriction was a "condition repugnant to the fee-simple estate created by the granting clause of the deed,"[32] and was void. Because the case addressed only ownership, the door remained open for RRCs to prohibit use or occupancy. Proponents of RRCs thereafter "fought harder to maintain the legal supports for segregated and privileged space, rewriting their racial restrictions to focus on occupancy rather than ownership."[33]

2. Janss Investment Co. v. Walden

In 1925, the California Supreme Court upheld a RRC preventing use and occupancy by African Americans. In *Janss Investment Co. v. Walden,*[34] Walden, a white man, had purchased property in 1922 from the Janss Investment Company pursuant to a land installment contract, in a subdivision with a RRC providing that "no part of said real property shall ever be leased, rented, sold or conveyed to any person who is not of the white or Caucasian race, nor be used or occupied by any person who is not of the white or the Caucasian race whether grantee hereunder or any other person."[35] Walden then transferred the property to the Wallings, who were African American. The developer filed suit to enforce the RRC.

The Court upheld the RRC, referring to its 1919 determination in *Los Angeles Investment Co. v. Gary*[36] that "the condition against the occupation of the property by anyone not of the Caucasian race is valid."[37] The Court in *Janss* stated that it

> feels itself bound by the ruling reached in that case. The date of the (*Gary*) decision was December 11, 1919, since which time it has been considered as settled law in this state and accordingly followed by subdividers of property and by purchasers of town lots and the owners of real property in general. It cannot now be disturbed.[38]

In that case, the sole issue before the Court was the sufficiency of the complaint for forfeiture by the developer as against a subsequent purchaser who was non-White. The Court found the complaint stated a cause of action and reversed the sustaining of a demurrer, stating "[o]ur conclusion is that the condition against the occupation of the property by anyone not of the Caucasian race is valid, and that since a breach of this condition is alleged, the complaint states a cause of action."[39] It was apparently on this language that the *Janss* court relied.

RRCs were not limited to purchase and sale transactions and were increasingly used to exclude African Americans even from renting and leasing properties. The effect of this practice, combined with other exclusionary tools, was reported on extensively in Los Angeles by Charlotta Bass,[40] an African American newswoman, and in California and beyond by later scholars who have examined the racial wealth gap that has ensued as a result of those exclusionary practices.[41] The racial wealth gap suffered by African Americans, in the past and today, can be largely attributed to discriminatory housing practices, including RRCs that have historically excluded them, and other non-Whites, from homeownership. In the last few years, increasing scholarship has been devoted to the long-term effects of those discriminatory housing practices.[42]

3. *Shelley v. Kraemer*

When the Colleys went to purchase their home in California, the United States Supreme Court had already eliminated the judicial enforcement of RRCs. The opinion of the *Shelley* Court provided, in part, that:

> In granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand…. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color.[43]

Thereafter, though courts could no longer enforce reversions or order evictions of non-Whites who purchased or occupied a home in violation of RRCs, private parties could still use the courts to seek other remedies based in contract, such as injunctions and damages.

4. *Ming v. Horgan*

In 1958, Oliver Ming, an African American man who had been honorably discharged from the United States Army after his service in World War II, was unable to buy a home in North Highlands in Sacramento County.[44] Ming sued the developer, who had used federal housing funds to build the home, and the real estate brokers, for excluding him as a buyer because of his race. The trial court in *Ming v. Horgan* found that, as a result of FHA and VA loan underwriting guidelines, as well as the actions of the real estate developers and brokers, "Negroes have been and are turned away from original sales of most tract homes in the area despite an increase in the percentage of Negro population in the last few years and an increase in their rate of income as compared with members of the white race."[45]

By this time, Nathaniel Colley was well known as Sacramento's first African American attorney in private practice and had become a local, state, and national champion in high-profile cases for fair housing, school desegregation, and equal access to public accommodations on behalf of the National Association for the Advancement of Colored People.[46] As one of the attorneys who represented Ming during trial, in reference to the role of government lending programs in housing discrimination, Colley memorably asserted that "when one dips one's hand into the Federal Treasury, a little democracy necessarily clings to whatever is withdrawn."[47] The court agreed, awarding Ming nominal damages and ordering the defendants to end their discriminatory practices.[48]

5. *State and National Fair Housing Legislation*

In 1959, the California Legislature passed the Unruh Civil Rights Act,[49] which prohibits discrimination on grounds of "race, color, religion, ancestry, or national origin" by "all business establishments of every kind whatsoever." In two cases in 1962, the California Supreme Court held that the Unruh Civil Rights Act was valid and applied to real estate transactions[50] and to real estate brokers, notwithstanding a request by an owner retaining a broker's services for the broker to engage in discriminatory practices.[51] The California Legislature, in the same session, passed the Hawkins Act,[52] which prohibited racial discrimination in

publicly-assisted housing accommodations. In 1961, the California Legislature then enacted its initial prohibitions against discriminatory restrictive covenants affecting real property interests[53] and RRCs in real property deeds.[54]

The Hawkins Act was superseded by the passage in 1963 of the Rumford Fair Housing Act[55] ("Rumford Act"). The Rumford Act provided that "the practice of discrimination because of race, color, religion, natural origin, or ancestry . . . is declared to be against public policy" and prohibited discrimination in the sale or rental of any private dwelling containing more than four units. The State Fair Employment Practice Commission was empowered to prevent violations.[56]

In May 1963, just before the passage of the Rumford Act, the Mulkeys, an African American couple, were unable to rent an apartment in Santa Ana in Orange County, California. They asserted the landlord, Reitman, refused to rent to them because they were African American. The Mulkeys sued Reitman to challenge his refusal. During that time, the controversial initiative campaign of Proposition 14, which was overwhelmingly supported by developers, real estate trade associations, and others, was approved by California voters in 1964, repealing the Rumford Act and amending the California Constitution to provide that

> neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.[57]

In 1966, more than 18 months after the passage of Proposition 14, the Mulkeys prevailed when the California Supreme Court held that Proposition 14 was a denial of equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. The court commented in its opinion that Proposition 14 was enacted "with the clear intent to overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might circumscribe this right."[58] The United States Supreme Court affirmed in 1967.[59]

Even after these decisions, it was not until other states began to pass fair housing laws, and the passage two years later of the federal *Fair Housing Act of 1968,*[60] that RRCs and racially discriminatory practices in the sale, purchase, and financing of real estate were finally prohibited.[61]

E. Ongoing Effects of Racially Restrictive Covenants

1. Are Racially Restrictive Covenants Still Harmful?

Since RRCs are no longer legally effective or enforceable, some may say that the resources to remove or redact RRCs from the public record could be better used to advance other goals, and not all agree that RRCs should be redacted and removed rather than preserved as a reminder of past discriminatory practices. Discussions about the regulation of the movement of people of color and racial territoriality[62] lead to discussions about the continuing impacts of past legal and social structures that perpetuate past systemic oppression.[63] Where some homebuyers have been shocked by the existence of RRCs and have immediately demanded redaction under current law,[64] other potential homebuyers have decided to purchase elsewhere. Other homeowners may learn much later, after their acquisition, that their property still has the recorded RRCs in the chain of title. Whether to take action to remove or redact RRCs from a home in California is currently a matter of personal preference and individual actions; one owner may choose to do so, and another owner in the same neighborhood and subject to the same RRCs may not.

2. Marin County

The County of Marin, California has recently taken steps to educate its residents, homeowners, and prospective homeowners about Marin County's own legacy of RRCs. At the height of World War II shipbuilding in Marin City, and during a time when much of the San Francisco Bay Area was racially segregated,[65] the Marinship Corporation established a community that was racially integrated by virtue of the employment and housing of industrial workers who came from throughout the United States to meet the wartime labor shortage. However, the same racially exclusionary practices that caused neighborhoods to become segregated, including the use of RRCs, the effects of FHA and VA lending programs, the increase in exclusive homeowners associations, and other practices, resulted in the segregation of areas that had previously been integrated.[66]

In an effort to acknowledge past history and to connect the narratives of past segregation, Marin County has recently launched its Restrictive Covenant Project.[67] The program facilitates identification by homeowners of RRCs, submission of RRCs to its Community Development Agency for review, and recording of Restrictive Covenant Modifications ("RCMs"). Other components of the

program include mapping the locations of past RRCs as well as an online gallery for the display of shared stories, photos, and videos of the lived experiences of past and present residents, illustrating and discussing the impact of RRCs on their lives.[68]

III. THE CALIFORNIA LEGISLATURE STEPS UP TO THE PLATE

Beginning in 1999, the California Legislature has attempted to enact solutions to amend CC&Rs to remove RRCs from the public record. Past proposals have considered and determined who should identify the existence of RRCs; methods to accomplish partial removal on a limited basis; who is responsible for specified disclosures and documents; and whether those processes are mandatory or permissive. Those measures have enabled homeowners to learn about the existence of RRCs in the CC&Rs or prior deeds to their homes and have helped them record the applicable documents evidencing their request for the identified RRCs to be removed from the public record. Recently enacted provisions build upon those past efforts and are intended to accelerate the removal of RRCs.

A. Early Innings Score Some Successes

1. A Good Beginning.

When Senator John Burton introduced Senate Bill (SB) 1148[69] in 1999, he specified as the basis for the measure a homeowner who discovered a provision in their common interest development ("CID") governing documents, which prohibited residency by anyone other than someone of the "White Caucasian Race" with the exception of servants. When requested by the homeowner to amend the document to remove the RRC, the homeowners association refused, and the homeowner filed a fair housing complaint with the U.S. Department of Housing and Urban Development ("HUD"). In response, the homeowners association eventually amended its declaration to remove the RRCs. Using this example, Senator Burton asserted that, "at a minimum, these discriminatory declarations have an adverse impact on minorities who wish to move into certain neighborhoods" and in some cases, were used for the purpose of explicit and purposeful discrimination. Senator Burton's measure to require homeowners associations for CIDs to remove RRCs from their governing documents was initially heard in the Senate Judiciary Committee, chaired by a young Adam Schiff. SB 1148 rocketed through policy and fiscal committees, and to the Senate and Assembly Floors, without receiving any "no" votes.

With the passage of SB 1148, beginning in 2001, California prohibited RRCs in the governing documents of CIDs, including those that denied or restricted access to the development on the basis of sex, color, race, religion, ancestry, national origin, familial status, marital status, or disability. To accomplish the goals of the measure, CIDs were required to amend CC&Rs to eliminate the prohibited restrictions. The remedy of injunctive relief was included for enforcement, and the measure also required that when certain real estate professionals (including title insurance companies, real estate salespersons, and homeowners associations), provided copies of prior restrictions they must include a cover page or stamp containing a notice that, if the document contained an unlawful RRC, any such restriction violated state and federal fair housing laws and was void, and a record owner could request that the county recorder remove the restrictive covenant language pursuant to section 12956.1(c) of the Government Code.[70] The measure also made it a misdemeanor for a person, other than a county recorder, who is exempt given their ministerial role, to record a document for the express purposes of adding a RRC.

Pursuant to SB 1148, any owner of a property subject to RRCs could require the county recorder to remove a "blatant" RRC in a recorded document affecting that property. That raised concerns among county recorders because it required county recorders to first identify, and then alter, an already-recorded document. Attempting clarification to address the county recorders' concerns, Senator Burton submitted a letter to the Secretary of the Senate at the time of the passage of SB 1148 stating that it was "not the Legislature's intent that a county recorder be required to alter . . . any records on deposit in his or her office."[71]

2. Resolving Unintended Consequences

In the second year of the 1999-2000 legislative session, Assembly Bill (AB) 1493[72] was enacted to address Senator Burton's concerns about the role of county recorders in modifying RRCs. This clean-up measure created a new procedure which tasked a record owner with applying in writing to the California Department of Fair Employment and Housing ("DFEH") for a determination of whether a restrictive covenant was a RRC in violation of the fair housing laws and was therefore void. The measure required DFEH to make that determination within ninety days of the record owner's application, and if determined to be void, the DFEH would authorize that record owner to

modify the existing RRC to strike out the void RRC and to record the modified document.

3. *Further Revisions*

In an effort to streamline the modification of RRCs, AB 1926[73] enacted a procedure by which a homeowner could identify and record a Racially or Otherwise Unlawfully Restrictive Covenant Modification ("RCM") on a form provided by DFEH and permitted, but did not require, county recorders to record a RCM without a determination from DFEH.[74] This measure also modified the provisions required in the stamp or cover sheet when recorded covenants were given by specified providers.

Further revisions followed in 2005, when AB 394[75] permitted a record owner to record a RCM without having to file an application with DFEH and without having to pay any recording fees. AB 394 required county recorders to provide the form of RCM and to submit the RCM, after completion by the record owner, together with a copy of the original document containing the RRC, to county counsel for a determination of whether the subject document contained an unlawful restriction based on race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income, or ancestry. County counsel was to then review and return the documents, with its determination, to the county recorder. The county recorder was then required to record the RCM, if the determination was that the document contained an unlawful covenant, or was prohibited from recording if it did not contain an unlawful covenant.

In a departure from prior measures, a provision was added that the RCM "shall be indexed in the same manner as the original document being modified. It shall contain a recording reference to the original document in the form of a book and page or instrument number, and date of the recording."[76] Prior measures had required only a reference to the property address and description of the property of the person requesting the RCM, rather than all properties affected by the RRC that was blanket in nature. By including this provision, the RCM could have the effect of being indexed for all properties affected by the RRC, in the case of blanket subdivision restrictions, rather than just the property of the record owner recording the RCM.[77]

B. Striking Out Twice

1. *2008: AB 2204 (De La Torre)*

In 2008, Assembly Member Hector De La Torre (D–Los Angeles) introduced AB 2204, stating "the present system is underutilized and public awareness on the issue is low. The passiveness of current law allows restrictive covenants to remain in the title documents. Ignoring the problem does not mean that the problem does not exist. Therefore, this legislation will take a major step toward resolving the issue."[78] As introduced, AB 2204 would have required title insurance companies to strike any unlawful restriction from a deed or document before the property was transferred. The proposal was strongly opposed by trade associations representing title insurers and escrow officers employed by title insurers, who wrote and testified that the measure would harm consumers by causing transaction closing delays, and that title insurers and escrow officers were not lawyers who could reasonably be tasked with reading and interpreting CC&Rs to determine the existence of unlawful restrictions.[79] County recorders opposed the measure on the basis that it would "create an enormous workload" and that it failed to consider the "potential near shut-down of county recorder offices"[80] if enacted. Despite significant amendments, the measure was held in the Senate Appropriations Committee and did not pass.

2. *2009: AB 985 (De La Torre)*

With the failure of AB 2204 at the end of the 2007-2008 legislative session, Assembly Member De La Torre introduced AB 985 at the beginning of the 2009-2010 legislative session. As introduced, the measure again would have required that a title insurance company identify and strike any unlawful restrictions before the recording of a deed or other transfer document. Not surprisingly, the measure was again opposed by the same trade associations who in the prior year had advocated against AB 2204. The proposal was amended seven times between June and September 2009; upon its arrival on his desk, Governor Schwarzenegger vetoed the bill.

IV. SWINGING FOR THE FENCES IN 2021—AB 1466

1. *At Bat—AB 1466, as Introduced*

As introduced on February 19, 2021, AB 1466 (McCarty)[81] would have required title companies, in a pending real estate transaction, to identify whether certain real estate

documents provided to a consumer during that transaction contained RRCs. If the title company identified a RRC, the title company would be required to submit a RCM to facilitate redaction of the RRC. The initial proposal would have required title companies to both identify documents that might contain RRCs and to review those documents to determine if they actually contained RRCs, processes far beyond the usual and customary scope for title searching and examination. The review process alone, contemplated to take place during the real estate transaction, would likely have added weeks of delay and significant costs to nearly every real estate transaction. Trade associations representing title companies and escrow companies opposed the measure, commenting that "the point of sale, transaction-by-transaction method proposed by this bill will only add to the cost and time of the escrow process, which many buyers already believe takes too long."[82]

2. *Hits and Misses—Amendments to AB 1466*

Ongoing discussions between the office of the bill's author Assembly Member Kevin McCarty and stakeholders, including the California Escrow Association, California Land Title Association, County Recorders Association of California, and the California Association of Realtors,* resulted in significant amendments to the proposal. As substantially amended July 12, 2021,[83] AB 1466 would have created a task force under the California Department of Housing and Community Development ("HCD"), in partnership with the University of California, to prepare and submit RCMs to remove RRCs. Additionally, this amendment proposed an additional recording fee of $2 to specified documents for a period of five years, to be remitted by county recorders to a new Unlawfully Restrictive Covenant Redaction Trust Fund ("Trust Fund"), after deduction by county recorders of expenses incurred by them.[84] The Trust Fund would have provided funding for the formation and administration of the task force, which would be comprised of public interest lawyers, law schools, county recorders, real estate industry representatives, software engineers, nonprofit organizations, and activist groups who have experience with RRCs. The task force would work with HCD, the University of California, and specific universities to conduct research about RRCs, to create a centralized database and map of RRCs in California, and to expedite the redaction of RRCs.[85] The amendments would have required county counsel review and response within "a reasonable period of time, not more than three months, unless extraordinary circumstances apply"[86] from the date the RCM recording request was made, and would have required a postcard notification to be sent by the county recorder to the requester to inform them of the outcome. Those amendments would also have allowed a person acquiring an interest, but not yet a record owner, to submit a RCM request.[87]

3. *Full Count—Further Amendments to AB 1466*

AB 1466 was further amended in late August 2021,[88] as part of its passage out of the Senate Committee on Appropriations, and again in the last week of the 2021 legislative session during which the California Legislature could act. Those amendments, in print on September 3, 2021,[89] reverted many of the prior amendments, and among other things, eliminated the task force, the database and mapping concepts, and the Trust Fund. The amendments also added a definition for the term "redaction"; added county recorders to those obligated to notify record owners and prospective purchasers of the existence of RRCs if the county recorder has actual knowledge that a document it is delivering directly to that party contains a RRC; required each county recorder to establish a restrictive covenant program to remove RRCs; and specified details for the additional $2 fee county recorders may charge to offset their costs in performing the specified duties.[90]

4. *Sliding into Home—Enactment of AB 1466*

AB 1466 was signed by Governor Newsom on September 28, 2021.[91] The measure includes a delayed implementation date of July 1, 2022, to allow for the development of procedures which require: (a) a county recorder, title company, escrow company, real estate broker, or real estate agent with actual knowledge of a "possibly unlawfully restrictive covenant" to notify a record title holder or a person acquiring an ownership interest of the existence of the covenant, and the ability to have it removed through the RCM process; (b) the title company or escrow company involved in a transaction, if requested, to assist in the preparation of a RCM; and (c) each county recorder to prepare a publicly available implementation plan that describes the methods by which that county recorder will identify and redact RRCs, track and maintain RRCs that have been identified, retain and index those records, and include implementation timelines.[92]

V. HITTING FOR THE CYCLE—CALIFORNIA, CONGRESS, AND THE REST OF US

In California and much of the United States, and more than seventy years after *Shelley*, the impact of RRCs in residential property records can still be felt. Some

state legislatures have previously enacted statutes for the redaction of RRCs, some states have attempted changes but have not yet succeeded, and others are either considering or have recently enacted processes for the redaction of RRCs. California could, in coming years, act to further refine AB 1466. On a nationwide scale, there are nascent efforts in Congress, and RRCs in deeds have been recently taken up by the national Uniform Law Commission. Individuals, organizations, and community groups are engaged in discussions about RRCs, and other matters related to fair and equitable housing reforms.

A. California Could Act Further

California could consider further changes to those enacted in 2021, making clarifying changes, if needed. And if during implementation it is anticipated that additional statutory guidance or revisions are needed, the Legislature could address any unintended consequences and could change the delayed implementation date, among other things. Some specifics that the stakeholders and the California Legislature may wish to consider include whether the new, statutory definition of the term "redaction" requires further refinement; to resolve procedural questions, if any, about what it means for a title company or escrow company to "assist" with the RCM process; and whether the term "possible unlawfully restrictive covenant" is an adequate standard that is reasonably and uniformly understood.

Other matters for consideration include whether AB 1466 is sufficient to interpret the statute; if the ability of any person or entity to request a RCM without being an owner of record is a reasonable expansion of the RCM procedure or should be qualified or limited to exclude any "other person"; if the language of the measure regarding actual knowledge of a document containing a RRC, as a trigger for a mandatory duty by a specified party, should include a definition of actual knowledge for the purposes of the statute; whether county recorders alone have sufficient resources to identify and redact RRCs on the large scale contemplated by the previously proposed but rejected task force model; and if the fifty-eight different county recorders in California are able to develop and maintain redaction procedures that are consistent, predictable, effective, efficient, and easily implemented and understood by county recorders and other stakeholders, including members of the public.

Evaluation of whether further changes are needed will also be informed by the experiences of members of the public, by information from stakeholder implementation working groups, by a "best practices meeting to share concepts on implementation of this section no later than December 31, 2022, with all California county recorder offices" to be then-convened by the County Recorders Association of California, and annually thereafter until December 31, 2027, and by the results of later status reports to the California Legislature, required pursuant to the new measure, from the County Recorders Association of California. Those reports, describing the progress of each county's restrictive covenant program, are due by January 1, 2023, and January 1, 2025.

B. Congress Could Act

The *Mapping Discrimination Act,* SB S. 2549,[93] was introduced in Congress on July 29, 2021, with the goals of providing grants and resources to educational institutions

> to support: (1) efforts by educational institutions to conduct primary analysis and digitization of historic housing discrimination patterns between 1850 and 1988; (2) efforts by local governments to digitize property deeds and other historic records relating to housing discrimination; and (3) the creation of a national, publicly available database of local records of housing discrimination patterns between 1850 and 1988.[94]

The passage of a federal measure such as the *Mapping Discrimination Act* could result in the availability of additional funds, technology, and other resources that could facilitate review and redaction processes in California.

C. Uniform Laws Commission

The Uniform Laws Commission ("ULC") has recently established a new drafting committee, the Restrictive Covenants in Deeds Committee,[95] tasked with preparing a new, uniform act or model state legislation to facilitate the release or expungement of RRCs in deeds. The role of the ULC is to facilitate collaborative, non-partisan study and discussion about issues where a uniform legislative structure could provide research, drafting, and practical guidance to states considering a broad variety of issues. The involvement of the ULC in RRCs is likely to provide additional information, drafting assistance, and resources for states that are considering enacting future legislation or revising or refining existing statutes.

D. The Rest of Us

In acknowledging the history of RRCs, it is relevant and important to seek input from those who have been harmed about additional ways that efforts to mitigate and resolve past harms would be meaningful. Outside the legislative arena, individuals and organizations are also engaged in this work. In Sacramento, members of one neighborhood talked about RRCs at a recent, outdoor social gathering and resolved to work together on modifications to RRCs in their subdivision. In Southern California, social media efforts have resulted in a loose affiliation of real estate salespersons engaging with one another in discussions, presentations, and changes in practices via Facebook[96] and LinkedIn. Community land trusts, shared-equity ownership, philanthropic efforts, and other structural changes are also being considered as additional opportunities to advance racial, social, and economic equity in the homeownership space.

VI. CONCLUSION

Racially restrictive covenants in real property records remain a painful reminder of the historic exclusions of non-Whites from homeownership, from society, and from the opportunity to thrive. Throughout California and the nation, conversations are taking place about what other methods can be used to address RRCs and their effects, and how those implicate the need for changes yet to come. Proposals enacted this year, as well as some previously enacted,[97] are intended (among other objectives) to address past injustices to people of color and to study the impacts of the structural and societal problems that have resulted from practices and programs that gave rights and privileges to Whites, rights that were withheld from non-Whites and signified a zero-sum game where success for Whites was dependent upon the suppression of opportunities for non-Whites.[98] California appears to have taken some early steps in the right direction to acknowledge past and present systemic discrimination, segregation, and exclusion, and to engage in actions to bring about necessary changes. California should continue rounding the bases with its efforts for equitable, just, meaningful, and sustainable results.

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Endnotes

1 Preservation Director Report, City of Sacramento, at 6 (Dec. 10, 2020), https://www.cityofsacramento.org/-/media/DR20-110-Staff-Report---signed/M20-003_Director-Staff-Analysis-and-Recommendation-signed-BM-11-21.pdf.

2 Grant Deed, recorded April 4, 1955, Book 2803, p. 325, Official Records of Sacramento Cty., Cal.

3 Grant Deed, recorded April 1, 1955, Book 2803, p. 249, Official Records of Sacramento Cty., Cal.

4 Preservation Director Report, *supra* note 1, at 4.

5 Richard Rothstein, Color of Law: A Forgotten History of How Our Government Segregated America 199-203 (N.Y., W. W. Norton & Co., Inc. 2017).

6 Thomas Shapiro, Tatjana Meschede & Sam Osoro, *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide,* Inst. on Assets & Soc. Pol'y Res. Brief (2013), *in* Joy Milligan, *Remembering: The Constitution and Federally Funded Apartheid* (U. of Chi. L. Rev., forthcoming 2021), https://ssrn.com/abstract=3849599.

7 For the purposes of this article, the term "non-White" is used here as an umbrella term for people including African American, BIPOC (Black, Indigenous, people of color), Chinese, Japanese, and other races and nationalities, and in some cases, religions, who have been historically excluded from housing as a result of RRCs and other exclusionary practices.

8 L. P. Hartley, *The Go-Between* 17 (N.Y., N.Y. Rev. Books Classics 1953).

9 *Shelley v. Kraemer*, 334 U.S. 1, 4 (1948).

10 Rothstein, *supra* note 5, at 78.

11 Tract Restrictions, recorded Feb. 7, 1947, Document No. 5746, Official Records of Sacramento Cty., Cal.

12 *Sacramento Bee*, April 12, 1947, from the collection of Chris Lango.

13 Restrictions for the Richert Tract, recorded Nov. 6, 1947, vol. 2510, 300-01, Official Records of Fresno Cty., Cal.

14 *Barrows v. Jackson*, 346 U.S. 249, 251-52 (1953).

15 Larry Santucci, *How Prevalent Were Racially Restrictive Covenants in 20th Century Philadelphia? A New Spatial Data Set Provides Answers* (Fed. Res. Bank of Phila. Discussion Paper No. 19-5, 2019), http://dx.doi.org/10.21799/frbp.dp.2019.05.
16 Eichler Network, https://www.eichlernetwork.com/article/wonderful-world-eichler-homes.
17 Thomas W. Joo, *Urban Renewal and Sacramento's Lost Japantown*, 92 Chi-Kent L. Rev. 1005 (2018).
18 Andrea Gibbons, *City of Segregation: 100 Years of Struggle for Housing in Los Angeles* 65 (Brooklyn, Verso 2018).
19 *Buchanan v. Warley*, 245 U.S. 60 (1917).
20 *Id.* at 82.
21 Rothstein, *supra* note 5, at 46-57.
22 *Corrigan v. Buckley*, 271 U.S. 323 (1926).
23 *Id.* at 330.
24 *Id.* at 331.
25 Richard R. W. Brooks & Carol M. Rose, *Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms* 108 (Harv. College 2013).
26 John Kimble, *Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans*, Law and Soc. Inquiry 32 (2007).
27 National Housing Act of 1936, Valuation Procedure, par. 284(3)(g).
28 *Title Guarantee & Tr. Co. v. Garrott*, 42 Cal. App. 152, 153 (1919).
29 *Id.*
30 *Id.* at 155.
31 *Id.* at 158.
32 *Id.* at 165.
33 Gibbons, *supra* note 18, at 66.
34 *Janss Inv. Co. v. Walden*, 196 Cal. 753 (1925).
35 *Id.*
36 *L.A. Inv. Co. v. Gary*, 181 Cal. 680 (1919).
37 *Id.* at 684.
38 *Walden*, 196 Cal. at 755.
39 *Gary*, 181 Cal. at 684.
40 *See* Charlotta Spears Bass, *Forty Years: Memoirs from the Pages of a Newspaper* (L.A., unpublished manuscript available at S. Cal. Research Library, 1960) *in* Gibbons, *supra* note 18, at 21-23.
41 Florence Wagman Roisman, *Teaching About Inequality, Race, and Property,* 46 St. Louis U. L.J. 665 (2002).
42 *Id.*
43 *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).
44 Mark Brilliant, *The Color of America Has Changed: How Racial Diversity Shaped Civil Rights Reform in California 1941-1978*, at 144-45 (N.Y., Oxford U. Press 2010).
45 *Ming v. Horgan*, No. 97130, Memorandum of Op. (Sacramento Cty. Super. Ct. June 23, 1958).
46 Brilliant, *supra* note 44, at 141-42; *see also* Colley Civil Rights Coalition, https://colleycoalition.org/.
47 Brilliant, *supra* note 44, at 144.
48 *Ming v. Horgan*, No. 97130 (Sacramento Cty. Super. Ct.).
49 Cal. Civ. Code § 51 (1959).
50 *Burks v. Poppy Constr. Co.*, 57 Cal. 2d 463 (1962).
51 *Lee v. O'Hara,* 57 Cal. 2d 476 (1962).
52 Cal. Health & Safety §§ 35700-35741 (repealed 1963).
53 Cal. Civ. Code § 53 (enacted by Stats. 1961, ch. 1877, § 1, at 3976).
54 *Id.* § 782 (enacted by Stats. 1961, ch. 1078, § 1, at 2540).
55 Cal. Health & Safety §§ 35700-35741 (repealed 1964).
56 *Id.*
57 *Mulkey v. Reitman*, 64 Cal. 2d 529, 532 (1966).
58 *Id.* at 534-35.
59 *Reitman v. Mulkey*, 387 U.S. 369 (1967).
60 Fair Housing Act of 1968 § 804, 42 U.S.C. § 3604.
61 *Id.*
62 Nancy H. Welsh, *Racially Restrictive Covenants in the United States: A Call to Action*, Agora J. of Urban Planning and Design 130-42 (2018), https://deepblue.lib.umich.edu/handle/2027.42/143831.
63 *Id.* at 137-38.
64 Sara Clemence, *Is There Racism in the Deed to Your Home?*, N.Y. Times (Aug. 17, 2021), https://www.nytimes.com/2021/08/17/realestate/racism-home-deeds.html.
65 Eli Moore, Nicole Montejo & Nicole Mauri, *Roots, Race, & Place: A History of Racially Exclusionary Housing in the San Francisco Bay Area* (Oct. 1, 2019), https://belonging.berkeley.edu/rootsraceplace.
66 Telephone Interview with Liz Darby, Cty. of Marin (Aug. 4, 2021).
67 Restrictive Covenant Project, https://www.marincounty.org/main/restrictive-covenants-project (accessed July 1, 2021).
68 *Id.*
69 Stats. 1999, ch. 589.
70 *Id.*

71 Letter to the Secretary of the Senate, Cal. Leg. Sess. 1999-2000 (1999) (statement of Sen. John Burton), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=199920000AB1493#.
72 Stats. 2000, ch. 291.
73 Stats. 2002, ch. 803.
74 *Id.*
75 Stats 2005, ch. 297.
76 Assemb. Comm. on Hous. and Cmty. Dev., Assemb. B. 394 (Mar. 30, 2005), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200520060AB394#.
77 It is unknown whether this resulted in uniform implementation or practice throughout California's fifty-eight counties.
78 Assemb. Comm. on Judiciary, Assemb. B. 2204, at 3 (Apr. 28, 2008), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200720080AB2204#.
79 *Id*. at 4-5.
80 S. Judiciary Comm., Assemb. B. 2204, at 6 (Jun. 26, 2008), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200720080AB2204#.
81 Assemb. B. 1466 (as introduced Feb. 19, 2021), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1466.
82 Assemb. Comm. on Judiciary, Assemb. B 1466, at 6 (Apr. 10, 2021), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB1466#.
83 Assemb. B. 1466 (as amended July 12, 2021).
84 *Id.* at 13-14.
85 *Id.* at 7-8.
86 *Id.*
87 *Id.* at 6-7.
88 Assemb. B. 1466 (as amended Aug. 26, 2021).
89 *Id*. (as amended Sept. 3, 2021).
90 *Id.*
91 Stats 2021, ch. 359.
92 *Id.*
93 Mapping Discrimination Act, S. 2549, 117th Cong. (Aug. 12, 2021), https://www.govtrack.us/congress/bills/117/s2549.
94 *Id.*
95 *ULC to Appoint New Drafting and Study Committees*, Unif. Laws Comm'n (July 15, 2021), https://www.uniformlaws.org/committees/community-home/digestviewer/viewthread?MessageKey=264fdc8a-1195-4214-a973-c7e7ddbe25e5&CommunityKey=d4b8f588-4c2f-4db1-90e9-48b1184ca39a&tab=digestviewer.
96 *Deliberately Fair Housing*, https://www.facebook.com/groups/deliberatelyfairhousing.
97 Stats 2020, ch. 319.
98 Heather McGhee, The Sum of Us: What Racism Costs Everyone and How We Can Prosper Together 22, 271(N.Y., One World).

One Woman's Perspective on Increasing the Percentage of Women of Color Equity Law Partners*

Maria Antonieta Sager, Esq.

Maria Antonieta Sager, a partner with Boxer & Gerson, is fluent in Spanish and conversational in Italian. She is also the Immediate Past Chair of the California Workers' Compensation Section Executive Committee; a frequent speaker on the Spanish radio program of "Informacion es Poder" ("Information is Power") on KIQI AM1010 where she discusses workers' compensation law; and serves as a pro tem judge at the Oakland Workers' Compensation Appeals Board.

I was compelled to write this article after reading that only 2% of equity law partners at large law firms are women of color in the June 22, 2020 American Bar Association (ABA) Journal article titled *Majority of Minority Female Lawyers Consider Leaving Law; ABA Study Explains Why.* My hope is my personal and positive story will help increase this number

I often tell students I mentor from Centro Legal de la Raza's Youth Law Academy where I serve on their Advisory Committee in Oakland, California I know how lucky I am to be where I am today. I am a multi-ethnic female lawyer, as my father is Italian and my mother Salvadoran. I am also someone who overcame immigrating to the United States at age four, poverty, and being raised primarily by a single mother who did not know how to read, write, or speak English. I share these vulnerabilities to help students see that if I could beat the odds, so can they.

I am also an equity law partner at one of the largest and most respected applicant workers' compensation law firms in Oakland, California, Boxer & Gerson LLP, where I have represented injured workers for nearly twenty years.

So how did I end up where I am today given where I started out? I believe it has to do with a little bit of luck, a lot of hard work, and most importantly, joining a law firm that treats you exactly as Boxer & Gerson treated me since day one. That is, respect me, assign engaged and meaningful mentors, and create a culture that recognizes my contributions. If more law firms treated their associates and partners as my firm treated me, that 2% number would undoubtedly increase as the above study discusses.

My story began eighteen years ago, soon after becoming a lawyer, in January 2003 when I responded to Boxer & Gerson's ad looking for a Spanish-speaking workers' compensation lawyer. This resulted in an interview shortly thereafter. I was interviewed by four of the firm's senior partners—founding partners Stewart Boxer, Senator Barbara Boxer's husband, and Michael Gerson as well as Julius Young and John Harrigan. During the interview, I remember answering each of their thoughtful and respectful questions. A level of respect I receive to this very day. All these years later I can't get out of my head Stewart's comment at the end of the interview that I had his vote.

Shortly after this interview, the firm offered me an associate lawyer position, which I accepted. One of the best decisions of my life right after deciding to become a lawyer, due to my father's sound advice, and marrying my husband Larry.

Julius Young and John Harrigan were assigned as my mentors. Each had different styles, helping shape me into the applicant workers' compensation lawyer I am today. Each made me feel supported from the very beginning.

I met with Julius on a weekly basis, without fail, where we went over my list of questions in an organized and systematic fashion. It was clear we were both determined

to do all needed to help me master the nuances of the practice of workers' compensation. We met weekly for around two years.

After this initial time, Julius was always there to answer whatever questions arose, as was John. Whenever I entered their offices with a question, each gave me their undivided attention. They took their time to answer every inquiry, however simple, never embarrassing or berating me for asking the same one more than once.

Their respectfulness towards me was essential to my survival at the firm as after all, I was a young lawyer, new and insecure, trying her best not to fail. I remember those associate years fondly, knowing Julius, John, and the other partners had my back and wanted me to succeed at their firm as much as I did.

During my eight years as an associate, I did exactly what I tell students whom I mentor to do. My word was all I had, so I followed through with all I said I would do. I was genuinely as nice as possible to all who I interacted with, inside and outside of the law firm, as I knew I was building my reputation with every single action I took. I also discovered early on I was a more effective advocate for my clients if I got along with opposing counsel as much as possible. I avoided unnecessary gossip, instead focusing on representing my clients as best I could. This was not only my ethical obligation, but over the years would result in a book of business I enjoy to this very day. I also became a California Certified Legal Specialist in Workers' Compensation, as this was important to the firm and a good thing for my career. During those years I never ruminated about when I would make partner, instead trusting the firm and knowing that if I was supposed to be a partner, it would happen when the timing was right.

Sometime during my eighth year as an associate, my mentor John and founding partner Michael asked me to lunch. During our lunch, it became clear I was being considered for partnership at their firm. I still remember Mike's comments as we ate that it was important for our firm to give back to our community. Something I heard him say often. As I write this article, I see so clearly each and every decision I made related to the firm was based on this advice. Shortly after this lunch I was offered a partnership position, which I proudly accepted.

The ABA article referenced above found one reason why minority female lawyers left law firms was because they worked for firms that failed to create cultures that recognized their contributions. This was never my experience at Boxer & Gerson. To the contrary, my contributions were regularly recognized by the partners which in turn made me feel truly valued.

In particular, the partners created a culture of recognizing my contributions by doing the following: attended Centro Legal de la Raza's yearly dinners where I served on their Board of Directors; cheered me on from the audience at the Latino Symposium for the Latino Caucus of the California Applicants' Attorneys Association I helped organize; attended the ceremony where I was named an attorney consultant to the San Francisco Mexican Consulate; and congratulated me when I became the Workers' Compensation Section Representative of the California Lawyers Association Board of Representatives. They also often sent public heartfelt e-mails acknowledging my contributions, two found below.

The first e-mail was sent to the entire law firm congratulating me on becoming the Chair of the California Workers' Compensation Section Executive Committee, one of the most rewarding professional experiences due to the incredible members I served alongside.

> "Maria, you really set the standard for involvement in the comp community and public interest community! I hope you know how we all admire your efforts." Julius Young, 7/10/18

The second e-mail was sent to the partners about my involvement in the annual Oakland Mayor's Toy Drive.

> Maria - "First, not for the first time nor the last I suspect, thank you for your hard work on this over the years. Thank you for your incredible organizational skills and follow through. For your inspirational leadership as your colleagues on the Toy Drive never wanted to let you down. Most of all, thank you on behalf of the thousands of Oakland kids who you and your colleagues brought joy to. Finally, thank you for the honor and respect you brought to the firm for your devotion to this project." John Harrigan, 11/4/19

Imagine how I felt after reading each. I'm not sure I would have lasted at the firm as happy as I've been for all these years had my partners stood in silence after each of my contributions instead of recognizing me as they did.

Looking back on it all, it dawns on me I never expected the partners at my firm to make any of the above happen. Even as an associate and new partner I intuitively knew I had to do the lion's share of cultivating these relationships

and although I did, it was still a true collaboration with the partners. I knocked on doors, they opened in large part due to the firm's reputation, and when I returned to the office, the partners provided the necessary recognition.

The above is all it takes. I debated publishing this article, as I worried my advice was too simple, but then realized that what Boxer & Gerson did with me is really all it takes. If law firms want to help increase this 2% figure, do exactly as my partners have done. Respect your lawyers, assign engaged mentors, and create a culture of recognizing contributions. I know how lucky I am to be among this 2% figure, especially given my beginnings, and will forever be grateful to the firm for creating a culture resulting in the best professional experience a person could ask for.

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THE NEW ETHICS COMMITTEE OF THE CALIFORNIA LAWYERS ASSOCIATION

The California Lawyers Association has created a new Ethics Committee to help ensure CLA members stay up-to-date with their ethical obligations. This new advisory group will create educational content, comment on proposed rule changes, write advisory opinions on emerging ethical issues, and issue ethics alerts and reminders to CLA members.

40 Acres and a Mule. Broken Promises, Black Wealth Inequality, Persistence of Housing Segregation and Exclusion, and How to Right (Some of) These Wrongs[1]

Chinyere Agbai, Branden Butler, and Paula Pearlman

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Paula D. Pearlman opened her own law practice during the 2020 pandemic focusing on monitoring post-litigation settlements, providing expert witness testimony, and conducting investigations and mediations. Throughout her legal career, Pearlman has been an advocate, professor and litigator for civil rights, and is a recognized expert in disability rights.

> "[I]t is not the unintended consequences of individual choices and of otherwise well-meaning law or regulation but of unhidden public policy that explicitly segregated every metropolitan area in the United States."
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> – Richard Rothstein, *The Color of Law*

Homeownership is the largest financial asset class that most American families possess.[2] Despite this fact, significant racial inequality in wealth continues to exist and is the largest between White and Black households. In 2019, Black-White wealth inequality stood at an average of $164,000, with White households having an average net worth of $188,200 and Black families have an average net worth of just $24,100.[3] Given that home equity is the largest asset American families possess,[4] homeownership serves as a significant proportion of the contemporary racial wealth gap. However, federal housing policies throughout American history have segregated Black Americans disproportionately, subsidizing homeownership for White families, while preventing Black families from amassing wealth to the same degree. In this article, we examine the ways that historic and contemporary housing policies have contributed to the large racial wealth gap, and outline what can be done to right some of these wrongs.

PART 1: HISTORICAL ORIGINS OF REDLINING AND THE INSTITUTIONALIZATION OF RACISM IN THE MORTGAGE MARKET

While land ownership following the Civil War was technically permitted for Black Americans, states erected barriers to land ownership, confiscated property, and created sharecropping systems that intentionally hampered wealth accumulation.[5] The Thirteenth Amendment, abolishing slavery that endured for hundreds of years in the United

States, did not take steps to ensure formerly enslaved people had the legal ability to own land in the post-Civil War America. The Civil Rights Act of 1866[6] marked the first time the United States government enacted a specific civil rights law, one which enabled newly freed slaves to own land. The legislation granted all citizens the "full and equal benefit of all laws and proceedings for the security of person and property." The following provision, however, was deleted from the final version of the Civil Rights Act of 1866: "There shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of servitude."[7] Despite the Civil Rights Act of 1866, or even its successor more than 100 years later, the Fair Housing Act of 1968,[8] racial discrimination against Black Americans has dramatically impacted the opportunity to build generational and household wealth.

Federal policy has been instrumental in the creation and exacerbation of racial inequality in homeownership, and therefore in the creation and building of wealth. During the Great Depression, the federal government began to play a more active role in the private market for housing in an effort to rescue the real estate market from ruin. However, in the process, federal agencies also standardized and popularized the use of racial discrimination in the process of determining creditworthiness and property value. These New Deal and post-World War 1 era race-conscious procedures would alter the racial and spatial landscape of American neighborhoods while precluding Black Americans from building wealth through home equity to the same extent as whites for decades to come.

In an attempt to rescue lenders and borrowers from the large number of home foreclosures during the Great Depression, the Roosevelt Administration created the Homeowners Loan Corporation (HOLC) in 1933. By purchasing delinquent mortgages from banks and refinancing them with long-term, low-interest loans, the creation of the HOLC gave the federal government a more active role in the private market for housing.

Though the HOLC provided access to homeownership on more favorable terms, it also institutionalized considerations of race and racism in the mortgage lending process. To mitigate the increased risk that the federal government was taking on by becoming invested in the private housing market, the HOLC, in collaboration with local realtors and lending institutions, began ranking neighborhoods based on perceived lending risk in "Residential Security Maps." These maps ranked neighborhoods from most desirable and valuable (A or green) to in decline and least valuable (D or red). Considerations of race were included explicitly in this ranking system. Newly-constructed neighborhoods primarily populated with White, middle-class, Christian residents (due to racial and religious covenants) were often given an A rating. Conversely, neighborhoods with older, deteriorating homes *or* those populated by non-Whites were assigned a D rating, or redlined. Working-class neighborhoods with European immigrants were often assigned C or D. However, the vast majority of neighborhoods with even a few Black residents were redlined, regardless of the physical condition of homes.

HOLC's Residential Security Maps were not the first time that race and notions of creditworthiness and home value were linked in this way. This practice had been in operation in real estate since the 1920's. However, the HOLC's practice of redlining standardized and expanded the use of this kind of racial calculus on a large scale. For instance, throughout the 1930s and 1940s, lending institutions created their own procedures that were heavily influenced by the HOLC's Residential Security Maps to determine the kinds of neighborhoods where they would finance mortgages.[9] For example, appraisals were conducted by real estate agents who were bound by national ethics codes to maintain segregated neighborhoods.[10] By modeling their procedures after the HOLC's practice of redlining, banks further institutionalized racial discrimination into the mortgage market.[11]

The most far-reaching effects of the use of racial considerations in determinations of creditworthiness manifested in the adoption of the discriminatory housing practices by the Federal Housing Administration (FHA). Established in the 1937 National Housing Act, the FHA drastically reduced the amount buyers were required to put down when purchasing a house by guaranteeing loans made by private lending institutions. As a result of the FHA loan program, homebuyers were required to put 10 percent down on a home, rather than the 33 percent minimum that was required before the program. In determining which mortgages to back, the FHA produced its own racist procedures. The FHA articulated its racial considerations in the 1938 *Underwriting Manual,* which standardized property evaluation procedures throughout the United States.[12] The manual prohibited realtors, and therefore lenders and builders, from introducing "incompatible" groups into White neighborhoods in an effort to "retain stability" and maintain property values.[13] The FHA also endorsed racially-restrictive housing covenants, which prohibited white homeowners from selling their properties to non-White buyers. In creating nationwide property evaluation standards that made distance from Blacks integral to creditworthiness and high property

values, the FHA further institutionalized race and racism in the real estate market.

One important implication of the FHA inextricably linking race, creditworthiness, and property value was the way that these standards were later applied in the implementation of the 1944 GI Bill. The 1944 GI Bill provided a host of benefits to returning soldiers, including U.S. Treasury-backed home loans under the Home Loan Guaranty (HLG).[14] The HLG program permitted veterans to purchase a home without a down payment and committed the federal government to paying for the first year of interest on the mortgage at interest rates of up to 4 percent.[15] By June of 1956, the Veterans Administration (VA), the government entity guaranteeing loans under the HLG program, had guaranteed more than 4.5 million home loans, totaling $19.6 billion.[16] By providing home loans on these favorable terms, the HLG program gave many returning soldiers a boost into the middle class. The HLG program helped 42 percent of WWII veterans become homeowners by 1956, while just 34 percent of non-veterans of comparable ages owned homes.[17]

Despite its role in boosting many veterans into the middle class through homeownership, the implementation of the HLG program was riddled with racial inequality as a result of FHA appraisal standards, including redlining, and segregation with racially restrictive covenants. Following the appraisal standards first set forth by the FHA in the 1938 *Underwriting Manual* and upheld in subsequent editions, the Veterans Administration consistently insured suburban homes in homogeneously White communities, while denying urban and/or Black applicants seeking to purchase in White neighborhoods.[18] This set of federal evaluation procedures incentivized banks, which would only make home loans with FHA or VA approval, to lend to White borrowers seeking to purchase homes in homogeneously White suburban developments, because older housing stock and neighborhoods with even a small number of non-White residents were perceived to be transitioning to lower value.[19]

As a result of racial discrimination in mortgage lending, only 0.1 percent of the nearly 70,000 VA loans granted by 1950 went to non-White applicants in the New York and northeastern New Jersey metropolitan area.[20] Further underscoring the severity of the ingrained racial bias in these Federal programs was that the FHA and VA were collectively insuring half of all new mortgages nationwide.[21] Moreover, with a system in place to provide pre-approved loans for unbuilt, planned housing developments, the FHA and VA subsidized massive housing construction. Banks funded the planned housing development projects because of the loan guarantees, which included racially restrictive covenants, including for Black veterans, as well as occupational segregation covenants, i.e. Blacks were not allowed to obtain skilled construction jobs.[22] Though the FHA removed explicitly discriminatory language from its underwriting manual by 1950, the FHA and the VA continued to support practices that worked to exclude the vast majority of Black individuals from homeownership throughout the 1960s.[23]

PART 2: HOUSING DISCRIMINATION AND THE WEALTH GAP

As described above, the twentieth century saw racist policies permeate throughout society, including local and federal government restrictions concerning where White and Black Americans could live. The repercussions of these racist policies persist today.[24]

Racial Disparities in Wealth Accumulation and Equity

Black wealth is impacted by de facto and de jure racial housing discrimination, restrictive covenants, and the disparate impact of private and public housing policies due to the history of discrimination and segregation in the United States. As a result, Black families have far less wealth accumulation and home equity than White families. Black Americans were historically shut out of the housing market in a materially gainful way in the United States, resulting in devastating wealth inequality for Black America. This impact is generational for many Black Americans. Gaps in wealth between Black and White households "reveal the effects of accumulated inequality and discrimination, as well as differences in power and opportunity that can be traced back to this nation's inception."[25]

Present Conditions

The median price of a Southern California home—or price at the midpoint of all sales—hit $688,500 in September 2021, up 24% in a year, according to DQ News/CoreLogic.[26] By comparison, annual price gains averaged 9.5% over the past nine years.[27] As housing prices across California continue to rise and the housing market expands, communities of color continue to be excluded from homeownership—a crucial wealth building vehicle for families in the U.S.[28] Lack of Black household wealth and generational wealth further unlocks the present-day impact of housing discrimination.[29] On average, White individuals receive much larger inheritances on average than Black families.[30] Inheritances and other intergenerational transfers "account for more of the racial wealth gap than any other demographic and socioeconomic indicators.[31] Research finds that homeownership and housing

wealth transfer from parents to children, as children are more likely to receive financial support and obtain information about the homebuying process.[32] With limited family support, young Black adults have a lower chance of obtaining homeownership at an early age, which is strongly correlated with future wealth.[33]

Black-White inequality in homeownership rates can be traced back to the impact of housing discrimination, which has robbed Black Americans of wealth for generations. The share of Black households that own their own home has remained virtually unchanged between 1968 (41.1 percent) and today (41.2 percent). Over the same period, homeownership for White households increased 5.2 percentage points to 71.1 percent.[34] Black families are still denied mortgages at a higher rate than White families; in 2017, the gap between Black and White homeownership rates was the highest it had been in 50 years. In addition, lack of affordable housing stock makes it difficult for Black Americans to purchase homes because they have less income, wealth, and access to capital for a down payment.[35] Lack of investment in Black neighborhoods also included a lack of investment in schools. Current research demonstrates that obtaining a college education does not eliminate or substantially reduce racial or ethnic wealth gaps.[36] Despite this fact, investment in education and schools has a significant impact in other areas of social development and Black Americans are disproportionately affected since school funding is directly tied to the property tax base in each neighborhood.[37] In 2019, the median purchase price for Black homebuyers was $225,000.[38] That is $40,000 lower than for White homebuyers. With limited supply and tighter credit, many Black Americans have missed out on the opportunity to enter homeownership and build wealth.

When Black families do attain homeownership, they experience uneven results, higher costs, and less wealth accumulation. Multiple studies have found the devaluation of Black-owned homes also plays a role in limiting wealth-building opportunities.[39] In 2017 alone, according to Brookings' November 2018 study *The Devaluation of Assets in Black Neighborhoods*, that amounted to $156 billion in lost equity for homeowners in Black neighborhoods, which would have financed "more than 4.4 million Black-owned businesses."[40] Furthermore, when Black Americans purchase a home similar in all respects to other homes in the surrounding area, many fall victims to discriminatory appraisals that devalue the homes, ultimately resulting in requiring higher down payments, higher monthly payments, and less wealth upon purchase, thereby further negating generational and household wealth for Black people. Discriminatory appraisals have come to the attention of a recent New York Times report, as well as numerous cases throughout the country.[41]

Renting for Life

According to 2019 Census data, 58% of Black American households are renting, while less than 31% of White households are renting.[42] Studies show that Black renters pay more for housing than White renters for units with similar characteristics in similar neighborhoods.[43] The inability of Black Americans to move to home ownership from renting is a lasting reminder of the enduring legacy of housing discrimination in California and the United States. Finally, the impact of housing discrimination in the United States can be seen by reviewing the high numbers of Black Americans who are homeless in California. Overall, California has a relatively small Black population compared to other states. While non-Hispanic Black residents comprise more than 10% of highly populated places like New York and Texas, they make up only about 5.5% of Californians, a proportion comparable to the Black populations of Kansas or Wisconsin.

But of the more than 150,000 Californians who experience homelessness on any given night, nearly 30% are Black people.[44] Several Bay Area regions, including San Francisco and Marin County, have some of the highest rates of Black homelessness in the country. In 2017, Black people represented only 9% of the general population in Los Angeles County, yet disproportionately comprised 40% of the population experiencing homelessness.[45] The history of discrimination in housing against Black Americans is long and continues to this day. It lives on today through intentional acts, and unintentional acts, resulting in the fact that Black Americans have far less generational and household wealth. With the extremely high prices of homes where generational and household wealth is necessary to enter the market, as is currently the case in large parts of California, many Black people are shut out. The current reality is Black people are renters more than homeowners and disproportionally homeless, part of the enduring legacy of housing discrimination in the United States.

PART 3: WHAT NOW? NEXT STEPS TO RECTIFY HOUSING INEQUITIES

Policy interventions to overcome the historical, systemic, and embedded obstacles to close Black homeownership and wealth gaps must be significant and far reaching to undo and repair the government policies that created and perpetuated these systems. Any successful strategy must address systemic racial barriers and biases, and directly confront the unequal and

unfair higher costs Black households pay for homeownership. The solutions must offer deeper structural reforms given the loss of generational wealth due to historic public policies, not individual efforts. [46] Specifically, any worthy policy solution must deal with the long-standing fact that "the dramatic and persistent racial wealth gap is reinforced by the twin effects of impaired access to fair lending and lower levels of inherited wealth."[47]

Anti-discrimination fair housing laws, fair credit lending and reporting laws, community reinvestment programs, and evidence-based research all support efforts to increase wealth accumulation. Building on these essential programs, advocates, including the Urban Institute, and all district banks in the Federal Reserve System, have proposed policies to dismantle structural racism, which will accelerate wealth accumulation and equity for households of color that are critical to increasing homeownership and reducing wealth disparities.[48]

Promote Policies That Accelerate Wealth Accumulation and Equity for Households of Color

Reparations

Reparations have been, and remain, a significant tool for wealth accumulation. As federal, state, and local governments created a system that deprived Blacks of wealth accumulation, and used the legal system to perpetuate this wrongdoing, the government should be involved in redressing this injustice. Reparations are grounded in "acknowledgement, redress, and closure for a grievous injustice."[49] Acknowledgment includes a "recognition and admission of the wrong by the perpetrators or beneficiaries of the injustice."[50] In addition to acknowledgment, a successful reparations system will require that the culpable party engage in a two-step process of both a formal apology and a commitment to compensate the victims.[51]

Reparations are now seriously being considered at both the state level, with Assembly Bill 3121, and at the federal level with House Resolution 40, which will establish a commission to study and consider a national apology and proposal for reparations. 52 California Assembly Bill 3121, signed into law in September 2020, established a task force to study and develop reparation proposals for African Americans. Following public hearings on the institution of slavery and its lingering negative effects on African Americans, the task force will recommend appropriate remedies of compensation, rehabilitation, and restitution for African Americans, with a special consideration for descendants of persons enslaved in the United States. Recommendations will also include an education and outreach plan, as mandated in the law.

Taxation Reform

Income from wealth, such as inheritances, is taxed at a much lower rate when compared to traditional earnings. Well-designed inheritance taxes, reforms to capital income taxation, and even taxes on wealth directly could address historic wealth inequality.[53] Increasing the inheritance or estate tax could enhance equality of opportunity, especially if revenues were invested in programs that give low-income children a better chance at economic success. Current tax policies benefit homeowners with a mortgage interest deduction, an entitlement that allows them to deduct interest paid on home mortgages valued at $1 million or less from their taxes. Other homeowner subsidies are real estate and property tax exclusions, yet the majority of non-White families are excluded from homeowner subsidies.[54]

The Burden of Student Loan Debt

Cancelling student debt would help borrowers of color to access credit. Homeownership and higher education are two of the most primary asset-building experiences. Higher education has higher tuition, fewer public subsidies, and larger student loans, making it harder to convert higher education into economic success.[55] Many Black families do not have access to wealth, and borrow more to go to college, which in turn prevents them from being able to obtain financing to purchase a home because of higher debt-to-income ratios.[56] According to the Brookings Institute, "anti-Black policies across multiple sectors have diminished wealth-building opportunities that accelerate economic and social mobility. To ignore wealth disparities in the search for solutions to the student debt crisis is to turn a blind eye to the systemic racism that created the crisis itself."[57] An innovative plan to address student debt that Abbott, a health technology company, implemented was a Freedom 2 Save Plan, contributing a five percent (5%) "match" of an employee's annual salary to a 401(k) retirement plan if employees contributed at least two percent (2%) of their salary towards student loans, without any 401(k) contribution of their own. While private industry has begun recognizing the crushing weight of student loan debt, a state or national solution would likely bring far broader relief for Black families looking to enter the housing market.

Direct Financial Assistance

Most wealth development proposals include down payment assistance and education about homeownership. These are

important proposals, yet remain insufficient to restore lost intergenerational wealth. One innovative proposal that may have a larger effect at reducing the wealth gap is to provide financial assistance to reduce the loan to value (LTV) ratios, which would increase equity in a home at the time of purchase. This is especially relevant as Black homeowners take out higher value mortgages on properties of all values as compared to their White counterparts.[58] Models using the Home Mortgage Disclosure Act data show providing Black homeowners with funding to reach a 10% down payment threshold (on par with White households) increases home equity at the time of purchase, thereby immediately increasing wealth.[59] Studies highlight how "developing forgivable down payment assistance grants or tax credit programs that significantly reduce loan amounts and lower LTV ratios at origination would mean more home equity for new homeowners up front."[60]

Research shows risk-based pricing, limited availability of down payment assistance, higher insurance costs, and property tax burdens are all calculable factors further burdening Black homeownership.[61] In addition, high-LTV-ratio scenarios result in families taking out larger mortgages on properties that are less valuable and may not appreciate as rapidly. Low appraisals in Black communities lead to higher LTV ratios and higher risk-adjusted interest rates, thus making Black families more vulnerable during a market disruption, natural disaster, or economic downturn.[62]

Another creative solution is the use of appraisal waivers and automated valuation methods for properties that have been historically devalued or are in census tracts with depressed values. These tools, if developed properly, help address appraisal gaps that many low-cost markets experience, which in turn makes access to mortgage credit a challenge. Notwithstanding the potential value of these alternatives, any technological advances in the appraisal and home valuation system must continue to remove human bias and inputs that undervalue Black communities.[63]

Expand Access to Community Development Financial Institutions, and Other Resources for Home Loans

Community Development Financial Institutions (CDFIs) are banks, credit unions, and other local financial institutions, including venture capital funds that support small businesses and affordable housing, which also provide other financial services to distressed urban and rural communities that mainstream banks do not serve. The loans CDFIs deliver support efforts such as opening local businesses and financing for affordable housing, among other efforts—all which support the broader community. CDFIs are critical to helping Black Americans purchase homes.[64] They play an important role in entrepreneurship for women and minority-owned businesses, which are critical in building long-term wealth.[65] The Biden administration is proposing increased funding to CDFIs, as is Governor Newsom. The California Legislature has pending legislation, Senate Bill 625, to further fund and expand CDFIs.[66]

California has further attempted to increase access to Black families to own a home through the California Housing Finance Agency (CalHFA), which emphasizes a Black homeownership initiative by providing preferred loan offices and promotes building Black wealth through first mortgage incentive programs and down payment assistance.[67] Representative Maxine Waters of California, Chairwoman of the House Committee on Financial Services, is introducing a legislative housing package, which includes down payment and other financial assistance to first-time homebuyers.[68]

Akin to CDFIs, Black-owned banks have long played an important role in providing mortgage and banking services to Black customers. City First Broadway in Los Angeles, however, is now one of only two Black-owned banks remaining in California and its assets cannot begin to cover the demand for mortgages to Black homeowners.[69] Focusing on helping establish Black-owned banks in historically Black communities will help ensure access to mortgages for Black families.

FinTech and Venture Capital

An emerging innovation in financing Black homeownership and wealth generation is through venture capital and financial technology (FinTech) companies. The National Community Reinvestment Coalition (NCRC) and its Innovation Council for Financial Inclusion are consumer advocates and financial service companies sharing an interest in a fair lending regulatory framework through partnering with FinTech firms to innovate financial instruments to increase Black homeownership and wealth acquisition through innovative financial tools.[70] Financial services and FinTech companies are reaching new consumers that traditional banks cannot service or have historically not served by providing new loan instruments and credit to people with limited credit histories.[71] One of the primary means of addressing historic problems such as redlining and creditworthiness through FinTech firms is using alternative credit data such as rental payment history and cash-flow based underwriting instead of FICO scores.[72]

In addition, strengthening the Consumer Financial Protection Bureau, along with enforcing housing

discrimination statutes, to oversee financial institutions and combating predatory lending and exploitative financial service practices would further eliminate systemic racial inequality in mortgage markets.[73]

Eliminate Single Family Zoning Requirements and Proxies

Numerous policies—ranging from single family zoning, height restrictions, minimum parking spaces, garage requirements, and minimum lot sizes per residence preserve neighborhood characteristics that retain the spatial segregation effects of historical redlining and discrimination.[74] Changing these requirements will increase housing accessibility and supply and will work towards eliminating poverty due to the high cost of housing.[75] The federal government is proposing changes to encourage the removal of these policies in the Build Back Better initiative.[76]

California has already enacted several such policies, including Senate Bill 9, which allows up to four units of housing on a single-family lot, and Senate Bill 10, which permits local governments to zone any parcel of land, including a single-family lot, to accommodate a building of 10 units or less.[77]

Since 2016, California has encouraged building Accessory Dwelling Units (ADUs), and new legislation is eliminating local opposition.[78] While ADUs are more affordable than traditional single-family homes, they will not solve homeownership access issues because they are often used for rental housing. Moreover, too few ADUs are being built to meet demand.[79] However, ADUs are increasingly viewed as a means to increase small-scale, multi-unit housing stock, known as the "missing middle."[80] ADUs can be built anywhere, including next to single-family zoned areas, having the effect of changing the composition of a neighborhood without a zoning change. "Missing middle housing" refers to small-scale, multiunit housing such as duplexes, fourplexes, bungalow courts, courtyard apartments, townhomes, multiplexes, and mansion apartments that are designed to be seamlessly integrated into residential neighborhoods.[81] This is a promising zoning change that has yet to be fully explored.

Governor Newsom's Comeback California Plan includes a $10.3 billion affordable housing package, with funding to further ADUs and to spur affordable housing development.[82] The federal government recently announced funding initiatives to increase affordable housing, build Black wealth, and reduce barriers to affordable housing production.[83] A potential use of these allocated state funds, in conjunction with expected federal funding, is to enhance CalHome, a program providing grants to public agencies and nonprofit developers, to enable low and very low-income households to become or remain homeowners, develop affordable small to midsize homes with buy-in and stay-in opportunities, and build and rehabilitate homes for low and middle income homebuyers.[84]

Affirmatively Furthering Fair Housing

Robust enforcement of federal and state fair housing laws is essential to eliminating structural segregation and increasing dispersed, affordable, and multi-family housing. The negative residual effects of segregation are well-documented on health, education, and wealth disparities.[85] But research demonstrates investments in schooling, safety, and housing quality raise the eventual adult socioeconomic outcome of children, hence improvements in intergenerational wealth.[86]

California recently expanded its commitment to eliminating the historical effects of segregation through a broadening of its obligations under the Fair Housing Act's Affirmatively Furthering Fair Housing (AFFH) obligations through the Department of Housing and Community Development (HCD).[87] State law requires cities and counties to develop plans to meet the housing needs in their communities as part of their general plan, which is their general comprehensive plan for growth covering seven elements: land use, transportation, conservation, noise, open space, safety, and housing.[88] This is a huge local undertaking requiring public input, assessments of local needs, and a vision for the future.[89] As part of this new undertaking, the approval of all elements related to housing must now include equity considerations and was codified in law.

In 2018, the California State Legislature passed Assembly Bill (AB) 686 to expand upon the fair housing requirements and protections outlined in the Fair Employment and Housing Act (FEHA). All state and local public agencies must explicitly address, combat, and relieve disparities resulting from past patterns of segregation to foster more inclusive communities, including in all housing elements due for revision on or after January 1, 2021.

AB 686 was specifically passed after the federal government rolled back the AFFH requirements in a Department of Housing and Community Development's (HUD) Affirmatively Furthering Fair Housing Rule, which has since been subject to a January 26, 2021 Executive Order to reexamine and revise as necessary.[90] California affirmed through AB 686 to protect and expand AFFH requirements, regardless of future federal actions.[91] AB 686 proactively applies the obligation to affirmatively further fair housing

to all public agencies in California. Public agencies must now examine existing and future policies, plans, programs, rules, practices, and related activities and make proactive changes to promote more inclusive communities.[92] Additionally, Government Code section 65008 prohibits discrimination against affordable housing based on financing or occupancy by low-and moderate-income households.[93] Lastly, HCD's enforcement authority was extended to ensure compliance with these housing goals through administrative orders, hearings, and ultimately referral to the Office of the Attorney General for violations of these provisions.[94]

CONCLUSION

As a society, it is our shared goal to promote common values of equality of human dignity and equality of opportunity. By standardizing the use of race in determinations of creditworthiness and property value, interfering with property ownership, instituting racially restricted covenants, restricting employment and professional opportunities, the federal government institutionalized racial discrimination in the mortgage market. The effects of this historic discrimination, which subsidized homes for White families and neglected to do the same for Black families for decades, have continued into the present day and remain a constraint on the ability of Black families to build wealth through home equity. By examining our history, our values, and our actions, we can reckon with the effects of these policies and implement long overdue change. Reparations to redress systemic racism, tax reform to rectify historic tax privilege, reengineering the mortgage industry and financing rules, ensuring access to down payments and fair credit and appraisals, and zealous enforcement of anti-discrimination statutes in housing, credit, and finance are essential to ensure access to Black wealth acquisition.

As Representative John Lewis said atop the Edmund Pettus Bridge in Selma, Alabama, on March 1, 2020, commemorating Bloody Sunday, March 7, 1965, "Get in good trouble, necessary trouble, and help redeem the soul of America."

REFERENCES

Glenn C. Altschuler & Stuart M. Blumin, The GI Bill: A New Deal for Veterans (Oxford, N.Y., Oxford U. Press 2009).

Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances, FEDS Notes (Wash., Bd. of Governors of the Fed. Reserve System, Sept. 28, 2020), https://doi.org/10.17016/2380-7172.2797.

Lizabeth Cohen, A Consumers' Republic: The Politics of Mass Consumption in Postwar America (N.Y., N.Y., Vintage Books 2003).

Dep't of Veterans Affairs, Annual Report for Fiscal Year Ending June 30, 1956 (Wash., D.C. 1956), https://www.va.gov/vetdata/docs/FY1956.pdf.

David Freund, Colored Property: State Policy and White Racial Politics in Suburban America (Chi., U. of Chi. Press 2007).

David Freund, *Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America*, The New Suburban History, Historical Studies of Urban America 11-32 (Kevin Michael Kruse & Thomas J. Sugrue, eds., Chi., U. of Chi. Press 2006).

Kathleen Frydl, The GI Bill (Cambridge, N.Y., Cambridge U. Press 2009).

Kenneth T. Jackson, Crabgrass Frontier: The Suburbanization of the United States 26 (N.Y., N.Y., Oxford U. Press 1985).

John Kimble, *Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans*, 32 Law & Social Inquiry, no. 2, 399-434 (2007).

George Lipsitz, How Racism Takes Place (Phila., Temple U. Press 2011).

Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass (Cambridge, Mass., Harv. U. Press, 10th ed. 1993).

Melvin L. Oliver & Thomas M. Shapiro, Black Wealth, White Wealth: A New Perspective on Racial Inequality (N.Y., N.Y., Routledge, 10th anniversary ed. 2006).

U.S. Dep't of Veterans Affairs, GI Bill - 75th Anniversary Celebration - VA Home Loans (June 18, 2019), https://benefits.va.gov/HOMELOANS/gibill_75.asp.

Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America (N.Y., N.Y., Liveright Publishing Corp. 2017).

Endnotes

1 In January 1865, Gen. William Tecumseh Sherman issued Special Field Order 15, providing for the distribution of hundreds of thousands of acres of former Confederate land issued in 40-acre tracts to newly freed people along coastal South Carolina and Georgia. But just four months later, in April, Lincoln was assassinated. Andrew Johnson, the racist, pro-Southern vice president who took over, immediately reneged upon this promise of 40 acres, overturning Sherman's order. Most white Americans felt that black Americans should be grateful for their freedom, that the bloody Civil War had absolved any debt. The government confiscated the land from the few formerly enslaved families who had started to eke out a life away from the white whip and gave it back to the traitors. And with that, the only real effort this nation ever made to compensate black Americans for 250 years of chattel slavery ended. Nikole Hannah-Jones, *What is Owed*, N.Y. Times Mag., June 30, 2020, https://nyti.ms/3GetQua.

2 Edward N. Wolff, *Household Wealth Trends in the United States, 1962 to 2013: What Happened Over the Great Recession?*, RSF: The Russell Sage Found. J. of the Social Sciences 2(6), 24-43, https://doi.org/10.7758/rsf.2016.2.6.02.

3 Neil Bhutta, et al., Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances, FEDS Notes (Wash., D.C., Bd. of Governors of the Fed. Res. Sys. 2020), https://doi.org/10.17016/2380-7172.2797.

4 US Census Bureau, Net Worth of Households: 2015 (Wash., D.C., U.S. Census Bureau 2019), https://www.census.gov/library/publications/2019/demo/p70br-164.html.

5 Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 154-55 (N.Y., N.Y., Liveright Pub. Corp. 2017).

6 Pub. L. No. 39-26, 14 Stat. 27.

7 Andrew Kull, The Color-Blind Constitution 75-78 (Harv. U. Press 1994).

8 42 U.S.C. 3601.

9 Kenneth T. Jackson, Crabgrass Frontier: The Suburbanization of the United States 203 (N.Y., N.Y., Oxford U. Press 1985).

10 Rothstein, *supra* note 5, at 64.

11 Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, Mass., Harv. U. Press, 10th ed. 1993).

12 David Freund, Colored Property: State Policy and White Racial Politics in Suburban America 140 (Chi., U. of Chi. Press 2007).

13 David Freund, *Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America*, The New Suburban History, Historical Studies of Urban America 16 (Kevin Michael Kruse & Thomas J. Sugrue, eds., Chi., U. of Chi. Press 2006); Melvin L. Oliver & Thomas M. Shapiro, Black Wealth, White Wealth: A New Perspective on Racial Inequality (N.Y., N.Y., Routledge, 10th anniversary ed. 2006).

14 Glenn C. Altschuler & Stuart M. Blumin, The GI Bill: A New Deal for Veterans (Oxford, N.Y., Oxford U. Press 2009).

15 Kathleen Frydl, The GI Bill (Cambridge, N.Y., Cambridge U. Press 2009); U.S. Dep't of Veterans Affairs, GI Bill - 75th Anniversary Celebration - VA Home Loans (June 18, 2019), https://benefits.va.gov/HOMELOANS/gibill_75.asp.

16 Dep't of Veterans Affairs, Annual Report for Fiscal Year Ending June 30, 1956, at 265 (Wash., D.C. 1956), https://www.va.gov/vetdata/docs/FY1956.pdf.

17 Lizabeth Cohen, A Consumers' Republic: The Politics of Mass Consumption in Postwar America 141 (N.Y., N.Y., Vintage Books 2003).

18 Freund, *Colored Property*, *supra* note 12, at 100, 181; John Kimble, *Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans*, 32 Law & Social Inquiry, no. 2, 399-434 (2007).

19 Rothstein, *supra* note 5; Freund, *Colored Property*, *supra* note 12.

20 Cohen, *supra* note 17, at 457.

21 Rothstein, *supra* note 5, at 70.

22 Cohen, *supra* note 17, at 457.

23 Freund, *Marketing the Free Market*, *supra* note 13; George Lipsitz, How Racism Takes Place 31 (Phila., Temple U. Press 2011).

24 There is a myriad of research supporting this conclusion. William R Emmons, *Wealth Inequality Grows Within Races and Ethnicities*, Fed. Res. Bank of St. Louis (Oct. 2, 2017), https://www.stlouisfed.org/on-the-economy/2017/october/wealth-inequality-grows-races-ethnicities; Paul A. Jargowsky, *What Would a New Kerner*

Commission Conclude Today?, Stan. Society on Poverty and Inequality, https://inequality.stanford.edu/sites/default/files/Pathways_Winter2019_Kerner.pdf/.

25 Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-White Wealth Gap,* https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/.

26 https://www.ocregister.com/2021/10/20/southern-california-home-prices-hit-record-high-despite-slowing-sales/.

27 https://www.ocregister.com/2021/07/20/southern-california-home-prices-set-fifth-straight-record-as-sales-soar/.

28 Rawan Elhalaby, *Home Lending to Communities of Color in California*, Greenlining Inst. (2020), https://greenlining.org/publications/2020/home-lending-to-communities-of-color-in-california/.

29 McIntosh, Moss, Nunn & Shambaugh, *supra* note 25.

30 Jeffrey P. Thompson & Gustavo A. Suarez, Exploring the Racial Wealth Gap Using the Survey of Consumer Finances, Finance and Economics Discussion Series 2015-076 (Wash., Bd. of Governors of the Fed. Res. Sys. 2015), http://dx.doi.org/10.17016/FEDS.2015.076.

31 McIntosh, Moss, Nunn & Shambaugh, *supra* note 25.

32 Jung Hyun Choi, Jun Zhu & Laurie Goodman, *The State of Millennial Homeownership*, Housing Matters (2018), https://housingmatters.urban.org/articles/state-millennial-homeownership.

33 Jung Hyun Choi & Laurie Goodman, *What Explains the Homeownership Gap Between Black and White Young Adults?* (2018), https://www.urban.org/urban-wire/what-explains-homeownership-gap-between-black-and-white-young-adults.

34 Homeownership rate data is from Laurie Goodman, Jun Zhu, and Rolf Pendall, *Are Gains in Black Homeownership History?* and accompanying downloadable spreadsheet, Urban Inst., Feb. 15, 2017. The 1968 figure is estimated as 0.2 times the figure for 1960 and 0.8 times the figure for 1970. Most recent data refer to 2015. *50 Years After the Kerner Commission: African Americans Are Better Off in Many Ways but Are Still Disadvantaged by Racial Inequality*, Econ. Pol'y Inst., epi.org, https://www.epi.org/publication/50-years-after-the-kerner-commission/#_note9.

35 Alanna McCargo & Jung Hyun Choi, *Closing the Gaps, Building Black Wealth Through Homeownership* 17 (Nov. 2020, updated Dec. 2020), https://www.urban.org/sites/default/files/publication/103267/closing-the-gaps-building-black-wealth-through-homeownership_1.pdf/.

36 Lowell R. Ricketts, *College Is Not Enough: Higher Education Does Not Eliminate Racial and Ethnic Wealth Gaps*, Fed. Res. Bank of St. Louis Rev. 7-39 (First Quarter 2017), https://doi.org/10.20955/r.2017.7-39.

37 https://www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem/.

38 McCargo & Choi, *supra* note 35.

39 Andre Perry, Jonathan Rothwell & David Harshbarger, *The Devaluation of Assets In Black Neighborhoods, The Case of Residential Property* (Nov. 2018), https://www.brookings.edu/wp-content/uploads/2018/11/2018.11_Brookings-Metro_Devaluation-Assets-Black-Neighborhoods_final.pdf/; Junia Howell & Elizabeth Korver-Glenn, *The Increasing Effect of Neighborhood Racial Composition on Housing Values, 1980-2015*, 68 Social Problems, no. 4, 1051-71 (Nov. 2021), https://doi.org/10.1093/socpro/spaa033; Dan Immergluck, Stephanie Earl & Allison Powell, Black Homebuying After the Crisis: Appreciation Patterns in Fifteen Large Metropolitan Areas, 18 City & Cmty, no. 3, 983-1002 (Sept. 2019), https://doi.org/10.1111/cico.12436.

40 Brentin Mock, Bloomberg City Law, *What It Will Take to Close the Race Gap in Home Appraisals*, March 3, 2021, https://www.bloomberg.com/news/articles/2021-03-03/appraisers-acknowledge-bias-in-home-valuations; Andre M. Perry, Jonathan Rothwell & David Harshbarger, *The Devaluation of Assets in Black Neighborhoods: The Case of Residential Property* (2018), https://www.brookings.edu/research/devaluation-of-assets-in-black-neighborhoods/.

41 Debra Kamin, *Black Homeowners Face Discrimination in Appraisals*, N.Y. Times (Aug. 25, 2020, updated Aug. 27, 2020), https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html; McCargo & Choi, *Closing the Gaps, supra* note 35; Jung Hyun Choi, Alanna McCargo, Michael Neal, Laurie Goodman & Caitlin Young, *Explaining the Black-White Homeownership Gap, A Closer Look at Disparities Across Local Markets*, https://www.urban.org/research/publication/explaining-black-white-homeownership-gap-closer-look-disparities-across-local-markets.

42 U.S. Census Bureau, Demographic Characteristics for Occupied Housing Units, 2019 American Community Survey, https://data.census.gov/cedsci/table?q=Owner%2FRenter%20%28Householder%29%20Characteristics&tid=ACSST1Y2019.S2502.

43 Sophia Weeden, *Black and Hispanic Renters Face the Greatest Threat of Eviction in Pandemic* (2021), https://www.jchs.harvard.edu/blog/black-and-hispanic-renters-face-greatest-threat-eviction-pandemic/.

44 https://calmatters.org/explainers/californias-homelessness-crisis-explained/.

45 Report and Recommendations of the Ad Hoc Committee on Black People Experiencing Homelessness, L.A. Homeless Servs. Authority (Dec. 2018), https://www.lahsa.org/documents?id=2823-report-and-recommendations-of-the-ad-hoc-committee-on-black-people-experiencing-homelessness.

46 McCargo & Choi, *Closing the Gaps, supra* note 35.

47 Darrick Hamilton & Christopher Famighetti, *State of the Union, Housing,* Stan. Society on Poverty and Inequality, https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2019_Housing.pdf.

48 McCargo & Choi, *Closing the Gaps, supra* note 35. All 12 district banks of the Federal Reserve System partnered to highlight the implications of racism in the United States and identify solutions. The banks host virtual events and feature research, working papers, reports, and policy proposals. The research highlights the systemic and structural nature of wealth inequality, rather than individual choices or educational attainment. https://www.minneapolisfed.org/policy/racism-and-the-economy.

49 William A. Darity Jr. & A. Kirsten Mullen, From Here to Equality, Reparations for Black Americans in the Twenty-First Century (Chapel Hill, N.C., U. of N.C. Press 2020). Darity has been studying and advocating reparations for 30 years and helps answer the questions about who should receive reparations and how a program would work.

> Reparations are not about punishing white Americans, and white Americans are not the ones who would pay for them. It does not matter if your ancestors engaged in slavery or if you just immigrated here two weeks ago. Reparations are a societal obligation in a nation where our Constitution sanctioned slavery, Congress passed laws protecting it and our federal government initiated, condoned and practiced legal racial segregation and discrimination against black Americans until half a century ago. And so it is the federal government that pays. […]
>
> Reparations would go to any person who has documentation that he or she identified as a black person for at least 10 years before the beginning of any reparations process and can trace at least one ancestor back to American slavery. Reparations should include a commitment to vigorously enforcing existing civil rights prohibitions against housing, educational and employment discrimination, as well as targeted investments in government-constructed segregated black communities and the segregated schools that serve a disproportionate number of black children. But critically, reparations must include individual cash payments to descendants of the enslaved in order to close the wealth gap.

Nikole Hannah-Jones, *It Is Time for Reparations*, N.Y. Times Mag., June 30, 2020, https://nyti.ms/3DtKEfb.

50 Darity & Mullen, *supra* note 49, at 2.

51 There are multiple instances of reparations, or redress to victims including Germany paying reparations to Israel and Holocaust survivors; the US government payments to Japanese Americans who were incarcerated during World War II; payments to families who lost loved ones during the 9-11 terrorist attacks (47 from California); payments to victims of the Boston Marathon bombings; and payments to those Americans taken hostage in Iran. Specifically, approximately 120,000 Japanese Americans were interned in concentration camps in World War II; with the passage of the Civil Liberties Act of 1988, more than 82,219 Japanese Americans received the uniform award of $20,000.

52 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3121 (enacted on Sept. 30, 2020, last visited Aug. 12, 2021), https://www.congress.gov/bill/117th-congress/house-bill/40.

53 Lily Batchelder, *Leveling the Playing Field Between Inherited Income and Income from Work Through an Inheritance Tax*, The Hamilton Project (Jan. 28, 2020), https://www.hamiltonproject.org/papers/leveling_the_playing_field_between_inherited_income_and_income_from_work_through_an_inheritance_tax; Natasha Sarin, Lawrence Summers & Joe Kupferberg, *Tackling the Tax Code: Efficient and Equitable Ways to Raise Revenue*, The Hamilton Project (Jan. 28, 2020), https://www.hamiltonproject.org/papers/tax_reform_for_progressivity_a_pragmatic_approach.

54 Matthew Desmond, *State of the Union, Housing*, Stan. Soc'y on Poverty and Inequality, https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2017_housing.pdf.

55 Fenaba R. Addo & Reid Cramer, *The Generational Wealth Gap,* The Future of Building Wealth, Brief Essays on the Best Ideas to Build Wealth—for Everyone 38-43 (Ray Boshara & Ida Rademacher, eds., Fed. Res. Bank of St. Louis, The Aspen Inst. 2021), https://futureofwealth.org/the-book/.

56 https://www.nerdwallet.com/article/mortgages/the-black-homeownership-gap-lisa-rice.

57 Andre M. Perry, Marshall Steinbaum & Carl Romer, *Student Loans, the Divide, and Why We Need Full Student Debt Cancellation*, Brookings (June 23, 2021), https://www.brookings.edu/research/student-loans-the-racial-wealth-divide-and-why-we-need-full-student-debt-cancellation/; https://www.brookings.edu/essay/student-debt-cancellation-should-consider-wealth-not-income/.

58 Raheem Hanifa, *High-Income Black Homeowners Receive Higher Interest Rates than Low-Income White Homeowners* (Feb. 2021), https://www.jchs.harvard.edu/blog/high-income-black-homeowners-receive-higher-interest-rates-low-income-white-homeowners/. Black homebuyers buy less expensive first homes with more debt than white homebuyers. Jung Hyun Choi, Alanna McCargo & Laurie Goodman *Three Differences Between Black and White Homeownership That Add to the Housing Wealth Gap*, https://www.urban.org/urban-wire/three-differences-between-black-and-white-homeownership-add-housing-wealth-gap.

59 Jung Hyun Choi, Alanna McCargo & Laurie Goodman, *Three Differences Between Black and White Homeownership That Add to the Housing Wealth Gap*, https://www.urban.org/urban-wire/three-differences-between-black-and-white-homeownership-add-housing-wealth-gap.

60 *Id.*

61 Michelle Aronowitz, Edward L. Golding & Jung Hyun Choi, *The Unequal Costs of Black Homeownership* (2020), https://gcfp.mit.edu/wp-content/uploads/2020/10/Mortgage-Cost-for-Black-Homeowners-10.1.pdf. The article demonstrates that Black homeowners on average will pay $67,320 more for their houses because each month Black homeowners pay slightly higher mortgage rates, mortgage insurance premiums, and property taxes. If these extra costs paid by African Americans are eliminated, the $130,000 Black-White gap in liquid savings at retirement would drop by half.

62 *Id.* at 8, fn. 18. Research by Andre M. Perry, Jonathan Rothwell, and David Harshbarger (2018) in *The Devaluation of Assets in Black Neighborhoods: The Case of Residential Property,* assesses and attempts to quantify the costs of devaluation on majority-Black neighborhoods. https://www.brookings.edu/wp-content/uploads/2018/11/2018.11_Brookings-Metro_Devaluation-Assets-Black-Neighborhoods_final.pdf. Jonathan Rothwell & Andre M. Perry, *Biased Appraisals and the Devaluation of Housing in Black Neighborhoods*, Brookings (Nov. 17, 2021), reflects current analysis to show the appraisal industry in contributing to the devaluation of Black neighborhoods. https://www.brookings.edu/research/biased-appraisals-and-the-devaluation-of-housing-in-black-neighborhoods/.

63 Michael Neal & Peter J. Mattingly, *Increasing Diversity in the Appraisal Profession Combined with Short-Term Solutions Can Help Address Valuation Bias for Homeowners of Color*, https://www.urban.org/urban-wire/increasing-diversity-appraisal-profession-combined-short-term-solutions-can-help-address-valuation-bias-homeowners-color.

64 Angela Hanks, Christian E. Weller & Danyelle Solomon, *Systematic Inequality, How America's Structural Racism Helped Create the Black-White Wealth Gap* (Ctr. for American Progress 2018), https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality/; https://www.cdfifund.gov/sites/cdfi/files/documents/cdfi_infographic_v08a.pdf.

65 Jorge Sun, *How CDFIs Can Maximize Their Impact On the Country's Economic Recovery,* https://www.forbes.com/sites/forbesfinancecouncil/2021/05/20/how-cdfis-can-maximize-their-impact-on-the-countrys-economic-recovery/?sh=6e9defe81e54.

66 https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=202120220SB625.

67 https://www.calhfa.ca.gov/community/buildingblackwealth.htm.

68 https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=408154.

69 https://www.investopedia.com/black-owned-banks-by-state-5024944. OneUnited Bank is a Boston based national online black owned bank with a California presence. https://www.branchspot.com/oneunited-bank/.

70 NCRC's President and CEO, Jesse Van Tol is a member of the Federal Reserve Board's Community Advisory

Council formed "to offer diverse perspectives on the economic circumstances and financial services needs of consumers and communities, with a particular focus on the concerns of low-and moderate-income populations," https://www.federalreserve.gov/aboutthefed/cac.htm/.

71 Jin Huang, Michael Sherraden & Margaret S. Sherraden, *We Have Clean Water and Clean Air: Why Not Clean Finance, Too? A Vision for Inclusion and Equity*, The Future of Building Wealth, Brief Essays on the Best Ideas to Build Wealth—For Everyone 83-89 (Ray Boshara & Ida Rademacher, eds., Fed. Res. Bank of St. Louis & the Aspen Inst. 2021).

72 https://comptroller.nyc.gov/reports/making-rent-count/rent-and-credit-report/; Arjan Schütte & Mickias Hailu, *More Money, Fewer Problems*, http://corevc.com/wp-content/uploads/2021/04/More-Money-Fewer-Problems-CoreVC.pdf; https://arjanschutte.medium.com/?p=33da30b8252e (Arjan Schütte is a member of the Federal Reserve Board's Community Advisory Council); https://www.federalreserve.gov/aboutthefed/cac.htm.

73 Christian E. Weller, Connor Maxwell & Danyelle Solomon, *Simulating How Progressive Proposals Affect the Racial Wealth Gap*, Ctr. for American Progress, Aug. 7, 2019, https://www.americanprogress.org/issues/race/reports/2019/08/07/473117/simulating-progressive-proposals-affect-racial-wealth-gap/; The U.S. Justice Department launched a Combatting Redlining Initiative to ensure federal fair lending and housing laws are vigorously enforced. https://www.justice.gov/opa/pr/justice-department-announces-new-initiative-combat-redlining.

74 Stephen Menendian, Samir Gambhir, Karina French & Arthur Gailes, *Single-Family Zoning in the San Francisco Bay Area, Characteristics of Exclusionary Communities*, Othering and Belonging Inst. (Berkeley, Cal. 2020), https://belonging.berkeley.edu/single-family-zoning-san-francisco-bay-area.

75 Karina French, *Decoding Zoning, Regulation and Reform in California*, Othering and Belonging Institute (Berkeley, Cal. 2021), https://belonging.berkeley.edu/decoding-zoning; Jerusalem Demsas, *How the US Made Affordable Housing Illegal*, Vox, Aug. 16, 2021, https://youtu.be/0Flsg_mzG-M. California has one of the highest poverty rates in the U.S. when balancing family resources against housing costs and other basic needs like food and clothing. While state and federal measures, such as rent relief and a moratorium on evictions, have assisted families in the short run, the high cost of housing increases the challenge of alleviating poverty in the longer term. Patricia Malagon & Caroline Danielson, *California's High Housing Costs Increase Poverty*, Pub. Pol'y Inst. of Cal. (Aug. 13, 2021), https://www.ppic.org/blog/californias-high-housing-costs-increase-poverty/.

76 For decades, exclusionary zoning laws—like minimum lot sizes, mandatory parking requirements, and prohibitions on multifamily housing—have inflated housing and construction costs and locked families out of areas with more opportunities. President Biden's plan seeks to help jurisdictions reduce barriers to producing affordable housing and expand housing choices for people with low or moderate incomes. The Build Back Better Plan will create an incentive program that awards flexible and attractive funding to jurisdictions that take concrete steps to reduce barriers to affordable housing production. https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/22/fact-sheet-how-the-build-back-better-plan-will-create-a-better-future-for-young-americans/.

77 S.B. 9; S.B. 10; *To Save California, Sacrifice Single-family Zoning*, L.A. Times, Aug. 22, 2021, https://www.latimes.com/opinion/story/2021-08-22/editorial-sb9-sb10-california-housing; Senate Bill 1120 introduced by Senators Atkins, Caballero, Rubio, and Wiener, 2019-2020 Legislative Session, died on the inactive list in November 2020, provided for the creation of accessory dwelling units by local ordinance, or, if a local agency has not adopted an ordinance, by ministerial approval, in accordance with specified standards and conditions. https://ternercenter.berkeley.edu/wp-content/uploads/2020/12/Single-Family_Zoning_Reform_An_Analysis_of_SB_1120.pdf.

78 California Department of Housing & Community Development administers the Accessory Dwelling Unit Program. In Government Code section 65852.150, the California Legislature found and declared that, among other things, allowing accessory dwelling units (ADUs) in zones that allow single-family and multifamily uses provides additional rental housing, and is an essential component in addressing California's housing needs. Changes to ADU laws effective January 1, 2021, further reduce barriers, better streamline approval processes, and expand capacity to accommodate the development of ADUs and junior accessory dwelling

units (JADUs), https://www.hcd.ca.gov/policy-research/accessorydwellingunits.shtml; Accessory Dwelling Unit Handbook, https://www.hcd.ca.gov/policy-research/docs/adu_december_2020_handbook.pdf.

79 But most ADUs in fact serve as rental housing. A forthcoming report by Karen Chapple, Professor and Chair for the Department of City and Regional Planning at University of California, Berkeley, based on a survey of 800 California homeowners who built ADUs, finds that about half (51%) serve as income-generating rental units. California homeowners built some 12,000 backyard flats in 2019—more than double the number permitted just two years earlier and a ten-fold increase since the State passed its preemption laws. Kriston Capps, *How California Set Off a Backyard Apartment Boom*, Mar. 25, 2021, https://www.bloomberg.com/news/articles/2021-03-25/can-granny-flats-fill-california-s-housing-gap.

80 Reflecting the type of housing in between single-family homes common in suburbs and high-rise multi-family buildings in large cities, missing middle housing represents the "missing" housing option that has not been in popular use since the early 1940s. Karen Chappele, Audrey Lieberworth, Dori Ganetsos, Eric Valchuis, Andrew Kwang & Rachel Schten, *ADUs in CA: A Revolution in Progress* 27, https://www.aducalifornia.org/wp-content/uploads/2020/10/ADU-Progress-in-California-Report-October-Version.pdf.

81 Daniel Parolek, Missing Middle Housing: Thinking Big and Small to Respond to Today's Housing Crisis (Wash. D.C., Island Press 2020).

82 https://www.gov.ca.gov/2021/07/19/governor-newsom-signs-historic-housing-and-homelessness-funding-package-as-part-of-100-billion-california-comeback-plan/.

83 https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/; https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/22/fact-sheet-how-the-build-back-better-plan-will-create-a-better-future-for-young-americans/.

84 https://www.hcd.ca.gov/grants-funding/active-no-funding/calhome.shtml. During the last funding cycle of CalHome General 2020 awarded only 37% of the requested amount ($57,603,900 of the $154,635,400). https://www.hcd.ca.gov/grants-funding/active-no-funding/calhome/docs/2020_calhome_awards_and_final_scores.pdf.

85 Richard Kahlenberg & Kimberly Quick, *Attacking the Black-White Opportunity Gap That Comes from Residential Segregation*, The Century Found., June 25, 2019, https://tcf.org/content/report/attacking-black-white-opportunity-gap-comes-residential-segregation/?agreed=1.

86 Bradley Hardy & Trevon Logan, *Race and the Lack of Intergenerational Economic Mobility in the United States*, Vision 2020: Evidence for a Stronger Economy 157-64 (Wash. D.C., Wash. Ctr. for Equitable Growth), https://equitablegrowth.org/wp-content/uploads/2020/02/v2020-book-forweb.pdf.

87 Title VIII of the Civil Rights Act of 1968, known as the Fair Housing Act, 42 U.S.C.A. § 3601, requires HUD and recipients of federal funds from HUD to affirmatively further the policies and purposes of the Fair Housing Act. https://www.hud.gov/program_offices/fair_housing_equal_opp/affh.

88 https://www.hcd.ca.gov/community-development/housing-element/index.shtml.

89 https://www.hcd.ca.gov/community-development/housing-element/docs/Housing%20Element%20Completeness%20Checklist.pdf.

90 https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/. Secretary of Housing and Urban Development ordered to examine the effects of "August 7, 2020, rule entitled 'Preserving Community and Neighborhood Choice' (codified at parts 5, 91, 92, 570, 574, 576, and 903 of title 24, Code of Federal Regulations), including the effect of repealing the July 16, 2015 rule entitled 'Affirmatively Furthering Fair Housing.'"

91 https://www.hcd.ca.gov/community-development/affh/index.shtml.

92 https://www.hcd.ca.gov/community-development/affh/docs/affh_document_final_4-27-2021.pdf#page=7.

93 Amended by Stats. 2019, ch. 665, § 2 (Assemb. B. 1743) (effective Jan. 1, 2020).

94 Amended by Stats. 2017, ch. 370 (Assemb. B. 72), § 65585 Cal. Gov't Code (relating to housing) (approved by Governor, Sept 29, 2017, filed with Secretary of State, Sept. 29, 2017).

California's Board Diversity Law: More Seats at the Table for Different Voices and Increased Scrutiny of Board Composition

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On September 1, 2020, Governor Gavin Newsom signed Assembly Bill (AB) 979, the so-called board diversity mandate, into law.[1] This first-of-its-kind legislation in the United States mandates that public corporations based in California have one to three directors from underrepresented communities by 2023. The precise number depends on the board's size.[2] The law sought to remedy historical injustices, change pervasive biases, and combat stereotypes that have caused most corporate boards to be overwhelmingly White and male. AB 979 was proposed amidst social movements, a series of shareholder lawsuits, and calls from the investment community for increased diversity on corporate boards. The law is an important tool to make boardrooms look more like the communities they serve. While it is subject to legal challenge, it represents one of many efforts that will affect how companies choose their directors for years to come. Companies are on notice and may need to reevaluate or begin their efforts to increase diversity to comply.

I. HISTORICAL AND LEGISLATIVE CONTEXT FOR AB 979

A. Historical Discrimination and Reasons for Lack of Minorities at the Board Level

1. Origins of California Corporations, Board-Managed Companies, and Underrepresentation on Public Company Boards Throughout the 20th Century

The concept of the corporation and it being managed by a board of directors grew out of English common law, early colonial law, and state incorporation acts of the early 1800s, beginning with the New York Incorporation Act of 1811.[3] California's State Constitution of 1849, which formed the basis of the modern-day Corporations Code, discussed the election of directors and their management of corporate affairs.[4] The law did not explicitly bar women and certain underrepresented groups from company boards, but social norms of the time tended to ensure that these groups were not present. Corporations were managed by White, male directors for the benefit of White, male shareholders. Women and people of color need not apply.

However, explicit legal barriers existed as well. For example, California's initial State Constitution contained language against Chinese-Americans: "No corporation now existing or hereafter formed under the laws of this State, shall, after the adoption of this Constitution, employ directly or indirectly, in any capacity, any Chinese or Mongolian."[5] Racial, ethnic, and gender relations of the 19th century were painfully different from today—men barred women from voting,

slaveowners treated Black people as chattel, Californians targeted Asian-Americans and Latino-Americans with xenophobic laws,[6] and state and non-state actors continued to engage in genocide against Native Americans.[7]

This sad state of affairs largely continued long after the Civil War and well into the 20th century. While women and people of color became increasingly present members of the business community, including becoming shareholders in companies, they continued to be shut out of major portions of economic life—including at the highest levels of corporations. In the early 20th century, women began being nominated to boards. Clara Abbott, married to Wallace Abbott —owner of Abbott Laboratories—was the first woman who served as a corporate director in America.[8] She served on the board of Abbott Laboratories from 1900 to 1908 and from 1911 to 1924 before the company was publicly listed.[9]

It was not until much later, in 1964, amid the civil rights movement, that two Black men —Samuel R. Pierce, Jr. and Asa T. Spaulding—became the first reported black directors of major company boards when they joined the boards of US Industries and W.T. Grant Company, respectively.[10] A decade later, there had been underwhelming growth with only eighteen Black directors on major company boards.[11] Asian and Latino Americans were also largely shut out of corporate director positions. But still, the following decades resulted in additional progress such that hundreds of underrepresented groups and women served as directors of public boards.

By 2019, American public company boards had increased diversity. 10% of Russell 3000 directors in 2019 were people of color.[12] The number of women in board positions surpassed 20% for the first time.[13] However, because the United States is over 40% non-White and 50% female, public company boards did not (and still do not) reflect America's population.

2. *Persistent Bias, Stereotypes, and Negative Network Effects Contribute to Low Minority Board Positions*

Researchers have investigated the causes for the lack of people of color in leadership positions (such as director positions) and related attitudes. Studies indicate that explicit and implicit biases, negative stereotypes, and board recruitment from insular social circles from which board positions arise may be a part of the problem.

For example, Asian-Americans and Black people may receive fewer board appointments due to baseless stereotypes. One study designed vignettes describing an Asian or White leader (Tung-Sheng Wong vs. John Davis) who worked in engineering or sales.[14] Participants read about the leader and then rated him on different dimensions of leadership.[15] Asians were rated as lower on leadership overall, particularly in sales and lacking in prototypical leadership attributes.[16]

Likewise, studies have found that individuals develop beliefs about behaviors and characteristics of leaders—being White is considered a characteristic of the prototypical business leader, which may lead to biased evaluations of minority leaders, particularly African-Americans who are unfairly and inaccurately stereotyped as being lazy and incompetent.[17] These stereotypical characteristics of a leader explain why research shows that White leaders are perceived as more effective and successful than Black leaders[18] and why African-Americans are perceived as lacking the knowledge and skills necessary for high-level positions.[19]

Further studies have shown that boards heavily rely on social networks in identifying board candidates. Over 50% of Black directors were known to a fellow board member prior to being appointed (as compared to 35% of White directors) and Black directors were more likely to have been recruited by an executive search firm.[20] On the other hand, White directors were more likely to be current or former executives of the company, suggesting that the internal pipeline to the board is dominated by White executives.[21] Thus, long-standing racial and gender inequities are perpetuated by network-based recruiting because of America's history, social segregation, and the fact that corporate America has been dominated by White men.

These studies lend credence to the view that despite strides in race relations, negative stereotypes and network effects stemming from insular social circles contribute to the lack of people of color on public company boards. Proponents of legislative action seek to remedy the historical discrimination inflicted against people of color and to correct bias and negative stereotypes that persist in America, including in large businesses.

B. AB 979's Precursor and Legislative Context

1. *SB 826—the Gender Diversity Mandate*

Recognizing the absence of women proportional to population in the boardroom, California sought to increase the number of women on California company's boards. In addition, the #MeToo movement raised awareness of sexual harassment and assault in the entertainment industry and beyond, which helped highlight potential reasons why women were absent from the boardroom. On September 30, 2018, California Governor Jerry Brown signed into law

Senate Bill Number 826 (SB 826)—the precursor to AB 979. SB 826 requires publicly traded companies with principal executive offices in California to have a minimum number of female directors.[22] The California Legislature found that increasing female board representation would boost the California economy, improve opportunities for women in the workplace, and protect California shareholder value.[23] The law recognized that if affirmative measures were not taken to increase the number of female directors, it would take as long as fifty years to achieve gender parity among directors.[24]

SB 826 adds sections 301.3 and 2115.5 to the California Corporations Code and requires a "publicly held domestic or foreign corporation" whose principal executive offices are located in California to have a minimum number of at least one to three female directors depending on the size of the board by the end of 2021.[25] For companies with six or more directors, there must be at least three female directors; for companies with five directors, there must be at least two female directors; and for companies with four or fewer directors, at least one female director.[26] SB 826 permits a company to amend its bylaws to increase the total number of directors to accommodate the female director or directors, so that no male director needs to be replaced.[27]

The law authorizes the Secretary of State of California to impose fines for violations of (i) $100,000 for a first violation and (ii) $300,000 for a second or subsequent violation.[28] The Secretary of State is also required to publish a report with compliance information, including the number of California public companies that have at least one female director, the number of companies that were in compliance during the calendar year, and the number of California public companies that have moved their headquarters outside of California.[29]

The constitutionality of SB 826 is still being challenged in two lawsuits. The first case, *Meland v. Padilla* in federal court, involves a shareholder's claim that the law's requirement violated his right to vote for a board member of his choice and thus violates the Fourteenth Amendment. [30] The trial court initially dismissed the case but the Ninth Circuit Court of Appeals recently reversed the decision.[31] The Ninth Circuit determined that the plaintiffs had standing to sue because they were the ones at the corporation responsible for electing members to the board of directors and SB 826 pressured them to make a choice—elect a woman to the board or face the threat of penalties for the company.[32] After remand to the trial court, plaintiffs filed for a preliminary injunction to prevent the Secretary of State from enforcing the law—briefing was ongoing as of the writing of this article.

The second case, *Crest v. Padilla* in Los Angeles Superior Court was set for trial in 2021.[33] That case involves a claim by taxpayers that the law's female directors requirement constitutes an unconstitutional quota. The parties have filed cross-motions for summary judgment such that the trial will likely not go forward until 2022.

SB 826 has not yet been ruled unconstitutional, and there is no injunction preventing it from being enforced by the California Secretary of State. Accordingly, the State of California will likely be able to enforce the law's minimum female directors requirement at the end of 2021.

2. Legislative Context—Post-George Floyd

On July 15, 2021, Assemblymembers Chris Holden and Cristina Garcia, with Assemblymember Eloise Gomez Reyes, introduced Assembly Bill 979 in the California Legislature.[34] This introduction was less than two months after race had become a focal point of the national conversation after former Minneapolis police officer Derek Chauvin murdered George Floyd. Following Floyd's murder, intense protest throughout the United States, including California, carried on throughout May and June. As a result of these events, the California Legislature proposed and passed various laws regarding policing reform,[35] education reform,[36] and corporation reform as a way to address historical and present-day prejudices that have exacerbated inequality between racial and ethnic groups.

The bills' authors and other Assembly members emphasized the various benefits of the bills to California and its companies. Assemblymember Chris Holden emphasized, "Corporations have money, power, and influence…. If we are going to address racial injustice and inequity in our society, it's imperative that corporate boards reflect the diversity of our State. One great benefit of this action – corporations with ethnically diverse boards have shown to outperform those that lack diversity."[37] Assemblymember Cristina Garcia noted that the Legislature had urged corporations to diversify top positions but could no longer wait, stating that "[b]y ensuring diversity on their boards, we know the corporations are more likely to both create opportunities for people of color and give them the support to thrive within that corporation."[38] Assemblymember David Chiu, the Chair of the Asian Pacific Islander Legislative Caucus, stated that the measure "recognizes that including the perspectives of underrepresented groups in leadership roles will result in more innovation, improved productivity, and better economic outcomes."[39]

3. Increased Shareholder Interest

In the late 2010s and the beginning of this decade, institutional investors have showed strong support for increasing diversity at the board level. Several of the largest asset managers and pension fund managers wrote letters and statements indicating they would closely scrutinize company approaches to board diversity and would work with companies to make racial and gender diversity part of their formal considerations for board members.[40] These investors cited studies that found that increased board diversity was associated with stronger corporate governance as well as stronger financial performance.[41] Additionally, proxy advisory firms and investors have developed formal policies in evaluating firms based on the approach to board diversity and nomination criteria.[42] In short, in the lead-up to the passage of AB 979, many sophisticated and active investors began exerting pressure on companies to diversify their boards.

4. Wave of Shareholder Suits Targeting Homogenous Boards

At the same time, shareholder derivative lawsuits regarding diversity increased. Between July and September, nearly a dozen lawsuits were filed in federal court claiming that company directors breached their fiduciary duty and committed securities violations because the companies did not have diverse boards of directors.[43] While each suit has its nuances, the underlying premise of these cases was that companies were falling short of their commitment to diversity in spite of their public commitments to the contrary. Plaintiffs used photographs of individual board members, alleging that boards were entirely (or nearly entirely) composed of White persons, that the company's leadership was aware that it had a diversity problem, and that it failed to do anything about it—despite public statements claiming to address the diversity issues.

The shareholders claimed that directors breached their fiduciary duty of loyalty when they failed to live up to the company's public statements on diversity and then covered up alleged discrimination at the board and executive level; the failures and subsequent cover-ups resulted in financial and reputational damage to the company. Shareholders also alleged public statements regarding company commitment to diversity in proxy statements were false and in violation of section 14(a) of the Securities Exchange Act of 1934. Therefore, the directors and officers were liable under a securities violation theory. Finally, the lawsuits included unjust enrichment claims—asserting that money that should have been appropriated toward addressing a corporation's diversity initiatives and resolving pay inequities instead went to bonuses and dividends that benefitted the directors.

Recently, a number of courts have dismissed these cases on the grounds of "demand futility"—i.e., the shareholders were required to make a demand on the company's board prior to bringing suit in the name of the corporation, but failed to do so.[44] Nonetheless, the underlying theory may still be presented to boards and be the source of future litigation if and when companies fail to live up to their word when it comes to diversity and inclusion.

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Amid social movements, increased shareholder interest, and a rise in board diversity lawsuits, the California Legislature expanded the mandate for companies to diversify their boards with AB 979.

II. CALIFORNIA'S SENATE BILL 979 AND ITS AFTERMATH

A. The Law

1. Legislative Findings—California Boards Do Not Reflect Diverse State and Diverse Boards Could Improve Company Performance

On September 30, 2020, Governor Gavin Newsom signed AB 979 into law. In signing the law, Governor Newsom stated that "the law is necessary to promote diversity in corporate boardrooms as part of a broader effort to improve racial equity" and that "[w]hen we talk about racial justice, we talk about empowerment, we talk about power, we need to talk about seats at the table."[45]

In passing the law, the California Legislature made a number of findings[46] regarding the lack of racial and ethnic diversity on California company boards as well as the broader lack of racial and ethnic diversity in technology company executive positions. The Legislature highlighted the growing number of jobs in the technology industry that pay higher wages and are more resilient than traditional jobs. In addition, the Legislature noted that the technology industry is an engine for growth and social mobility. Nonetheless, data from the Equal Employment Commission reflects that "the high tech sector employed a larger share of Whites (63.5% to 68.5%), Asian Americans (5.8 percent to 14 percent), and a smaller share of African Americans (14.4 percent to 7.4 percent), Hispanics (13.9 percent to 8 percent) in comparison to the general US population"; only *1 percent* of Silicon Valley executives and

managers are African American; and Asians were less likely to be promoted to executive positions despite making up a significant portion of the Silicon Valley workforce.[47]

Not only is the C-suite predominantly White, the boardroom is too, despite California's changing demographics. According to data from 2018 that the Legislature cited, 35% of California boards are composed solely of White directors.[48] Meanwhile, of the 662 publicly-traded companies headquartered in California—13% had at least one Latino board member, 16% had at least one Black director member, and 42% had at least one Asian board member.[49] Likewise, "the percentages of Fortune 500 company board seats held by people identified as African American/Black, Hispanic/Latino(a), and Asian/Pacific Islander were 8.6 percent, 3.8 percent, and 3.7 percent, respectively."[50] The paucity of racially diverse boards is particularly striking given California's diversity. California has become increasingly diverse. Currently, California's population is 39% Hispanic, 36% non-Hispanic White, 15% Asian or Pacific Islander, 6% African American, fewer than 1% Native American or Alaska Native, and 3% multiracial or other.[51]

According to the Legislature, the lack of racial or ethnic diversity could be hindering the success of companies because more diverse boardrooms are associated with greater financial growth. The Legislature cited studies stating that the tech industry could generate an additional $300 billion to $370 billion each year if the racial or ethnic diversity in tech company workforces reflected that of the talent pool: for every 10% increase in racial and ethnic diversity on the senior-executive team, earnings before interest and taxes rises 0.8%. In addition, the cited studies found that culturally homogenous boards pay CEOs more than a culturally diverse board, which means that company resources are allocated away from the general workforce; lastly, diverse boards further the goals of the Sarbanes-Oxley Act of 2002, which pushed for more independent boards to decrease the likelihood of corporate fraud.[52]

Based on these findings, the Legislature announced its intent that by December 2021, companies have at least one director from an underrepresented community and by January 2023, every publicly held corporation in California achieve diversity on its board of directors by having a minimum of directors from underrepresented communities on its board, based on size.[53]

Justifying the constitutionality of the law (possibly in anticipation of a constitutional challenge to the law), the Legislature found "[e]xperts argue that affirmative action plans to increase the representation of women and minorities in historically unrepresented fields and occupations further the legislative goals of the Civil Rights Act of 1964."[54] And under the Civil Rights Act, Title VII permits

> the imposition of affirmative action plans to address past discrimination and patterns of discrimination; permits state actors to create affirmative action plans designed to increase representation of women and minorities in job positions in which they are historically underrepresented, so long as such plans are moderate, temporary, and designed and intended to attain a balanced workforce; and does not forbid private actors from voluntarily creating action plans to increase representation of women and minorities, so long as those plans are temporary and do not create an absolute bar to White or male employees.[55]

Thus, the law was to address past discrimination and increase representation to obtain balance in the workforce without barring White persons from serving on boards.

2. *Diversity Mandate Requiring One to Three Board Members of Underrepresented Communities*

The Board Diversity Bill adds sections 301.4 and 2115.6 to the California Corporations Code[56] to require a publicly held domestic or foreign corporation whose principal executive offices are located in California[57] to have a minimum of one director from an "underrepresented community" no later than the close of calendar year 2021. Such California publicly held[58] companies must comply with the following director composition requirements no later than the close of calendar year 2022:

- If the number of directors is nine or more, the company must have a minimum of three directors from underrepresented communities.
- If the number of directors is more than four but fewer than nine, the company must have a minimum of two directors from underrepresented communities.
- If the number of directors is four or fewer, the company must have a minimum of one director from an underrepresented community.

An individual is from an "underrepresented community" if such individual "self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native," or "self-identifies as gay, lesbian, bisexual, or transgender."[59] In addition, a "publicly held corporation" means a corporation with outstanding

shares listed on a major "United States stock exchange."[60] While the statute does not define "major United States stock exchange," the California Secretary of State has previously stated that a "publicly held corporation" means a corporation with shares listed on the New York Stock Exchange, Nasdaq, or American Stock Exchange, and excludes corporations with shares quoted or traded on over-the-counter markets. Publicly held companies incorporated in another state, such as Delaware, or any other country, are subject to the new requirement if their principal executive offices are located in California.

As with its predecessor, SB 826, under AB 979 a company is permitted to amend its bylaws or charter to increase the total number of directors to accommodate the required directors from underrepresented communities, so that no incumbent director need be replaced. And while not explicitly stated in the text of the law, a female director from an underrepresented community may "count" for purposes of both laws. In addition, a director from an underrepresented community is not required to hold office for the entire calendar year to satisfy the rules—it is sufficient that he or she holds a seat for only a portion of the calendar year applicable under the requirement.[61]

3. Reporting and Verification

AB 979 does not state how companies must report their board composition and the demographic information of their members. However, the California Secretary of State's website[62] states that a company "can report compliance with the statutory requirements [of ABA 979] through its annual Publicly Traded Corporate Disclosure Statement filed with the California Secretary of State." Section Five of the CDS form asks companies to list the "[t]otal number of directors on the corporation's current Board of Directors," the number of female directors on the corporation's current Board of Directors, and the "[n]umber of directors from underrepresented communities on the corporation's current Board of Directors." Section Five also asks companies to list whether they have moved their principal executive office into or out of California.

4. Consequences and Penalties

The law authorizes the California Secretary of State to impose fines for violations as follows: (1) $100,000 for a first violation and (2) $300,000 for a second or subsequent violation.[63] Each director seat required to be filled by an individual from an underrepresented community that is not filled by an individual from an underrepresented community will count as a separate and independent violation.[64] Additionally, failure by a covered corporation to meet the reporting requirement can result in a $100,000 penalty.[65] As of March 1, 2022, the Secretary of State will be required to report compliance. In the report regarding compliance with SB 826, the Secretary of State will be required, no later than March 1, 2022, to include in its report information regarding compliance with AB 979, including the number of corporations subject to the rule that were in compliance with the requirements, and the number of publicly held corporations that moved their U.S. headquarters to California from another state or out of California into another state.[66]

B. Aftermath and Progress So Far—Legal Challenges to AB 979, Improvements in Board Diversity, and Board Diversity Lawsuit Dismissals

1. Potential Conflicts with Corporate and Constitutional Law

AB 979 has been praised as an important and much-needed step toward remedying past discrimination, combating implicit bias that may prevent people of color from obtaining leadership positions, and improving board performance through diversity that can combat groupthink. Nonetheless, during and after passage of AB 979, some commentators have opined that the law would likely be challenged because it could be seen as improperly interfering with shareholders' rights, unlawfully discriminating against White people, and operating as an unconstitutional racial quota.

Some commentators argued that companies incorporated in other states should not have to abide by California's rules and that requiring boards to be comprised of a number of people based on racial lines improperly limits shareholders' ability to select directors of their choice. The Internal Affairs Doctrine "recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands."[67] Opponents of AB 979 say that the nomination and composition of a company's board of directors fall within the Internal Affairs Doctrine and, therefore, come under the exclusive ambit of the law where the state was incorporated—not in California where its headquarters are based.[68] Besides the legalistic Internal Affairs Doctrine, there are practical fairness concerns implicated by AB 979. Some shareholders may desire their corporations to seek directors without any consideration of their racial, ethnic, or other background;

may have different conceptions of the value of diversity; or may think the Legislature's definitions are too narrow.

The most viable challenge to AB 979, however, is that it violates the Equal Protection Clause of the Fourteenth Amendment. Commentators have opined that the law is based on race and entitles companies and the Secretary of State to make race-based decisions. For example, the law itself specifies racial categories that fall within "underrepresented communities" and mandates that companies have a specified number of people from certain Legislature-defined racial categories. As a result of the Legislature's mandate, companies will have to make race-based decisions; companies must now collect data regarding directors' race and comply with the new law by nominating new directors if they do not already comply with the mandate. The Supreme Court's most recent interpretations of the Equal Protection Clause (*see Fisher v. Texas* and *Parents Involved in Community Schools v. Seattle*)[69] coupled with conservative Justice Amy Coney Barrett replacing liberal Justice Ruth Bader Ginsburg indicate the Court may have a distaste for AB 979 based on the fact that it requires companies to make race-based decisions.

2. Lawsuits

Two lawsuits have been filed to invalidate AB 979. In the first case, *Crest v. Padilla II,*[70] plaintiffs have filed taxpayer suits under "California's common law taxpayer standing doctrine and Code of Civil Procedure Section 526a, which grants California taxpayers the right to sue government officials to prevent unlawful expenditures of taxpayer funds and taxpayer-financed resources."[71] The plaintiffs contend that the state will expend hundreds of thousands of dollars gathering demographic information and publishing the report mandated by the statute.[72] They further contend that because the law classifies people based on race and mandates companies have a certain number of directors of particular races, ethnicities, and sexual preferences it can only be justified by a compelling governmental interest, and its use of race and ethnicity must be narrowly tailored to serve that compelling interest.[73] Arguing that the Secretary of State cannot produce evidence of this narrow tailoring, the taxpayers claim the law does not survive strict scrutiny and must be invalidated.

The second lawsuit, *Alliance for Fair Board Recruitment v. Weber* (2:21-cv-05644 (C.D.CA)), was recently filed in July 2021.[74] This lawsuit was brought by a Texas-based organization whose president, Edward Blum, has been involved in a number of lawsuits challenging race-conscious legislation. This suit argues that under the Internal Affairs Doctrine, AB 979 impermissibly overrides the laws of the company's state of incorporation and also argues that the law causes discrimination against board candidates because it improperly impairs shareholders' ability to vote for a candidate of their choice.[75] This case is still in its early stages and there is no trial date set.

3. Progress in Female Board Representation

Because AB 979 was only passed one year ago, there is insufficient data to conclude what effect, if any, it has had on female representation at the board level. Nonetheless, reports show somewhat promising results in female board representation after the passage of SB 826. A 2020 report shows that the number of women on California corporate boards has increased 66.5% since 2018 after the passage of SB 826.[76] This report contains data from 650 publicly held companies headquartered in California whose securities are traded on the New York Stock Exchange or Nasdaq. It shows that the total representation still remains a mere 24% and that 72% of California companies had slightly over one year to nominate additional female directors to comply with the law. Thus, while SB 826 appears to have increased the number of women on boards, there is much work to do.

C. Interplay with Exchange Regulations

AB 979 is not the only disclosure rule pertaining to racial and ethnic underrepresented groups to which California companies are subject—exchanges have joined states in urging companies to diversify their boards, albeit in more subtle ways. In August 2021, the Securities and Exchange Commission (SEC) signed off on new proposed Nasdaq rules requiring companies to disclose how diverse their boards are and explain when they do not have certain numbers of diverse persons on their boards.[77]

Subject to certain exceptions, rule 5606(a)[78] requires Nasdaq-listed companies to publicly disclose statistical information about the self-identified gender, race, and self-identification as LGBTQ+ of the companies' directors in an aggregate fashion. This disclosure must be provided on the company's website or in the company's proxy statement or similar disclosure.

Rule 5605(f)[79] requires each Nasdaq-listed company to have, or explain why it does not have, at least two diverse directors, including (a) at least one director who self-identifies as female; and (b) at least one director who self-identifies as an underrepresented minority, or as LGBTQ+. For purposes of the rule, "diverse" means an individual who self-identifies in one or more of the following categories: female,

underrepresented minority, or LGBTQ+. "Underrepresented minority" means any person who self-identifies as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or two or more races or ethnicities. "Female" means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth.

A Nasdaq-listed company that fails to satisfy the diversity requirements will be required to specify which requirements have not been satisfied and provide public disclosure of the board's reasons for not satisfying such requirements. This disclosure must be provided on the company's website or in the company's proxy statement. If the company elects to provide the disclosure on its website, it will also be required to provide Nasdaq with a URL link to the information within fifteen calendar days of the company's annual meeting via the initial listing center. Companies that both (i) fail to meet the board diversity expectations within the requisite timeframes and (ii) do not publicly disclose the company's rationale for doing so would have a cure period of at least six months to remedy the deficiency and would be subject to delisting if unable to do so. As part of the new rules, Nasdaq established a helpful new service that is being offered for free to certain companies, which identifies board-ready diverse candidates.[80]

Whereas AB 979 strongly pushes for increases in minority representation at the board level, the Nasdaq rules are more of a subtle nudge and primarily focused on responding to shareholder interest in board diversity and calls for increased transparency. In approving the rules, the SEC contrasted Nasdaq's "comply or explain" approach with the "diversity mandate" approach embodied in AB 979. The rules do not mandate any particular board composition. Rather, companies need only disclose director diversity on an aggregate basis and explain why they do not meet Nasdaq's proposed two diverse directors objective. Under the Nasdaq rules, directors are not required to self-identify and companies have substantial flexibility in crafting an explanation for not meeting Nasdaq's diversity objectives.

Additionally, where the California Legislature found strong empirical support for the finding that diverse boards contribute to companies' success, the SEC found the research to be a mixed bag:

> Some of the results from the studies cited by the Exchange and commenters are consistent with the view that increases in board diversity cause increases in shareholder wealth…. Other studies have concluded that increases in board diversity may not be beneficial to investors … [and] some studies of some board diversity mandates have concluded they are not beneficial to investors.[81]

The SEC also identified research suggesting that the "comply or explain" approach has proved beneficial to investors. In sum, the Nasdaq rules regarding diversity at the board level have focused on shareholder transparency, and the SEC found this to be in line with the SEC's goals.

As soon as the Nasdaq Rules went into effect, the same organization suing the Secretary of State of California over AB 979 challenged the rule in a petition before the Fifth Circuit. The litigants argue that the Nasdaq rules are discriminatory and unconstitutional, and the proffered rationale for supporting the rule was mere pretext. The group has argued that Nasdaq "exceed[ed] its role and the authority granted by federal securities law" and violates constitutional guarantees against compelled speech and discrimination and claims that the rules encourage stereotypes, treating "all people of the same skin color or sex as being alike and interchangeable."[82]

III. THE FUTURE OF BOARD DIVERSITY REGULATION AND PRACTICAL GUIDANCE

Corporations have come a long way from the early days of board-led corporate governance that was composed of solely White men. Slowly, but surely, through social movements, positive legislation, and individual effort, pressure has caused many companies to appoint members of underrepresented communities to lead companies in the 21st century. AB 979 and other laws are an extension of these changes.

The path ahead for AB 979 and other laws and regulations, such as the new Nasdaq rules, will be highly dependent on court challenges. Litigants will continue to seek to prevent board diversity regulation and legislation from being enforced, claiming constitutional and corporate law concerns. Nonetheless, whether in the form of simple reporting requirements, less-intrusive "comply-or-explain" rules, full-blown mandates, or lawsuits against the board, and shareholder activism, the diversity of California company boards will be under the microscope in years to come. Additionally, "as California goes, so goes the nation"—other states have proposed similar legislation to varying degrees. Thus, diversity legislation and regulation in other states and exchanges will likely impact companies in other states as well in the future.

Accordingly, companies need to take considerate, proactive steps when it comes to board composition. Below are a few takeaways that will help start this process:

- **Understand which laws and regulations apply.** AB 979 and SB 826 do not apply to all corporations—only certain publicly held corporations that are headquartered in California. Likewise, Nasdaq is the only exchange to have any specific requirement, and it has many exceptions and varying requirements for certain types of companies. Seek knowledgeable counsel on which, if any, rules may apply to a company.

- **Educate stakeholders on what these rules mean.** These rules are not as simple as they may appear at first blush. People's initial reaction to these rules can provoke emotional reactions and can lead to misunderstandings. They appear particularly threatening to board members who may think their positions are in danger. There must be an intentional effort to clearly explain what the rules mean and what options a company may have for compliance.

- **Plan a path forward consistent with the company's diversity and inclusion philosophy.** Once it has been determined that certain board diversity rules apply to a company and stakeholders have been educated, it is time to plan a path toward compliance. Even if no rules apply, companies may want to get ahead of future legislation and regulation and reevaluate their board diversity policies. At all times, the company should keep in mind whatever tenets and beliefs it has espoused regarding diversity and inclusion. As recent shareholder suits have demonstrated, litigants may find that companies' attempts to comply with diversity rules contradict their espoused views on diversity.

- **Gather information in a sensitive way.** In complying with any of the board diversity rules, one must collect demographic information from directors. This may feel intrusive to some, so it is necessary to be considerate and sensitive when collecting, maintaining, and reporting information.

- **Nominate new directors.** While there is no requirement that existing directors must be replaced to comply with AB 979, there may be a need to add directors to obtain compliance with the law. Companies should, in compliance with their nomination policies, consider adding new directors from underrepresented communities who may contribute to the board.

- **Carefully complete the forms.** With the assistance of counsel, carefully complete the necessary documentation to comply with the applicable board diversity rules. California rules require that specific information be reported with hefty penalties for violations, so close attention must be paid when completing and disclosing the necessary board diversity information.

- **Thoughtfully communicate with employees, shareholders, and the public.** Statements regarding diversity and reports of homogenous boardrooms can negatively affect the investing public's perception of the company. In preparation for complying with AB 979 and other board diversity rules, companies must also develop a communications strategy to respond to stakeholder concerns and media inquiries.

Endnotes

1 Patrick McGreevy, *Newsom Signs Law Mandating More Diversity in California Corporate Boardrooms*, L.A. Times (Sept. 30, 2020), https://www.latimes.com/california/story/2020-09-30/california-law-requires-diversity-corporate-boardrooms-gavin-newsom.

2 Cal. Corp. Code § 301.4.

3 *See generally* Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 Hofstra L. Rev. 89, 108 (2004).

4 *See* Cal. Const. of 1849, art. XII, Corporations.

5 Cal. Const. of 1849, art. XIX, Chinese.

6 *See, e.g.*, Prim Phoolsombat, *The 19th Century California Genocide,* Retrospect J., https://retrospectjournal.com/2019/11/10/the-19th-century-california-genocide/ ("The Anti-Vagrancy Act of 1855, also known as the Greaser Act, legalized the arrest of those subjectively believed to be 'vagrants.'" Though this act mostly targeted Mexicans, it was also used against Native Americans and Asian immigrants.").

7 *See generally* Benjamin Madley, *Understanding Genocide in California Under United States Rule, 1846-1873*, 47 The Western Historical Quarterly 449–61 (Winter 2016).

8 David F. Larcker and Brian Tayan, *Pioneering Women on Boards: Pathways of the First Female Directors*, Stan. Closer Look Series (Sept. 3, 2013), https://www.gsb.stanford.edu/sites/default/files/publication-pdf/cgri-closer-look-35-women-boards.pdf.

9 *Id.*

10 Richard L. Zweigenhaft & G. William Domhoff, Diversity in the Power Elite: Ironies and Unfulfilled Promises 88-92 (Rowman & Littlefield Publishers, 3d ed. 2006).

11 *Negroes on Boards of 16 Corporations*, N.Y. Times (Mar. 4, 1971), https://www.nytimes.com/1971/03/04/archives/negroes-on-boards-of-16-corporations.html.

12 Subodh Mishra, U.*S. Board Diversity Trends in 2019*, Institutional Shareholder Servs., Inc., June 18, 2019, https://corpgov.law.harvard.edu/2019/06/18/u-s-board-diversity-trends-in-2019/.

13 Equilar, *Equilar Q2 2019 Gender Diversity Index: Russell 3000 Boards Surpass 20% Female Representation*, Sept. 11, 2019, https://www.equilar.com/reports/67-q2-2019-equilar-gender-diversity-index.html.

14 Stefanie K. Johnson & Thomas Sy, *Why Aren't There More Asian Americans in Leadership Positions?*, Harv. Bus. Rev. (Dec. 19, 2016), https://hbr.org/2016/12/why-arent-there-more-asian-americans-in-leadership-positions.

15 *Id.*

16 T. Sy, L.M. Shore, J. Strauss, T.H. Shore, S. Tram, P. Whiteley & K. Ikeda-Muromachi, *Leadership Perceptions as a Function of Race-occupation Fit: The Case of Asian Americans*, 95(5) J. of Applied Psychol. 902–19 (2010).

17 A.S. Rosette, G. J. Leonardelli & K.W. Phillips, *The White Standard: Racial Bias in Leader Categorization*, 93(4) J. of Applied Psychol. 758–77 (2008).

18 *Id.*

19 A.D. Steward & G. B. Cunningham, *Racial Identity and Its Impact on Job Applicants*, 29 J. of Sports Mgmt. 245–56 (2015).

20 J. Yo-Jud Cheng, Boris Groysberg & Paul M. Healy, *Why Do Boards Have So Few Black Directors?*, Harv. Bus. Rev. (Aug. 13, 2020), https://hbr.org/2020/08/why-do-boards-have-so-few-black-directors.

21 *Id.*

22 Cal. Corp. Code § 301.3 (2021).

23 Corporations: Boards of Directors, S.B. 826 § 1 (Oct. 1, 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB826.

24 *Id.*

25 Cal. Corp. Code § 301.3(b).

26 *Id.*

27 *Id.*

28 *Id* § 301.3(e)(1).

29 *Id.* § 301.3(c).

30 *Meland v. Padilla*, No. 2:19-cv-02288 (E.D. Cal.).

31 *Meland v. Weber*, 2 F.4th 838, 842 (9th Cir. 2021).

32 *Id.* at 847.

33 Sup. Ct. No. 19STCV2756.

34 https://a41.asmdc.org/press-releases/20200715-new-legislation-require-diversity-corporate-boards.

35 Assembly Bill 1506 requires a state prosecutor to investigate incidents of an officer-involved shooting resulting in the death of an unarmed civilian, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1506; Assemb. B. 1196 (banning chokeholds), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1196; https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB846; Assembly Bill 846 requires the evaluation of peace officers to include bias against race or ethnicity against others.

36 *Gov. Newsom Signs Bill Making Ethnic Studies Course a Requirement at California State University*, https://edsource.org/2020/gov-newsom-signs-assembly-bill-1460-requiring-ethnic-studies-at-csu/638506.

37 Office of Chris Holden, *California Legislature Passes Bill to Require Diversity on Corporate Boards* (Aug. 30, 2021), https://a41.asmdc.org/press-releases/20200830-california-legislature-passes-bill-require-diversity-corporate-boards.

38 Office of Chris Holden, *California Bill Requiring Diversity on Corporate Boards Signed into Law* (Sept. 30, 2020), https://a41.asmdc.org/press-releases/20200930-california-bill-requiring-diversity-corporate-boards-signed-law.

39 *Id.*

40 Phillip Brown, *Institutional Investors Turn Up Pressure on Companies to Embrace Diversity* (May 29, 2019), https://www.corporatecomplianceinsights.com/institutional-investors-turn-up-pressure-on-companies-to-embrace-diversity/.

41 *Id.*

42 Skadden, ISS and Glass Lewis Release Updated Proxy Voting Guidelines (Dec. 2020), https://www.skadden.com/insights/publications/2020/12/iss-and-glass-lewis-release.

43 Morgan, Lewis & Bockius LLP, *Director Diversity And Derivative Lawsuits—Climate Of Change* (Oct. 9, 2020), https://www.morganlewis.com/pubs/2020/10/director-diversity-and-derivative-lawsuits-climate-of-change.

44 *City of Pontiac Police & Fire Ret. Sys. v. Caldwell*, 2021 WL 2711750, at *6 (N.D. Cal. July 1, 2021); *Ocegueda on Behalf of Facebook v. Zuckerberg*, 2021 WL 1056611, at *7 (N.D. Cal. Mar. 19, 2021); *Klein v. Ellison*, 2021 WL 2075591, at *8 (N.D. Cal. May 24, 2021); *In re Danaher Corp. S'holder Derivative Litig.*, 2021 WL 2652367, at *12 (D.D.C. June 28, 2021).

45 Patrick McGreevy, *Newsom Signs Law Mandating More Diversity in California Corporate Boardrooms*, L.A. Times (Sept. 30, 2020), https://www.latimes.com/california/story/2020-09-30/california-law-requires-diversity-corporate-boardrooms-gavin-newsom.

46 Assemb. B. 979, 2020 Reg. Sess. (Cal. 2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB979.

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 Pub. Policy Inst. of Cal., California Population: Just the Facts, https://www.ppic.org/publication/californias-population/.

52 Assemb. B. 979, 2020 Reg. Sess. (Cal. 2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB979.

53 *Id.*

54 *Id.*

55 *Id.*

56 Cal. Corp. Code § 301.4.

57 "Principal office location" is defined as what is set forth on the corporation's annual report on Form 10-K filed with the U.S. Securities and Exchange Commission (SEC). Cal. Corp. Code § 301.4(a).

58 "Publicly held corporation" means a corporation with outstanding shares listed on a major United States stock exchange. Cal. Corp. Code § 301.4(e)(2).

59 *Id.* § 301.4(e)(1).

60 *Id.* § 301.4(e)(2).

61 *Id.*§ 301.4(d)(2).

62 FAQ from California Secretary of State, https://www.sos.ca.gov/business-programs/diversity-boards/general-faqs (last visited Aug. 17, 2021).

63 Cal. Corp. Code § 301.4(d)(1).

64 *Id.* § 301.4(d)(2)(A).

65 *Id.* § 301.4(d)(1)(A).

66 *Id.* § 301.4(c).

67 *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

68 Courtney Murray & Eric Talley, *Racial Diversity and Corporate Governance: Assessing California's New Board Diversity Mandate*, Oct. 8, 2020, https://clsbluesky.law.columbia.edu/2020/10/28/racial-diversity-and-corporate-governance-assessing-californias-new-board-diversity-mandate/.

69 *Fisher v. U. of Tex.*, 136 S. Ct. 2198 (2016); *Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

70 No. 20STCV37513 (L.A. Super. Ct. Sept. 30, 2020).

71 Cindy Posner, *Crest v. Padilla Redux—AB 979, California's Board Diversity Law for "Underrepresented Communities," Faces Taxpayer Challenge*, Oct. 6, 2020, https://cooleypubco.com/2020/10/06/crest-v-padilla-redux/.

72 *Id.*

73 *Id.*

74 Keith Bishop, Allen Matkins, *New Challenge Filed to California Board Quota Laws,* Nat'l L. Rev., July 10, 2021, https://www.natlawreview.com/article/new-challenge-filed-to-california-board-quota-laws.

75 *Id.*

76 Robin Nunn, Morgan, Lewis & Bockius LLP, *Report: California Sees Significant Increase in Female Directors After SB 826, but More Needed*, Oct. 28, 2020, https://www.morganlewis.com/pubs/2020/10/report-california-sees-significant-increase-in-female-directors-after-sb-826-but-more-needed.

77 SEC Approval Order for Nasdaq Rules 5605(f), 5606, and 5607, Aug. 6, 2021, https://www.sec.gov/rules/sro/nasdaq/2021/34-92590.pdf.

78 Nasdaq, Nasdaq Exch. Rule, Corporate Governance Requirements, https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series.

79 *Id.*

80 *Id.,* Nasdaq r. 5607.

81 SEC Approval Order for Nasdaq Rules 5605(f), 5606, and 5607, at 32-33, Aug. 6, 2021, https://www.sec.gov/rules/sro/nasdaq/2021/34-92590.pdf.

82 https://www.law360.com/texas/articles/1414120/sec-approved-nasdaq-diversity-rule-challenged-in-5th-circ-.

Law License and CLA Renewal Time

February 1 deadline. Remember to select the CLA membership option when you renew your license with the State Bar (https://members.calbar.ca.gov/login.aspx). Standard plan, at $150, includes access to 1 Section of your choice (make it Real Property Law) plus additional Sections for $40 each. New "all-access" plan, for $300 gives you access to all 17 Sections. Questions? Contact CLA at info@calawyers.org

Recent RPLS eNews Articles of Interest

October: Recent Fires Serve as Reminder That Casualty Will Always be a Hot Issue: - In the leasing context, … as long as the tenant does not cause the damage and subject to certain other conditions, [Civil Code] Section 1932(2) allows a tenant to terminate a lease if the "greater part of the thing hired" (i.e., the leased premises) is destroyed. This means that if a landlord's building is destroyed, the landlord dealing with insurance claims and rebuilding may also face the prospect of having to find new tenants as well. The economic damages from the casualty could end up being worse than the physical damage to the building. …

In the purchase setting, California Civil Code Section 1662 allows a purchaser to terminate a pending acquisition contract so long as the right of termination is not waived in the contract and the purchaser is not in possession of the property. In these cases, a buyer may no longer want to proceed with its acquisition and, relying on California Civil Code, terminate its contract. This may be a fair outcome for the buyer, but the seller is now stuck with a potentially less marketable property on top of dealing with rebuilding its property. And if the market shifts while the repairs occur, the seller may never recover.

CLA Announces New Executive Director. Oyango A. Snell

Effective December 13, Oyango A. Snell is the new CLA CEO. Snell comes to CLA from the Western States Petroleum Association (WSPA) where he served as the organization's first in-house general counsel in its 114-year history. Snell is a Certified Association Executive (CAE) credentialed by the American Society of Association Executives and he earned his Juris Doctor (JD) from The Ohio State University, Moritz College of Law. He also holds a master's degree in business administration (MBA) from Franklin University in Columbus, Ohio, and a bachelor's degree in political science from Central State University in Wilberforce, Ohio.

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Title	Event	Date
▶ **Interested in presenting a real property webinar for RPLS? We are always looking for good ideas. Contact: Nancy Goldstein – nancy@gr8calilawyer.com**		
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Commercial Lease Guarantees	Foreign entities	1.00 hours MCLE
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Inviting case summaries, practice tips, short articles of interest to the real estate community

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In 2017, the California Legislature decided it was important for the State Bar of California to focus on its regulatory duties—licensure, admissions, and discipline. It enacted S.B. 36, which provided for the creation of the California Lawyers Association with the 16 substantive efforts law Sections and CYLA as its inaugural members. CLA also took on those roles that are traditionally associated with professional associations.

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