THE AMERICAN CIVIL RIGHTS PROJECT
P.O. BOX 12207
DALLAS, TEXAS 75225

Telephone: (214) 504-1835
Email: DAN@AMERICANCIVILRIGHTSPROJECT.ORG
Website: WWW.AMERICANCIVILRIGHTSPROJECT.ORG

August 20, 2024

By Email and Overnight Delivery:

The Honorable Gavin Newsom
Governor of California
1021 O Street
Suite 9000
Sacramento, California 95814
gavin.newsom@gov.ca.gov
governor@gov.ca.gov

The Honorable Robert Rivas
Speaker of the California Assembly
P.O. Box 942849-0029
Sacramento, CA 95814
Assemblymember.RRivas@assembly.ca.gov

Office of Legislative Counsel
1021 O Street
Suite 3210
Sacramento, CA 95814
Cara.jenkins@legislativecounsel.ca.gov

Office of Legislative Analyst
925 L St.
Suite 1000
Sacramento, CA 95814
Gabe.Petek@lao.ca.gov

Re: Registering Opposition to Proposed Senate Bills 1050, 1331, 1348, and 1403

Ladies and Gentlemen,

I write on behalf of the American Civil Rights Project to draw your attention to the unlawfulness of proposed SBs 1050, 1331, 1348, and 1403. I also write to register our opposition to these proposals.

I. SB 1403's Proposal

Begin with SB 1403. As proposed, amended, and relevant here, SB 1403 would create the "California American Freedmen Affairs Agency" (the "Agency"). The bill would then charge the Agency to, *inter alia*:

(1) "[I]mplement the recommendations of the [Task Force to Study and Develop Reparation Proposals for African Americans, with a Special Consideration for African Americans Who are Descendants of Persons Enslaved in the United States], as approved by the Legislature and the Governor."

(2) "[D]etermine how an individual's status as a descendant shall be confirmed."

(3) Establish a Genealogy Office to support potential reparations claimants by establishing a process for conducting or verifying genealogical research to confirm reparations eligibility and provide expedited assistance with the claims process.

(4) Establish an Office of Legal Affairs responsible for advising and counseling the agency and ensuring compliance.

(5) "[O]versee and monitor existing state agencies and departments tasked with engaging in direct implementation of the policies that fall within the scope of the state agencies and departments' authority, including policies related to reparations."

SB 1403, proposed §§ 16002-03.

II. SB 1403's Deficiencies

There are two possible readings of SB 1403. Either: (a) SB 1403 is so incompetently-drafted that no reasonable reader can determine what it's intended to do *or* actually does; or (b) it intentionally alters the entire structure of California's state government to create an overarching commissariat empowered to direct the work of all other state agencies.

A. First Option: Incompetence

Perhaps the authors of SB 1403 simply exercised near total incompetence in their drafting work. That could charitably explain the startling number of errors and ambiguities packed into this bill.

1. Ambiguity of Whether Further Approvals Will be Required to Implement the Reparations Report

For one example, SB 1403's current text requires that the Agency "implement the recommendations of the task force, as approved by the Legislature and the Governor." Among the unanswered questions this language raises:

- The task force's final report contains well over 1,000 pages. Its executive summary, alone, exceeds 70 pages. Is the Agency required to implement all of its recommendations? The bill doesn't say to implement them "if" or "when" they're approved, it says "as approved by."

- What does "as approved by" apply to, anyway?
    - Is "as approved by" a limitation on *which* recommendations the agency is authorized to implement (only policies approved by both branches)?
    - Or is it a limitation on *when* the agency is authorized to implement them (each policy is authorized sequentially *as* it is approved)?
    - Or is it a limitation on *how* the agency is authorized to implement them (only in the manner approved)?

- What, for that matter, does "approved by" mean?
    - Does it mean "legislated by and signed by," or does the Agency have authority to implement any policy recommended by the task force regarding which the governor and legislature have expressed their approval?
    - The Governor has, after all, expressed approval for the entire report.
    - SB 1403 directs the agency to implement the task force's recommendations—is SB 1403 *itself* the necessary approval for implementation of *all* task force recommendations? After all, it *is* legislation that, if passed by the legislature and signed by the governor, would have been "approved by" both and it expressly directs the agency to "implement the recommendations of the task force." Why would any further steps be necessary after that instruction is signed into law?

- How would the "approved by" function in the face of a veto?
    - Under the California Constitution, a bill *can* become law by bicameral passage and gubernatorial signature. Alternatively, if a governor vetoes a bill passed by the state legislature, the Assembly and Senate can override that veto through bicameral two-thirds votes.
    - Should such a scenario unfold for SB 1403 (or for a separate piece of legislation "approving" of some recommendation (or all the recommendations)) of the task force report, what would result?
    - On the one hand SB 1403 (or such separate piece of legislation) would have become law. On the other hand, it would do so *without* the approval of the governor. SB 1403 only authorizes the Agency to "implement recommendations of the task force, as approved by the Legislature ***and*** the Governor"—would an overridden veto suffice, despite the absence of the required approval by the governor?

2. How Sweeping is the Agency's Mandate?

Another example: SB 1403, as amended, places *all* of *every* state agency and department wholly under the direction of the Agency. That's what it explicitly does in its last provision: the Agency "shall oversee ... existing state agencies and departments[.]" Which agencies and departments? Only those agencies and departments that are "tasked with engaging in direct implementation of the policies that fall within the scope of [those] agencies and departments' authority[.]"

Think for a few moments, and you'll realize that's literally every agency and department in the state;

what agency or department is *not* tasked with the implementing of policies that fall within its authority? One might guess that the drafters meant to limit "policies that fall within [their] authority" to policies *recommended by the reparations task force*. But the bill doesn't say that. And not only does it lack any such limiting language, it contains language *discouraging* inference of any such limitation, because it goes on to specify that this grant of oversight over *all* agencies applies to agencies who implement policies "*including* policies related to reparations."

The *only* way a literate court could read this provision is as a general grant of oversight authority over *all* state agencies, effectively setting up the new Secretary of Skintone as the Governor's (mandatory) government-wide second-in-command.

B. Second Option: SB 1403 Means *Exactly* What it Says (as Do SB 1331, 1050, and 1348)

Or perhaps precisely *none* of these defects are errors and the legislature crafted S.B. 1403 to achieve *exactly* what it meant. Such a reading would at least explain how legislators could have produced the current bill.

This theory would explain why SB 1403 seemingly curtails the need for any future direct vote (and thus any future democratic accountability) on the Reparations Task Force's radical (and deeply unpopular) recommendations.[1]

Under this reading, the legislature has not *stumbled* into placing *all* the work of *every* state office under the oversight of the Agency. Instead, it has intentionally followed the advice of Ibram X. Kendi (on the state level) to create a super-Agency, tasked with pursuing antiracism.[2] Expressly, the legislature would empower the Agency to "oversee and monitor" what every other branch of California's government is doing forever.

This reading would also explain the contemporaneous passage out of committee of amended SBs 1331, 1050, and 1348. SB 1331 creates a "Fund for Reparations and Reparative Justice." SB 1331 allocates no money *to* that fund, but authorizes it to "receive moneys from any other federal, state, or local grant, or from any private donation or grant[.]" So, like in Dr. Kendi's original proposal, the current version of SB 1331 creates a vehicle outside of appropriations, through which SB 1403's super-Agency can fund its oversight of the entirety of the California state government in perpetuity.

Similarly, the current text of SB 1050 authorizes the Agency to investigate past incidents of racially motivated eminent domain, for the provision of supplemental compensation for such prior takings. But SB 1403 makes clear that the legislature has created the Agency solely for the benefit of "descendants" alone. So SB 1050's authorization will not extend to any investigations of racially motivated eminent domain against other historically aggrieved groups, even though such use of

---

[1] Taryn Luna, *L.A. Times*, *New Poll Finds California Voters Resoundingly Oppose Cash Reparations for Slavery*, Sep. 10, 2023.

[2] https://www.politico.com/interactives/2019/how-to-fix-politics-in-america/inequality/pass-an-anti-racist-constitutional-amendment/.

the power is clearly documented in California's history. Nor would SB 1331's vehicle for funding benefits to descendants outside of any appropriations process extend to fund any recompense for non-descendants similarly targeted through race-motivated takings.

Finally, SB 1348—in its current form—would create a new designation for Black Serving Institutions (defined by the number or percentage of Black enrolled students, among other factors), without allotting any funds either to pay for the positions it creates to oversee this program or for any institution to pursue any policy in pursuit of the designation. However, when read together with SB 1331 and SB 1403, it becomes clear that the same non-appropriated funding stream would become available under SB 1348 to fund these activities.

III. Open Defiance of the U.S. Constitution

The joint operation of SB 1050, SB 1331, SB 1348, and SB 1403 make clear a long-term aim of enabling racial discrimination and spoils. That aim is antithetical to the U.S. Constitution's guarantee of Equal Protection. But the threat of unconstitutionality does not loom on a distant horizon; it has already arrived. The bills create the Agency, mandate that it develop an unconstitutional racial classification scheme to facilitate future melanin-tested public programming, dodge any future votes on approving those programs, and impose an unappropriated funding stream to block a future legislature from backtracking on the effort. Top to bottom, these proposals focus on operationalizing the kind of racial classification our laws fundamentally forbid.

For more than 150 years, the "'clear and central purpose of the Fourteenth Amendment [has been] to eliminate all official state sources of invidious racial discrimination in the States.' "[3] The Fourteenth Amendment's Equal Protection Clause forbids public entities from engaging in intentional racial discrimination.[4] It forbids "'expres[s]' racial classifications, no matter the race affected, because these classifications are 'a stimulant to ... race prejudice.'"[5] Simply put, the Constitution almost *always* forbids racial classifications as well the policies they enable, because "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[6] It is also worth noting that the Supreme Court has read the Constitutional guaranty of equal protection to bar discrimination between ancestry-groups regardless of whether those groups are currently scored as "races" by the Census Bureau—accordingly, the bills' systematic differential treatment of "descendants" will fall under this rubric, even if one wished to argue that "descendants" excludes some of those the Census Bureau would call Black or African American (due to a later arrival of

---

3 *SFFA*, p. 14 (citing *Loving v. Virginia*, 388 U.S. 1, 10 (1967).

4 *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) (quoting *Alexander v. Choate*, 469 U.S. 287, 293 (1985)).

5 *SFFA* (J. Thomas, concurring), p. 16 (citing *Strauder v. W.Vir.*, 100 U.S. 303, 307-308 (1880)). E.g., *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229 (1995) (racial classifications "exacerbate rather than reduce racial prejudice.").

6 *SFFA*, p. 16 (citing *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (itself quoting *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943)).

such individuals' ancestors in America).

"Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known ... as 'strict scrutiny.'"[7] Strict scrutiny, always and everywhere, asks "first, whether the racial classification is used to 'further compelling governmental interests'" and "[s]econd, if so, ... whether the government's use of race is 'narrowly tailored' – meaning 'necessary' – to achieve that interest."[8]

The modern judiciary recognizes "only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute.... The second is avoiding imminent and serious risk to human safety in prisons, such as [during] a race riot."[9]

No such compelling interest is present here.[10] The interest at which the legislation is directed is race-based wealth transfers, which is itself a not merely uncompelling but constitutionally (and morally) *illegitimate* interest.

But set aside for a moment the unconstitutional goals these bills are intended to enable down the road. SB 1403 itself charges the Agency *today* with developing a classification scheme to ensure that only Black Californians—and, at that only the *right* Black Californians—can benefit from the programs at issue.

Thankfully, the U.S. Supreme Court has been explicit and emphatic for many decades now: such racist classification schemes are themselves odious to the Constitution and injure the dignity of the schemes' objects, even independently of the racist policies the scheme seeks to enable.[11]

---

7 *SFFA*, p. 15 (citing *Adarand*, 515 U.S. at 227).

8 *Id.* (citing, respectively, *Grutter v. Bollinger*, 539 U.S. 206, 236 (2003) and *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311-312 (2013)).

9 *Id.* (citing, for the first, *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) and *Shaw v. Hunt*, 517 U.S. 899, 909-910 (1996), and, for the second, *Johnson v. Cal.*, 543 U.S. 499, 512-513 (2005)).

10 To the extent that *any* of these bills could be argued to serve a compelling purpose, their limitation of benefits solely to "descendants" would itself be subject to strict scrutiny in ways it could not meet. Again, consider SB 1050. One could argue that a program to rectify the under-compensation of *all* victims of racially targeted eminent domain might fall properly in the category of remediating a specific, identified instance of past discrimination that violated the Constitution. But this would be equally true of the Hispanic Californians, Native Californians, Asian Californians, and Black Californians whose ancestors entered America after 1900 who were racially targeted for under-compensated takings, but whom SB 1050 *would not allow* to receive compensation for the same wrong. The legislative choice strict scrutiny would assess, then, would not be to create a program to address past racial discrimination in eminent domain; it would be to *exclude* from such a program all of those who are not Black Californians whose ancestors were in America before 1900. So stated, it should be obvious that the racial component of SB 1050 serves no compelling state purpose.

11 *See, e.g.*, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 746 (2007) (noting racial classifications promote "notions of racial inferiority and lead to a politics of racial hostility," "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their

SB 1408 charges the Agency with a project that is inherently incompatible with the United States Constitution in order to enable a program that is similarly incompatible. To enact laws guaranteed to be struck down by federal courts is to squander the resources of California's longsuffering taxpayers.[12]

IV. Open Defiance of the California Constitution

Our primary expertise is the United States Constitution, not California's. But California's Constitution contains similar (and in places more explicit) protection against the sort of unsavory racial classification scheme SB 1050, 1331, 1348, and 1403 seek to create, fund, and further enable.

Article I, Section 7 of the California Constitution provides both that "[a] person may not be ... denied equal protection of the laws" and that "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens."

The entire scheme of systematic discrimination and racial spoils these proposals seek to enable is irreconcilable with the California Constitution's equal protection and privileges or immunities clauses. One simply cannot undertake a scheme to racially classify the state's residents in order to implement a racial spoils system without "grant[ing] privileges or immunities" to "one class of citizens" that are "not granted on the same terms to all citizens." Doing so could not afford all the equal protection of California law.[13]

Furthermore, when the task force produced its report, it anticipated that Article I, Section 31

---

skin," and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict" (cleaned up)); *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."); *Shaw v. Reno*, 509 U.S. 630, 649-50 (1993) (noting that "[c]lassifying citizens by race" both "threatens special harms" and "implicates unique historical, constitutional, and institutional concerns"); *Ala. Black Caucus v. Ala.*, 575 U.S. 254, 263 (2015) ("Those harms are personal. They include being personally subjected to a racial classification..." (cleaned up)).

[12] Historically longsuffering, at least. *See, e.g.*, https://fortune.com/2023/10/19/how-many-people-leaving-california-for-texas-florida-moving-migration/.

[13] While California has generally read its equal protection clause to be co-extensive with that found in the Fourteenth Amendment (see, *e.g.*, *Serrano v. Priest*, 18 Cal.3d 728, 764 (1976); *Dep't of Mental Hygiene v. Kirchner*, 62 Cal.2d 586, 588 (1965)), except for the inclusion of sex and sexual orientation as "suspect classifications" for policymaking, triggering strict scrutiny (*see e.g.*, *Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 17-20 (1971); *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 32 Cal.4th 527, 564 (2004); *In re Marriage Cases*, 43 Cal.4th 757, 839-843 (2008); *Strauss v. Horton*, 46 Cal.4th 364, 411 (2009)), the California Supreme Court has read Art. I, Sec. 31 to bar discrimination with no exception for even programs narrowly tailored to serve compelling state interests (*Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal.4th 537, 567 (2000) (holding that because it "categorically prohibits discrimination and preferential treatment" with no exception for "compelling state exception, we find nothing to suggest the voters intended to include one sub silento.")). Precisely the same could be said of Article I, Section 7.

would be repealed—it has not been. Indeed, the Assembly's effort to gut Article I, Section 31 through ACA-7 died from inaction last month in the Senate. As a result, Article 1, Section 31 of the California Constitution still makes explicit that its promise of equal protection extends to banning discrimination by the state in public employment, education, or contracting. The notion that the legislature might actually try to go forward with legislation to dispense racial favors *despite* its complete failure in 2020 and in 2024 to amend the most prominent bar on differential treatment in the state Constitution is laughable. That broad proscription continues to present a legal minefield that an agency charged with racially classifying California citizens in order to enable race-based transfer payments is unlikely, to put it mildly, to successfully traverse.

V. Conclusion

Just three years ago, California enjoyed a $100 billion budget surplus. Now it faces a deficit almost half again as large. Indeed, the AP reported this week that the California Legislature can't even muster the vigor to secure the state's s most vital clean energy source.[14] This comes as California languishes as the American state with the highest poverty rate and lowest literacy rate.[15]

The responsibility for salvaging California's fisc falls squarely on your shoulders. But instead of, say, *literally keeping California's lights on* while mitigating global warming, finding ways to better educate the state's people, or even just allowing them to work and thrive at rates comparable to Mississippi, its leaders are focused on strip-mining the state's last free assets to fund a payout to a favored racial constituency.

That cannot be the right answer. Not for the state. Not for its people. Not for its officials, who hope to seek reelection or to pursue higher office. California should not press forward with its anti-Constitutional identitarian crusade in this sure-to-lose fashion. If it does, groups like ours will assuredly see you soon to block these anti-Constitutional measures from taking effect.

Respectfully Yours,

Daniel I. Morenoff
The ACR Project,
Executive Director

---

[14] https://www.mymotherlode.com/news/local/3409363/california-legislators-break-with-gov-newsom-over-loan-to-keep-states-last-nuclear-plant-running-2.html

[15] For California's place as America's most impoverished state, see: *Poverty Rate by State 2024*, World Population Review, https://worldpopulationreview.com/state-rankings/poverty-rate-by-state (last visited Aug. 19, 2024); for California's place as America's least literate state, see: *U.S. Literacy Rates by State 2024*, World Population Review, https://worldpopulationreview.com/state-rankings/us-literacy-rates-by-state (last visited Aug. 19, 2024).