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October 8, 2024

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Re: Notice of Intent to Sue Over Discriminatory Program

Dear Friends,

Along with our co-counsel at Benbrook Law Group, PC, this firm represents the Californians for Equal Rights Foundation and a set of Sacramento taxpayers who intend to assert claims over the unlawful Family First Economic Support Pilot (the "Program"). The Program's webpage states that its cash benefits—government-provided money—are available *only* to "parent[s] or legal guardians who are the primary care providers of Black/African American or American Indian/Alaska Native child ages 0-5." In other words, the Program exists to provide government benefits based on race and ethnicity; disfavored races need not apply. The Program violates, at least, the California Constitution, the United States Constitution's Equal Protection Clause, and Title VI of the Civil Rights Act of 1964, and appears to violate 42 U.S.C. § 1981, as well.

Should you insist on going forward with Program despite your receipt of this letter, we must insist that each of your offices preserve all documents and electronic data relating to the Program.

I. THE PROGRAM FACIALLY DISCRIMINATES BASED ON RACE, USING PUBLIC FUNDS

The Sacramento Department of Child, Family, and Adult Services website reflects that Sacramento is currently accepting applications for the Program. The website flatly states that applicant eligibility will be limited to "Parents/legal guardians caring for Black/African American, American Indian & Alaska Native (Native American) children ages 0-5[.]" The Program's associated Eligibility Requirements page is no less clear—it, too, baldly states without pretense or qualification that one: "Must be a parent or legal guardians [and] the primary care providers (sic) of a Black/African American or American Indian/Alaska Native child ages 0-5" to apply for participation in the Program.

It is also refreshingly forthright on the public role in the Program. The Eligibility Requirements page admits both that the Program is "Funded by the County of Sacramento Department of Child Family and Adult Services" and that this county support is underwritten by "a State Block Grant" "released" by the "California Department of Social Services" ("CDSS") "with the intention of prioritizing services that focus on racial equity and reducing disproportionate entries of Black and American Indian/Alaska Native families into the foster care system."[1]

II. THE PROGRAM IS BLATANTLY UNLAWFUL

A. US CONSTITUTION'S EQUAL PROTECTION CLAUSE

The U.S. Constitution forbids public entities from engaging in intentional racial discrimination. The County and CDSS entities are subject to its prohibitions. The Program openly engages in

[1] The Eligibility Requirement page expressly describes its reasoning as pursuing "racial equity." While sovereign Native American tribes hold a special place in American law, the Program qualifies individuals not based on their membership in any such tribes but based on the *racial* character of children cared for by an applicant.

precisely the kind of intentional racial discrimination the Constitution forbids.

Such intentional racial discrimination is only permissible if it satisfies strict scrutiny. Strict scrutiny, always and everywhere it applies, requires a "compelling purpose" and "narrow tailoring." Given the limits the courts have placed on what qualifies as a "compelling purpose," there is no serious argument that a basic-minimum income program rejecting Americans in poverty who are ethnically Asian, Hispanic, or White solely because of their race is lawful.

B. Title VI of the Civil Rights Act of 1964

Both the county and the CDSS are recipients of federal funding and are therefore subject to the anti-discrimination requirements of Title VI of the Civil Rights Act of 1964:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[2]

The Program's admissions, detailed above, conclusively demonstrate that you are currently funding the Program's blatant subjection of impoverished Sacramentans to racial and ethnic discrimination, despite the fact that your entities receive federal financial.

It is generally understood that Title VI imposes on federal funding recipients precisely the same constraints that the federal Equal Protection Clause imposes on state and local governments,[3] so for the same reason it violates the Equal Protection Clause, the Program violates Title VI.

C. The California Constitution

California law is no more forgiving of the Program.

Since at least 1974, the California Constitution has separately included governing provisions forbidding the Program. Article I, Sec. 7 of the California Constitution both establishes that "[a] person may not be ... denied equal protection of the laws"[4] and provides that "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens."[5]

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[2] 42 U.S.C. § 2000d.

[3] Some argue that Title VI's language affords no "out" for even those federal funding recipients whose intentional racial discrimination is narrowly tailored to achieve a compelling state purpose. E.g., *Students for Fair Admissions v. Harvard*, 143 S.Ct. 2141, 2219-2221 (J. Gorsuch, concurring) (2023) (so arguing for the two Justices that reached the matter, while at least four others declined to address its merits).

[4] Cal. Const. Art. I § 7(a).

[5] Cal. Const. Art. I § 7(b).

California's courts have traditionally read the state's equal protection clause co-extensively with that in the Fourteenth Amendment.[6] However, California courts have also recognized their authority to independently interpret the provision to provide greater protections against discrimination.[7] They have read similar state constitutional provisions barring discrimination to make no exception for intentional discrimination serving even compelling state purposes.[8] As such, your support of the Program's discrimination plainly violates the California Constitution.

Moreover, the California Constitution prohibits granting any "citizen or class of citizens" "privileges or immunities not granted on the same terms to all citizens." Cal. Const., Art. I, § 7(b). This straightforward prohibition prevents your entities from giving public assistance based on race and ethnicity. The Program violates this prohibition by expressly granting privileges (government payments) to individuals chosen based on the race and ethnicity of their children, which your agencies do not grant to citizens whose children are of other races on the same terms. The constitutional prohibition includes no carve-out for compelling state purposes.

To the extent that the Program functions through public contracts, it also violates Article I, Sec. 31 of the California Constitution, which prohibits the State of California "itself, any city, county, city and county, public university system, including the University of California, ... school district, ... or any other political subdivision or governmental instrumentality of or within the State" from "discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, ... color, ethnicity, or national origin in ... public contracting."[9]

D. 42 USC § 1981

1. Potential Application of 42 USC § 1981

Section 1981 began life as Section 1 of the Civil Rights Act of 1866.[10] Congress subsequently wrote the Fourteenth Amendment to cut off any argument that the Civil Rights Act of 1866 might

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6 E.g., *Crest v. Padilla*, 2002 Cal. Sup. LEXIS 11070, *19-*20 (Cal. Sup. Ct.—L.A., 2022).

7 E.g., *Manduley v. Sup. Ct.*, 27 Cal. 4th 537, 571 (Cal. 2002).

8 *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal.4th 537, 567 (Cal. 2000) (holding that, while the Fourteenth Amendment "allows discrimination and preferential treatment whenever a court determines they are justified by a compelling state interest and are narrowly tailored to address an identified remedial need, it does not...preclude a state from providing its citizens greater protection against both.... Unlike the equal protection clause, section 31 categorically prohibits discrimination and preferential treatment. Its literal language admits no 'compelling state interest' exception; we find nothing to suggest the voters intended to include one sub silento.").

9 Cal. Const. Art. I § 31.

10 14 Stat. 27.

overreach Congress's pre-existing legislative powers.[11] Following ratification of the Fourteenth Amendment, Congress re-passed Section 1981's antecedent in 1870 to head off any contention that it had lacked the authority to pass Section 1981 in 1866.[12] Congress recodified the statute in 1874.[13] Section 1981's basic structure then remained unchanged until 1991.[14]

The Supreme Court uniformly—for decades—understood Section 1981 to bar discrimination on the basis of *any* race in *any* contracting, whether by actors private or public.[15] This means that it was "violated if a[n] offeror refuses to extend to [an American], solely because [of his race], the same opportunity to enter into contracts as he extends to [other] offerees."[16] Then, Congress acted in 1991 to dispel any remaining confusion about the extent of Section 1981's ambit. In the Civil Rights Act of 1991, Congress added two subsections to Section 1981, only the first of which—subsection (b)—matters for present purposes. That subsection states:

> For purposes of this section, the term "make and enforce contracts" includes the *making*, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.[17]

The original public meaning of Section 1981, as amended in 1991, is thus clear. The modern version of Section 1981 "protects the equal right of all persons ... to *make* and enforce contracts without respect to race."[18] Thus, "Section 1981 prohibits intentional race discrimination in the *making* and enforcement of public and private contracts."[19]

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[11] *See, e.g.*, *Gen'l Bldg. Contractors Ass'n v. Pa.*, 458 U.S. 375, 389 (1982) ("The 1866 Act represented Congress's first attempt to ensure equal rights.... As such, it constituted an initial blueprint of the Fourteenth Amendment, which Congress proposed in part as a means of 'incorporat[ing] the guaranties of the Civil Rights Act of 1866 in the organic law of the land.'") (citing *Hurd v. Hodge*, 334 U.S. 24, 32 (1948)).

[12] *Runyon v. McCrary*, 427 U.S. 160, 168-69 n.8 (1976) (recounting the early history of 42 U.S.C. § 1981).

[13] *Id.*

[14] *See Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 372-73 (2004) (discussing the relevant history of 42 U.S.C. § 1981 through its last amendment in 1991).

[15] *See*, e.g., *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 298 (1976) (Section 1981 "was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race.").

[16] *Runyon*, 427 U.S. at 170-71. The Supreme Court released its opinions in *Runyon* and *McDonald* on the same day (June 25, 1976), with seven (7) of the Justices signing onto both majority opinions. Accordingly, while only the *McDonald* opinion focuses on the universality of § 1981's protection of Americans *of all races* against racial contracting discrimination, with *Runyon* instead focusing on the applicability of § 1981 to the categorical refusal of (private) parties to extend contracts to any Black customers, one can properly read the cases in conjunction as clarifying that § 1981 bars *all* actors from deciding not to contract with *any* American because of *any* race.

[17] 42 U.S.C. § 1981(b) (emphasis added).

[18] *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006) (cleaned up) (emphasis added).

[19] *Jenkins v. Nell*, 26 F.4th 1243, 1249 (11th Cir. 2022) (emphasis added).

To the extent that the Program operates through contracts, it is subject to Section 1981. As should be clear, to that extent, the Program—with its categorical exclusion of entire classes of Sacramentans based on race—would clearly violate Section 1981.[20]

2. RAMIFICATIONS IF § 1981 APPLIES

Focused as it is on contracts, one might imagine that Section 1981 would only assign liability for illicitly discriminatory contracting decisions to the contracting enterprise in privity with a plaintiff. That would be reasonable, but also very wrong. *All* of the courts of appeals that have considered the issue have agreed that the personnel authorizing or implementing a Section 1981 violation are *personally* liable for the damages worked.

The Fourth Circuit faced the question first. In 1975, in *Tillman v. Wheaton-Haven Recreation Association*,[21] after the Supreme Court held a community swimming pool's policy against black memberships to violate the Civil Rights Act of 1866, the district court—on remand—"absolved the directors from all liability" for the policy,[22] reasoning that although the directors knew that they were intentionally approving racial discrimination, they didn't know that it was illegal when they did so.[23]

The Fourth Circuit reversed. It reasoned that: (a) Section 1981 created a statutory tort; (b) "[g]enerally, a tortfeasor who acted intentionally cannot defend on the ground that he mistook the law"; and (c) "Section 1981 ... create[s] no exception[] to these principles."[24] The court expressly held that "a complainant relying on § 1981 ... need not prove that the defendant knew the duties these statutes impose. Stated conversely, ignorance of the rights secured by these statutes is not a defense to an action brought to enforce them."[25] As a result, the *Wheaton-Haven* court held that one "who actually votes for the commission of a tort is personally liable, even though the wrongful act is performed in the name of the [entity].... Proof that [individual] voluntarily and intentionally caused the ... act is sufficient to make him personally accountable."[26]

Since *Wheaton-Haven*, at least seven more U.S. courts of appeals have reached the same

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[20] While Section 1981 claims may not be asserted as such against governmental parties, the Courts have long acknowledged that governmental actors' actions violating Americans' Section 1981 rights are themselves actionable as denials of civil rights under 42 U.S.C. § 1983. E.g., *Yoshikawa v. Seguirant*, 74 F.4th 1042, 1047 (9th Cir. 2023) (A plaintiff seeking to enforce rights secured by § 1981 against a state actor must bring a cause of action under § 1983.")

[21] 517 F.2d 1141 (4th Cir. 1975).

[22] *Id.* at 1142.

[23] *Id.* at 1143.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 1144.

conclusion. In 1985, the Seventh Circuit expressly followed *Wheaton-Haven* on this issue.[27] 1986 saw the Third Circuit follow suit in *Al-Khazraji v. St. Francis College*.[28] It, too, reasoned that:

> [a]lthough Section 1981 is a federal civil rights remedy it is in the nature of a tort remedy.
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> An individual [decision maker] may be liable for injuries suffered by third parties because of his torts, regardless of whether he acted on his own account or on behalf of [a legal entity.]. "An officer ... who takes part in the commission of a tort by [a legal entity] is personally liable therefore."[29]

The Third Circuit expressly held that such decision-makers "may become personally liable when they intentionally cause an infringement of rights protected by Section 1981, regardless of whether the [entity they control] may also be held liable," so long as they "are personally involved in the discrimination ... and if they intentionally caused [the] infringe[ment of] Section 1981 rights, or if they authorized, directed, or participated in the alleged discriminatory conduct."[30] The Third Circuit has reiterated this holding as recently as 2020.[31] The Sixth Circuit reached the same conclusion in 1986.[32] The Tenth Circuit concurred as early as 1991[33] and expressly reiterated the point in 2002.[34] The Second Circuit did the same in 2020.[35] Slightly less clearly, the Fifth[36] and

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27 *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 753 (7th Cir. 1985) ("We agree with the Fourth Circuit that personal liability cannot be imposed on a[n] official for the [entity's] violations of section 1981 when the official is not alleged to have participated in the actual discrimination against the plaintiff.... Personal liability is imposed only when the officer is alleged to have taken part in the *illegal act* initially giving rise to the corporation's liability.") (citing *Wheaton-Haven*, 517 F.2d at 1144, among other authorities).

28 784 F.2d 505 (3rd Cir. 1986).

29 *Id.* at 518 (citing *Goodman v. Lukens Steel*, 777 F.2d 113, 118 (3d Cir. 1985); *Zubik v. Zubik*, 384 F.2d 267, 275-76 (3d Cir. 1967)).

30 *Id.*

31 *Pedro v. City Fitness LLC*, 803 F.App'x 647, 652 n.9 (3d Cir. 2020).

32 *Jones v. Continental Corp.*, 789 F.2d 1225, 1231 (6th Cir. 1986) ("[T]he law is clear that individuals may be held liable for violations of § 1981," including when acting as "'agents' of the employer.") (internal citations omitted).

33 *Allen v. Denver Pub. Sch. Bd.*, 928 F.2d 978, 983 (10th Cir. 1991), *overruled on other grounds*, *Kendrick v. Penske Transp. Servs.*, 220 F.3d 1220, 1228 (10th Cir. 2000).

34 *Flores v. Cty. of Denver*, 30 F.App'x 816 (10th Cir. 2002) ("[A]n individual defendant can be held liable under § 1981 if the individual defendant was personally involved in the discriminatory conduct.").

35 *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 75 (2nd Cir. 2020) ("We now explicitly hold what has been implicit in our previous cases: individuals may be held liable under § 1981 [when] 'a plaintiff [has] demonstrate[d] 'some affirmative link to causally connect the actor with the discriminatory action[ ]' [and the claim is so] 'predicated on the actor's personal involvement.'") (internal citations omitted).

36 *Foley v. Univ. of Houston Sys.*, 355 F.3d 333 (5th Cir 2003) ("recogniz[ing] a tension" in prior assertion that "it has not yet been decided [in the Circuit] 'whether a § 1981 claim lies against an individual

Eleventh[37] Circuits have agreed.

While the Ninth Circuit has so far lacked the chance to join this chorus, its district courts have followed the Court of Appeals' consensus.[38]

There are *no* counter-authorities. *No* court of appeals has rejected this approach and read Section 1981 to hold discriminating entities liable while holding harmless the individuals through which they act. With one voice, the courts that have considered the topic agree that Section 1981 leaves the individuals responsible for violations personally liable for the resulting damages.

III. NOTIFICATION CONCERNING PERSONAL LIABILITY, EVEN IF SECTION 1981 *DOES NOT* APPLY

All these legal matters are so well-known that we can only conclude that the actors funding the Program with public dollars and managing the Program simply don't care that they are violating the law.[39] In any event, please understand that you are all being advised through this letter that: (1) the Program is patently illegal, and (2) therefore, further involvement in it can subject participants to personal liability for their knowing participation in the denial of Americans' and Californians' civil rights. It is long past the time for government actors who racially discriminate to stop relying on qualified immunity to shield them from personal liability.[40] It has been "clearly

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defendant not a party to a contract giving rise to a claim" while nonetheless reiterating that the Circuit "has accepted that § 1981 liability will lie against an individual defendant if that individual is 'essentially the same' as the [contracting party] for the purposes of complained of conduct'") (citing *Felton v. Polles*, 315 F.3d 470 (5th Cir. 2002)).

37 *Powell v. Am. Remediation & Envtl., Inc.*, 618 F.App'x 974 (11th Cir. 2015) (faulting district court for having "overlooked the fact that [while] '[i]ndividual capacity suits under Title VII are ... inappropriate' [since] [t]he relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act' ... an employee may be held personally liable under 42 U.S.C. § 1981 for intentionally infringing rights that statute protects") (citing *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991); *Faraca v. Clements*, 506 F.2d 956, 595 (5th Cir. 1975)).

38 *See, e.g.*, *Plymale v. Dyer*, 837 F. Supp. 2d 1077, 1086-89 (E.D. Cal. 2011) (agreeing that where a plaintiff "establish[es] that [a] defendant was involved personally in ... adverse action and intentionally infringed on Section 1981 rights," such individual defendants would bear personal liability under § 1981, before assessing evidence and finding no such personal involvement).

39 Director Johnson's foreknowledge of the illegality of the Program is particularly clear, given that she is *already* a defendant in a parallel suit challenging the facial illegality and unconstitutionality of another racially exclusive basic minimum income program that her office has chosen to fund. See, *Californians for Equal Rights Foundation v. City and County of San Francisco*, Superior Court of Cal., County of San Francisco, Case No.: CGC-23-606796.

40 E.g., *Sanchez v. City of Santa Ana*, 1991 U.S. App. LEXIS 10459, *37-*38 (9th Cir. 1991) (citing *more than 30 years ago* authorities *even then* long-since recognizing the "right to be free from such invidious discrimination" to have been "so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it[,]" including the rights

established" that racial discrimination is unlawful for a lifetime. The Program exists solely to advance discriminatory treatment. These are not close questions and no court would treat them as such.

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I doubt you will take any actions in response to this notification. However, we provide it now so that you will not be able to contend later that you were not warned.

Respectfully Yours,

Daniel I. Morenoff

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protected by §§ 1981 and 1983, for governmental officials *already* to have had no "qualified immunity from a section 1981 or section 1983 action based on intentional discrimination[.]").