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June 13, 2023

Via Messenger

ERIC MCDONNELL
San Francisco African-American Reparations Committee
c/o San Francisco Human Rights Commission
25 Van Ness Ave, Ste 800
San Francisco, CA 94102

CC: City Attorney David Chiu

Dear Chairman Eric McDonnell,

As a long-time resident and taxpayer of the City and County of San Francisco, I am writing to demand that you immediately **cease** all publicly-funded work on consideration of *The Draft San Francisco Reparations Plan* (the “*Plan*”), and **desist** from any future use of taxpayer monies in expenditures for or relating to the *Plan*. Moreover, I specifically demand that you **cease and desist** from further requesting of an appropriation of \$50 million (or other amount) of taxpayer funds for creating an “Office of Reparations” as requested March 21, 2023 by Supervisor Shamann Walton, joined by Supervisor Dean Preston and Supervisor Hillary Ronen.

While various aspects of the *Plan* violate numerous different constitutional provisions as well as pre-emptive state and federal statutes,¹ the *Plan* clearly violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 7 of the California Constitution.² Both constitutional provisions strictly prohibit race discrimination under nearly all circumstances.³ The *Plan* makes clear that **only** African American residents and African American former residents of San Francisco will be considered eligible for reparations programs, clearly discriminating on the basis of race in violation of both the federal and state equal protection clauses.⁴

¹ A non-exhaustive list of other constitutional provisions and statutes are implicated including, but necessarily limited to: Article I, Section 8 of the California Constitution, Article I, Section 19 of the California Constitution, Article I, Section 31 of the California Constitution, Article XVI, Section 3 of the California Constitution (to the extent state funds are expended), Article XVI, Section 6 of the California Constitution (to the extent state funds are expended), the 1964 Civil Rights Act, the 1968 Fair Housing Act, the Unruh Civil Rights Act, and the San Francisco City Charter.

² U.S. CONST. amend. XIV, § 1; CAL. CONST. Art. I, § 7(a).

³ See, e.g., *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 729-733 (2007) (holding that racial balancing is never a compelling interest of the state); *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (“No inquiry into legislative purpose is necessary when the . . . racial classification appears on the face of the statute.”); *Loving v. Virginia*, 388 U.S. 1, 10 (1967) (“The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.”); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (“Distinctions between citizens solely because of their race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.”). See also *Bostock v. Clayton County*, 140 S. Ct. 1731, 1740 (2020) (“*Bostock*”) (“To ‘discriminate against’ a person . . . means ‘treating that individual worse than others who are similarly situated.’”).

⁴ *Sei Fujii v. California*, 38 Cal. 2d 718, 729 (Cal. 1952) (“By its terms the land law classifies persons on the basis of eligibility to citizenship but in fact it classifies on the basis of race or nationality. This is a necessary consequence of the use of the express racial qualifications found in the federal code. Although Japanese are not singled out by name

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While there may be some very narrowly limited exceptions in the United States Constitution that allow for the government to discriminate on the basis of race,⁵ the California Constitution strictly prohibits even those narrow and limited exceptions.⁶ And while some may argue that racial discrimination is permissible because it is “slavery reparations”, the United States Supreme Court recently made clear in *Bostock v. Clayton County*,⁷ “it’s irrelevant what [one] might call its discriminatory practice, how others might label it, or what else might motivate it.”⁸ Moreover, while some may attempt to argue the *Plan* is legal because it will exclude some African Americans from reparations who fail to meet other requirements, the United States Supreme Court in *Bostock* also reaffirmed that prohibited discrimination is still illegal even if there are other motivating factors involved in the discriminatory action.⁹

The San Francisco Board of Supervisors is not only considering implementation of the *Plan*, despite its clear unconstitutionality, but also apparently considering an advance appropriation of \$50 million (or other amount) to establish an office to determine eligibility for recipients under the *Plan*. This is a violation of the supervisors' oath and duty as elected officials to uphold and defend the United States and California Constitutions.¹⁰

Fortunately, there is a remedy. California Civil Procedure Code § 526a allows any taxpayer in the City and County of San Francisco to bring a taxpayer lawsuit or citizen lawsuit against the City and County of San Francisco for the violation of the United States and California Constitutions should the *Plan* be enacted.¹¹ More importantly, California Civil Procedure Code § 526a also allows taxpayers to bring an action for the waste of public funds.¹²

for discriminatory treatment in the land law, the reference therein to federal standards for naturalization which exclude Japanese operates automatically to bring about that result.”).

⁵ *Metro Broad v. FCC*, 497 U.S. 547, 601 (1990)(Stevens, J., concurring)(explaining that “racial or ethnic characteristics provide a relevant basis for disparate treatment only in extremely rare situations . . . [such as] . . . broadcast diversity, . . . an integrated police force, diversity in the composition of a public school faculty or diversity in the student body of a professional school”).

⁶ CAL. CONST. Art. I, § 31(a); *Hi-Voltage Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 567 (Cal. 2000)(“Its literal language admits no ‘compelling state interest’ exception”); *Connerly v. California*, 229 Cal. App. 4th 457, 462, n.4 (Cal. Ct. App. 2014)(“Under equal protection principles, all state actions that rely upon suspect classifications must be tested under strict scrutiny, but those actions which can meet the rigid strict scrutiny test are constitutionally permissible. [Article I, Section 31], on the other hand, prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny.”).

⁷ 140 S. Ct. 1731 (2020)(“*Bostock*”).

⁸ *Bostock*, at 1744. See also *Rice v. Cayetano*, 528 U.S. 495, 514 (2000)(“Ancestry can be a proxy for race.”).

⁹ *Bostock*, at 1742 (explaining that “it [does not] matter that, when an employer treats one employee worse because of that individual’s sex, other factors may contribute to the decision. Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman and a fan of the Yankees is a firing “because of sex” if the employer would have tolerated the same allegiance in a male employee.”). See also *Rice v. Cayetano*, 528 U.S. 495, 516-517 (2000)(“Simply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral.”).

¹⁰ *Leger v. Stockton Unified School District*, 202 Cal. App. 3d 1448, 1454 (Cal. Ct. App. 1988)(“Under [Article I, Section 26 of the California Constitution], all branches of government are required to comply with constitutional directives . . . or prohibitions.”).

¹¹ *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16, 29-30 (Cal. Ct. App. 2001).

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The action for a waste of public funds is its own independent cause of action against government, separate from the violations of the constitution.¹³ A waste of public funds is described as a government expenditure that, even when lawfully done, is “completely unnecessary,” “useless,” or “provides no public benefit.”¹⁴ A waste of public funds undoubtedly occurs when the government spends money to administer an illegal or unconstitutional program.¹⁵

Indeed, the California Supreme Court has prohibited expenditures by city and county governments for the waste of public funds when the funds would have been expended for a violation of the Constitution.¹⁶ As the California Court of Appeals has explained, “a court must not close its eyes to wasteful, improvident and completely unnecessary public spending, merely because it is done in the exercise of a lawful power.”¹⁷

The appropriation of \$50 million of taxpayer money by the City and County of San Francisco to establish an office of reparations for a program that is unconstitutional and will be unable to legally meet its objectives, is clearly a waste of public funds. Thus, I have also demanded that the Board of Supervisors **cease and desist** from implementing any allocation of public funds for determining recipient eligibility under the *Plan*.

I further demand a full accounting of all monies allocated, received and spent, salaries paid, beginning January 2020 through May 31, 2023 inclusive, by you, the African American Reparations Advisory Committee and the San Francisco Human Rights Commission, on the creation and drafting of the *Plan*.

You are hereby demanded to respond to this Cease & Desist Letter within ten (10) business days from receipt, via email to richie@greenbergnation.com or via messenger to the address above, informing me of whether you will comply. Should you fail to cease implementation of expenditures for determining eligibility under the *Plan*, I will consider taking legal action. Thank you for your cooperation in this matter.

Sincerely,
Richie Greenberg

¹² CAL. CIV. PROC. CODE § 526a(a)(“An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a local agency, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf . . .”).

¹³ *Los Altos Property Owners Association v. Hutcheon*, 69 Cal. App. 3d 22, 30 (Cal. Ct. App. 1977)(holding that plaintiffs, having “alleged that defendants will be expending public funds on a consolidation plan that costs a great deal more than alternative plans considered, without a finding of any additional public benefit”, had stated a cause of action for waste of public funds).

¹⁴ *Sundance v. Municipal Court*, 42 Cal. 3d 1101, 1108-1109 (Cal. 1986).

¹⁵ *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1086 (Cal. 1995).

¹⁶ *Hartnett v. County of Sacramento*, 195 Cal. 676, 683 (Cal. 1925)(“Where it is proposed to hold an election for the submission of a measure to the popular vote, and that measure will be wholly void and inoperative even if adopted by the people, the courts may, at the instance of a resident taxpayer, enjoin the holding of the election upon the ground that it will be a useless expenditure and waste of public funds (Section 526a).”).

¹⁷ *City of Ceres v. City of Modesto*, 274 Cal. App. 2d 545, 555 (Cal. Ct. App. 1969)(prohibiting a public expenditure by a city that constituted a waste of public funds).