

Written Testimony of

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Before the

California Reparations Taskforce

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Madam Chair, Members of the Committee:

The California Reparations Taskforce has an historic opportunity to set the agenda for current and future reparations determinations. I would encourage the Taskforce to recognize that the production of a report that fully accounts for the history of intergenerational race-based wrongdoing, and its continuing significant impact, is an important end in itself, independent of the ability to legislate an adequate slate of remedies to address those wrongs.

My work includes developing national and local litigation and legislation strategies seeking reparations on behalf of the descendants of enslaved people and of victims of Jim Crow segregation and racial violence. In particular, I have worked for 20 years seeking reparations for the victims of the Tulsa race massacre, as well as being briefly involved with some of the lawyers representing the Georgetown 272 Descendants movement, seeking justice for the descendants of people enslaved and sold by Georgetown University. Accordingly, my work engages with reparations from enslavement to contemporary policing. I was a member of the Reparations Coordinating Committee which filed pathbreaking federal reparations lawsuit on behalf of the survivors of the Tulsa Race Massacre of 1921, *Alexander v. State of Oklahoma*, and I and took a leading role in drafting the complaint. I am currently a member of Lawyers for Justice for Greenwood, and again took a lead role in drafting and arguing a reparations public nuisance lawsuit, *Randle v. City of Tulsa*, filed in 2020.

General Features of Reparations

Reparations is set of remedies, featuring economic, institutional, social, political, legal, economic, and cultural rebuilding, owed to the victims of some significant, intergenerational, group-based or race-targeted dignity wrong.

Reparations is might be called a *wrong-based* remedy, to contrast it with a variety of other rights-based ways of remediating racial injustice, such as affirmative-action programs. Reparations responds to direct, race-based intergenerational injuries in which both the perpetrator and the victim can be identified. These intergenerational wrongs are ones that occurred, and are still being perpetrated, at the national, state, and municipal level. They featured the actions of governments, corporations, other institutions, and individuals.

The wrongs that are addressed by AB 1321, included, certainly, the expropriation of life and labor from enslaved people. However, AB 1321 goes much further, to include not only the wrongs of enslavement, but also “sharecropping, convict leasing, Jim Crow laws, redlining, unequal education, and disproportionate treatment at the hands of the criminal justice system,” as well as debilitating economic, educational, and health hardships,” occurred in different ways to different groups at different times. These wrongs thus include the destruction proscription of social, cultural, economic, educational, and medicinal institutions as a means of disempowering Black people and preventing their social and political organization and self-determination. For these wrongs, direct monetary payments are insufficient. Only the creation of social, economic, and political institutions will suffice.

The century-long effort to gain reparations for the Tulsa Race Massacre, which gained its contemporary political traction beginning about 1996, is exemplary here. Over a night of incredible violence, on May 31-June 1, 1921, hundreds of white people entered Greenwood, the Black district of Tulsa, Oklahoma, murdering around 300 Black people and burning about 40 city blocks to the ground, rendering about 8,000 people homeless and destitute. The Tulsa massacre, was a massive, intergenerational, race-targeted act of violence that destroyed a whole community's social and economic institutions: its residential and business districts, its schools, a library, and a hospital. The City and State inflicted catastrophic mental and emotional trauma upon a generation of African American Tulsans, The City and State prevented the residents of Greenwood from rebuilding their town, and reduced them to a dependent state. And to cover its tracks, the City and State erased the massacre from the official history of the state, and suppressed reporting of the massacre, so that subsequent generations did not know about the massacre or did not believe that it had happened.

The damage wrought by the Tulsa race massacre extended beyond the victims and their descendants. It impacted every African American who lived in Tulsa, in the State of Oklahoma, and indeed (as a recent study of Black entrepreneurship made clear) across the United States. The City and State communicated a clear message about African Americans' subordinate status. The City and State ensured the dependent status of Black Tulsans when it destroyed the social, political, legal, economic, and cultural institutions and infrastructure that had been created by African Americans in the Greenwood district of Tulsa. The City and State then prevented their reconstruction. Reparations in Greenwood would thus take the form, in part, of responding to these wrongs by creating and investing in local institutions, identified and created by African Americans, run by African Americans, employing African Americans, serving African Americans, because it was these African American community institutions and infrastructure that was targeted for destruction.

A core question for the California Task Force is whether there are state and federal legal barriers to remedying reparations. Having worked on both federal and state lawsuits seeking reparations, I am familiar with these issues, and with some of the unique challenges facing reparations in California.

Proposition 209 Challenges

Proposition 209 is codified in the California Constitution, Article 1, Section 31, which declares that the state, including its political subdivisions, "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." (§ 31, subd. (a).) West's Ann.Cal.Const. Art. 1, § 31.

The effect of Proposition 209 is primarily to remove a core justification for government-sponsored race-based remediation programs in the areas of education, employment, and contracting: that there is some "compelling government interest" justification for race-remedial legislation in the context of education, employment, and contracting. *C&C Construction, Inc. v. Sacramento Municipal Utility Dist.*, 122 Cal.App.4th 284, 293 (2004). More simply, under Proposition 209, past discrimination cannot serve as a blanket justification for present

remediation. *C&C Construction, Inc. v. Sacramento Municipal Utility Dist.*, 122 Cal.App.4th 284, 301 (2004); *Coral Construction, Inc. v. City and County of San Francisco*, 50 Cal.4th 315, 337 (2010).

The California Supreme Court has quite broadly interpreted the “shall not discriminate” language in Proposition 209 to include *any* discrimination. Thus, discrimination is defined for purposes of Proposition 209 as “a distinction in treatment given to different individuals because of their different race, religion, or national origin.” *C&C Construction, Inc. v. Sacramento Municipal Utility Dist.*, 122 Cal.App.4th 284, 303 (2004) (quoting *Steelworkers v. Weber* (1979) 443 U.S. 193, 236 [99 S.Ct. 2721, 2744, 61 L.Ed.2d 480, 509], fn. 16 (dis. opn. of Rehnquist, J.) quoting 110 Cong. Rec. 7477 (1964).)

Proposition 209 is, however, somewhat narrower in the terms of the sorts of activity that it covers. First, Proposition 209 is limited by its express terms to governmental action in the areas of education, employment, and public contracting. There is, however, another important set of limitations on Proposition 209: it does not apply to situations in which race-based remediation is *necessary* under federal law. Thus, where the Equal Protection clause requires race-based remediation, the Prop. 209 cannot prevent it. This is referred to in *Coral Construction, Inc.*, as the “federal compulsion” doctrine.

The federal compulsion doctrine applies in cases in which there has been “purposeful discrimination.” *Coral Construction, Inc. v. City and County of San Francisco*, 50 Cal.4th 315, 337 (2010). Thus, the guiding California Supreme Court Cases are clear that where the injury is direct racial discrimination, and that federal law *requires* race-conscious action to remedy that injury, then Proposition 209 does not prohibit such remediation. *Coral Construction, Inc. v. City and County of San Francisco*, 50 Cal.4th 315, 337 (2010).

Thus, there are two separate issues in which a race-based remedy might arise.

1. If some person is *directly and purposely* injured on the basis of race (e.g., the institution expressly used race as a criterion to exclude that person from its programs), then that person has a remedy even under Proposition 209.
2. If some person is indirectly discriminated against as a member of a *group* (e.g., the institution has discriminated against this group in the past, there is currently disproportionate underrepresentation of that group, and the institution now wishes to adopt a policy to remedy that underrepresentation) the if the discrimination is in the context of government education, employment, or contract, Proposition 209 applies to preclude the remedy, even if the state has a compelling interest in doing so.

Proposition 209 applies *only* to the second category of discrimination.

Reparations is, as I have said, a wrong-based remedy. In other words, it depends upon showing the sort of direct and purposeful wrongdoing to specific individuals, and providing a remedy for that wrong. As the California Supreme Court acknowledged, where some institution has:

"(1) ... purposefully or intentionally discriminated against [e.g., Black Californians]; (2) that the purpose of the [legislation] is to provide a remedy for such discrimination; (3) that the [legislation] is narrowly tailored to achieve that purpose; and (4) that a race-and gender-conscious remedy is necessary as the only, or at least the most likely, means of rectifying the resulting injury."

Coral Construction, Inc. v. City and County of San Francisco, 50 Cal.4th 315, 337 (2010), then such legislation will survive *both* Proposition 209 and strict scrutiny under the Equal Protection Clause of the United States Constitution (U.S. Const. Art. XIV).

Finally, it is worth noting that so long as the *remedy* is race-neutral, it does not matter that the *injury* is race-specific. As the California Supreme Court has emphasized, "Section 31 does not imply that racial discrimination and barriers do not exist. 'States and their local subdivisions have many legislative weapons at their disposal both to punish and prevent present discrimination and to remove arbitrary barriers to minority advancement.'" *C&C Construction, Inc. v. Sacramento Municipal Utility Dist.*, 122 Cal.App.4th 284, 293 (2004) (quoting *City of Richmond v. Croson Co.* 488 U.S. 469, 494 (1989))

Potential Remedies and Eligibility

California has already passed a number of statutes plausibly construed as awarding reparations to various racial, ethnic, and religious groups. These include victims of the Armenian genocide; victims of the Holocaust; victims of the United States Bracero program; and victims of, in particular, Japanese Slave Labor during WWII. Notably, all of these statutes extend relief both to the surviving victims and also the "heirs or beneficiaries of the victims." *See, e.g.*, Cal. Code Civ. Proc. § 354.4 (Holocaust victims); § 354.6 (victims of Japanese slave labor) ;§ 354.7 (victims of Bracero programs). All of these statutes were enacted after Proposition 209 came into force, and whilst all but the Bracero statute were pre-empted by the federal government's power to govern foreign relations, none of the statutes have been struck down as violating Proposition 209.

1. Inapplicability of Proposition 209 Outside the Context of Education, Employment, and Contracting

Proposition 209 is applicable only in the context of public employment, public education, and public contracting. Accordingly, remedies for past discrimination that do not impact these interests are not covered by Proposition 209.

2. Applicability of Strict Scrutiny in the Context of Race-Based Remediation

Even if Proposition 209 does not apply, the Supreme Court has applied the highest standard of review to attempt to remedy racial discrimination that benefit discrete racial groups. Under this standard, "the state must establish that it has a compelling interest that justifies and necessitates the law in question." *Strict Scrutiny*, Black's Law Dictionary (11th ed. 2019).

There are three potential approaches to remedy that can avoid the impact of Proposition 209 and strict scrutiny. These are: (A) identifying a set of directly discriminatory wrongs that require race-based remediation; (B) identifying a set of race-neutral wrongs that have a substantial race-positive impact; and (C) identifying a set of indirectly discriminatory wrongs but propose a race-neutral remedies.

A. Directly Discriminatory Wrongs

Monetary payments and other forms of relief for people who are directly injured through racial discrimination will survive strict scrutiny. This was a focus of the legal research conducted by the legal team litigating the Tulsa Race Massacre of 1921. It is clear that state-sponsored race-based homicide, property damage, unlawful detention, and servitude in violation of the Fourteenth Amendment to the United States Constitution's Equal Protection Clause could result in direct monetary payments to the survivors and in certain cases, the descendants, of the Tulsa Race Massacre.

To the extent that the descendants of the Tulsa Race Massacre cannot receive direct monetary payments because of some limitations in the federal enabling statute, 42 U.S.C. §1983, permitting litigation under the Equal Protection Clause, could be amended in the manner of the California reparations statutes. Indeed, Congressional H.R.3466, the Tulsa-Greenwood Massacre Claims Accountability Act of 2021, introduced by Representative Henry Johnson (D-GA) does just this, using the California reparations statutes as a model.

Similarly, the return of property wrongly misappropriated from Black people (as in the case of Bruce's Beach) does not violate strict scrutiny. Neither do the various California reparations acts. These statutes, however, contemplate a relatively narrow class of beneficiaries, however. That, in itself, is part and parcel of reparations wrong-based approach: there must be some directly discriminatory injury to some particular person. Under this narrow understanding of eligibility the discrete individuals able to recover would include the survivors (if any) and their descendants: what the California statutes call their "heirs and beneficiaries."

B. Race-Neutral Wrong

The State of California could also simply enact a statute that identifies the injury of "slave labor" and, like the WWII Slave Labor act, tie it to a particular time period, for example, prior to 1865. Since *all* slave labor would be compensated, irrespective of race, the statute would provide a race-neutral solution. The statute could provide that the victim's "heirs and beneficiaries" have a remedy based on *inheriting* an interest in stemming from the original injury. Finally, the State could structure any reparations claims act like the tort claims act, waiving immunity for certain injuries.

Depending on the injury, the class of people entitled to compensation may be large or small. If the injury is enslavement in California, that class is certainly smaller than those who are injured by enslavement in the United States.

Other injuries may apply to a broader class of claimants. For example, characteristic injuries inflicted by enslavement and Jim Crow racial violence include family separation, certain forms of labor and sexual exploitation, and certain types of aggravated or ritualistic torture or homicide. Los Angeles County is currently paying damages for white supremacist gangs among its law-enforcement personnel that target people by “race, socioeconomic status, [and] physical appearance.” For “various forms of mistreatment, including harassment, retaliation, and excessive force.” SAMUEL PETERSON, ET AL., UNDERSTANDING SUBGROUPS WITHIN THE LOS ANGELES COUNTY SHERIFF’S DEPARTMENT: COMMUNITY AND DEPARTMENT PERCEPTIONS WITH RECOMMENDATIONS FOR CHANGE xiii (2021).

3. Race-Neutral Remedy

To satisfy strict scrutiny, the State could identify a race-specific injury, but craft a race-neutral solution. To the extent that there are injuries that are disproportionately suffered by certain groups, though suffered by all, then focusing on remedying those injuries is not a preference under Proposition 209 nor should it fall foul of federal strict scrutiny standards. This is the “rising tide floats all boats” argument proposed by Professor Charles J. Ogletree, Jr. in a number of articles discussing reparations and supporting a variety of reparations efforts following the federal Tulsa litigation. *See, e.g.*, Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 Harv. C.R.-C.L.L. Rev. 279 (2003); Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051 (2003). This sort of remedy has the widest eligibility, as all people in the relevant class receive benefits.

Some Lessons from the Tulsa Race Massacre

In the current public nuisance litigation, *Randle v. City of Tulsa*, filed on behalf of, among others, the three living survivors of the Massacre, we sought a variety of remedies which could be thought of as remedies for direct discrimination including remedies for the race-based refusal to provide adequate health care, sanitation, and public infrastructure. The remedies we have demanded include:

- Property development, including purchase of business and residential property and repairs and upgrading of existing property, in the Greenwood neighborhood or North Tulsa;
- Development of mental health and educational programs by individuals who live in Greenwood or North Tulsa for residents of Greenwood and North Tulsa; or organizations with 75% of their leadership consisting of individuals who live in Greenwood or North Tulsa;
- Development of a quality-of-life program for individuals who live in Greenwood or North Tulsa for emergency needs related to maintaining employment, medical emergencies, and home maintenance;
- Creation of a land trust into which all vacant or undeveloped land in the historical Greenwood neighborhood and North Tulsa community currently owned by Defendants will be placed. Residents who are descendants of those who lost homes or businesses in the Massacre shall be able to receive a parcel as close to the size that was destroyed in the Massacre or taken for less than fair market value during urban renewal;

- Construction of a Level 1 Trauma Center hospital, including an urgent care center, in Greenwood, in which Greenwood and North Tulsa residents are given top priority for employment at all levels, that is named after and dedicated to the Massacre murder victim and nationally acclaimed surgeon, Dr. A.C. Jackson;
- Immunity from all City of Tulsa and County of Tulsa taxes, fees, assessments, and/or utility expenses for the next 99 years for residents of the City of Tulsa or Tulsa County who are Massacre survivors or descendants of those who were killed, injured or lost property in the Massacre.

Many of the remedies also respond to the second category of race-neutral injuries because the wrongs perpetrated during the Massacre include murder, arson, theft, kidnap, wrongful arrest, and peonage. After the Massacre, the City also engaged in various environmental, health, and public safety injuries shared by the whole neighborhood.

Finally, it is worth noting that many of the remedies also with the third category of race-neutral remedies. The proposed programs are place-based not race-based. It just so happens that the place is the Black neighborhood because the wrong was and still is a series of attacks on the quality of life for Black people who are clustered within those neighborhoods.

Even our different claims of unjust enrichment which comes closest to the narrowest reparations demand for a direct monetary compensation for the wrongful taking of property shares the double race-conscious/race-neutral character because though race-neutral in law, the wrongs happen to be ones that target Black people. Because the wrongs injured Black people, the remedies will happen to be ones that recompense those same Black people and their heirs and beneficiaries.

Beyond Cash Payments

Reparations remedies must, however, include more than just cash payments. In fact, the biggest difference between two lawsuits filed seeking justice for the Tulsa Race Massacre are that the 2003 federal litigation sought only money damages whereas the current state public nuisance litigation seeks to build institutions to abate the multiple separate wrongs perpetrated during the Massacre and after. For example, Human Rights Watch published a study of Greenwood and North Tulsa entitled *The Case for Reparations in Tulsa, Oklahoma: A Human Rights Argument*. <https://www.hrw.org/news/2020/05/29/case-reparations-tulsa-oklahoma#>. It found that Greenwood and North Tulsa are health, food, and banking deserts: if a Black resident of North Tulsa has a health emergency, the ambulance comes from and returns to the white South Tulsa neighborhood, increasing the time taken to receive emergency care. The only banks in North Tulsa are payday lenders. The small businesses presence is half that of the rest of the City.

All of this is because the economy of Tulsa, Oklahoma, is designed to redirect Black dollars as efficiently as possible into white pockets. For 100 years, white Tulsans have sought to undermine Black enterprise and render Black Tulsans dependent on white businesses.

Exemplary of this money drain is Greenwood Rising an history center built with the support of a Race Massacre Centennial Commission created by the City of Tulsa's overwhelmingly white

political, philanthropic, and business community. That community has, for the last 100 years, sought to whitewash the reputation of the City of Tulsa and redirect funds that support reparations for the Black community to institutions that overwhelmingly benefit the white community. Neither Greenwood Rising nor the Centennial Commission has provided any money in direct payments to the three living survivors or any of the descendants of the Massacre, despite having raised \$30 million from a variety of donors, \$18.2 million of which has been spent on the Greenwood Rising project. Kevin Matthews, Chair of the Centennial Commission, has said that the survivors “don’t have a right to the 30 million raised.”¹ All this while the survivors still live in poverty because of the Massacre and its continued harm.

The theme of the Commission and the history center is that "Greenwood is Rising," "Tulsa Triumphs" and that "Tulsa is leading America's journey to racial healing," Yet the Commission refused to allow the survivors any input regarding the formation, membership or goals of the Commission when it was founded. Greenwood Rising has heavily referenced the survivors and descendants in their publicity, By claiming that the Greenwood Rising project is "dedicated" to the survivors, the Commission creates the false impression that they support reparations and the Greenwood community.

The City government and the Commission have sought to appropriate the history of the Massacre for itself and turn Black Wall Street into a brand for white Tulsans to sell. The City has refused to address the continuing impacts of Tulsa’s policies in producing a geographically and socially isolated black community marked by economic, health, educational, and safety deficits, and to create institutions and opportunities for Black Tulsans to invest in their communities and promote their own well-being.

The Scope of Reparations

Direct monetary payments to Black people are a vital part of reparations. Monetary payments to Black people in the United States take on an outsized importance given the repeated stigmatization of Black people as incapable of financial responsibility. This invidious stereotype has haunted black people from slavery, to Reconstruction, and on through Jim Crowe as a means of forcing sharecroppers into indentured servitude. Most recently, it has reappeared in stereotypes of welfare fraudsters.

However, focusing too narrowly on direct money payments for lost labor and lives will must sort of stating the full restitution due. The work of reparations requires an holistic and transformative account of the repair due for the multiple different types of wrong and categories of wrongdoer that have injured Black people in California and across the United States. To catalog these wrongs and wrongdoers, the Task Force should not be bound at the investigation, accounting, and recommendation stage to present a report with the hope of reconciliation with individuals who continue to benefit from 400 years of white supremacy.

¹ Janelle Stecklein, *Last Tulsa Race Massacre Survivors Push for Reparations*, Stillwater News Press, May 21, 1921. https://www.stwnewspress.com/news/last-tulsa-race-massacre-survivors-push-for-reparations/article_723e23ee-ba77-11eb-94fe-ff46ecbe9968.html.

Again, the Tulsa experience is instructive. After gaining bipartisan legislative support for an investigation, and Support from the Governor, the 2001 Commission to Study the Tulsa Race Riot of 1921 focused on detailing the history of the Massacre, but only very tentatively proposed reparations. Despite this effort at reconciliation, the State enacted a statute that completely ignored reparations and disavowed any legal responsibility for the Massacre, while acknowledging the facts of its involvement in the Massacre. For the 20 years since the Commission's Report, the survivors and descendants of the Massacre have remained disgusted by the City's and State's response, and pursued a variety of litigative and legislative strategies to gain reparations.

The California Task Force has the opportunity to be exemplary, not only in its investigation, reporting, and proposals but also in its practice. Reparations is also a political movement, as well as a form of remedy. It demands bottom-up participation empowers descendants and current victims to participate and determine for themselves what sorts of payments and institutions are needed. In this way, reparations is quite different from more traditional, top-down, civil rights struggles and organizations. Real reparations includes this sort of wide, grassroots, participation, not just a scholarship and a cash payoff.

Indeed, historically, reparations movements have been led by people overlooked or even rejected by mainstream groups and experts: people like Callie House or Queen Mother Audley Moore. This Taskforce should embrace not only the spirit, but the reparative practice of House and Moore, by reaching out not just to community leaders, but to the community members themselves, and develop innovative ways for seeking their input and lifting up their voices to determine what reparations looks like for the impacted communities of California.

Conclusion

State, county, and municipal governments, along with other organizations and institutions, have been slow to acknowledge the multiple ways they has actively participated in, and passively facilitated, race-targeted dignity harms that have a continuing effect on African American communities throughout this state. By adopting a broad, wrong-based definition of reparations, and engaging in a bottom-up, inclusive process of investigating and reporting, this Task Force as an historic opportunity to establish California as a model for reparations nationally and internationally.