



● **Board of Directors**
Communications and Legislation Committee

9/15/2020 Board Meeting

7-4

Subject

Express support for Proposition 16, the “Allows Diversity as a Factor in Public Employment, Education and Contracting Decisions” legislative constitutional amendment; the General Manager has determined that the proposed action is exempt or otherwise not subject to CEQA

Executive Summary

If passed by the voters, Proposition 16 would repeal Proposition 209 (1996) from the California Constitution, permitting state and local entities to use race, sex, color, ethnicity, or national origin in public education, public employment, and public contracting decisions to the extent allowed by federal law.

Details

Background

Assembly Constitutional Amendment 5 (ACA 5) placed an initiative, Proposition 16, on the November 3, 2020, ballot asking voters to repeal Proposition 209 (California Constitution, Article 1, Section 31).

ACA 5 (**Attachment 1**) was authored by Assembly Members Weber (D-San Diego), Gipson (D-Carson), Santiago (D-Los Angeles), and Gonzalez (D-San Diego). Coauthors include Assembly Members Burke (D-Inglewood), Cooper (D-Elk Grove), Holden (D-Pasadena), Jones-Sawyer (D-Los Angeles), Kamlager (D-Los Angeles), McCarty (D-Sacramento), and Stone (D-Scotts Valley); and Senators Bradford (D-Gardena), Mitchell (D-Los Angeles), and Hueso (D-San Diego). Assembly Member Weber introduced ACA 5, stating that, “While it was sold as a civil rights law when it passed in 1996, Proposition 209 has...set up barriers to women and minorities to share in the economic life of California. It’s time to give voters a chance to right this wrong.”

Proposition 16 would repeal Section 31 of Article 1 of the California Constitution, which was added in 1996 by Proposition 209. Proposition 209 established a ban on the consideration of race, sex, color, ethnicity, or national origin in public education, public employment, and public contracting. If passed, Proposition 16 would permit government decision-making bodies to consider race, sex, color, ethnicity, or national origin to address diversity in the operation of public employment, education or contracting to the extent allowable by federal law.

Proposition 209 (1996): “The California Civil Rights Initiative”

Proposition 209 was passed by the voters in 1996 with the strong support of then-Governor Wilson. The proposition effectively banned affirmative action or other practices that gave preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin by state and public agencies.

Existing Law

The Fourteenth Amendment to the U.S. Constitution establishes a right to equal protection, stating (in part), “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U.S, nor deny to any person within its jurisdiction the equal protection of the laws.” As a result, there are limits to the use of certain characteristics as deciding factors in hiring, contracting, or admissions. To ensure compliance with federal law, these policies and programs must meet certain conditions that limit the consideration of these characteristics to prevent discrimination that violates equal protection. The Civil Rights Act of 1964 also

prohibits discrimination on the basis of race, sex, religion, color and national origin. California state law, likewise, also has a number of antidiscrimination provisions that are similar to those in federal law.

Under the federal constitution, race, sex, religion, and national origin are considered “suspect classifications.” Any policy based on a suspect classification is subject to strict scrutiny by the courts if it is legally challenged. If California voters approve the repeal of Proposition 209 and Metropolitan adopts any policies based on suspect classifications (race, sex, religion, or national origin), it must demonstrate both a compelling interest in the policy and means that are narrowly tailored to achieve that interest.

Arguments in Support

Arguments in support of Proposition 16 generally state that contrary to the initial arguments for Proposition 209, the effects have not ensured fairness, diversity and equity in education, public contracting, and public employment. A report commissioned by the Equal Justice Society notes that, “Proposition 209 caused the state and local governments to end their race-conscious contracting programs, resulting in a loss of \$1 billion to \$1.1 billion annually for minority and women business enterprises (MWBs).” Supporters say the state needs to hire more women to positions of leadership, contract with businesses that reflect the diversity of California, and expand access to higher education for all Californians. As a result of the significant changes to the social and economic fabric of the state, voters should be permitted an opportunity to reconsider the merit or necessity of this statewide policy banning affirmative action-type programs.

Supporters

The list of current and former elected officials, individuals and organizations in support of Proposition 16, includes but is not limited to: AFSCME California, Anti-Defamation League, California Black Chamber of Commerce, California Hispanic Chambers of Commerce, California Teachers Association, Chinese for Affirmative Action, Equality California, League of Women Voters of California, Los Angeles County Board of Education, and the University of California Board of Regents.

Arguments in Opposition

Arguments in opposition to Proposition 16 assert that the repeal of Proposition 209 would reintroduce racial preference in California in violation of law and court decisions. Opponents also assert that Proposition 209 does not categorically prohibit affirmative action, and that this measure constructs a false narrative of racial inequities.

Opponents also state that the measure will create division among race or ethnic demographics and would minimize the importance of the contributions of minority groups as a result of preferential treatment.

Opponents

Opponents include, but are not limited to: American Civil Rights Institute, American Freedom Alliance, Chinese American Civic Action Alliance, Students for Fair Admissions, Inc., State Senator Chang (R-Diamond Bar), State Senator Melendez (R-Lake Elsinore), Bob Huff, former Republican State Senate Minority Leader, and Ward Connerly.

Impacts to Metropolitan and Member Agencies

The California Constitution (Article XI) broadly defines the state to include the state, any city, county, public university system, community college district, school district, special district, or any other political subdivision or governmental instrumentality of, or within, the state. As a result, Proposition 16 would apply broadly to all state and public agencies, including Metropolitan and its member agencies.

Repeal of the constitutional prohibition on affirmative action created by Proposition 209 would allow the state and other public agencies in California, including Metropolitan, to consider race, sex or ethnicity in the areas of public employment, public contracting, and public education to the extent allowed by federal law. This could include providing priority to contracts with minority- and women-owned businesses, similar to what is currently provided to small and veteran-owned businesses. It could also be used to develop policies to incentivize the hiring and promotion of minority and women candidates.

Policy

Metropolitan Water District Administrative Code Section 11104: Delegation of Responsibilities.

Metropolitan Water District Administrative Code, Division VI, Chapter 3, Article 1: Equal Employment Opportunity and Affirmative Action.

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA (Public Resources Code Section 21065, State CEQA Guidelines Section 15378) because the proposed action will not cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment and involves legislative proposals that do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment (Public Resources Code Section 21065 and Section 15378(b)(1) of the State CEQA Guidelines).

CEQA determination for Option #2:

None required

Board Options

Option #1

Express support for Proposition 16, the “Allows Diversity as a Factor in Public Employment, Education and Contracting Decisions” Legislative Constitutional Amendment.

Fiscal Impact: The measure does not require any change to policies or programs and does not create an unfunded mandate.

Business Analysis: If approved by the voters, Proposition 16 would repeal Section 31 of Article 1 of the California Constitution, and permit government decision-making policies to consider race, sex, color, ethnicity, or national origin to address diversity in the operation of public employment, education or contracting.

Option #2

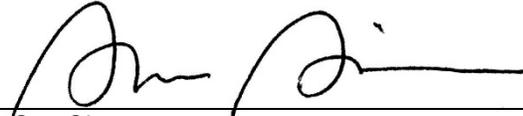
Take no position on Proposition 16, the “Allows Diversity as a Factor in Public Employment, Education and Contracting Decisions” Legislative Constitutional Amendment.

Fiscal Impact: If not approved by the voters, there is no change to the status quo.

Business Analysis: If not approved by the voters, Section 31 of Article 1 of the California Constitution would remain in effect, generally prohibiting the consideration of race, sex, color, ethnicity or national origin in the operation of public employment, education or contracting.

Staff Recommendation

Option #1


 Sue Sims
 External Affairs Manager

8/26/2020

Date


 Jeffrey Kishlinger
 General Manager

8/28/2020

Date

Attachment 1 – Assembly Constitutional Amendment 5 (Weber, et al), chaptered June 25, 2020

Assembly Constitutional Amendment 5 (Weber, et al), chaptered June 25, 2020

Assembly Constitutional Amendment No. 5

RESOLUTION CHAPTER 23

Assembly Constitutional Amendment No. 5—A resolution to propose to the people of the State of California an amendment to the Constitution of the State, by repealing Section 31 of Article I thereof, relating to government preferences.

[Filed with Secretary of State June 25, 2020.]

LEGISLATIVE COUNSEL'S DIGEST

ACA 5, Weber. Government preferences.

The California Constitution, pursuant to provisions enacted by the initiative Proposition 209 in 1996, prohibits the state from discriminating against, or granting 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. The California Constitution defines the state for these purposes to include the state, any city, county, public university system, community college district, school district, special district, or any other political subdivision or governmental instrumentality of, or within, the state.

This measure would repeal these provisions. The measure would also make a statement of legislative findings in this regard.

WHEREAS, Equal opportunity is deeply rooted in the American ideals of fairness, justice, and equality. Programs to meet the goals of equal opportunity seek to realize these basic values. Equal opportunity not only helps individuals, but also helps communities in need and benefits our larger society. California's equal opportunity program was upended by the passage of Proposition 209 in 1996; and

WHEREAS, Proposition 209, entitled the California Civil Rights Initiative, amended Article I of the California Constitution to prohibit race- and gender-conscious remedies to rectify the underutilization of women and people of color in public employment, as well as public contracting and education; and

WHEREAS, Proposition 209 invalidated a series of laws that had been enacted by the California Legislature over the 20 years prior to it that required state agencies to eliminate traditional patterns of segregation and exclusion in the workforce, to increase the representation of women and minorities in the state service by identifying jobs for which their employment was underrepresented due to discrimination, and to develop action plans to remedy such underrepresentation without effectuating quota systems; and

WHEREAS, Proposition 209 also overshadowed other landmark civil rights and antidiscrimination laws. In 1959, after a 37-year campaign by

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labor and civil rights groups, the Unruh Civil Rights Act was passed, which was the forerunner of the Civil Rights Act of 1964; and

WHEREAS, As a result of the passage of Proposition 209, women and people of color continue to face discrimination and disparity in opportunities to participate in numerous forms of association and work that are crucial to the development of talents and capabilities that enable people to contribute meaningfully to, and benefit from, the collective possibilities of national life; and

WHEREAS, The State of California has provided employment opportunities for people of color and women of all races. However, lingering, and even increasing, disparity still exists, particularly for Asian Americans, Pacific Islanders, Black Americans, Latino Americans, Native Americans, and women, and should be rectified; and

WHEREAS, Proposition 209 has impeded California's continuing interest in supporting the equal participation of women in the workforce and in public works projects, in addressing the historical and present manifestations of gender bias, and in promulgating policies to enforce antidiscrimination in the workplace and on public projects; and

WHEREAS, In the wake of Proposition 209, California saw stark workforce diversity reductions for people of color and women in public contracting and in public education. Studies show that more diverse workforces perform better financially and are significantly more productive and focused; and

WHEREAS, Since the passage of Proposition 209, the state's minority-owned and women-owned business enterprise programs have been decimated. A 2016 study conservatively estimates that the implementation of Proposition 209 cost women and people of color over \$1,000,000,000 annually in lost contract awards. Most procurement and subcontracting processes remain effectively closed to these groups due to the changes brought on by Proposition 209; and

WHEREAS, Women are vastly underrepresented among firms receiving public contracts and the dollars awarded to certified women-owned business enterprises fell by roughly 40 percent, compared to levels before Proposition 209. In addition, only one-third of certified minority business enterprises in California's transportation construction industry are still in operation today, compared to 20 years ago; and

WHEREAS, Women, particularly women of color, continue to face unequal pay for equal work. White women are paid 80 cents to every dollar paid to white men doing the same work. Black women are paid 60 cents for every dollar paid to white men doing the same work and would theoretically have to work an extra seven months every year to overcome that differential. This persistent gender wage gap continues to harm women, their families, and communities; and

WHEREAS, Despite a booming economy with almost full employment, a persistent racial wealth gap remains rooted in income inequality. Improving minority access to educational and labor market opportunity reduces the wealth gap and strengthens the economy; and

WHEREAS, Proposition 209 has had a devastating impact on minority equal opportunity and access to California's publicly funded institutions of higher education. This violates the spirit of the California Master Plan for Higher Education by making it more difficult for many students to obtain an affordable and accessible high quality public education. While federal law allows schools to use race as a factor when making admissions decisions, California universities are prohibited by Proposition 209 from engaging in targeted outreach and extra efforts to matriculate high-performing minority students. This reduces the graduation rates of students of color and, in turn, contributes to the diminution of the "pipeline" of candidates of color for faculty positions; and

WHEREAS, Since the passage of Proposition 209, diversity within public educational institutions has been stymied. Proposition 209 instigated a dramatic change in admissions policy at the University of California, with underrepresented group enrollment at the Berkeley and Los Angeles campuses of the University of California immediately falling by more than 60 percent and systemwide underrepresented group enrollment falling by at least 12 percent. Underrepresented group high school graduates faced substantial long-term declines in educational and employment outcomes as a result of these changes; and

WHEREAS, Among California high school graduates who apply to the University of California, passage of Proposition 209 has led to a decreased likelihood of earning a college degree within six years, a decreased likelihood of ever earning a graduate degree, and long-run declines in average wages and the likelihood of earning high wages measured by California standards. The University of California has never recovered the same level of diversity that it had before the loss of affirmative action nearly 20 years ago, a level that, at the time, was widely considered to be inadequate to meet the needs of the state and its young people because it did not achieve parity with the state's ethnic demographics; and

WHEREAS, The importance of diversity in educational settings cannot be overstated. The Supreme Court of the United States outlined the benefits that arise from diversity, as follows, "the destruction of stereotypes, the promotion of cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivation of a set of leaders with legitimacy in the eyes of the citizenry"; and

WHEREAS, Federal courts continue to reaffirm the value of diversity in favor of race conscious admissions, as exemplified by United States District Judge Allison D. Burroughs who stated, "race conscious admissions programs that survive strict scrutiny have an important place in society and help ensure that colleges and universities can offer a diverse atmosphere that fosters learning, improves scholarship, and encourages mutual respect and understanding. Further, Judge Burroughs recognized that there are no race-neutral alternatives that would allow a university to achieve an adequately diverse student body while still perpetuating its standards for academic and other forms of excellence; and

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WHEREAS, It is the intent of the Legislature that California remedy discrimination against, and underrepresentation of, certain disadvantaged groups in a manner consistent with the United States Constitution and allow gender, racial, and ethnic diversity to be considered among the factors used to decide college admissions and hiring and contracting by government institutions; and

WHEREAS, It is further the intent of the Legislature that California transcend a legacy of unequal treatment of marginalized groups and promote fairness and equal citizenship by affording the members of marginalized groups a fair and full opportunity to be integrated into state public institutions that advance upward mobility, pay equity, and racial wealth gap reduction; now, therefore, be it

Resolved by the Assembly, the Senate concurring, That the Legislature of the State of California at its 2019–20 Regular Session commencing on the third day of December 2018, two-thirds of the membership of each house concurring, hereby proposes to the people of the State of California, that the Constitution of the State be amended as follows:

That Section 31 of Article I thereof is repealed.

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