Date of Hearing: May 5, 2020

ASSEMBLY COMMITTEE ON PUBLIC EMPLOYMENT AND RETIREMENT
Freddie Rodriguez, Chair
ACA 5 (Weber) – As Amended May 4, 2020

SUBJECT: Government preferences

SUMMARY: Amends the California Constitution by repealing Section 31 of Article I relating to the prohibition against discrimination or preferential treatment, among other provisions. Specifically, **this Constitutional Amendment**:

1) Repeals provisions enacted pursuant to Proposition 209 in 1996 that prohibit the state and all institutions and political subdivisions thereof 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.

2) States legislative findings in this regard.

EXISTING LAW:

1) Federal

   a) Known as the Equal Protection Clause, the Fourteenth Amendment to the United States (U.S.) Constitution states in part that, "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."

   b) Established the Civil Rights Act of 1964 that, among other things, prohibited discrimination on the basis of race, sex, religion, color, or national origin.

2) State

   a) Establishes, pursuant to Section 26 of Article I of the California Constitution, that the provisions of the California Constitution are mandatory and not prohibitory, unless by express words they are declared to be otherwise.

   b) Expressly prohibits, pursuant to Section 31 or Article I of the California Constitution, 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. In addition, this section also provides the following:

i) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are necessary to the normal operation of public employment, public education, or public contracting.

ii) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for a federal program where ineligibility would result in a loss of federal funds to the State.

iii) The "state" includes, but is not necessarily limited to, all political subdivisions of the state (i.e., the State itself, any city, county, city and county, public university system, , including the University of California, community college district, school district, and special district).

iv) Establishes that the remedies for violating this section must be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are available for violations of existing state antidiscrimination law.

v) This section is self-executing. If any part or parts are found to be in conflict with federal law or the U.S. Constitution, the section must be implemented to the maximum extend that federal law the U.S. Constitution permit, and severability.

c) Relating to sex, race, etc., as not a disqualification for business, the California Constitution provides, pursuant to Section 8 of Article I, that a person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.

d) Provides, pursuant to Section 1 of Article VII of the Constitution of California, that the civil service includes every officer and employee of the state except as otherwise provided, and that in the civil service, permanent appointment and promotion be made under a general system based on merit ascertained by competitive examination.

e) Requires, pursuant to the State Civil Service Act, state employment to be based on the merit principle; that appointments are based upon merit and fitness ascertained through practical and competitive examination, and that tenure of civil service employment is subject to good behavior.[1]

f) Establishes that it is the policy of the state to afford all persons in public schools, regardless of their disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of

[1] See Section 18500 et seq. of the Government Code.

hate crimes, as provided, including immigration status, equal rights and opportunities in the educational institutions of the state.[2]

g) Establishes the Department of Fair Employment and Housing, California's civil rights agency responsible for enforcing the state's civil rights laws, including the Fair Employment and Housing Act.

h) Establishes the California Department of Human Resources (CalHR) which is responsible for all matters relating to state employee salaries, benefits, job classification, civil rights, training, exams, and recruitment and retention. In addition, the Director of CalHR has the duty to administer and enforce laws relating to personnel.

FISCAL EFFECT: Unknown. This Constitutional Amendment is flagged as fiscal by Legislative Counsel.

COMMENTS: According to the author, "Californians have built the fifth largest and strongest economy in the world, but too many hardworking Californians are not sharing in our state's prosperity--particularly women, families of color, and low-wage workers. Assembly Constitutional Amendment 5 will help improve all of our daily lives by repealing Proposition 209 and eliminating discrimination in state contracts, hiring and education. [This Constitutional Amendment] is about equal opportunity for all and investment in our communities."

1) Basics: The Process of Amending the California Constitution

The California Constitution prescribes the processes in which it may be amended and revised. This may be accomplished by 1) a proposal by the Legislature (with two-thirds of the membership of each house (Assembly and Senate, respectively) concurring, 2) a constitutional convention where two-thirds of the membership of each house concurring, may submit at a general election the question whether to call a convention to revise the Constitution, or 3) the electors (i.e., the voters) by (ballot) initiative.[3]

In the instant matter, Assembly Constitutional Amendment 5 is a proposal by the author to amend the California Constitution. With the requisite votes needed in each house of the Legislature, this matter could be placed on the statewide ballot for consideration by California's electorate.

2) Brief History Regarding Affirmative Action Policies and Programs

In 1941, through Executive Order (EO) 8802, President Franklin D. Roosevelt outlawed discrimination on the basis of race, color, creed, and national origin in the federal government and defense industries as the nation prepared for World War II.

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[2] See Section 200 of the Education Code.

[3] See Sections 1 through 4 of Article XVIII, and Section 8 of Article II, of the California Constitution.

As previously stated by the author, in 1961, EO 10925 was issued by President John F. Kenney which used affirmative action for the first time. This EO instructed federal contractors to take "affirmative action to ensure that applicants are treated equally without regard to race, color, religion, sex, or national origin." Subsequently, the Committee on Equal Employment Opportunity was created.

Since that time, there have been numerous landmark actions by the federal government to address the challenges faced by minorities and women relating to employment, public education, and business. These actions include, but are not limited to, the effectuation of the Civil Rights Act of 1964, President Johnson's issuance of EO 11246 in 1965, which required all government contractors and subcontractors to take affirmative action to expand job opportunities for minorities (which later was amended in 1967 to include women), actions by President Nixon (through EO 4 in 1970, and EO 11625 in 1971), President Jimmy Carter (EO 12138 in 1979); President Ronald Reagan (EO 12432 in 1983), and President William J. Clinton who, in 1995, reviewed all affirmative action guidelines by federal agencies and declared his support for affirmative action programs by announcing his administration's policy of "Mend it, don't end it."

While these actions were taken, they were not without controversy. There was an attempt in 1995 by the Congress to end federal government policies that treat citizens differently based on their race or gender.[4] In addition, there are a number of landmark legal decisions regarding affirmative action policies and programs and whether they essentially offend the "intent" or "spirit" of equal opportunity and treatment under the law.

3) Basics: Judicial Standards of Review Regarding Government Action and Equal Protection

When considering a matter involving equal protection, there are three tiers of judicial scrutiny (strict, intermediate, or rational basis) that a court may employ in its review of the matter.

When a law burdens a fundamental right or classifies persons based on race or national origin, the law will be subject to strict scrutiny. This means that the government must prove that the law is narrowly tailored to a compelling state interest.

The court will employ an "intermediate" standard of review if the classification is based upon gender (sex-based classifications) or illegitimacy (child of unwed parents). This means that the court will uphold the law only if the government can demonstrate that the classification is substantially related to an important government interest.

If a law involves a classification that relates only to matters of economics or social welfare, or simply does not fall into one of the above categories, the law may be upheld so long as the classification is rationally related to a legitimate state interest. Here, the plaintiff bears the burden under rationale basis review.

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[4] See S. 1085, the federal Equal Employment Opportunity Act of 1995 (104th Congress).

A law may establish a classification "on its face" which means that the law, by its own terms, classifies persons for different treatment. For example, a state law provides that no women may vote. Here, the law creates a classification, on its face, between women and men. However, a facially "neutral" law may be applied in a discriminatory manner. This means that the governmental official who is enforcing the law is applying it with different degrees of severity to different groups of people.[5]

The following highlight some of these standards of review in legal decisions regarding affirmative action policies and programs.

4) Examples of Judicial Standards of Review Regarding Affirmative Action Policies and Programs

In 1978, the U.S. Supreme Court found that the UC's admissions program involved the unlawful use of an explicit racial classification, thereby disregarding individual rights as guaranteed by the Fourteenth Amendment. Here, there needed to be a showing that the classification was necessary to promote a substantial state interest because the admissions program hinged on race, an inherently suspect distinction. The UC failed to show that the classification was necessary to its goals; however, it had a substantial interest that legitimately could be served by the competitive consideration of race, where race could be deemed a "plus", yet not insulate the applicant from comparison with all other candidates for the available seats. Nevertheless, the UC also failed to show that, but for the existence of its unlawful special admissions program, *Bakke* would not have been admitted. As a result, *Bakke* was entitled to admission.[6]

In *United Steel Workers of America, AFL-CIO v. Weber*, the U.S. Supreme Court held that race-conscious affirmative action efforts designed to eliminate a conspicuous racial imbalance in an employer's workforce resulting from past discrimination are permissible if they are temporary and do not violate the rights of white employees."[7] In 1986, the U.S. Supreme Court upheld a judicially-ordered 29 percent minority "membership admission goal" for a union that had intentionally discriminated against minorities, which confirmed that courts may order race-conscious relief to remedy past discrimination and prevent discrimination in the future.[8]

The U.S. Supreme Court struck down the *City of Richmond's* minority contracting program as unconstitutional, requiring that a state or local affirmative action program be supported by a "compelling interest" and be "narrowly tailored" to ensure that the program furthers that interest. This decision was similar to *Pena* where the court held that a federal affirmative action program

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[5] See *Yick Wo v. Hopkins,* 118 U.S. 356 (1886)

[6] See *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978)

[7] See *United Steel Workers of America, AFL-CIO v. Weber,* 443 U.S. 193 (1979)

[8] See *Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission*, 478 U.S. 421 (1986)

remains constitutional when narrowly tailored to accomplish a compelling government interest such a remedying discrimination. [9]

While there are numerous other relevant legal decisions, landmark decisions include, but are not limited to, several that are discussed *infra*.

5) Relevant Legal Decisions Regarding The Fourteenth Amendment to the U.S. Constitution: The Equal Protection Clause

Previously discussed under "Existing Law," the Equal Protection Clause requires states to treat similarly situated individuals in a similar manner and is violated when a state singles out a specific class of individuals for arbitrary treatment. Generally, if a class of individuals have been treated by the government differently than all other similarly situated persons, they may bring an equal protection claim.

A single individual also may bring an equal protection claim against the government even though that person is a "class of one." Thus, an individual who alleges that the government has applied a "general law" to him or her in a unique and unfavorable manner can challenge the government action under equal protection (although the claim would likely be reviewed under the rational basis test).[10] However, the "class of one" theory generally does not apply in the public employment context. The rationale here is that in the employment context, decisions are often subjective and individualized resting on a wide array of factors that are difficult to articulate. Government offices could not properly function if every employment decision became a constitutional matter.

In a legal decision regarding the Equal Protection Clause, the U.S. Supreme Court ruled that the Equal Protection Clause did not prohibit the University of Michigan Law School's "narrowly tailored use of race in admissions decision to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."[11] In another related matter, the U.S. Supreme Court also ruled that the University of Michigan's undergraduate admissions policy, which automatically distributed one fifth of the points needed to guarantee admission to every single "underrepresented minority" applicant, was not narrowly tailored to achieve the University's asserted interest in diversity and did violate the Equal Protection Clause.[12]

The University of Texas at Austin adopted an admissions process in 2004 after a year-long study of its process. This was undertaken in the wake of the *Grutter* and *Gratz* cases, Ibid. The university concluded that its prior race-neutral system did not reach its goal of providing the educational benefits of diversity to its undergraduate students. When a high school student was

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[9] See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), respectively.

[10] See *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)

[11] See *Grutter v. Bollinger*, 539 U.S. 306 (2003)

[12] See *Gratz v. Bollinger*, 539 U.S. 244 (2003)

denied admission to the university's 2008 freshman class, the student filed suit alleging that the university's consideration of race as part of its holistic review process disadvantaged her and others of the same race in violation of the Equal Protection Clause.

In this case, the U.S. Supreme Court held that university's race-conscious admissions program in use at the time of the student's application was lawful under the Equal Protection Clause.[13] Thus, it was a means of obtaining the educational benefits that flow from diversity of the student body. Enrolling a diverse student body promotes cross-racial understandings, helps to break down racial stereotypes, promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.

The aforementioned judicial decisions are just a few among numerous others regarding the Equal Protection Clause.

6) Brief History of Proposition 209 and Relevant Legal Decisions

Proposition 209, also known as the "California Civil Rights Initiative," amended the California Constitution by adding Section 31 of Article I. This statewide ballot proposition was placed before California voters during the 1996 November General Election and received approximately 55 percent of votes cast in favor of its passage. Generally, and as stated under "Existing Law," this initiative prohibited all government agencies and institutions from giving preferential treatment to individuals on the basis of race or sex.

During the late 1970s, the use of racial quotas and minority set-asides led to court challenges of affirmative action as a form of "reverse discrimination." The origins of Proposition 209 partly stem from the judicial decision in *Bakke*.[14] Similar to the history of affirmative action, the passage of Proposition 209 has, and continues to be, not without controversy. Indeed, in private and public discourse there are numerous arguments for and against the moral, social, philosophical, political, economic, and legal aspects of Proposition 209, and the effects that it, and other similar laws have on the pillars on which the United States was founded. While Proposition 209 reversed decades of California policies that afforded preferential treatment, As of this writing, Proposition 209 continues to withstand legal scrutiny, for right or wrong depending on perspective, following numerous lawsuits challenging its enforcement. Several of these legal challenges are discussed directly below.

The case of *Hi-Voltage Wire Works, Inc. v. City of San Jose* involved a legal challenge that a program required contractors bidding on city projects use a specified percentage of minority and women subcontractors, or document efforts to include such subcontractors in their bids. In this case, *Hi-Voltage Wire Works, Inc.* intended to only use its personnel on a project, was unable to comply with the requirement, and its bid was rejected. *Hi-Voltage* sued alleging that the requirement to give preferential treatment to anyone on the basis of race or sex violated Section

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[13] See *Fisher v. University of Texas,* 136 S. Ct. 2198 (2016)
[14] See *Regents of the University of California v. Bakke,* Ibid.

31 of Article I. The California Supreme Court affirmed the holding of the appellate court which ruled that the intention of Section 31 was to reinstitute those principles forbidding discrimination which were present in state and federal jurisprudence in the original construction of the Civil Rights Act, and prohibited the preferential treatment contemplated by the [city's] program. Section 31 did not require *Hi-Voltage* to violate any federal statutory or constitutional provision.[15]

In *Coral*, the contractors challenged an ordinance in the City and County of San Francisco that required preferential treatment to women and minorities in the awarding of contracts. The California Supreme Court held that Section 31 of Article I, which forbid a public entity awarding public contracts to discriminate or grant preferential treatment based on race or gender, did not violate the political structure doctrine. Section 31 prohibited race- or gender-conscious programs the federal Equal Protection Clause permitted, but did not require. Instead of burdening the right to equal treatment, Section 31 directly served the principle that all government use of race had to have a logical endpoint. Further, a core purpose of the Equal Protection Clause was to do away with all governmentally imposed discrimination based on race, ultimately creating a political system in which race no longer mattered. The federal funding exception in subdivision (e) of Section 31 did not exempt the ordinance from Section 31's general prohibition on racial preference.[16]

7) Other States that Have Prohibited Affirmative Action Policies and Programs

After passage of Proposition 209 in 1996, several other states have attempted to adopt, or adopted, similar bans on racial and other preferences. Most of those measures include language similar to Proposition 209. These states are: Washington (adopted by initiative statute in 1998), Florida (adopted by Executive Order of the Governor in 1999), Michigan (adopted by initiative constitutional amendment in 2006), Nebraska (adopted by initiative constitutional amendment in 2008), Colorado (failed initiative constitutional amendment in 2008), Arizona (adopted by constitutional amendment in 2010), New Hampshire (adopted by statute in 2011), and Oklahoma (adopted by legislatively referred constitutional amendment in 2012).

Although several states have adopted similar bans, extensive research and data exists that paints an interesting picture which may lead some to conclude that this trend is in the opposite direction of where the values of society, and in particular, California, exist today. The arguments for and against affirmative action or Proposition 209 are numerous, as is the research. The following are only a few sources regarding the subjects of affirmative action or Proposition 209; thus, the sources and data provided herein are not exhaustive.

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[15] See *Hi-Voltage Wire Works, Inc. v. City of San Jose,* 24 Cal. 4th 537 (2000)
[16] See *Coral Construction, Inc. v. City and County of San Francisco,* 50 Cal. 4th 315 (2010)

8) Reports, Studies and Surveys Regarding Proposition 209 or Diversity

In September 2008, the Thelton E. Henderson Center for Social Justice at the UC Berkeley School of Law released a report based on trends in public employment since 1990.[17] Several key findings in the report are:

- There is modest, but persistent, gender disparity**.** Men were more likely to be employed as civil servants than women, even after accounting for differences in the working age population. Disparity increased in the mid-1990s, around the time Proposition 209 was on the ballot, and remained steady during the following decade.

- Trends over time are largely the same for men and women within each racial and ethnic group. White American men are much more likely to be employed in the civil service than White American women, though for African Americans and Filipino Americans, women are more likely than men to be employed.

- People of color show rapid gains in employment as civil servants, though these gains trail increases in the working age population. Over time, the number of people of color in the civil service has grown while the number of White American civil servants has remained constant. However, the civil service employment rate for people of color has lagged several years behind changes in the working age population.

- Latino Americans are greatly underrepresented in civil service positions. Latino Americans, though making large gains in terms of the number of civil servants, are vastly underrepresented relative to their population. Furthermore, this disparity has grown over time. White Americans and African Americans are overrepresented as civil servants, while Asian Pacific Islander Americans have mostly been at parity."

The Pew Research Center conducted a survey during February 27, 2014, to March 16, 2014, and according to the data, it appears that nationally, most Americans (63 percent) are strongly supportive of affirmative action particularly relating to higher education. The data also shows that this figure has increased since May 2003 when that figure was 60 percent. The survey also shows that within that figure (i.e., 63 percent), there appears to be a racial and partisan divide on the subject.[18]

According to the California Postsecondary Education Commission's eligibility report, as to eligibility by race and ethnicity the report states that, "…the results show substantial differences

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[17] See *"Proposition 209 and Public Employment in California: Trends in Workforce Diversity."* https://www.law.berkeley.edu/wp-content/uploads/2015/04/Proposition-209-and-Public-Employment-Workforce-Diversity_Page_01.jpg

[18] See Pew Research Center, https://assets.pewresearch.org/wp-content/uploads/sites/5/legacy-questionnaires/4-22-14%20Affirmative%20Action%20Topline.pdf

in university eligibility by race and ethnicity. The UC eligibility rates for African American and Latino graduates are much lower than the rates for White and Asian American graduates. While racial and ethnic gaps have persisted in [the] UC, their magnitude has shrunk considerably.

"The gap between the two largest groups of students, White and Latino, is now less than half of what it was in 2007 (dropping from 7.7 percent to 3.4 percent). Over the same period, the eligibility gap between African American and White students narrowed from 8.3 percentage points to 5.4 points. Since the 1996 Eligibility Study, when African American and Latino students had eligibility rates of 2.8 percent and 3.8 percent, respectively, the rates for both groups have increased with each successive study." The report further states that, "At CSU campuses, racial and ethnic gaps have shrunk dramatically since the 2007 study. The pool of eligible students is more diverse than ever before. Latino eligibility rates, which jumped in the 2007 report, continued to grow rapidly — to 31.9 percent in 2015. That number represents an increase of 9.4 percentage points since 2007 and it is almost double the rate of 16.0 percent reported in 2003."[19]

Published in March 2019, the California Department of Human Resources issued its report which, among other things, conveys data on California state civil service representation by race, ethnicity, gender, disability, veteran status, and upward mobility for state employees from January 1, 2017, through December 31, 2017, over a five year period. This report shows that the number of persons that are White decreased 3.3 percent from 2013 through 2017, while the number of persons of all other races and ethnicities as a group, labeled Nonwhite, increased by 3.3 percent. In addition, the report details the total number of positions held by women, and men. [20]

According to a report commissioned by Equal Justice Society, "a major impact [following the passage of Proposition 209] was in the public procurement process of the state, as well as local governments." The study 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 (MWBEs). Other items noted in the report include, the loss of about $820 million per year in MWBE contracts for the state; the loss of about $200 million annually in MWBE contracts for the City and County of San Francisco, with some of the loss materializing after Proposition 209 and additional losses following the decision in *Coral*, which ended San Francisco's race-conscious procurement program; the loss of about $30 million per year in MWBE contracts with the City of Oakland, and the loss of an

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[19] See *"University Eligibility Study for the Public High School Class of 2015,"* http://opr.ca.gov/docs/20190823-RTI_Eligibility_Report_071417_FINALtoOPR.pdf

[20] See *"2017 Annual Census of Employee in State Civil Service,"* https://www.calhr.ca.gov/Documents/ocr-census-of-employees-2017.pdf

estimated $20 million per year in MWBE contracts with the City of San Jose following the decision in *Hi-Voltage*, which ended San Jose's race-conscious contracting program.[21]

9) Facts, Numbers, Data and Information: Are They Relative?

It is common knowledge that facts, numbers and data are, at times, rationalized or interpreted to suit one's particular view or agenda towards achieving a desired result. Nonetheless, facts are facts, numbers are numbers, and data is, well, data. The question then typically turns as to whether the source of the research and its methodology used to reach its conclusions, or to simply to provide information, are plausible and credible.

The dichotomy inherent in competing reports, statistics, surveys and other forms of research regarding affirmative action or Proposition 209 continues, and will likely continue in the foreseeable future. However, one may plausibly argue that it ultimately is up to the recipient of the information to make a determination whether to accept the information as valid. Relating to Assembly Constitutional Amendment 5, the ultimate determination could be made by California voters.

10) Voter Choice

External to the Legislature, Proposition 209 was independently placed on the ballot for consideration by the electorate. As with all other measures placed on the ballot, California voters were afforded an opportunity to either pass or reject that measure. Assembly Constitutional Amendment 5 is, as previously stated, an attempt by the author via the Legislature, to provide California voters another opportunity to pass or reject a change in the policy of the state which has become more diverse, and is the most diverse among the States, since the passage of Proposition 209 over two decades ago.

This Constitutional Amendment, in and of itself, cannot and will not change the policy of the state with respect to Section 31 of Article I of the California Constitution absent submittal to the voters for consideration and passage by the voters; therefore, *a fundamental question relating to this proposal is whether the various policy and fiscal committees, and the full body of each house of the Legislature (with the requisite number of votes) ultimately deem that voters should be afforded another opportunity to change the policy of the state regarding this subject?*

11) Comments by Supporters

A number of supporters state that, "California is currently the fifth largest economy in the world and has the world's largest system of higher education. Despite this, women and people of color are not getting their fair share of opportunities to get ahead:

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[21] See *"Impact of Proposition 209 on California's MWBEs"*, https://equaljusticesociety.org/wp-content/uploads/2019/10/ejs-impact-prop-209-mwbes.pdf

- A 2015 study showed that businesses owned by women and people of color lose $1.1 billion annually in government contracts.

- Women in California earn only 80 cents for every dollar a man earns on average, and women of color and single moms make less than 60 cents on the dollar for the same work as their white male counterparts.

- Just a third of leadership and tenured faculty positions at the California Community Colleges, California State University, and the University of California are held by Black, Latino, or Asian-American scholars.

- At the UC, women make up 54 percent of enrolled students, but just one third of the tenured faculty and less than a third of the members of the Board of Regents."

These supporters further state that, "Overturning California's ban on programs that promote equal opportunity is long overdue. The growing concerns about the economic harm of the COVID-19 pandemic only heightens the importance of bringing fairness to our public contracting and employment practices. There's no denying that small businesses owned by women and people of color will be the hardest hit by any downturn in the economy. [This Constitutional Amendment] will ensure that any government solution to spur economic growth will actually help the most vulnerable in our community."

In closing, "In the 21st century, the State of California 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. We can't continue to deny Californians an opportunity to succeed simply because of how they look or who they are. Assembly Constitutional Amendment 5 will level the playing field and allow all Californians to find a good job, earn a decent wage and get ahead in life and their careers. You can't have shared success without shared opportunity. Let's put California on a path toward true equal opportunity for all."

12) Prior or Related Legislation

Since the passage of Proposition 209, there have been several legislative attempts to revise the application of its provisions, as discussed below. Among these, Assembly Constitutional Amendment 5 represents another attempt, but the first legislative attempt to completely repeal Proposition 209.

Senate Constitutional Amendment 5 (Hernández, 2013) was introduced which proposed a constitutional amendment to be placed before the voters that removed provisions implemented through the enactment of Proposition 209 relating to public education. This measure was passed by the Senate (27-9), and after submittal to the Assembly for consideration, was ordered (i.e., returned) to the Senate without a vote of the Assembly. SCA 5 was then held in the Senate without further consideration by the Legislature; thus, failed to be passed.

Senate Bill 185 (Hernández, 2011) stated legislative intent to authorize the CSU and the UC to consider race, gender, ethnicity and national origin, geographic origin, and household income, along with other relevant factors, in undergraduate and graduate admissions, as specified, and required the CSU and requests the UC to report on the implementation of these provisions to the Legislature and Governor by November 1, 2013, as specified. This bill was vetoed by the Governor who stated:

> *"I wholeheartedly agree with the goal of this legislation. Proposition 209 should be interpreted to allow UC and CSU to consider race and other relevant factors in their admissions policies to the extent permitted under the Fourteenth Amendment of the United States Constitution. In fact, I have submitted briefs in my capacities as both Governor and Attorney General strongly urging the courts to adopt such an interpretation.*
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> *"But while I agree with the goal of this legislation, I must return the bill without my signature. Our constitutional system of separation of powers requires that the courts -- not the Legislature -- determine the limits of Proposition 209. Indeed, there is already a court case pending in the 9th Circuit against the State and the UC on the same issues addressed in this bill. Signing this bill is unlikely to impact how Proposition 209 is ultimately interpreted by the courts; it will just encourage the 209 advocates to file more costly and confusing lawsuits."*

Assembly Constitutional Amendment 23 (Hernández, 2009) established an exemption from the California Constitutional prohibition granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in public education for the purposes of implementing student recruitment and selection programs at public postsecondary education institutions that are permissible under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. This measure passed the Assembly Committee on Higher Education (6-1), but subsequently received no further action.

Assembly Bill 1452 (Nunez, 2005) authorized the UC and CSU to consider race, ethnicity, national origin, geographic origin, and household income, along with other relevant factors, in undergraduate and graduate admissions, so long as no preference is given and such consideration takes place if and when the university, campus, college, school, or program is attempting to obtain educational benefit through the recruitment of a multi-factored, diverse student body. This bill was subsequently amended to address an unrelated subject.

Assembly Bill 2387 (Firebaugh, 2003) was substantially similar to AB 1452 prior to that bill being amended to address an entirely different subject. Assembly Bill 2387 was vetoed by the Governor who stated that the provisions of this bill would likely be ruled as unconstitutional. However, prior to the Governor's action on the bill, Legislative Counsel offered Opinion #7053 (April 19, 2004) stating "if adopted and enacted, the amendment to Section 66205 of the Education Code, as proposed by Assembly Bill No. 2387, as amended March 22, 2004, would not violate Section 31 of Article 1 of the California Constitution."

REGISTERED SUPPORT / OPPOSITION:

Support

Chinese for Affirmative Action
Mayor Libby Schaaf, City of Oakland
AAPI Women Lead
Abriendo Puertas/Opening Doors
ACLU California
Advancement Project
AFSCME, Local 3299
Alliance for Boys and Men of Color
Alliance for Children's Rights
American Association for Access, Equity and Diversity
American Civil Liberties Union, Northern and Southern California, and San Diego and Imperial Counties
American Federation of State, County and Municipal Employees, Local 3299
Anderson Baker Architects
Anti-defamation League
Asian Americans Advancing Justice, California
Asian Americans Advancing Justice, Los Angeles
Asian Law Alliance
Association of California State Employees with Disabilities
Aypal: Building API Community Power
Black Students of California United
Brother, Sons, Selves Coalition
Building Blocks for Kids
California Black Chamber of Commerce
California Change Lawyers
California Council on American-Islamic Relations
California Democratic African American Party
California Faculty Association
California Lulac
California Pan-Ethnic Health Network
California Reinvestment Coalition
California Religious Action Center of Reform Judaism
California State University Northridge - Department of Asian American Studies
California-Hawaii State Conference of the NAACP
Californians for Justice
Californians Together
Canal Alliance
Career Ladders Project

Center for Leadership, Equity, and Research
Child Care Law Center
Children Now
Children's Defense Fund-California
Chinese American Progressive Action
City of Oakland - City Attorney's Office
Communities United for Restorative Youth Justice
Community Coalition
Community Legal Services in East Palo Alto
Congregations Organized for Prophetic Engagement
Consumers for Auto Reliability and Safety
Cope of San Bernardino
Del Sol Group, Inc.
Disability Rights Education and Defense Fund
Diversity in Leadership Institute
East Bay Community Law Center
Education Board Partners
Empowering Pacific Islander Communities
Energy Convertors
Equal Justice Society
Faith in Action East Bay
Families in Schools
Fathers and Families of San Joaquin
Feminist Majority Foundation
Food for People
Fortune School of Education
Friends Committee on Legislation of California
Future Leaders of America
Gente Organizada
GO Public Schools
Greater Sacramento Urban League
Hispanic Association of Colleges and Universities
Hmong Cultural Center of Butte County
Hmong Innovating Politics
Inland Congregations United for Change
InnerCity Struggle
Innovate Public Schools
International Action Network for Gender Equity & Law
Justice in Aging
Khmer Girls in Action
Kid City Hope Place
LA Comadre
Lao American National Alliance
Latino and Latina Roundtable of the San Gabriel and Pomona Valley

Lawyers' Committee for Civil Rights Under Law
Long Beach Coalition for Good Jobs and a Healthy Community
LS Consulting
Maternal and Child Health Access
National Action Network - Sacramento Chapter
National Association of Women Business Owners – California
National Center for Transgender Equality
National Center for Youth Law
National Women's Law Center
New Life Christian Church
Nextgen California
OCA Sacramento - Asian Pacific American Advocates
Officers for Justice Peace Officers Association
Parent Organizing Network
Policy Link
Poverty & Race Research Action Council
Public Advocates Inc.
Public Counsel
Reappropriate
Reinvent Stockton Foundation
Resilience Orange County
Rex and Margaret Fortune School of Education
Rubicon Programs
San Francisco African American Chamber of Commerce
Social Justice Collaborative
Somos Mayfair
Southeast Asia Resource Action Center
Southern California College Access Network
Speak UP
Teach for America
Teach for America Los Angeles
Teach Plus
The Cambodian Family Community Center
The Desertsong Group
The Education Trust – West
The Fresno Center
The Hawk Institute
The Leadership Conference on Civil and Human Rights
The Praxis Project
The Village Nation
True Plus
UC Berkley School of Law
United Cambodian Community

United Negro College Fund
University of California Student Association
Urban League - Greater Sacramento
USC Race and Equity Center
Western Center on Law and Poverty
Workplace Fairness
Youth and Education Law Project, Mills Legal Clinic of Stanford Law School
10,000 Degrees
28 California Black and African American Academics and Scholars
6 California Latin-x Academics and Scholars
71 Asian American and Pacific Islander Individuals

Opposition

None on file

Analysis Prepared by: Michael Bolden / P.E. & R. / (916) 319-3957