

Proposition 16

Affirmative Action

Research Assistant: Adhitya Venkatraman '22

Purpose

Proposition 16 would repeal a 1996 state constitutional amendment requiring that “the state 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.”¹

This measure would create a pathway for governments, public universities, and other public entities to develop and implement affirmative action programs on the basis of the above characteristics.²

Background

In 1996, Californians approved Proposition 209, an initiative constitutional amendment that prohibited affirmative action in the public sector, as described above. California was the first state to establish such a ban; several others followed. A group called Californians Against Discrimination and Preferences led the campaign for Prop 209, with Glynn Custred and Thomas Wood co-authoring the initiative and Ward Connerly chairing the campaign.³

Many California lawmakers now want to repeal Proposition 209 and thereby lift the state’s ban on affirmative action. Under California law, the legislature cannot repeal an initiative without voter consent; accordingly, the legislature placed the repeal on the 2020 ballot through a constitutional amendment titled ACA 5, authored by Assembly member Shirley Weber (D-San Diego). Constitutional amendments require a two-thirds vote by both chambers. The legislature failed to meet this requirement in earlier attempts. In 2020, the effort succeeded, with the legislature approving ACA 5 by a 30-10 vote in the Senate and 60-14 in the Assembly.⁴

¹ California Constitution, Art. I, section 31.

² California Secretary of State, “Official Voter Information Guide, California General Election, November 3, 2020,” Proposition 16, <https://voterguide.sos.ca.gov/propositions/16/>.

³ Ballotpedia, “California Proposition 209, Affirmative Action Initiative (1996),” [https://ballotpedia.org/California_Proposition_209,_Affirmative_Action_Initiative_\(1996\)](https://ballotpedia.org/California_Proposition_209,_Affirmative_Action_Initiative_(1996)).

⁴ Antonio Ray Harvey, “California Senate Okays ACA 5: Affirmative Action Decision Moves to Voters,” *Sacramento Observer*, June 25, 2020, <https://sacobserver.com/2020/06/california-senate-okays-aca-5-affirmative-action-decision-moves-to-voters/>.

In *City of Richmond v. Croson* (1989), the United States Supreme Court held that all race-based public affirmative action programs must be reviewed using strict scrutiny.⁵ If voters approve Proposition 16, the strict scrutiny standard would require that any new program that treats people differently on the basis of race must advance a compelling state interest and be narrowly tailored to achieve that end.

Proposal

This measure would repeal Prop 209 and permit race-based or sex-based preferences within the limits of federal law.

Fiscal Impact

The Legislative Analyst's Office notes that this measure would have no direct fiscal impact because it would not by itself create any new affirmative action programs. The indirect fiscal effects are uncertain and depend on the extent to which governments in California develop and implement such programs.⁶

Supporters

Assemblymember Shirley Weber (D-San Diego) authored ACA 5. Ninety state legislators voted to approve the amendment. The Opportunity for All Coalition has been organized as a political action committee to support Prop 16.

Supporters include:

- U.S. Senator Kamala Harris (D)
- Governor Gavin Newsom (D)
- Most statewide elected officials
- U.C. Board of Regents
- Labor organizations
- California Democratic Party

As of September 19, 2020, supporters raised approximately \$12.5 million in total contributions. Major donors included Quinn Delaney, Kaiser Foundation Health Plan, Inc., Patty Quillin (the wife of Netflix founder and CEO Reed Hastings), Steve Ballmer (former CEO of Microsoft) and his wife Connie Ballmer, and the California Teachers Association (CTA).⁷

⁵ *City of Richmond v. J. A. Croson Co.*, 488 U. S. 469 (1989).

⁶ Legislative Analyst's Office, "Proposition 16. Allows Diversity as a Factor in Public Employment, Education, and Contracting Decisions," <https://lao.ca.gov/BallotAnalysis/Proposition?number=14&year=2020>

⁷ Ibid. See also, California Secretary of State, Cal-Access Resources, "Measure Contribution Totals, Proposition 16 – ACA 5," <https://www.sos.ca.gov/campaign-lobbying/cal-access-resources/measure-contributions/2020-ballot-measure-contribution-totals/proposition-16-aca-5-resolution-chapter-23-weber-government-preferences>.

Arguments of Supporters

Supporters say Prop 16 would:

- Diversify the student bodies of public universities.
- Increase employment opportunities for women and people of color.
- Recover nearly \$1 billion lost by minority- and women-owned businesses following Prop. 209.⁸

Opponents

Twenty-four members of the California Legislature opposed this measure. Senator Ling Ling Chang (R-Diamond Bar) and Senator Jim Nielsen (R-Tehama) have been the most outspoken critics among state legislators. Ward Connerly, who led the campaign to pass Prop 209, is leading the campaign to oppose Prop 16. Connerly heads the political action committee Californians for Equal Rights.

Other opponents include:

- Former Congressman Darrell Issa (R-San Diego)
- Chinese American Civic Action Alliance
- California Republican Party
- Students for Fair Admissions

As of September 19, 2020, opponents had raised approximately \$1 million in total contributions. The largest contributor was an organization called Students for Fair Admissions.⁹

Arguments of Opponents

Opponents say Prop. 16 would:

- Legalize racial and sex discrimination by the state.
- Fail to target benefits to low income and other disadvantaged persons; instead, many preferences would go to racial minorities and women who already are well-off.
- Cause Asian-Americans to experience drastic reductions in admission to the state's public universities.¹⁰

⁸ "To Dismantle Systemic Racism, Legislators Must Let Voters Consider Prop. 209," *Sacramento Bee*, June 10, 2020, <https://www.sacbee.com/article243413131.html>; "Of Course Race Matters: Put Affirmative Action Back on the Ballot," *Los Angeles Times*, June 12, 2020, <https://www.latimes.com/opinion/story/2020-06-12/editorial-of-course-race-matters-put-affirmative-action-back-on-the-ballot>; Jim Lohrentz, "The Impact of Proposition 209 on California's MWBEs" The Equal Justice Society, January 2015, <https://equaljusticesociety.org/wp-content/uploads/2019/10/ejs-impact-prop-209-mwbcs.pdf>.

⁹ Ballotpedia, "California Proposition 16, Repeal Proposition 209 Affirmative Action Amendment (2020)," [https://ballotpedia.org/California_Proposition_16,_Repeal_Proposition_209_Affirmative_Action_Amendment_\(2020\)](https://ballotpedia.org/California_Proposition_16,_Repeal_Proposition_209_Affirmative_Action_Amendment_(2020)).

¹⁰ Larry Gordon, "California Universities Prepare for Possible Return of Affirmative Action in Admissions," Ed Source, June 22, 2020, <https://edsources.org/2020/california-universities-prepare-for-possible-return-of->

Conclusion

A YES vote on Prop 16 would repeal Prop 209, allowing public entities to develop and implement affirmative action programs for university admissions, public employment, and contracting on the basis of race or sex.

A NO vote on Prop 16 would retain Prop 209's ban on state-sponsored affirmative action programs.

[affirmative-action-in-admissions/634178](https://www.arcadiaweekly.com/news/the-fight-over-affirmative-action-arrives-in-arcadia/); Fabiola Diaz, "The Fight Over Affirmative Action Arrives in Arcadia," *Arcadia Weekly*, August 6, 2020, <https://www.arcadiaweekly.com/news/the-fight-over-affirmative-action-arrives-in-arcadia/>.