



To: Members of the RCRC Board of Directors
From: Paul A. Smith, Senior Vice President Governmental Affairs
Arthur Wylene, General Counsel
Date: August 4, 2020
Re: Proposition 16/ACA 5 – Repeal of Proposition 209 of 1996 – **ACTION**

Summary

This memo provides an analysis of Proposition 16, which would repeal Proposition 209, which was enacted by the voters in 1996 to prohibit the use of affirmative action in public employment, public education, or public contracting. Proposition 16 will appear on the November 2020 General Election ballot for consideration. RCRC staff is recommending the RCRC Board of Directors adopt a “Support” position on this measure.

Background

In November of 1996, the voters approved Proposition 209 which instituted a constitutional prohibition on discriminating against, or granting preferential treatment to, any group or individual on the basis of race, sex, color, ethnicity or national origin in the functions of public employment, public education (including universities/colleges) and public contracting.

The enactment of Proposition 209 built upon a 1978 landmark U.S. Supreme Court decision – *the Regents of the University of California v. Bakke*, which allowed race to be considered in college admissions, but invalidated specific racial quotas. Proposition 209 effectively limited the reach of *Bakke* in California by flatly prohibiting race (and gender) conscious affirmative action programs in the public sector.

Issue

Assembly Constitutional Amendment 5, authored by Assembly Member Shirley Weber (D-San Diego), secured legislative passage in June of 2020 and will now appear on the November General Election ballot as Proposition 16. The measure simply repeals the provisions of Proposition 209 from 1996.

RCRC did not offer any formal position on ACA 5 when it was being considered during the legislative process.

Proposition 16 does not *require* the State or local governments to adopt affirmative action policies, it merely repeals a prohibition. The effect of this repeal largely depends two factors: (1) State and local efforts to adopt affirmative action policies; and (2) the evolving

attitude of the federal courts regarding race-conscious hiring, contracting, and admissions policies.

With regard to the first factor, a number of counties are considering and/or adopting resolutions affirming that racism is a public health issue. In adopting those documents, these counties are evaluating their hiring processes to reflect and enhance diversity. Additionally, several local governments are considering cannabis equity programs that target investment and licensing opportunities toward minority communities most heavily affected by the war on drugs. Repeal of Proposition 209 could potentially provide these agencies with additional tools to address historic discrimination and promote an ethnically-balanced workforce.

The second factor is a matter of considerable legal uncertainty. The U.S. Supreme Court has held that race-conscious affirmative action programs in the public sector are subject to "strict scrutiny" under the equal protection clause of the U.S. Constitution's Fourteenth Amendment. Like the debates over Proposition 209, most of the recent court decisions have focused on higher education. In those cases, the courts have upheld admissions policies that consider race as one factor - but not the decisive factor - in an individualized evaluation of applicants in order to promote a diverse student body. However, the U.S. Supreme Court has cautioned that higher education is a "unique context," and has outlined arguably more stringent standards for affirmative action programs in areas more directly impacting local government - i.e. public employment and contracting.

In that context, the federal courts have generally required governmental entities desiring to adopt race-conscious programs to *both* demonstrate past discrimination by the entity adopting the program, *and* "narrowly tailor" their policies to remedying that discrimination (similar requirements are imposed in the employment arena by federal statute under Title VII of the Civil Rights Act.) Since these standards were articulated in the late 1980's, a substantial number of state and local affirmative action programs for hiring and contracting have been struck down (including California's Public Contract Code provisions favoring minority, women and disabled veteran business enterprises, which were invalidated by the Ninth Circuit in 1997).

Compounding these uncertainties are changes in the composition of the U.S. Supreme Court. Three of the current Justices (John Roberts, Clarence Thomas, and Samuel Alito) have indicated willingness to more broadly strike down affirmative action programs. Further, the two most recent appointees, Justices Neil Gorsuch and Brett Kavanaugh, are widely expected to take a similarly narrow view of affirmative action. Therefore, this remains an area of considerable uncertainty, and consequently the full impacts of repealing Proposition 209 are difficult to determine at this time. Nonetheless, repeal would eliminate one barrier for counties considering affirmative action programs, and will unquestionably allow greater local flexibility in this area than presently permitted.

Staff Recommendation

RCRC staff recommends the RCRC Board of Directors adopt a "Support" position on Proposition 16. In concert with 'local control' for municipalities to decide the perimeters of their respective workforce, the enactment of Proposition 16 would provide RCRC member counties greater opportunity to adopt policies that promote racial and ethnic diversity amongst their hiring and contracting process than allowed under current law.

Conversely, counties, under Proposition 16, are NOT required to adopt these policies. Proposition 16 simply allows counties to adopt these types of policies.

Attachment

- Copy of Assembly Constitutional Amendment 5 (Weber)