

Proposition 16:

Allowing Affirmative Action in Public Contracting, Employment, and Education

Initiative Constitutional Amendment

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I. EXECUTIVE SUMMARY

Proposition 16, also known as the Repeal Proposition 209 Affirmative Action Amendment, is an initiative constitutional amendment that would repeal Proposition 209.¹ Proposition 209 was a 1996 ballot measure which prohibited government and other public institutions from considering race, sex, color, ethnicity, or national origin in public employment, public education, and public contracting.²

A **YES** vote would allow state and local entities to consider race, sex, color, ethnicity, and national origin in public education, public employment, and public contracting to the extent allowed under federal and state law.³

A **NO** vote would leave Proposition 209 as is and would retain the statewide ban on affirmative action.⁴

II. THE LAW

A. Current Law

Proposition 209 was authored by Ward Connerly, an ally of then Governor Pete Wilson.⁵ Governor Wilson, who was running for President in the Republican primaries, had recently been successful “in using the ballot initiative process (specifically Proposition 187 of 1994) as a wedge issue to drive electoral support from [W]hite men.”⁶ Both Connerly and Governor Wilson emphasized the “need for a colorblind society.”⁷ Specifically, they argued that Proposition 209 was essential because California children could only have access to equal opportunity if they were allowed to “succeed on a fair, color-blind, race-blind, [and] gender-blind basis.”⁸

Proposition 209, referred to as the California Civil Rights Initiative by its proponents, amended the California Constitution through a ballot proposition placed before voters in 1996.⁹ With approximately 55 percent of votes cast in favor of its passage, Proposition 209 amended the state Constitution to add Section 31 of Article I, titled “Affirmative Action.”¹⁰

While Article 31 generally bans the consideration of race, sex, color, ethnicity, or national origin in public programs, it contains some exceptions. For instance, subsection (d) of Section 31 allows the State to consider the sex of an employee when it is “reasonably necessary” for the staffing of certain jobs, such as ensuring that staff and inmates at state prisons are the

¹ Cal. Proposition 16 (2020); Text of Prop. 16 (Assembly Constitutional Amendment 5), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200ACA5 (last visited Oct. 6, 2020).

² Cal. Proposition 209 (1996).

³ Ballot Analysis of Proposition 16, <https://lao.ca.gov/BallotAnalysis/Proposition?number=16&year=2020> (last visited Sept. 21, 2020).

⁴ *Id.*

⁵ SENATE FLOOR ANALYSIS OF ACA 5, at 3 (June 23, 2020).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ ASSEMBLY FLOOR ANALYSIS OF ACA 5, at 1 (June 5, 2020); Cal. Const. art. I, § 31.

same sex.¹¹ Additionally, subsection (e) of Article 31 gives state and local entities the authority to consider “specified characteristics when it is required to receive federal funding.”¹² One example of this is that in order to receive federal funding for transportation projects, the state is required to set goals for the portion of contracts awarded to specified groups, such as businesses owned by women or people of color.¹³ Under Proposition 209, the state can comply with such program requirements in order to receive federal funds.

B. Path to the Ballot

Proposition 16, also referred to as Assembly Constitutional Amendment (“ACA”) 5, would amend the Constitution by repealing Section 31 of Article I, and enabling government preferences.¹⁴ The California Constitution allows for members of the state legislature to propose an amendment or revision of the Constitution, or to amend or withdraw a proposal.¹⁵ To do so, the member proposing the amendment or revision must secure a two-thirds roll call vote from members of both houses.¹⁶ Once the Legislature passes the amendment, it proceeds to go on the ballot before California voters.¹⁷

Proposition 16 was introduced as ACA 5 by Assembly Member Shirley Weber on January 18, 2019.¹⁸ It was then amended in Spring 2020 in the Assembly Committee on Public Employment and Retirement and the Assembly Committee on Rules.¹⁹ Proposition 16 was passed in the Assembly on June 10, 2020 with a 60-14 vote, then in the Senate on June 24, 2020 with a 30-10 vote.²⁰ It was subsequently filed with the Secretary of State on June 25, 2020 to be placed on the November 2020 ballot for California voters.²¹

C. Proposed Law

Proposition 16 proposes to repeal Section 31 of Article I of the California Constitution, which was added by Proposition 209 in 1996.²² Proposition 209 implemented a ban on the consideration of race, sex, color, ethnicity, or national origin in public employment, education, and contracting in the state.²³ Proposition 16 would eliminate this ban, giving state and local entities the option to consider these immutable characteristics.

¹¹ Ballot Analysis of Proposition 16, *supra* note 1.

¹² *Id.*

¹³ *Id.*

¹⁴ Cal. Proposition 16 (2020), *supra* note 3.

¹⁵ Cal. Const. art. XVIII, § 1.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Cal. Proposition 16 (2020), *supra* note 1.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

Though Proposition 16 would provide the option to consider these characteristics in public contracting, education, and employment, it would not require it.²⁴ State officials could opt to engage in affirmative action programming but would not be required to give preferential treatment. Proposition 16 would simply restore affirmative action as an available practice, and public entities would still be bound by existing federal and state laws that protect individuals from arbitrary discrimination against one's gender, race, ethnicity, color, and national origin.

III. LITIGATION RELATED TO PROPOSITION 209

Proposition 209 was challenged in federal court almost immediately upon its enactment and was ultimately found to be constitutional by the Ninth Circuit Court of Appeals.²⁵ Since then, there have been a number of lawsuits filed alleging that various public programs are in violation of Proposition 209 because they grant some form of preferential treatment to women or minorities.

A. Coalition for Economic Equity v. Wilson

One day after the passage of Proposition 209, several individuals and groups representing the interests of racial minorities and women filed a complaint in United States District Court for the Northern District of California against state officials and political subdivisions.²⁶ Brought under 42 U.S.C. section 1983, the complaint alleged that Proposition 209 denied racial minorities and women the equal protection of the laws guaranteed by the Fourteenth Amendment.²⁷ It also alleged that Proposition 209 conflicted with Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972.²⁸ The plaintiffs asked the court to declare Proposition 209 unconstitutional and sought a permanent injunction to stop the State from implementing and enforcing it.²⁹ They also filed an application for a temporary restraining order and a preliminary injunction.³⁰

The district court engaged in extensive fact-finding and found that the elimination of affirmative action programs “would reduce opportunities in public contracting and employment for women and minorities.”³¹ Additionally, it would “cause enrollment of African-American, Latino, and American Indian students in public colleges to fall, though enrollment of Asian-American students would increase.”³² Finally, the district court found that if affirmative action programs were to be reinstated, the California Constitution would have to be amended with another initiative.³³ For these reasons, the district court granted both the temporary restraining

²⁴ *Proposition 16 Allows Diversity as a Factor in Public Employment, Education, and Contracting Decisions. Legislative Constitutional Amendment*, LEGISLATIVE ANALYST'S OFFICE, <https://lao.ca.gov/ballot/2020/Prop16-110320.pdf> (last visited Oct. 7, 2020).

²⁵ *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997).

²⁶ *Id.* at 697.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 698.

³² *Id.*

³³ *Id.*

order and the preliminary injunction, barring the State from implementing and enforcing Proposition 209 until a trial or a final judgment was reached by the court.³⁴

However, the Ninth Circuit reversed the district court. The Ninth Circuit held that Proposition 209 was constitutional under the Equal Protection Clause of the United States Constitution.³⁵ The plaintiffs argued that women and racial minorities would be denied equal protection under Proposition 209 because it would deny them preferential treatment intended to level the playing field with non-minorities.³⁶ However, the Ninth Circuit asserted that the Equal Protection Clause prohibits the government from classifying individuals “on the basis of impermissible criteria.”³⁷ Since Proposition 209 actually prohibits the government from classifying individuals by race or gender, the court determined that it did not classify individuals by race or gender and therefore, did not violate the Equal Protection Clause.³⁸

B. Hi-Voltage Wire Works v. City of San Jose

In 2000, the California Supreme Court found a San Jose program requiring contractors bidding on city projects to use a specified percentage of women and minority subcontractors to be in violation of Article I Section 31 of the California Constitution (Proposition 209).³⁹ In that case, a general contracting firm intended to use its own work force on a project and thus failed to comply with the city’s program requirements.⁴⁰ When the contracting firm’s bid was rejected, it filed a lawsuit alleging that the city’s program violated Proposition 209 because it granted preferential treatment to individuals on the basis of race and sex.⁴¹ The California Supreme Court affirmed the appellate court’s holding and found that the ballot materials accompanying Proposition 209 made it clear that Article I Section 31 was intended to prohibit the kind of preferential treatment encouraged by the city’s program.⁴²

IV. CONSTITUTIONAL AND STATUTORY PROTECTIONS

While Proposition 16 would allow the state to consider diversity as a factor in public employment, education, and contracting, the state and federal constitutions continue to provide all people with equal protection under the law.⁴³ Prior to the enactment of Proposition 209, state and local entities that considered race, sex, color, ethnicity, or national origin in their policies and programs still had to comply with other provisions of state and federal law that limit the use of these considerations.⁴⁴ Laws that protect against discrimination in public employment, public education, and public contracting exist at both the state and federal level. Federal law covers all

³⁴ *Id.*

³⁵ *Id.* at 701.

³⁶ *Id.* at 702.

³⁷ *Id.*

³⁸ *Id.* (finding also that Proposition 209 was consistent with the 1964 Civil Rights Act and that Title VII does not require states to give preferential treatment to women or minorities).

³⁹ *Hi-Voltage Wire Works v. City of San Jose*, 24 Cal. 4th 537 (2000).

⁴⁰ *Id.* at 544.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Ballot Analysis of Proposition 16, *supra* note 3.

⁴⁴ *Id.*

three grounds in the form of Title VI and Title VII of the Civil Rights Act of 1964, Title IX, and interpretations of the Equal Protection Clause to public contracting.

A. Federal Constitution and Other Statutory Provisions

Much of the rhetoric surrounding Proposition 16 involves concerns regarding racial, gender, and other types of discrimination. However, there are several federal safeguards in place to protect individuals in the fields of public employment, education, and contracting from such forms of discrimination, including statutory, constitutional, and common law provisions.

Title VI of the Civil Rights Act of 1964 states: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁴⁵ This statute prohibits those programs that receive federal financial assistance from engaging in discrimination, and if a recipient of federal assistance is found to have engaged in discrimination, their contract for federal funding can be terminated.⁴⁶

Title VII of the Civil Rights Act of 1964 is similar to Title VI, but specifically prohibits employment discrimination based on race, color, religion, sex, and national origin.⁴⁷ Under Title VII, an employer cannot discriminate on any of these bases in regard to any term, condition, or privilege of employment.⁴⁸

In the realm of public education, Title IX, a federal civil rights law, protects individuals from discrimination based on sex in education programs or activities that receive federal financial assistance.⁴⁹ Title IX states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁵⁰

Outside of these federal statutes, Proposition 16 may present longstanding federal constitutional concerns due to its engagement with affirmative action. In 1978, the United States Supreme Court reviewed *Regents of University of California v. Bakke*, a case involving an affirmative action issue with the UC Davis School of Medicine.⁵¹ In that case, UC Davis had set aside 16 of the 100 available spaces for qualified minorities.⁵² The court held that although race was a legitimate factor for admission, racial quotas violate the Equal Protection Clause of the Fourteenth Amendment.⁵³ Following this case, there are still concerns that initiatives which aim to allow government preference are akin to the racial quotas in *Bakke*, and thus violate the Fourteenth Amendment of the United States Constitution.

The Equal Protection Clause of the Fourteenth Amendment states: “No State shall make or enforce any law that abridge the privileges or immunities of citizens of the United States; nor

⁴⁵ 42 U.S.C. § 2000d (2020).

⁴⁶ 42 U.S.C. § 2000d-1 (2020).

⁴⁷ 42 U.S.C. § 2000e-2 (2020).

⁴⁸ *Id.*

⁴⁹ 20 U.S.C. § 1681 (2020).

⁵⁰ *Id.*

⁵¹ *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

⁵² *Id.* at 275.

⁵³ *Id.*

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws”.⁵⁴ In essence, the Equal Protection Clause under the federal constitution requires that state and local government entities treat different classes of people similarly, unless there is a legitimate reason to treat them differently.

In cases analyzing the Equal Protection Clause as it pertains to immutable characteristics, racial classifications are subjected to the most rigid, strict scrutiny and to be upheld, must exist for a compelling state purpose.⁵⁵ For example, in *City of Richmond v. J.A. Croson Co.*, the Supreme Court found a government program that set aside city contracts for minority-owned businesses lacked a compelling government interest.⁵⁶ The Court felt the city program needed to be more narrowly tailored to remedy the history of discrimination against those minority groups in the United States.⁵⁷

This principle was already touched upon in *Bakke*. In that case, the Supreme Court stated that to avoid violating the Equal Protection Clause, state and local governments using affirmative action programs must engage in more narrowly tailored efforts, and use “race-plus” factors to support minority students; in other words, race could be a “plus” on an applicant’s file, but need not be the sole determining factor.⁵⁸ Similarly, in *Parents Involved in Community Schools v. Seattle School District No. 1*,⁵⁹ the Supreme Court held more recently that programs using race as a tiebreaker for admission to public schools require more narrow tailoring to the underlying motivation, such as remedying historical discrimination. This development of law from the Court regarding government preferences demonstrates that under appropriate circumstances, classifications that have clear remedial motivations do not violate the Equal Protection Clause.

Thus, Proposition 16 opponents may be concerned that the initiative violates the Equal Protection Clause because it can treat one class of people differently than other classes of people based on race, gender, ethnicity, and other characteristics. However, Proposition 16 does not require the consideration of these immutable traits in public contracting, employment, or education. It only provides the option for these state entities to look at these traits in their hiring, contracting, or admissions decisions. Additionally, the Equal Protection Clause, as well as the Due Process Clause of the Fifth and Fourteenth Amendments, would remain in effect if Proposition 16 were to pass. These constitutional provisions would continue to prohibit discrimination based on race, gender, and other traits.

B. California Constitution and Other Statutory Provisions

In addition to protections provided by the federal government, states have the authority to pass legislation that prohibits invidious discrimination in public employment, education, and contracting.⁶⁰ Accordingly, California provides for the protection of civil rights through the state

⁵⁴ U.S. Const. amend. XIV.

⁵⁵ *Bakke*, 438 U.S. at 299.

⁵⁶ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503 (1989).

⁵⁷ *Id.*

⁵⁸ *Bakke*, 438 U.S. at 317.

⁵⁹ *Parents Involved in Cmty. Sch. v. Seattle School Dist. No. 1*, 551 U.S. 701, 724 (2007).

⁶⁰ 12 CAL. JUR. 3D, *Civil Rights* § 2 (2020).

Constitution, state statutory provisions, and common law principles.⁶¹ The most significant civil rights protections are provided by the California Constitution’s Equal Protection Clause, the Unruh Civil Rights Act, the Fair Employment and Housing Act (“FEHA”), the Education Code, and the Public Contract Code.⁶²

Article I Section 7 of the California Constitution provides, “A person may not be deprived of life, liberty, or property without due process.”⁶³ It also guarantees that individuals may not be denied equal protection of the laws.⁶⁴

Building upon that foundation, the Unruh Civil Rights Act protects individuals from discrimination in all business establishments.⁶⁵ It states:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.⁶⁶

The Unruh Civil Rights Act prohibits only against “arbitrary, invidious, or unreasonable discrimination.”⁶⁷ Therefore, policies or practices that involve arbitrary distinctions, including gender-based ones, are prohibited.

The strongest protection against discrimination in public employment under California law come from the FEHA. California’s FEHA states that the “practice of discrimination because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information in housing accommodations is against the public policy of this state.”⁶⁸ FEHA applies to public and private employers.⁶⁹ It provides that it is “illegal for employers of five or more employees to discriminate against job applicants and employees because of a protected category, or retaliate against them because they have asserted their rights under the law.”⁷⁰

In regard to public education, the California Education Code provides that any educational institution that receives state financial assistance or enrolls students who receive state financial aid cannot discriminate based on “disability, gender, gender identity, gender

⁶¹ *Id.*

⁶² *Id.*

⁶³ Cal. Const. art. I, § 7.

⁶⁴ *Id.*

⁶⁵ CAL. CIV. CODE § 51 (2020).

⁶⁶ *Id.*

⁶⁷ 12 CAL. JUR. 3D, *Civil Rights* § 7 (2020).

⁶⁸ 12 CAL. JUR. 3D, *Civil Rights* § 30 (2020); CAL. GOV. CODE §§ 12900–12996.

⁶⁹ CAL. DEP’T OF FAIR EMP. & HOUS., <https://www.dfeh.ca.gov/employment/> (last visited. Oct. 6, 2020).

⁷⁰ *Id.*

expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic...including immigration status.”⁷¹

Turning to public contracting, Assembly Bill 2844, signed into law by Governor Jerry Brown in 2016, specifically prohibits discrimination in public contracting.⁷² AB 2844 added section 2010 to the Public Contract Code.⁷³ This bill requires that a person who “submits a bid or proposal to, or otherwise proposes to enter into or renew a contract with, a state agency with respect to any contract in the amount of \$100,000 or more to certify, under penalty of perjury,...that they are in compliance with the Unruh Civil Rights Act and the California Fair Employment and Housing Act.”⁷⁴

Therefore, while voters and Proposition 16 opponents may be concerned that repealing Proposition 209 will allow the state to discriminate against individuals arbitrarily, this is definitely not the case. The California Constitution and state statutes offer a broad range of protections against invidious and arbitrary discrimination based on protected characteristics. Even if Proposition 16 passes, repealing Proposition 209, state and local entities cannot discriminate against individuals.

V. PUBLIC POLICY CONSIDERATIONS

Due to the longstanding history of affirmative action and similar programs not only in California but in the United States generally, there are strong proponents and opponents to Proposition 16. Much of the debate is centered on whether affirmative action can actually address institutionalized, systemic oppression in these public forums, such as racism or sexism, or if it creates quotas, particularly in university admissions.⁷⁵ Proponents of Proposition 16 are hoping to address barriers to entry in academia, especially in the UC system for prospective students.

When ACA 5 was on the Senate floor to be voted on, various senators of color appealed to their peers, calling for racial justice in the passage of ACA 5.⁷⁶ Due to the current social movement spurred by various police shootings throughout the country, particularly after the death of George Floyd, over two thirds of the California legislature voted to put Proposition 16 on the ballot before voters in the November election.⁷⁷ But many, including opponents in communities of color, view this proposition as offensive to notions of equal opportunity, arguing that success should stem from meritocracy.⁷⁸

⁷¹ CAL. EDUC. CODE § 220 (2018).

⁷² AB 2844, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB2844 (last visited Oct. 6, 2020).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Proposition 16: Restoring Affirmative Action*, CALMATTERS, <https://calmatters.org/election-2020-guide/proposition-16-affirmative-action/>.

⁷⁶ Mario Koran, *California Weighs Overturning 24-year Ban on Affirmative Action*, THE GUARDIAN, June 22, 2020, <https://www.theguardian.com/us-news/2020/jun/24/california-affirmative-action-aca5-vote>.

⁷⁷ CALMATTERS, *supra* note 75.

⁷⁸ Nico Savidge, *Proposition 16: Why Some Asian Americans are on the Front Lines of the Campaign Against Affirmative Action*, THE MERCURY NEWS, Sept. 17, 2020,

Currently, with less than a month before the election, Proposition 16 does not seem to have overwhelming backing, nor overwhelming disapproval, from surveyed voters; yet, there appears to be a slight tip towards the opposition, as shown in a study completed by the Public Policy Institute of California.⁷⁹ This study was completed in September 2020 and showed 31% of likely voters in support, 22% undecided, and 47% in opposition, to Proposition 16.⁸⁰ And according to the 2020 Asian American Voter Survey (“AAVS”), Chinese Americans opposed Proposition 16 by a 38-30 margin, with the other 32 percent of voters unsure or undecided on the issue.⁸¹ An opponent from the StopProp16 grassroots organization believes proponent politicians voted against the will of the people because the polls demonstrate a preference to retain Proposition 209.⁸² Although this polling data suggests that undecided voters may be confused or conflicted about the proposition, opponents stand behind this slight majority in the polling results.⁸³

A. Proponents’ Arguments

Proposition 16 has many high-profile proponents. These include United States Senators Kamala Harris and Dianne Feinstein, Governor Gavin Newsom, and the University of California Board of Regents.⁸⁴

The proponents of Proposition 16 primarily argue that affirmative action provides equal opportunities for women and people of color who “are paid less for the same work, given fewer chances to access higher education, and denied job opportunities.”⁸⁵ Affirmative action “level[s] the playing field by allowing policymakers to consider race and gender—without quotas—when making decisions about contracts, hiring and education” to eliminate systemic discrimination and remedy past harm.⁸⁶ A source from the “Yes on 16” campaign asserted that “Some people have always been operating at a disadvantage. Proposition 16 is just making sure that everyone is on equal footing to begin with.”⁸⁷ Before Proposition 209, state and local entities had policies and programs in place to “increase opportunities and representation for people who faced inequalities as a result of their race, sex, color, ethnicity, or national origin.”⁸⁸ For example, state and local entities had employment and recruitment policies in place to increase the hiring of people of

<https://www.mercurynews.com/2020/09/17/proposition-16-why-some-asian-americans-are-on-the-front-lines-of-the-campaign-against-affirmative-action/>.

⁷⁹ Public Policy Institute of California (“PPIC”), *Californians and Their Government—September 2020—Full Crosstabs—Likely Voters Only*, PPIC Statewide Survey, Sept. 2020, at 16, <https://www.ppic.org/wp-content/uploads/crosstabs-likely-voters-0920.pdf>.

⁸⁰ *Id.*

⁸¹ Savidge, *supra* note 78.

⁸² Interview with Tony Guan, StopProp16 (Sept. 28, 2020) (notes on file with *California Initiative Review*).

⁸³ *Id.*

⁸⁴ *California Proposition 16, Repeal Proposition 209 Affirmative Action Amendment (2020)*, BALLOTPEDIA, [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)).

⁸⁵ *Facts, YES ON 16*, <https://voteyesonprop16.org/why-prop-16/facts/> (last visited Oct. 3, 2020).

⁸⁶ *Id.*

⁸⁷ Interview with “Yes on 16,” (Sept. 25, 2020) (notes on file with the *California Initiative Review*).

⁸⁸ Ballot Analysis of Proposition 16, *supra* note 3.

color and women.⁸⁹ After the enactment of Proposition 209, all of these policies and programs were either discontinued or modified unless they fell within one of the exceptions.⁹⁰

In 2015 Equal Justice Society, an Oakland based nonprofit, conducted a study regarding the impact of Proposition 209 on California's minority and women business enterprises ("MWBEs").⁹¹ This study demonstrated that MWBEs "lost the potential equivalent of \$1 billion in public contracts because of Proposition 209."⁹² "Taxes from women and people of color help fund public contracts, but [they] are denied equal opportunities to obtain those contracts," said Eva Paterson, the president of the Equal Justice Society.⁹³ After the enactment of Proposition 209, the study found a loss of approximately \$820 million per year in MWBE contracts with the State and a loss of approximately \$200 million per year in MWBE contracts with the City and County of San Francisco.⁹⁴

Assembly Member Shirley Weber, one of the authors of Proposition 16, also points out that "the improvement of my schools is contingent upon getting teachers who understand the kids."⁹⁵ She argues that Proposition 16 is critical because "everybody tells us we need teachers who look more like our students, yet we can't develop a teacher training and a program of recruitment" designed to recruit a diverse teaching pool.⁹⁶

Additionally, proponents argue that Proposition 209 has significantly reduced the enrollment of Black and Latinx students at UC campuses.⁹⁷ A UC Berkeley study released in August 2020 found that not only has Proposition 209 reduced the enrollment of minority students, it has also lowered their graduation rates and driven down their wages when they enter the workforce.⁹⁸ The study also found that affirmative action programs that existed prior to Proposition 209 "did not significantly hurt Asian American and [W]hite students denied admission to UC's most selective campuses. That's because they enrolled instead at universities of comparable high quality and earned similarly high earnings in the following years."⁹⁹ This is

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Tim Lohrentz, *The Impact of Proposition 209 on California's MWBEs*, Jan. 2015, <https://equaljusticesociety.files.wordpress.com/2019/10/ejs-impact-prop-209-mwbes.pdf>.

⁹² *Id.*

⁹³ Keith Kamisugi, *Impact of Prop. 209 on Calif. MWBEs*, Feb. 24, 2015, <https://equaljusticesociety.org/2015/02/24/one-billion-in-potential-contract-dollars-lost-annually-by-businesses-owned-by-women-and-people-of-color-due-to-proposition-209/>.

⁹⁴ *Id.*

⁹⁵ Shalina Chatlani, *Prop. 16 Would Bring Affirmative Action Back to California, Critics Say It's Not Necessary*, KPBS, Oct. 1, 2020, <https://www.kpbs.org/news/2020/oct/01/prop-16-would-bring-affirmative-action-back-califo/>.

⁹⁶ *Id.*

⁹⁷ Phil Willon, *New Poll Finds Shaky Support for Proposition 16 to Restore Affirmative Action in California*, L.A. TIMES, Sept. 16, 2020, <https://www.latimes.com/california/story/2020-09-16/california-proposition-16-ppic-affirmative-action-poll>.

⁹⁸ *Id.*; Zachary Bleemer, *Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209*, Aug. 2020, https://cshe.berkeley.edu/sites/default/files/publications/rops.cshe.10.2020.bleemer.prop209.8.20.2020_2.pdf.

⁹⁹ Teresa Watanabe, *Affirmative Action Ban Drove Down Black and Latino UC Enrollment and Wages Study Finds*, L.A. TIMES, Aug. 22, 2020, <https://www.latimes.com/california/story/2020-08-22/prop-209s-affirmative-action-ban-drove-down-black-and-latino-uc-enrollment-and-wages-study-finds>.

likely why the UC Board of Regents unanimously supports repealing Proposition 209.¹⁰⁰ UC President Janet Napolitano points out that, “It makes little sense to exclude any consideration of race in admissions when the aim of the University’s holistic process is to fully understand and evaluate each applicant through multiple dimensions.”¹⁰¹

Proponents also argue that California is out of step with the majority of the country. 41 states currently take gender, race, and ethnicity into consideration when making decisions about government contracts, college admissions, and job opportunities.¹⁰² Proposition 16 will align California with the rest of the country and enable our positions of leadership and contracts with businesses to reflect the diversity and values of California.¹⁰³

Additionally, in response to opponents’ argument that affirmative action just leads to quotas, proponents point out that colleges and universities cannot and will not use racial quotas to achieve diversity.¹⁰⁴ Racial quotas have been held unconstitutional by the Supreme Court of the United States and have been outlawed in university admissions since 1978.¹⁰⁵ Passing Proposition 16 will not lead to quotas.

B. Opponents’ Arguments

The cornerstone of the opponents’ arguments is the belief that equality under the law, regardless of race, should remain a principle enshrined in the California constitution.¹⁰⁶ Upon this principle, they present three main arguments: (1) advantaging applicants on the basis of immutable characteristics discriminates against others; (2) the government does not need affirmative action to accomplish diversity initiatives; and (3) Proposition 16 will be expensive for California taxpayers. A large number of the opponents are Chinese Americans, and often first-generation immigrants, who find Proposition 16 insulting to their cultural and traditional belief that under equal opportunity, success comes from hard work in America.¹⁰⁷ However, the official opponents of the proposition vary widely in race, gender, and background, and are largely concerned about Proposition 16 potentially lowering standards in education and hiring and endorsing discrimination.¹⁰⁸

First, opponents of Proposition 16 argue that providing the option to consider immutable characteristics in state processes inevitably involves disadvantaging other groups of people, on the same grounds.¹⁰⁹ In essence, they claim that making decisions based on race, ethnicity, or

¹⁰⁰ *Id.*

¹⁰¹ *UC Board of Regents Unanimously Endorses ACA 5, Repeal of Prop. 209*, UNIV. OF CAL. PRESS ROOM, June 15, 2020, <https://www.universityofcalifornia.edu/press-room/uc-board-regents-endorses-aca-5-repeal-prop-209>.

¹⁰² YES ON 16, *supra* note 85.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Interview with Stephen Miller, Californians For Equal Rights (Oct. 6, 2020) (notes on file with the *California Initiative Review*).

¹⁰⁷ Savidge, *supra* note 78.

¹⁰⁸ *Keep Discrimination Illegal*, Californians for Equal Rights, <https://californiansforequalrights.org> (last visited Oct. 6, 2020).

¹⁰⁹ *Id.*

gender is “its own kind of prejudice.”¹¹⁰ Opponents view Proposition 16 as a way to legalize discrimination.¹¹¹ One opponent of Proposition 16, Assembly Member Steven Choi, fears implementing the ideology that race, ethnicity, and other traits can determine one’s chances at getting a job.¹¹² An immigrant from South Korea, Assembly Member Choi opposes Proposition 16 due to his concerns that if passed, it could allow state programs to use one’s skin color or national origin to determine qualifications for a position or college admission.¹¹³

Another major opponent of Proposition 16 is Ward Connerly, a former appointee to the Board of Regents of California’s public university system.¹¹⁴ He now serves as the President of Californians for Equal Rights (CFER), the official nonprofit organization that is defending Proposition 209 and opposing Proposition 16.¹¹⁵ Connerly was the creator of Proposition 209, as a fervent advocate against affirmative action.¹¹⁶ He opposes affirmative action because he believes “race-based remedies only prolong America’s racial divisions and inequities.”¹¹⁷ As a Black man, he believes affirmative action initiatives like Proposition 16 reinforce the idea that students of color are inferior, because these programs tell students they need a preference to succeed.¹¹⁸ To preserve his legacy and defend his creation, he leads CFER’s campaign.¹¹⁹ CFER views the initiative as “divisive and discriminatory” because it threatens “hard-fought equal rights for all regardless of race, sex, color, ethnicity or national origin.”¹²⁰ Opponents of Proposition 16 support Proposition 209 because they feel it affirms the notion that the government should consider people on equal terms instead of giving government preference to some people over others.¹²¹ They view Proposition 209 as having “enhanced California’s good civil reputation...in support of equal opportunity for all individual American citizens.”¹²²

For Asian Americans in particular, many feel Proposition 16 “doesn’t fit into their American journey” because it threatens their chances at success and admission into California’s public universities such as the prestigious UC Berkeley and UCLA.¹²³ According to Janelle Wong, a professor of Asian American Studies at the University of Maryland, many opponents

¹¹⁰ CALMATTERS, *supra* note 75.

¹¹¹ Californians for Equal Rights, *supra* note 108.

¹¹² Dan Morain, *Ending California’s Ban on Affirmative Action Could Show How Far it’s Come*, WASH. POST, Aug. 6, 2020, <https://www.washingtonpost.com/opinions/2020/08/06/ending-californias-ban-affirmative-action-could-show-how-far-its-come/>.

¹¹³ *Id.*

¹¹⁴ Ward Connerly, *America: A Nation of Equals* at Harvard University, Cambridge, M.A., Apr. 5, 1998, (transcript at <http://americanradioworks.publicradio.org/features/blackspeech/wconnerly.html>).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Kevin Carey, *A Detailed Look at the Downside of California’s Ban on Affirmative Action*, N.Y. TIMES, Aug. 21, 2020, <https://www.nytimes.com/2020/08/21/upshot/00up-affirmative-action-california-study.html>.

¹¹⁹ *Id.*

¹²⁰ Californians for Equal Rights, *supra* note 108.

¹²¹ The Editorial Board, *Vote No on Proposition 16 to Defend State’s Respect for Diversity and Equality*, LOS ANGELES DAILY NEWS, Aug. 28, 2020, <https://www.dailynews.com/2020/08/28/vote-no-on-proposition-16-to-defend-states-respect-for-diversity-and-equality/>.

¹²² Charles Gesheker and David Randall, *The Effects of Proposition 209 on California*, NAT’L ASSOCIATION OF SCHOLARS, July 16, 2020, <https://www.nas.org/blogs/article/the-effects-of-proposition-209-on-california-higher-education-public-employment-and-contracting-2020-update>.

¹²³ Savidge, *supra* note 78.

from older, first-generation Chinese American groups are motivated by values of prestige and equity, as well as fears of scarcity and racial quotas.¹²⁴ In a study relied on by opponents, Princeton researchers found that in a race-neutral system, the number of white students would see little change, while Asian Americans would increase from 23.7% to 31.5% of admitted students, meaning the current system rejects one-fourth of all Asian Americans that would be admitted in a race-neutral system.¹²⁵ Opponents believe this result is racial discrimination, even though proponents view these practices as simply race-conscious.¹²⁶ Meanwhile, proponents point to other studies such as the Civil Rights Project at UCLA, which found that although the student sizes at UC Berkeley and UCLA have doubled since the passage of Proposition 209, of the applicants offered admission to the two universities, Black and Latinx students dropped by 70 to 75 percent, while White and Asian students dropped only by 40 and 35 percent, respectively.¹²⁷ Though there are social studies on both sides of the issue, the strong concerns presented by each side may result in a continued battle over affirmative action in courts and the Legislature, regardless of the election result.¹²⁸

Second, opponents of Proposition 16 argue the government does not need to have a preference for certain immutable characteristics to accomplish racial, gender, and ethnic equity in state programs. Opponents claim that increased diversity can be accomplished by targeting other characteristics not banned by Proposition 209, such as being a first in one's generation, or coming from a low-income or working-class family.¹²⁹ And since the passage of Proposition 209, they claim public entities have succeeded in their consideration of these additional characteristics, to support underrepresented groups without resorting to government preference.¹³⁰ Extraneous factors such as income level, educational achievement, and a household's familiarity with higher education can determine the success of individuals from various ethnic and racial groups in college.¹³¹ According to the National Association of Scholars, both the UC and CSU systems have expanded their efforts to prepare low-income high school students for college, without using government preference, after 1996.¹³² Thus, opponents of Proposition 16 retort to campaigns for affirmative action by urging for a stronger focus on improving K-12 education.¹³³

Furthermore, opponents of Proposition 16 are concerned that if Proposition 16 passes, though public entities will avoid establishing a concrete racial quota, race-based admissions efforts will strongly push towards one, without naming it.¹³⁴ To them, if proponents are truly motivated to achieve diverse and genuine representation in public institutions to reflect the

¹²⁴ Koran, *supra* note 76.

¹²⁵ Miller, *supra* note 106.

¹²⁶ *Id.*

¹²⁷ Patricia Gandara, *California: A Case Study in the Loss of Affirmative Action*, THE CIVIL RIGHTS PROJECT, Aug. 8, 2012, <https://civilrightsproject.ucla.edu/research/college-access/affirmative-action/california-a-case-study-in-the-loss-of-affirmative-action>.

¹²⁸ Carey, *supra* note 118.

¹²⁹ The Editorial Board, *supra* note 121.

¹³⁰ *Id.*

¹³¹ Gesheker and Randall, *supra* note 122.

¹³² *Id.*

¹³³ The Editorial Board, *supra* note 121.

¹³⁴ Miller, *supra* note 106.

population, this cannot be accomplished without balancing percentages and numbers.¹³⁵ And this comparison of numbers, opponents believe, is inherently a quota-like activity.¹³⁶ Should Proposition 16 pass, opponents are worried that instead of treating applicants equally based on their qualifications and experiences, public institutions will be preoccupied with pushing towards representation of the population insofar as the Fourteenth Amendment allows.¹³⁷

Outside the realm of education, CFER argues that in public employment, diversity for people of color in public employment has increased.¹³⁸ From 1990 to 2007, minorities rose from 38% to 50% of the public workforce.¹³⁹ And regarding public contracting, supporters of Proposition 209 argue that since the passage of Proposition 209, there are still minority and women-owned businesses that have thrived and expanded. This success is attributed to personal characteristics outside of those that are immutable, such as “patience, hard work, ingenuity, innovativeness, education, and the ability to delay gratification.”¹⁴⁰ And they claim those MWBEs that went out of business after the passage of Proposition 209 were perhaps not competitive to begin with.¹⁴¹ These supporters of Proposition 209 further claim that the success or failure of MWBEs may not be attributed to a single disparity such as race or gender discrimination, but can be due to the lack of the specific expertise or capability of doing the work sought.¹⁴² Ultimately, they align with Governor Pete Wilson’s belief that “business has no color.”¹⁴³

Lastly, opponents argue that the passage of Proposition 16 will be costly to taxpayers, largely due to the ramifications it will have on public contracting. According to the CFER fact-tracker, Proposition 209 saved the California Department of Transportation millions of dollars.¹⁴⁴ From 1998 to 1999, following the passage of Proposition 209, the Department saved approximately \$64 million, equivalent to over \$1 billion dollars in 2020. Proponents use this same figure to demonstrate how MWBEs lost millions of dollars after the passage of Proposition 209.¹⁴⁵ In essence, opponents have toted these savings because public entities have the ability to contract with corporate businesses at a reduced cost.¹⁴⁶ The scale and capacity of these businesses allow them to bid for contracts at a lower rate than MWBEs, which are often smaller businesses who need to bid at a higher rate to fulfill a contract.¹⁴⁷

¹³⁵ Guan, *supra* note 82.

¹³⁶ *Id.*

¹³⁷ Miller, *supra* note 106.

¹³⁸ Californians for Equal Rights, *supra* note 108.

¹³⁹ *Id.*

¹⁴⁰ Gesheker and Randall, *supra* note 122.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Californians for Equal Rights, *supra* note 108.

¹⁴⁵ YES ON 16, *supra* note 85.

¹⁴⁶ Justin Marion, *How Costly is Affirmative Action? Government Contracting and California’s Proposition 209*, UNIV. OF CAL., SANTA CRUZ, DEP’T OF ECON., Oct. 2007, at 19, https://people.ucsc.edu/~marion/Papers/Prop209_oct2007_revision.pdf.

¹⁴⁷ *Id.*

VI. FUNDING SUPPORT

Despite the slight lead for the opposition with regard to recent polling, the fundraising efforts by the proponents of Proposition 16 overwhelmingly outweigh those of the opponents. The proponents' campaign is being bankrolled at over \$17 million dollars, whereas the opponents are at just over \$1 million dollars.¹⁴⁸ Donors in support of Proposition 16 include the California Teachers Association and Kaiser Foundation Health Plan and Hospitals.¹⁴⁹ Recently, opponents protested outside of a Netflix office in Los Gatos, CA after learning that Patricia Quillen, wife of the Netflix CEO Reed Hastings, donated \$1 million dollars to the proponents.¹⁵⁰ On the other side, donors in opposition to Proposition 16 include Students for Fair Admissions, an anti-affirmative action advocacy group, and coalition members of CFER.¹⁵¹

VII. CONCLUSION

Proposition 16 would repeal Section 31 of Article I of the California Constitution, which was added in 1996 through the passage of Proposition 209. In effect, this constitutional amendment initiative will eliminate the ban on allowing state institutions to have the option to consider immutable characteristics in public contracting, employment, and education. Although these public entities would be able to consider these traits under Proposition 16, they are not required to do so, and the repeal of Proposition 209 would not result in arbitrary discrimination. Proponents support the initiative because in their view, it can begin to remedy the institutionalized barriers that marginalized groups have had to traverse over the years, by empowering state and local entities and schools to consider applicants more holistically. Opponents of Proposition 16 argue that the initiative would only legalize discrimination, as the consideration of race, gender, and other traits would inherently disadvantage individuals from other groups. They also argue it could be costly to California taxpayers.

¹⁴⁸ CALMATTERS, *supra* note 75.

¹⁴⁹ *Id.*

¹⁵⁰ Savidge, *supra* note 78.

¹⁵¹ CALMATTERS, *supra* note 75.