

**JOINT COMMITTEE ON
GOVERNMENTAL RELATIONS AND EDUCATIONAL POLICY**

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Discussion 1. Proposition 16: Allows Diversity as a Factor in Public Employment, Education, and Contracting Decisions. Legislative Constitutional Amendment, *Action*

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Proposition 16: Allows Diversity as a Factor in Public Employment, Education, and Contracting Decisions. Legislative Constitutional Amendment.

Presentation By

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Summary

This item contains a resolution endorsing Proposition 16, a legislative constitutional amendment that will appear on the November 3, 2020, general election ballot.

Background

During the 2019-2020 legislative session, Assembly Constitutional Amendment 5 (ACA 5) authored by Assembly Member Dr. Shirley Weber passed the Assembly and Senate with the support of more than two-thirds of each legislative house and will appear on the November 3, 2020, ballot. If Proposition 16 is passed by voters, public agencies would no longer be restricted by the state constitutional provision from considering race, sex, color, ethnicity or national origin to address diversity concerns in public employment, public contracting or public education due to the repeal of article I, section 31, of the California Constitution, which was added by Proposition 209 in 1996. The CSU supported ACA 5.

If passed by voters, the repeal of article I, section 31 of the California Constitution would not alter other state or federal laws guaranteeing equal protection and prohibiting unlawful discrimination. The CSU would continue to be required to comply with these other laws. The Legislative Analyst's Office (LAO) has determined that there is no direct fiscal effect on state and local entities because the measure does not require any change to current policies or programs. The LAO further states that the possible fiscal effects would depend on future decisions by state and local entities to implement policies or programs that consider race, sex, color, ethnicity or national origin in public education, public employment and public contracting.

Potential CSU Impacts of Proposition 209 Repeal

While it is unknown how other public agencies may change their policies or what state legislation may be advanced in future years if Proposition 209 is repealed, the CSU is most interested in exploring ways to provide appropriate additional targeted supports to students and faculty, when based on data and thorough analysis.

Since launching Graduation Initiative 2025 four years ago, the CSU has achieved year-over-year historic gains in increasing completion rates for all students. One of the primary goals of the initiative that is yet to be realized, however, is the *elimination* of equity and opportunity gaps. To address equity gaps based on race and ethnicity, one potential opportunity to be considered is to employ race-conscious or race-attentive strategies and practices. Many potential strategies to improve educational equity and completion outcomes are directly prohibited by Proposition 209, such as:

- Focused student recruitment that considers race/ethnicity or sex;
- Externally funded scholarship programs that consider race/ethnicity or sex;
- Programs to recruit or retain CSU faculty and teacher candidates that consider race/ethnicity or sex; and
- Student retention programs that consider race/ethnicity or sex.

In light of the restrictions imposed by Proposition 209 and other nondiscrimination laws, the university and its campuses have not considered race/ethnicity and instead have used information such as a student's family income and parents' educational level in their policies and practices. For example, the Education Opportunity Program (EOP) used race as one of a number of factors for program eligibility prior to the passage of Proposition 209 and could consider whether that factor should again be used. Since the passage of Proposition 209, the program has instead utilized family income and parents' educational level to determine eligibility. While income has often been used as an alternative attribute for program qualification or additional consideration for many programs, disparities in college access and completion outcomes differ for White, Latinx and African American students, even within the same income groups.

To address and eliminate opportunity gaps, should Proposition 16 pass, the CSU may decide after careful evaluation that it is appropriate—in a narrow, tailored manner that does not harm other students—to employ certain race-conscious or race-attentive strategies. For example, the CSU may decide to explore options that would allow a campus to begin to accept donations for scholarships where race, ethnicity or sex is one factor of a donor's requirements. A campus that had to discontinue a student retention program focused on women in engineering due to Proposition 209 could now consider whether such a program is again warranted to address disparities in enrollment by sex in engineering disciplines. Or campuses may explore whether it is permissible to adopt or modify an affirmative action plan for employment in areas where women or people of color are

underrepresented. Or the university and its campuses may intentionally design retention programs to address the interests of students of a particular race or ethnicity, if an evaluation of the data shows disparities by race and it is determined that consideration of race is necessary to address the cause of these disparities. Any activity that considers the race, ethnicity and/or sex of students or employees must be undertaken very carefully in order to avoid unlawful discrimination.

While the CSU and its campuses have implemented initiatives designed to increase diversity, the repeal of Proposition 209 will allow the CSU to explore whether it is possible to expand and improve on these existing initiatives and programs. For example, the California Pre-Doctoral Program is designed to increase the pool of potential CSU faculty by supporting the doctoral aspirations of CSU students who have experienced economic and educational disadvantages. The repeal of Proposition 209 may allow for expansion of the scope of such programs by permitting the CSU to also consider applicants' race, ethnicity or sex. As part of a holistic and balanced employment process, the repeal of Proposition 209 may allow the CSU's workforce to become increasingly diverse.

Finally, the CSU may have discretion to participate in federal procurement and contracting programs, such as Minority Business Enterprises and Women Owned Business Enterprises, that are currently not permitted. Before modifying or adjusting any contracting practices, the Business and Finance Division would conduct a thorough analysis to understand benefits, costs and what is allowable under remaining state and federal law.

Next Steps if Proposition 209 is Repealed

The CSU recognizes that the repeal of Proposition 209 would mean that an absolute prohibition of some activities which consider race, ethnicity and/or sex will be removed, while other non-discrimination laws remain. Existing non-discrimination laws prohibit discrimination but do allow consideration of race, ethnicity or sex in narrow, limited ways. They require the entity wishing to consider race, ethnicity or sex in hiring or other decisions to engage in careful study and prepare a detailed analysis of problems that could be ameliorated by the consideration of race, ethnicity or sex, such as underrepresentation of women or people of color in a particular job category. Use of race, ethnicity or sex in university decisions is never a decision to be taken lightly or in the absence of extensive study and careful consideration of all options and impacts. Should Proposition 209 be repealed, the CSU commits to undertaking these careful studies to determine whether any consideration of race, ethnicity or sex in decisions related to hiring, student success or contracting is warranted in our pursuit of inclusive excellence.

Support and Opposition

Support

The Opportunity for All Coalition, also known as Yes on Prop. 16, is leading the campaign in support of Proposition 16. They argue that a “yes” vote would reverse the ban on equal opportunity policies like affirmative action so that elected leaders can design programs that provide good jobs, better wages and access to great schools for all Californians. Chairpersons include Thomas Saenz (MALDEF), Vincent Pan (Chinese for Affirmative Action) and Eva Paterson (Equal Justice Society). Supporters include the University of California Board of Regents, the California State Student Association, the California Faculty Association, the California Teachers Association, ACLU of California, many elected and formerly elected officials, and [others](#).

Opposition

Californians for Equal Rights, also known as No on 16, is leading the campaign in opposition to Proposition 16. They argue that California has made great strides in promoting diversity since 1996 and that Proposition 16 legalizes discrimination in violation of federal law. Opponents include Ward Connerly (chair), Senator Ling Ling Chang, Senator Melissa Melendez, the American Civil Rights Institute, Students for Fair Admissions, Inc. and [others](#).

Additional Information

Additional information on Proposition 16 can be found on the Secretary of State’s website at: <https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf>

Recommended Action

Should the Trustees choose to endorse Proposition 16 on the November 3, 2020, general election ballot, the following resolution is recommended:

WHEREAS, Proposition 16 is a legislative constitutional amendment that repeals the provisions of Proposition 209 so that it is possible, where appropriate, to consider race, sex, color, ethnicity or national origin in public employment, education and contracting decisions; and

WHEREAS, the California State University desires more options to consider toward its goals of inclusive excellence for students and employees; now, therefore, be it

RESOLVED, by the Board of Trustees of the California State University, that the board endorses Proposition 16, the legislative constitutional amendment authorized by Assembly Constitutional Amendment 5, which will appear on the November 3, 2020, general election ballot.