



County of San Mateo

Inter-Departmental Correspondence

Department: COUNTY MANAGER

File #: 20-758

Board Meeting Date: 10/6/2020

Special Notice / Hearing: None
Vote Required: Majority

To: Honorable Board of Supervisors
From: Michael P. Callagy, County Manager
Connie Juarez-Diroll, Legislative Officer
Subject: Resolution in Support of Proposition 16 (2020)

RECOMMENDATION:

Adopt a resolution in support of Proposition 16, a Statewide Ballot Initiative to Repeal California's Affirmative Action Ban.

BACKGROUND:

Proposition 16, approved by the Legislature as ACA 5 (Weber), would repeal Section 31 of Article I of the California Constitution, which prohibits the State of California, including counties and other local agencies, from "discriminat[ing] against, or grant[ing] 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 1996, California voters approved Proposition 209, a ballot initiative that banned the use of affirmative action in California. Specifically, Proposition 209 amended Section 31 of Article I of the California Constitution to prohibit counties and other government entities from granting preferential treatment based on race, sex, color, ethnicity, or national origin in matters of public employment or contracting. Leading up to Proposition 209's passage by 55 percent of California voters, Ward Connerly-a leading proponent of the measure and a then member of the University of California Board of Regents-contended that while affirmative action once helped to promote equal opportunity, it had outlived its usefulness. He testified before the United State Senate Judiciary Committee in April 1996 that, "Affirmative action was meant to be temporary. It was meant to be a stronger dose of equal opportunity for individuals, and the prescription was intended to expire when the body politic had developed sufficient immunity to the virus of prejudice and discrimination."* The official 1996 ballot argument in support argued that affirmative action was reverse discrimination that "perpetuate[d] the myth that 'minorities' and woman cannot compete without special preferences" and instead, the path to equality was to embrace a color-blind, race-blind, and gender-blind society.** Proposition 209's passage spurred similar affirmative action bans in nearly a dozen other states.

In 2020, race- and gender-based disparities persist. An August 2019 Economic Policy Institute Study, for example, found that Black workers are twice as likely to be unemployed as white workers, and a similar disparity exists between Black college-graduates and their white counterparts. In the Bay Area, Black households in each of the region's nine counties earn, on average, less than their white counterparts. For example, the 2014 median average income for white households in San Mateo County was approximately \$111,660 versus \$52,257 for Black households.*** A 2020 Public Policy Institute of California analysis recently concluded that California is one of the most economically unequal states in the country with Bay Area residents in the 90th percentile earning incomes of approximately \$384,000 a year, compared to just \$32,000 for those in the bottom 10th percentile.**** Additionally, large majorities of those in the bottom 10th percentile were comprised of African American and Latino families.***** Finally, according to the National Women's Law Center, approximately 12.9 percent of women in California live in poverty and 31.9 percent of female-headed households in the state live in poverty. In California, women typically make \$0.88 cents for every dollar paid to men-with Black women making \$0.61 cents and Latina women making \$0.42 cents for every dollar paid to white men.*****

In addition to prohibiting affirmative action in hiring and college admissions, Proposition 209 also prohibited race and gender conscious procurement policies by the State of California and local agencies. It is difficult to quantify the precise impact this had on minority and women business enterprises (WMBEs) since the state and many local agencies stopped requiring collection of race and gender data after the law's passage until subsequent legislation clarified that this was permissible. A 2015 study commissioned by the Equal Justice Institute estimates that WMBE's lost over \$1 billion per year in business relative to the share they had been receiving prior to passage of Proposition 209.***** It also points to Caltrans' experience with its disadvantaged business enterprise (DBE) program-a requirement of federal funds-as an interesting case study of race-neutral approach. In the four years prior to eliminating race as a factor in its contracting (a decision Caltrans made in response to an executive order in 1995 preceding Proposition 209), Caltrans' had an average DBE contracting rate of 22 percent. This fell to an average of 4.6 percent from FY 2007-2011 after it shifted to a completely race-neutral approach. Caltrans currently administers its race-neutral DBE program in compliance with federal law with a statewide goal of 12.5 percent for its federally funded transportation contracts.

DISCUSSION:

Proposition 16, if passed by the voters, would not implement any changes to state or local hiring practices or public education, in and of itself. It would, however, repeal the prohibition against government entities using race, sex, color, ethnicity, or national origin in those decisions and enable California's public universities, the state, local governments, and other public entities to develop programs and policies that directly aim to increase opportunities for people of color and women in admissions, hiring, and the awarding of public contracts. Government entities would still be limited to programs that fall within the bounds permitted by the U.S. Constitution and federal law. The Senate Floor bill analysis of ACA 5 summed it up as follows: "In short, the repeal of Proposition 209 would permit the use of race and/or gender as a 'plus' factor in college admissions, public employment, and public contracting. It would not permit the use of quotas or policies that [are] broadly tailored and do not consider the totality of the individual college applicants, job applicant, or contract bidder."

Proposition 16 is supported by, among others, the California State Association of Counties (CSAC) and the following: Senators Dianne Feinstein and Kamala Harris, Rep. Anna Eshoo, Rep. Jackie Speier, Governor Gavin Newsom, State Senator Scott Wiener, City of San Jose, Los Angeles County,

Monterey County, Leagues of Women Voters California, Asian Americans Advancing Justice, and UC Board of Regents.

The measure is opposed by, among others, State Senators Ling Ling Chang and Melissa Melendez, former U.S. Representative Darrell Issa, and various organizations including Californians for Equal Rights, chaired by Ward Connerly (Chairperson of the campaign behind California Proposition 209 (1996), Chinese American Civic Action Alliance, Students for Fair Admissions, Inc., the American Civil Rights Institute, and the American Freedom Alliance.

Supervisors Slocum and Groom have requested that the Board support this measure.

Passage and implementation of Proposition 16 would allow changes in the County's hiring policies to take into account race, gender and other factors which are currently excluded from consideration by Proposition 209, and would allow the implementation of new programs and processes that directly aim to increase opportunities for people of color and women.

In the area of Procurement, other than a preference for San Mateo County-based providers in the event of "tie bids" where the combination of price, quality, and terms are otherwise substantially equal, the County does not currently have a vendor preference policy. Some public entities, however, grant additional weight to local, minority, women owned and other federally permitted classes to promote these groups. If Proposition 16 passes, the County may modify its contractor selection parameters, including its RFP/selection process.

Proposition 16 is consistent with the County's current equity efforts as outlined by Board President Slocum on January 7, 2020 including the implementation of the Social Progress Index (SPI) and the SMC Recovery Initiative. Proposition 16 is a unique opportunity for the Board of Supervisors to support a statewide policy change that will provide state and public agencies across the state a valuable tool to help create a more diverse, workforce and contracting pool within the confines of federal law.

County Counsel has reviewed and approved the resolution as to form.

FISCAL IMPACT:

The fiscal impacts of implementation of the measure are currently unknown.

*<https://www.google.com/books/edition/California_and_Affirmative_Action/p2df-VVq1ssC?hl=en&gbpv=1>

**<<http://vigarchive.sos.ca.gov/1996/general/pamphlet/209yesarg.htm>>

***<<https://www.sfchronicle.com/bayarea/article/Incomes-rise-across-S-F-except-for-African-6548522.php>>

****<<https://www.kqed.org/news/11799308/bay-area-has-highest-income-inequality-in-california>>

*****<<https://www.ppic.org/publication/income-inequality-in-california/>>

*****<<https://nwlc.org/state/california/>>

*****<<https://equaljusticesociety.org/wp-content/uploads/2019/10/ejs-impact-prop-209-mwbes.pdf>>