



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Lee Wilcox

**SUBJECT: PROPOSITION 16 ON THE
NOVEMBER 3, 2020 CALIFORNIA
GENERAL ELECTION BALLOT**

DATE: August 5, 2020

Approved

D. OSYL

Date

8/6/2020

RECOMMENDATION

Receive analysis and adopt a support position for Proposition 16 on the November 3, 2020 California General Election ballot.

OUTCOME

The Administration will conduct legislative advocacy to advance the City's adopted position on Proposition 16.

BACKGROUND

On June 24, 2020, the Rules and Open Government Committee directed the Administration to return to Council with analysis on ACA 5 (Weber) on Government Preferences, which is now Proposition 16. If voters pass Proposition 16, it would go into effect five days after the Secretary of State certifies election results for November 3, 2020.

On June 24, 2020, the California State Legislature placed ACA 5 (Weber) on the November 2020 ballot. The measure would overturn Section 31 of Article I of the State Constitution, which voters added with Proposition 209 in 1996. Proposition 209 prohibits the state, cities, counties, community college districts, public universities, and special districts from "discriminating against, or granting preferential treatment to, any individual or group on the basis of race, color, ethnicity, national origin, or gender when making decisions about public employment, public education, or public contracting."

Apart from Proposition 209, other Federal and State laws and case law govern discrimination and preferences. As some examples, at the State level, the Fair Employment and Housing Act prohibits discrimination in employment and housing based on a person's race, ethnicity, gender, sexual orientation, disability, age, and religion, among other protected categories. At the Federal

level, the Equal Protection Clause of the 14th Amendment prohibits discrimination on the basis of race and other protected categories unless the policy is narrowly constructed and has a compelling governmental interest. Under the 14th Amendment, government officials are allowed to consider race in policymaking, but are not allowed to use racial classifications, which sorts people into categories based on race. Separate Supreme Court cases like *UC Regents v. Bakke* and *Grutter v. Bollinger* have said that race-based quota systems are unconstitutional, but that race can be a plus-factor in a holistic evaluation of a candidate under racially-conscious programs.

Proposition 209 created an additional barrier in California for governmental entities to pursue race-conscious and gender-conscious policies like Minority- and Women-Owned Business Enterprises in procurement processes. Proposition 209 also created challenges to collecting and communicating demographic information in policy decision-making.

ANALYSIS

A support position on Proposition 16 aligns with the Council's Legislative Guiding Principle of local control. The passage of Proposition 16 aligns with the intent of recent Council actions including adoption of the Equity Pledge, and removes a barrier to collecting and communicating gender and racial data.

Additionally, repealing Proposition 209 would remove a state barrier to allowing race and gender as a factor in programs or policies at the City. For example, under Proposition 209, the City cannot enact race and/or gender based "goals/good-faith efforts" programs, unless the program is necessary to obtain federal funds. Proposition 209 also does not allow outreach to contractors or job applicants based on race and gender, unless that the outreach is part of a general program of outreach. While there will continue to be other Federal and State laws that govern preferences and prohibit discrimination based on an individual's membership in a protected category, Proposition 16 provides local control to jurisdictions to explore potentially new policies and procedures in hiring and procurement to encourage women and minorities.

In 1996, the ballot argument for the Proposition stated that:

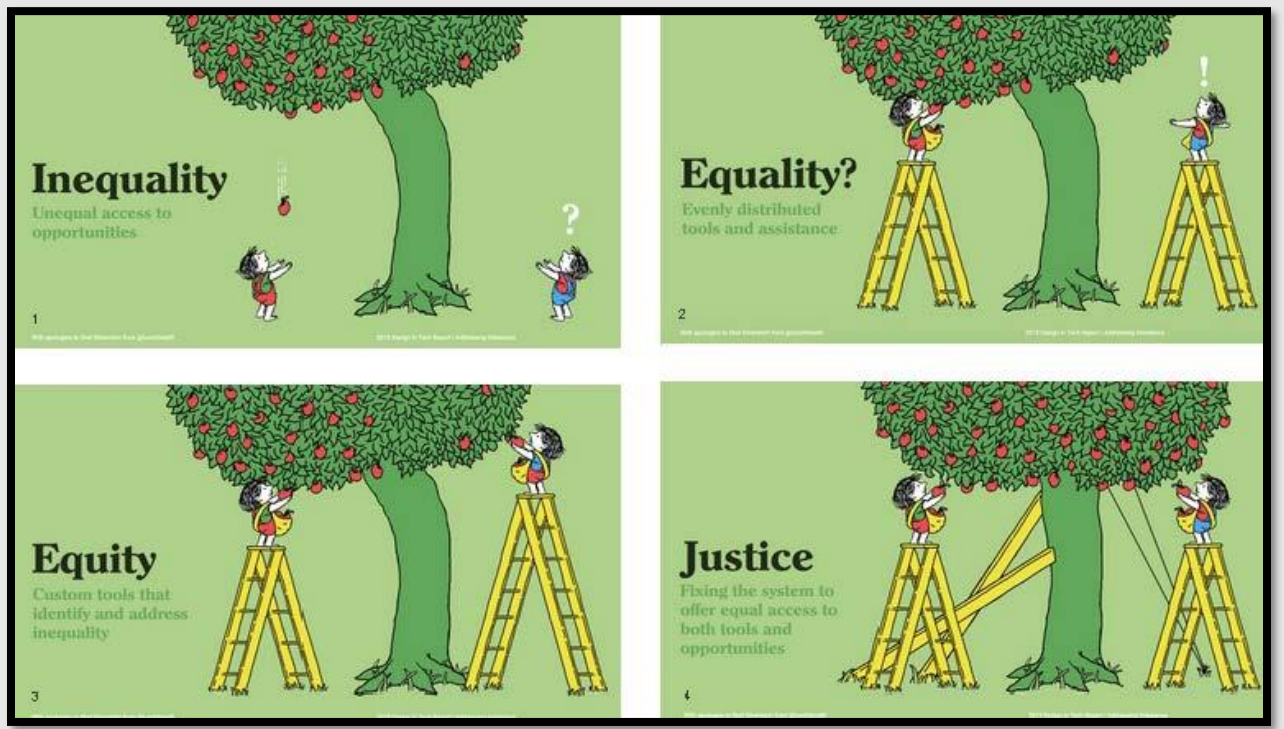
“The only honest and effective way to address inequality of opportunity is by making sure that all California children are provided with the tools to compete in our society. And then let them succeed on a fair, color-blind, race-blind, gender-blind basis.”

In the ensuing 25 years since Proposition 209, some data suggests that historic inequities continue to exist under a color-blind, race-blind, and gender-blind approach. For example, according to data compiled by the Education Trust-West from the University of California (UC), admission rates for minority groups have gone down since the passage of Proposition 209. In 1994, prior to Proposition 209 and a UC Regent vote to end affirmative action, the admission rates for UCs were 82% of Asian American, 75% of blacks, 82% of Latinx, and 87% of Native

Americans. In 2019, the admission rates for UCs were 68% of Asian Americans, 45% of blacks, 55% of Latinx, and 57% of Native American students.

Systemic racism and sexism have resulted in policies that disadvantage minorities and women ranging from disproportionate access to educational opportunities, lower salaries, and reduced promotional opportunities. Equality and providing the same things for everyone does not mean that we are addressing historic disadvantages as the following figure illustrates:

Figure 1: Adaptation from the Giving Tree by Tony Ruth



Using the analogy in Figure 1, Proposition 209 limits the height of the second ladder in the “Equity” illustration. Proposition 16 would remove one of the barriers to providing a taller ladder for those who experience structural inequities.

Local government procurement and hiring practices that advantage minorities and women can help create policies that right those historic inequities. Having diversity in City administration and leadership can help bring a variety of perspectives in program and policy development and implementation. Additionally, according to a June 9, 2020 analysis by the Pew Research Center, 11.5 million women compared to 9 million men lost their jobs from February to May of 2020. For both men and women, Latinx, Black, and Asian Americans experienced a steeper decline in employment than whites. Additional procurement policies and programs for women and minorities could provide opportunities for City contracts to groups hardest hit by the pandemic.

Since the death of George Floyd in May 2020, there's been a renewed national conversation about racism and the structures that lead to different outcomes for different groups. Proposition 16 comes in that context and primarily impacts hiring and procurement practices for the City. In the City of San José, after voters passed Proposition 209, the City closed its affirmative action program of monitoring and tracking City employees by gender and ethnic origin. Prior to voters passing Proposition 209, the Office of Equality Assurance ran this program by comparing the City's workforce with the local labor market. If the Office of Equality Assurance found a discrepancy between the City's workforce and the labor market, it worked to equalize that imbalance.

On procurement, prior to Proposition 209, the City had a Minority- and Women-Owned Business Enterprise program that required large city contractors to demonstrate either that they hired Minority- and Women-Owned Business Enterprise subcontractors at specific percentages or made good faith efforts to do so. After voters passed Proposition 209, the City modified its program to require contractors to fulfill either an outreach or participation component. However, in 2000, the California State Supreme Court in the *Hi-Voltage Wire Works v. City of San José* decision found that the City's program violated Proposition 209 because the outreach and participation components gave special advantages to particular groups. Currently, the City has programs for disadvantaged and local business enterprises, and a Public Works Contracting Academy to provide educational opportunities for disadvantaged businesses.

Proposition 209 also limits the demographic information that Departments collect. For example, Human Resources cannot require that employees answer questions about their gender or ethnicity/race. Furthermore, the information the City does collect often cannot be shared in decision-making because it cannot be used to discriminate against or give preferential treatment to individuals and groups based on race, gender, and ethnicity. Without better data and the ability to communicate data, the City will have challenges understanding the equity impact of policies and programs.

If voters pass Proposition 16, Council could consider modifications to the City's hiring and procurement policies and could direct staff to provide analysis of potential program and process changes, including any resource needs.

Supporters of Proposition 16 (partial list):

Local Governments and Elected Officials: League of California Cities, CalCCA, City of Oakland - City Attorney's Office, City and County of San Francisco Board of Supervisors, San Francisco Mayor London Breed, Oakland Mayor Libby Schaaf, Stockton Mayor Michael Tubbs, Los Angeles Mayor Eric Garcetti, Governor Gavin Newsom, Senator Dianne Feinstein, Senator Kamala Harris, Congresswoman Anna Eshoo, Congressman Ro Khanna

Stakeholders and Community Organizations: Chinese for Affirmative Action, AAPI Women Lead, Abriendo Puertas/Opening Doors, ACLU California Advancement Project, AFSCME, Local 3299, Alliance for Boys and Men of Color, Alliance for Children's Rights, American

Association for Access, Equity and Diversity, American Civil Liberties Union, Anti-Defamation League, United Brother, Sons, Selves Coalition, Building Blocks for Kids, California Democratic African American Party, California Change Lawyers California Council on American-Islamic Relations, California Lulac, California Pan-Ethnic Health Network, California Reinvestment Coalition, California Religious Action Center of Reform Judaism, California-Hawaii State Conference of the NAACP, Californians for Justice, Californians Together, Canal Alliance, Career Ladders Project Center for Leadership, Equity, and Research, Child Care Law Center, Children Now, Children's Defense Fund-California, Chinese American Progressive Action, Communities United for Restorative Youth Justice, Community Coalition Community Legal Services in East Palo Alto, Congregations Organized for Prophetic Engagement Consumers for Auto Reliability and Safety, Cope of San Bernardino, Del Sol Group, Inc., Disability Rights Education and Defense Fund, Diversity in Leadership Institute, East Bay Community Law Center, Education Board Partners, Empowering Pacific Islander Communities, Energy Convertors, Equal Justice Society, Faith in Action East Bay, Fathers and Families of San Joaquin, Feminist Majority Foundation, Food for People, Friends Committee on Legislation of California, Future Leaders of America, Gente Organizada, Greater Sacramento Urban League, Hmong Cultural Center of Butte County, Hmong Innovating Politics, Inland Congregations United for Change, InnerCity Struggle, International Action Network for Gender Equity & Law Justice in Aging, Khmer Girls in Action, Kid City Hope Place, LA Comadre, Lao American National Alliance, Latino and Latina Roundtable of the San Gabriel and Pomona Valley, Lawyers' Committee for Civil Rights Under Law, Long Beach Coalition for Good Jobs and a Healthy Community, LS Consulting, Maternal and Child Health Access, National Action Network - Sacramento Chapter, National Center for Transgender Equality, National Center for Youth Law, National Women's Law Center, New Life Christian Church, Nextgen California, OCA Sacramento - Asian Pacific American Advocates, Officers for Justice Peace Officers Association, Parent Organizing Network, Policy Link, Poverty & Race Research Action Council, Public Advocates Inc., Public Counsel, Reappropriate, Reinvent Stockton Foundation, Resilience Orange County, Rubicon Programs, Social Justice Collaborative, Somos Mayfair, Southeast Asia Resource Action Center, Speak UP, The Cambodian Family Community Center, The Desertsong Group, The Fresno Center, The Hawk Institute, The Leadership Conference on Civil and Human Rights, The Praxis Project, The Village Nation, True Plus, United Cambodian Community, Urban League - Greater Sacramento, Western Center on Law and Poverty, Workplace Fairness, Youth and Education Law Project, and 10,000 Degrees

Labor: Northern and Southern California, and San Diego and Imperial Counties American Federation of State, County and Municipal Employees, Local 3299, Asian Americans Advancing Justice, California Asian Americans Advancing Justice, Los Angeles, Asian Law Alliance, Association of California State Employees with Disabilities, Aypal: Building API Community Power

Chambers of Commerce and Businesses: Anderson Baker Architects, California Black Chamber of Commerce, San Francisco African American Chamber of Commerce, National Association of Women Business Owners – California

HONORABLE MAYOR AND CITY COUNCIL

August 5, 2020

Subject: Proposition 16

Page 6

Education and Student Organizations: San Jose State University, Black Students of California, California Faculty Association, California State University Northridge – Department of Asian American Studies, Families in Schools, Fortune School of Education, GO Public Schools, Hispanic Association of Colleges and Universities, Innovate Public Schools, Mills Legal Clinic of Stanford Law School, Rex and Margaret Fortune School of Education, Teach for America, Teach for America Los Angeles, Teach Plus, The Education Trust – West, University Council-American Federation of Teachers, University of California Board of Regents, UC Berkley School of Law, UC Chicana Latinx Alumni Association, UCLA Center for the Study of Women, University of California Student Association, USC Race and Equity Center, National Association of Women Business Owners – California, United Negro College Fund

Opponents (partial list):

Assemblymember Steven Choi, State Senator Melissa Melendez, State Senator Ling Ling Chang, former Congressman Tom Campbell, Asian American Coalition for Education, Organization for Justice and Equality, San Diego Asian Americans for Equality, Silicon Valley Chinese Association Foundation, and Silicon Valley Community United.

CONCLUSION

The Administration will conduct legislative advocacy to advance the City's adopted position on Proposition 16.

EVALUATION AND FOLLOW-UP

The Administration will report out on the November 2020 election results as part of the Intergovernmental Relations Annual Report to Council in November 2020.

CLIMATE SMART SAN JOSE

The recommendation in this memo has no effect on Climate Smart San José energy, water, or mobility goals.

PUBLIC OUTREACH

The Administration will post this memorandum on the City's Council Agenda website for the August 18, 2020 Council Meeting.

HONORABLE MAYOR AND CITY COUNCIL

August 5, 2020

Subject: Proposition 16

Page 7

COORDINATION

The Administration coordinated this memo with the City's state legislative advocates, the City Attorney's Office, the City Manager's Office, and the Departments of Finance, Human Resources, and Public Works.

COMMISSION RECOMMENDATION/INPUT

The recommended actions do not have a Commission Recommendation.

CEQA

Not a Project, File No. PP17-010, City Organizational and Administrative Activities resulting in no changes to the physical environment

/s/

LEE WILCOX

Chief of Staff, City Manager's Office

For questions, please contact Bena Chang, Director of Intergovernmental Relations, 408-975-3240.