

Date of Hearing: June 6, 2023

ASSEMBLY COMMITTEE ON HUMAN SERVICES

Corey A. Jackson, Chair

ACA 7 (Jackson) – As Amended May 18, 2023

SUBJECT: Government preferences: interventions or programs: exceptions

SUMMARY: Amends the California Constitution to allow the State to fund interventions or programs for the purpose of increasing the life expectancy of, improving educational outcomes for, or lifting out of poverty specific groups. Specifically, **this Constitutional Amendment:**

- 1) Authorizes, subject to approval by the Governor, the State to use state moneys to fund research-based, or research-informed, and culturally specific interventions or programs in any industry, including, but not limited to, public employment, public education, and public contracting, if those interventions or programs are established or otherwise implemented by the State for purposes of increasing the life expectancy of, improving educational outcomes for, or lifting out of poverty specific groups based on race, color, ethnicity, national origin, or marginalized genders, sexes, or sexual orientations.
- 2) Defines “state moneys” to mean all money, bonds, and securities possessed by the State itself.
- 3) Requires the Governor to review and approve or reject an application submitted to the Governor for purposes of 1) within 60 days of receiving the application. Requires the Governor, if the application is denied, to notify the applicant and publish on their internet website a message explaining the basis for the denial.
- 4) Defines “culturally specific intervention or program” to mean a program or practice that infuses the history, language, ancestry, traditions, and rituals of a specific race, color, ethnicity, national origin, religion, gender, sex, or sexual orientation into its design and implementation.
- 5) Defines “research-based intervention or program” to mean a program or practice that has been tested in a manner that meets all of the following conditions:
 - a) The test is conducted with a single randomized evaluation, a single statistically controlled evaluation, or both;
 - b) The test is inclusive and representative of the diverse populations in the state, based on the most recent census data; or,
 - c) The test demonstrates sustained desirable outcomes or the weight of the evidence from a systemic review of the test supports sustained outcomes.
- 6) Defines “research-informed intervention or program” to mean a program or practice that exercises the explicit and judicious use of the best available evidence from multiple sources that use disaggregated data to increase the likelihood of a favorable outcome.

- 7) Defines “disaggregated data” to mean data that has been broken down into detailed subcategories within ethnic groups, age, sexual orientation, and gender identity, with the intent of identifying the unique differences within groups and addressing more concentrated disparities facing specific subgroups.

EXISTING LAW:

- 1) Provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. This article is also known as the *Equal Protection Clause*. (United States Constitution, Article 14)
- 2) Prohibits the State of California from discriminating against, or granting 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. (California Constitution, Article I, Section 31, enacted through Proposition 209 (1996))
- 3) Facilitates the operation of Article VII of the California Constitution to promote and increase economy and efficiency in the state service and to provide a comprehensive personnel system for the state civil service, in which:
 - a) Positions involving comparable duties and responsibilities are similarly classified and compensated;
 - b) Appointments are based upon merit and fitness ascertained through practical and competitive examination;
 - c) State civil service employment is made a career by providing for security of tenure and the advancement of employees within the service insofar as consistent with the best interests of the state;
 - d) The rights and interests of the state civil service employee are given consideration insofar as consistent with the best interests of the state;
 - e) Applicants and employees are treated in an equitable manner without regard to political affiliation, race, color, sex, religious creed, national origin, ancestry, marital status, age, sexual orientation, disability, political or religious opinions or nonjob-related factors; and,
 - f) Tenure of civil service employment is subject to good behavior, efficiency, the necessity of the performance of the work, and the appropriation of sufficient funds. (Government Code Section 18500)
- 4) Establishes in the California Constitution that the initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them. Authorizes an initiative measure to be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5% in the case of a statute, and 8% in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election. Requires the Secretary of State to then submit the measure at the

next general election held at least 131 days after it qualifies or at any special statewide election held prior to that general election. Permits the Governor to call a special statewide election for the measure. (California Constitution, Article II, Section 8)

FISCAL EFFECT: Unknown, this measure has not been analyzed by a fiscal committee.

COMMENTS:

Background: *Proposition 209.* In 1996, Proposition 209 (Prop 209) was placed on the ballot and approved by voters, by a nearly 55-45 margin, to amend the state constitution to provide, “the state shall not discriminate against, or grant 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.”

As noted by the Legislative Analyst’s Office (LAO) in the 2020 Official Voter Information Guide:

“State and local entities can consider sex when it is necessary as part of normal operations. For example, the state can consider the sex of an employee when staffing specific jobs at state prisons where it is necessary for staff and inmates be the same sex. Additionally, state and local entities may consider specified characteristics when it is required to receive federal funding. For example, the state is required to set goals for the portion of contracts awarded to certain groups for federally funded transportation projects, like businesses owned by women and people of color.”

“Before Proposition 209, state and local entities had policies and programs intended to increase opportunities and representation for people who faced inequalities as a result of their race, sex, color, ethnicity, or national origin. These types of programs often are called ‘affirmative action’ programs. For example, some of the state’s public universities considered race and ethnicity as factors when making admissions decisions and offered programs to support the academic achievement of those students. State and local entities had employment and recruitment policies intended to increase the hiring of people of color and women. The state also established programs to increase the participation of women-owned and minority-owned businesses in public contracts. The state set goals for the portion of state contracts that were awarded to those types of businesses. After voters approved Proposition 209, these policies and programs were discontinued or modified unless they qualified for one of the exceptions.”

According to a 2002 publication from the Senate Office of Research (SOR) entitled *Legal History of Proposition 209*:

“A common misconception of the initiative was that it outlawed affirmative action. Affirmative action, which is not mentioned in the initiative’s wording, has different meanings for different people. To some, it is synonymous with preferences based on race or gender that are clearly illegal under Proposition 209. For others, the term speaks to positive actions taken to overcome the effects of past and current discrimination. The California codes contain a number of references to affirmative action concepts, programs and officers. Such references do not violate Proposition 209 unless the statute discriminates or grants preferential treatment on the basis of race, sex, color, ethnicity, or national origin.”

The SOR publication discusses the many legal cases that have ensued as a result of the passage of Prop 209 in an effort to define the scope of Prop 209. It concludes that while specific provisions of laws ordering affirmative action were invalidated in subsequent court cases, “the courts were careful to note that proactive steps to encourage diversity are permissible so long as they are consistent with Proposition 209.”

ACA 5 and Proposition 16. While there were numerous legislative attempts in the intervening years since Prop 209 was adopted to repeal provisions relating to public education, ACA 5 (Weber), Resolution Chapter 23, Statutes of 2020, was the first to be placed on the ballot since Prop 209 was approved by voters in 1996, and sought to repeal Prop 209 in its entirety. Specifically, ACA 5 would have permitted government decision-making policies to consider race, sex, color, ethnicity, or national origin to address diversity by repealing Article I, Section 31, of the California Constitution, which was added by Proposition 209 in 1996.

While Prop 209 generally prohibits state and local governments from discriminating against, or granting preferential treatment to, individuals or groups on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, education, or contracting, it does not alter other state and federal laws guaranteeing equal protection and prohibiting unlawful discrimination. According to the LAO:

“The federal, state, and local governments run many programs intended to increase opportunities for various groups -- including women and racial and ethnic minority groups. These programs are commonly called "affirmative action" programs. For example, state law identifies specific goals for the participation of women-owned and minority-owned companies on work involved with state contracts. State departments are expected, but not required, to meet these goals, which include that at least 15 percent of the value of contract work should be done by minority-owned companies and at least 5 percent should be done by women-owned companies. The law requires departments, however, to reject bids from companies that have not made sufficient "good faith efforts" to meet these goals.”

As a result of ACA 5 being adopted by the Legislature, and Chaptered by the Secretary of State, Proposition 16 was placed on the ballot, but was ultimately rejected with 57% of California’s electorate voting to keep Prop 209’s provisions in place.

Author’s Statement: According to the author, “Proposition 209 severely limits the state’s ability to address systemic inequalities with proven best practices, further exacerbating disparities in public employment, public education, and public contracting. [This measure] will empower California’s Governor to approve applications from state and local entities to use state funds for the implementation of research-based, or research-informed, and culturally specific programs or interventions to increase the life expectancy of, improve educational outcomes for, or lift out of poverty specific ethnic groups or marginalized genders. In California’s efforts to address the long-standing inequalities facing its most vulnerable populations, the Golden State cannot afford to have a hand tied behind its back.”

Need for this bill: This bill seeks to create a process by which the Governor could allow the State to use state moneys to fund research-based, or research-informed, and culturally specific interventions or programs including within public employment, public education, and public contracting, if those programs have been demonstrated to increase the life expectancy of,

improve educational outcomes for, or lift out of poverty specific groups based on race, color, ethnicity, national origin, or marginalized genders, sexes, or sexual orientations.

Equity Implications: Research has demonstrated that educational attainment, income, wealth, and economic mobility exhibit significantly persistent racial disparities in the United States. Access to selective universities is a key determinant of economic success and intergenerational mobility. An August 2020 University of California (UC) Berkeley Goldman School of Public Policy publication entitled, *Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209* by Zachary Bleemer, analyzed Prop 209's impact on student outcomes and found that the average underrepresented minority (URM) applicants' undergraduate and graduate degree attainment declined overall and in STEM fields, especially among lower-testing applicants. As a result, the average URM UC applicant's wages declined by 5% percent annually between ages 24 and 34, almost wholly driven by declines among Latino applicants. The study further finds that, by the mid-2010s, Prop 209 had caused at least a 3% cumulative decline in the number of early-career URM Californians earning over \$100,000. Prop 209 also deterred thousands of qualified URM students from applying to any UC campus. The study concluded that enrolling at less-selective UC campuses did not improve URM students' performance or persistence in STEM course sequences.

Furthermore, a report conducted by the Equal Justice Society found that Prop 209 caused the state and local governments to end their race-conscious contracting programs, costing minority and women business enterprises over \$1 billion annually.

Data confirms that communities of color in California still suffer significantly higher rates of poverty relative to their White counterparts: specifically, 22.9% of Latino Californians suffer from poverty, along with 18.2% of Black Californians, compared to 12.8% of White Californians. Racial disparities in health outcomes persist for communities of color, most specifically the Black community, ranking last in California in life expectancy at birth at 75.1, much lower than the state average of 81. Additionally, when comparing data from test scores of K-12 students prior to Prop 209 to the present, it is evident that the educational equity gap between Black, Hispanic, and White students has not been adequately addressed. While the gap between Black-White test scores and Hispanic-White test scores has narrowed, stark disparities in outcomes remain.

This constitutional amendment might allow California to implement more programs that have been demonstrated to increase the life expectancy of, improve educational outcomes for, or lift out of poverty, specific marginalized populations which would benefit all Californians.

Policy Considerations: While it is important to address disparities and the negative impacts of Prop 209 on California's population, this measure may benefit from additional details as it relates to the application process. The author's stated intent is to allow state moneys to fund research-based, or research-informed, and culturally specific interventions or programs for purposes of increasing the life expectancy of, improving educational outcomes for, or lifting out of poverty, specific groups which is critical in creating an equitable society.

This measure is vague about the details of the application and does not mention a process nor any criteria that would be used for approval or denial. Should this measure move forward, in order to create an equitable process and application, the author may wish to establish a formal

application process that includes details regarding the type of information that would be required, along with who would have the authority to create said application.

While it is important to create streamlined processes to ensure efficiency in government, this measure gives a singular person, who may not have the expertise required, the authority to approve or deny already-appropriated state funds for specific programs. Should this measure move forward, the author may wish to consider directing appropriate government entities with the expertise needed to make these important decisions.

Double referral: Should this measure pass out of this Committee, it will be referred to the Assembly Judiciary Committee.

RELATED AND PRIOR LEGISLATION:

ACA 5 (Weber), Resolution Chapter 23, Statutes of 2020, proposed to amend the California Constitution by repealing Section 31 of Article I relating to the prohibition of the State to discriminate against or grant 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. *ACA 5 was placed on the ballot as Proposition 16 in November of 2020, and failed with 43% voting yes and 58% voting no.*

SCA 5 (Hernandez) of 2013, proposed to amend the situation to be placed before the voters to remove provisions implemented through Prop 209 relating to public education. *SCA 5 was passed by the Senate, and after submittal to the Assembly for consideration, was returned to the Senate without a vote from the Assembly.*

SB 185 (Hernandez) of 2011, stated legislative intent to authorize the California State University (CSU) and the UC to consider race, gender, ethnicity and national origin, geographic origin, and household income, along with other relevant factors, in undergraduate and graduate admissions, as specified, and required the CSU and requests the UC to report on the implementation of these provisions to the Legislature and Governor by November 1, 2013, as specified. SB 185 was vetoed by Governor Brown who stated:

"I wholeheartedly agree with the goal of this legislation. Proposition 209 should be interpreted to allow UC and CSU to consider race and other relevant factors in their admissions policies to the extent permitted under the Fourteenth Amendment of the United States Constitution. In fact, I have submitted briefs in my capacities as both Governor and Attorney General strongly urging the courts to adopt such an interpretation.

"But while I agree with the goal of this legislation, I must return the bill without my signature. Our constitutional system of separation of powers requires that the courts -- not the Legislature -- determine the limits of Proposition 209. Indeed, there is already a court case pending in the 9th Circuit against the State and the UC on the same issues addressed in this bill. Signing this bill is unlikely to impact how Proposition 209 is ultimately interpreted by the courts; it will just encourage the 209 advocates to file more costly and confusing lawsuits."

ACA 23 (Hernandez) of 2009, established an exemption from the California Constitutional prohibition granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in public education for the purposes of implementing student

recruitment and selection programs at public postsecondary education institutions that are permissible under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. *ACA 23 passed the Assembly Committee on Higher Education and was referred to the Assembly Committee on Judiciary but was not set for hearing.*

AB 1452 (Nunez) of 2005, as passed by the Assembly, AB 1452 authorized the UC and CSU to consider race, ethnicity, national origin, geographic origin, and household income, along with other relevant factors, in undergraduate and graduate admissions, so long as no preference is given and such consideration takes place if and when the university, campus, college, school, or program is attempting to obtain educational benefit through the recruitment of a multi-factored, diverse student body. *AB 1425 was substantially amended in the Senate on June 22, 2006, to address an unrelated subject.*

AB 2387 (Firebaugh) of 2004, was substantially similar to AB 1452 as passed by the Assembly. AB 2387 was vetoed by Governor Schwarzenegger who stated that the provisions of AB 2387 would likely be ruled as unconstitutional. However, prior to the Governor's action on the bill, Legislative Counsel offered Opinion #7053 (April 19, 2004) stating "if adopted and enacted, the amendment to Section 66205 of the Education Code, as proposed by Assembly Bill No. 2387, as amended March 22, 2004, would not violate Section 31 of Article 1 of the California Constitution."

REGISTERED SUPPORT / OPPOSITION:

Support

California Teachers Association
California-Hawaii State Conference of the NAACP
National Association of Social Workers, California Chapter
The Education Trust - West

Opposition

None on file

Analysis Prepared by: Jessica Langtry / HUM. S. / (916) 319-2089