Date of Hearing: May 6, 2025

ASSEMBLY COMMITTEE ON JUDICIARY
Ash Kalra, Chair
ACA 7 (Jackson) – As Introduced February 13, 2025

As Proposed to be Amended

SUBJECT: GOVERNMENT PREFERENCES

KEY ISSUE: SHOULD PROPOSITION 209 BE AMENDED TO PROHIBIT THE STATE FROM DISCRIMINATING AGAINST, OR GRANTING A PREFERENCE TO, ANY INDIVIDUAL OR GROUP ON THE BASIS OF RACE, SEX, COLOR, ETHNICITY, OR NATIONAL ORIGIN IN THE AREAS OF PUBLIC EMPLOYMENT, *HIGHER EDUCATION ADMISSIONS AND ENROLLMENT*, OR PUBLIC CONTRACTING?

SYNOPSIS

Article I, Section 31 of the California Constitution (also known as Proposition 209) prohibits the state from granting a preference to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the areas of public employment, public education, or public contracting. This proposed constitutional amendment would strike out "public education" and replace it with "higher education admissions and enrollment." In other words, preferences based on the protected characteristics would still be prohibited in college admissions, consistent with a recent decision by the U.S. Supreme Court, but it would not be prohibited in K-12 schools or, presumably, in any aspect of higher education other than admissions and enrollment.

This is not the first time that the Legislature has attempted to amend or repeal portions of Proposition 209. In 2013, SCA 5 would have removed "public education" entirely from the Article I, Section 31, so that it only would have applied to public employment and public contracting. SCA 5 passed off the Senate Floor but was held at the Assembly desk before it was eventually ordered returned to the Senate, where it died. In 2020, ACA 5 passed in both houses by large majorities; it was chaptered by the Secretary of State and became Proposition 16. This measure would have repealed Proposition 209 in its entirety and thus authorized the state to consider racial and gender diversity as a factor in public employment, public education, and public contracting. Proposition 16 was rejected by over 57% of the voters. Although opponents of this measure point to this history to suggest that this measure is somehow contrary to public opinion or the will of the voters, two points warrant attention: first, this bill is much narrower than the two prior measures and retains a prohibition that is consistent with a recent decision of the U.S. Supreme Court; second, the measure cannot run contrary to public opinion or the will of voters because it must be approved by the voters before it becomes part of the state constitution.

Ed Trust-West supports this bill because it will allow schools to engage in targeted interventions to address disparities and improve educational outcomes. The bill is opposed by the Pacific Legal Foundation and Californians for Equal Rights Foundation, because the opposition alleges it will repeal principles of equality and anti-discrimination enshrined in the California and U.S. constitutions.

SUMMARY: Replaces "public education" with "higher education admissions and enrollment" in subdivision (a) of Section 31, of Article I of the California Constitution so that it will read as follows: "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, higher education admissions and enrollment, or public contracting." Makes other conforming changes.

EXISTING LAW:

1) Provides that 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." (Article I, Section 31 of the California Constitution.)

2) Provides that no person shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is funded, conducted, operated, or administered by the state or by any state agency. (Government Code Section 11135.)

3) Prohibits discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other protected characteristic, as specified, in any programs or activities conducted by any postsecondary education institution that receives or benefits from state financial assistance, or enrolls students who receive state financial aid. (Education Code Section 66270.)

4) Provides, under Title IX of the Education Amendments Act of 1972, that no person shall 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, except as provided. (20 U.S.C. Sections 1681-1688.)

5) Provides, under Title VI of the Civil Rights Act of 1964, that no person shall be discriminated against on the basis of race, color, or national origin in any programs and activities receiving federal assistance. (42 U.S.C. 2000d *et seq.*)

6) Prohibits, under Title VII of the Civil Rights Act of 1964, discrimination in employment based on race, color, religion, sex or national origin and prohibits retaliation against employees who evoke their rights under this provision. (42 U.S.C. 2000e *et seq.*)

FISCAL EFFECT: As currently in print this measure is keyed fiscal.

COMMENTS: According to the author, "ACA 7 seeks to provide clarity to existing legislation concerning Proposition 209, also known as Article I, Section 31 of the California Constitution. For too long, the provisions of this law have been subject to broad interpretation, leaving Californians without a clear understanding of its intended application. This measure introduces clarifying language and makes a modest adjustment to focus specifically on 'higher education [admissions and] enrollment.' These changes will help ensure a more accurate interpretation of the state constitution, allowing its provisions to be implemented as originally intended."

Proposition 209. Article I, Section 31 of the California Constitution, usually known as Proposition 209, was adopted by the voters in 1996 in the midst of a political reaction against "affirmative action" in the state and around the nation. Proposition 209 declared that 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." The language prohibiting "discrimination" was largely superfluous, given that state and federal law, as well as the equal protection clause of the 14th Amendment, already prohibited such discrimination. What Proposition 209 did, therefore, was to prohibit "preferential treatment." Although the measure did not define "preferential treatment," the courts have held that it means "to give priority or advantage to one person . . . over others." [*Hi-Voltage Wire Works v San Jose* (2000) 24 Cal. 4th 537, 559, quoting *Webster' New World Dictionary* (3d Ed. 1988).] While a dictionary is a good place to start, it often defers rather than settles meaning. What is clear from the debates about Proposition 209 at the time, most people understood that it would all but ban "affirmative action," and that was generally understood to mean either setting "quotas" or, less objectionably, considering race as a one "factor" among many in someone's qualifications.

This bill makes a simple but very significant change to Article I, Section 31: it would strike out "public education" and replace it with "higher education admissions and enrollment." In other words, affirmative action would still be prohibited in college admissions, consistent with a recent decision by the U.S. Supreme Court, but it would not be prohibited in K-12 schools or, presumably, in any aspect of higher education other than admissions and enrollment. According to the author, the constitutional amendment will simply provide "clarity" to the scope of Proposition 209. However, based on applicable precedents, if adopted by the voters, the measure would alter the scope of Proposition 209. The prohibition in existing law applies to all aspects and all levels of "public education," whereas under this measure the prohibition would only apply to public colleges and universities, and only to policies relating to admissions and enrollment. Narrowing the scope of Proposition 209 in this fashion may be a good idea – and the voters may approve of it – but the practical application of this amendment would likely amount to more than a clarification of existing state constitutional law.

Past efforts. This is not the first time that the Legislature has attempted to amend or appeal Proposition 209. In 2013, SCA 5 would have removed "public education" entirely from the Article I, Section 31, so that it only would have applied to public employment and public contracting. SCA passed off the Senate Floor but was held at the Assembly desk before it was eventually ordered returned to the Senate, where it died. In 2020, ACA 5 passed in both houses by large majorities; it was chaptered by the Secretary of State and became Proposition 16. This measure would have repealed Proposition 209 in its entirety, thereby authorizing the state to consider racial and gender diversity as a factor in public employment, public education, and public contracting. Proposition 16 was rejected by over 57% of the voters. Although opponents of this measure point to this history to suggest that this measure is somehow contrary to public opinion or the will of the voters, two points warrant attention: first, this bill is much narrower than the two prior measures and retains a prohibition that is consistent with a recent decision of the U.S. Supreme Court; second, by definition this measure cannot run contrary to public opinion or the will of voters since it will only become part of the state constitution if it is approved by the voters.

"Affirmative action" under Proposition 209 and the equal protection clause of the 14th Amendment. Although discussions about affirmative action in California sometimes conflate the

limits imposed by Proposition 209 with the limits imposed by the equal protection clause of the 14th Amendment, it is important to distinguish between them. For example, a policy that survives strict scrutiny under the equal protection clause of the 14th Amendment – because it serves a compelling government interest by narrowly tailored means – could still violate Proposition 209, because Proposition 209 is an outright prohibition with no exceptions for compelling government interests served by narrowly tailored means. At the risk of stating the obvious, this measure, if adopted, could not possibly violate Proposition 209 because it will *modify* Proposition 209. One could argue, as the opposition does, that this measure may run contrary to public opinion, insofar as the voters reaffirmed their support for Proposition 209 in 2020 by rejecting Proposition 16, a ballot measure that would have *repealed* Proposition 209.

However, unlike Proposition 16, this measure does not repeal Proposition 209; it only narrows it. The measure would leave in place the prohibition on discriminating against, or granting preferences to, a person or group on the basis of its protected characteristics in public employment and public contracting. It would modify the prohibition as it currently applies to "public education" by only having it apply to college admissions and enrollment. Presumably, then, under this measure, there would be no prohibition on granting preferences outside of higher education or outside of admissions and enrollment. For example, a K-12 school district could presumably adopt policies that considered race, sex, or ethnicity in its admissions and enrollment policies, and a college or university could consider these characteristics in policies that do not concern admissions or enrollment. Given that this measure, if adopted, would change Proposition 209, the more pertinent question may be whether this change to Proposition 209 would permit policies that run afoul of the equal protection clause of the 14th Amendment.

To begin with, the author is correct that by leaving "higher education admissions and enrollment" in Article I, Section 31, the proposed change is fully consistent with recent case law. For almost 50 years, affirmative action policies in higher education have sparked some of the most controversial equal protection cases. In *Bakke v. UC Regents* (1978) 438 U.S. 265, a divided U.S. Supreme Court held that affirmative action programs that established a "quota" (that is an automatic "set aside" for members of a particular group) violated the equal protection clause because it did not allow for an individualized assessment of each candidate. However, the Court held that considering race as one "factor" among many was constitutionally permissible. As late as 2003, the Court reaffirmed the *Bakke* distinction between permissible "factors" and impermissible "quotas." (*Grutter v Bollinger* (2003) 539 U.S. 306 and *Gratz v. Bollinger* (2003) 539 U.S. 244.)

The settled distinctions running from *Bakke* to the *Bollinger* cases were drastically unsettled two years ago in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (2023) 600 U.S. 181. The Court held that Harvard's admissions policies – even if it only used race as a "factor" for admission – violated the equal protection clause of the 14th Amendment. The Court held that Harvard (and the University of North Carolina in a consolidated case) could not show a "compelling state interest" in any measurable way. However, the Court did provide a slight opening for affirmative action when it conceded that a college could consider an applicant's discussion of how race affected the applicant's life, so long as the discussion is tied to the character or unique ability of the individual candidate. (It should be noted that even this would arguably not survive Proposition 209, either in its current form or as proposed to be amended.) Yet, the overall message of the Court was perhaps best summarized when, quoting prior case law, the majority of the Court wrote that, "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded

upon the doctrine of equality." (*Students for Fair Admissions*, supra, quoting *Rice v. Cayetano* (2000) 528 U.S. 495, which in turn was quoting *Hirabayashi v. United States* (1943) 320 U.S. 81.)

While leaving "higher education admissions and enrollment" in Article I, Section 31 is consistent with existing case law, it remains to be seen whether policies permitted under this proposed constitutional provision would violate the equal protection clause of the 14th Amendment. To be clear, this measure would not – indeed, *could not* – by itself violate the equal protection clause; because it does not by itself discriminate against, or grant a preference to, any individual or group. It simply declares what the state *cannot* do; it does not say what it *can* or *must* do. The opponents of this measure, therefore, are apparently concerned that this proposed change in the state constitution might *permit* policies that violate the equal protection clause. If the intent of the measure is to permit K-12 to discriminate on the basis of race, or permit colleges and universities to discriminate on the basis of race in everything other than admissions and enrollment, those polices might pass constitutional muster under the state constitution, as revised, but those policies might still violate the equal protection clause of the 14th Amendment, at least as interpreted by the U.S. Supreme Court in *Students for Fair Admissions.*

What policies would this measure permit that are not permitted now? Although the author claims that the intent of this bill is to "clarify" existing law, the effect of the new language would allow K-12 schools to consider race and gender in developing its policies, and would permit college and universities to consider race and gender in all policies other than those affecting admission and enrollment. According to Ed Trust-West, one of the supporters of this bill, this measure would address disparities rooted in race by permitting "targeted, research-based interventions that improve educational outcomes." Neither the author's background material nor the letter of support say precisely what those "interventions" would be, but presumably this could mean curricular, recruitment, and outreach programs that target or appeal to historically underrepresented groups, or it could mean providing remedial, financial, or other forms of support to individuals from those groups. *The Committee may wish to explore with the author what specific policies this would permit that are not permitted under existing law.*

Proposed author's amendments. The author wishes to take the following clarifying amendment in this Committee:

- On page 1, line 7, page 2, line 11, and page 2 line 15 change "enrollment" to *admissions and enrollment.*

Amendment that the author may wish to consider. While this measure is admirably concise and straightforward, a seeming redundancy in one of the provisions might cause confusion. Subdivision (a) sets out the substantive prohibition against discriminating against, or granting preferences to, any person or group on the basis of the protected characteristics in areas of "public employment, higher education admissions and enrollment, and public contracting." Proposed subdivision (b) states: "This section shall apply only to action taken after the section's effective date *and is limited to the areas of public employment, higher education admissions and enrollment, and public contracting*." The purpose of the italicized language is not entirely clear. Subdivision (a) already states that the section only applies to the three stated areas, so it is not clear why it is necessary to state again that it only applies to those areas. If this language is intended to do something more than restate what is already achieved in subdivision (a), then that

"something more" needs to be clarified. If the language does not do anything more than reiterate the scope of subdivision (a), then it should be deleted.

***ARGUMENTS IN SUPPORT**:* Education Trust West, an organization committed to advancing policies and practices that dismantle the racial and economic barriers embedded in California's educational system, supports this constitutional amendment for the following reasons:

> This measure would amend the California constitution to permit use of race in public education policy, excluding higher education enrollment.
>
> As explained in our recent publication "Black Minds Matter," (Black Minds Matter: Building Bright Black Futures) research and data on public education show significant racial disparities in opportunity and achievement. In many cases, these disparities are rooted in race. ACA 7 recognizes this and would permit targeted, research-based interventions that improve educational outcomes. Without ACA 7, we'll continue to struggle to close opportunity and achievement gaps as no effective proxy for race has been found to target educational interventions and resources.

***ARGUMENTS IN OPPOSITION**:* The Pacific Legal Foundation writes in opposition:

> ACA 7 is a step backwards from equality. Permitting the government to treat individuals differently and distribute benefits on the basis of race will undoubtedly disadvantage individuals based on traits that they cannot control. "A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." For a state as diverse as California, discriminatory distribution of benefits on the basis of race is grievously and needlessly destructive to equality and opportunity for Californians of all races and ethnicities. By permitting the government to base opportunity on traits that individuals cannot control, ACA 7 will remove the ability of Californians to control their own destinies through their personal skills, qualities, and lived experiences. Californians cannot live freely if ACA 7 allows the government to discriminate against them in this way.
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> While ACA 7 preserves the prohibition on discrimination in higher education enrollment, it will permit the government to discriminate in all aspects of K-12 education and all other aspects pertaining to colleges and universities. This uneven and inconsistent preservation of equality and opportunity fails to fully live up to the guarantee of the equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

REGISTERED SUPPORT / OPPOSITION:

Support

The Education Trust West

Opposition

Californians for Equal Rights Foundation
Pacific Legal Foundation

Analysis Prepared by: Tom Clark / JUD. / (916) 319-2334