September 18, 2020

Attention: Legislation and Public Outreach Committee

Adopt a Resolution of Support for Proposition 16 – the “Allows Diversity as a Factor in Public Employment, Education and Contracting Decisions” Legislative Constitutional Amendment. (Action)

Staff recommendation
Adopt resolution 2020-_____ endorsing Proposition 16, the “ Allows Diversity as a Factor in Public Employment, Education and Contracting Decisions” legislative constitutional amendment.

Alternatives
Do not adopt the recommended position or resolution, or adopt a modified position or resolution.

Fiscal Impact
There is no direct fiscal impact associated with the consideration of adopting a resolution in support of this ballot measure.

Discussion

Proposition 16 – The “Allows Diversity as a Factor in Public Employment, Education and Contracting Decisions” Legislative Constitutional Amendment
Proposition 16 on the November 2020 general election ballot would enact the “ Allows Diversity as a Factor in Public Employment, Education, and Contracting Decisions” legislative constitutional amendment, and, if approved by the voters, would repeal Proposition 209 – Section 31 of Article 1 of the California Constitution – which would eliminate the ban on the consideration of race, sex, color, ethnicity, or national origin in public education, public employment, and public contracting. As a result, state and local entities could establish a wider range of policies and programs related to public employment, education, and contracting decisions as long as they are consistent with federal and state laws related to equal protection.

Assembly Constitutional Amendment 5 (ACA 5), which was authored by Assembymember Shirley Weber, was passed on a bipartisan vote by the Legislature during 2020 and signed by the Governor, placing a ballot measure – Proposition 16 – on the November 2020 general election ballot. Assembymember Weber introduced ACA 5, stating that, “While it was sold as a civil rights law when it passed in 1996, Proposition 209 has...set up barriers to women and minorities to share in the economic life of California. It’s time to give voters a chance to right this wrong.”

Proposition 209 – “The California Civil Rights Initiative” – was passed by voters on a 54.5% affirmative vote in 1996 with the strong support of then-Governor Pete Wilson. Proposition 209
amended the California Constitution to effectively prohibit the implementation and use of affirmative action or other practices that provided preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin by state and public agencies.

Proposition 16 would repeal Section 31 of Article 1 of the California Constitution, which was added by Proposition 209. If passed, Proposition 16 would allow – but would NOT require or compel – government decision-making bodies to develop and implement policies and programs that would consider race, sex, color, ethnicity, or national origin to address diversity in the operation of public employment, education, or contracting, to the extent allowable by state and federal law.

Proposition 16 would apply broadly to all state and public agencies, including the Water Authority and its member agencies. Repeal of the Constitutional prohibition on affirmative action created by Proposition 209 would allow the state and other public agencies, including the Water Authority and its member agencies, to consider race, sex, or ethnicity in the areas of public employment, public contracting, and public education to the extent allowed by state and federal law.

If voters approve Proposition 16 at the November 2020 general election, key questions will relate to the permissibility of post-Proposition 16 policies and programs under today’s law. As cited in the Senate Floor Analysis for ACA 5 (attached), “…the Supreme Court ruled in Bakke that UC Davis’ use of racial quotas for medical admissions was unconstitutional. Justice Powell, looking to Harvard’s admission policy for guidance, affirmed that it was constitutional for a school to use race or gender as a ‘plus,’ but not as a decisive criterion for admission…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 applicant, job applicant, or contract bidder.” [Emph. added]

Support
Arguments in support of Proposition 16 generally state that, contrary to the arguments in support of Proposition 209, the effects of implementing Proposition 209’s prohibitions have not ensured fairness, diversity, and equity in education, public contracting, and public employment. Supporters argue that, as a result of the significant changes to the social and economic fabric of the state, voters should be permitted an opportunity to reconsider the merit or necessity of the statewide policy banning affirmative action programs.

A sample list of support and endorsements for Proposition 16 includes:

- Governor Gavin Newsom
- U.S. Senator Dianne Feinstein
- Congressman Mike Levin
- Congressman Juan Vargas
- Assemblymember Shirley Weber

- U.S. Senator Kamala Harris
- Dozens of current and former elected officials
- Congressman Scott Peters
- Senate President Pro Tempore Toni Atkins
- Assemblymember Todd Gloria
Opposition
Arguments in opposition to Proposition 16 generally assert that the repeal of Proposition 209 would reintroduce racial preference in California in violation of law and court decisions. Opponents also assert that Proposition 209 does not categorically prohibit affirmative action, and that Proposition 16 constructs a false narrative of racial inequities. Opponents argue that Proposition 16 would create division among race or ethnic demographics and would minimize the importance of the contributions of minority groups as a result of preferential treatment.

A sample list of opponents to Proposition 16 includes:

-State Senator Ling Ling Change (R-Diamond Bar)
-State Senator Melissa Melendez (R-Lake Elsinore)
-Former Congressmember Darrel Issa
-Students for Fair Admissions
-Chinese American Civic Action Alliance
-Orange County Register Editorial Board
-Wall Street Journal Editorial Board

Impact on Water Authority
While Proposition 16 would not compel the development and implementation of any policies or programs, it would provide an opportunity for dialogue regarding the creation, development, and implementation of programs at the Water Authority, and would also create the opportunity for a conversation regarding whether the Water Authority could become a regional resource for member agencies who choose to develop and implement post-Proposition 16 programs and policies. Those programs and policies could include the consideration of providing priority to contracts with minority- and women-owned businesses, similar to the program currently implemented for small businesses through the Water Authority’s Small Contractor Outreach and Opportunities Program (SCOOP), and developing policies to incentivize the hiring and promotion of minority and women employment candidates.
Staff recommends the Board adopt Resolution 2020-_____ endorsing Proposition 16.

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Approved by: Dan Denham, Deputy General Manager

Attachment: Resolution No. 2020-_____
Legislative Analyst’s Office analysis of Proposition 16