



Asian American Coalition for Education

ASIAN AMERICAN COALITION FOR EDUCATION

Representing the interests of over 5 million Asian-American children and parents in California

AN OPEN LETTER TO THE CHAIR AND MEMBERS OF
THE CALIFORNIA STATE ASSEMBLY
COMMITTEE ON PUBLIC EMPLOYMENT & RETIREMENT
URGING SUPPORT FOR EQUAL PROTECTION OF THE LAWS AND EQUAL
EDUCATION RIGHTS BY VOTING “NO” ON
ASSEMBLY CONSTITUTIONAL AMENDMENT 5
WHICH SEEKS TO REPEAL PROPOSITION 209 AND
REINTRODUCE RACIAL PREFERENCES

05/04/2020

VIA E-MAIL and REGULAR MAIL

The Honorable Freddie Rodriguez
Chair, Assembly Committee on Public Employment and Retirement
California State Legislature
Legislative Office Building, 1020 N Street, Room 153
Sacramento, CA 95814

Re: Opposing ACA-5 which intends to reinstitute race-based affirmative action in public education, public employment and public contracting opportunity

Dear Honorable Chair Rodriguez,

The Asian American Coalition for Education (AACE) writes on behalf of over 5.5 million Asian Americans in California to urge you and members of the Assembly Committee on Public Employment & Retirement to vote “no” on Constitutional Amendment 5 (ACA-5). We strongly believe in the value of diversity and equality, but passing ACA-5 will not advance the purported goal of “fairness, justice, and equality”. Instead, promoting affirmative action through race-conscious remedies for the explicitly stated groups of “Black Americans and Latino Americans” will most likely result in racial discrimination against Asian Americans in California without delivering the intended benefits. The AACE is a non-political, non-profit national organization, the proven leader in fighting for equal education rights, with over 290 partner organizations nationwide. We are a 501c(3) organization registered in the state of California.

ACA-5 Constructs A False Narrative Of Racial Inequities And Falsely Attributes Racial/Gender Gaps To Proposition 209

ACA-5’s bill text misleadingly portrays a grim picture of employment and education prospects for black Americans, Latino Americans and women. According to the bill proponents, as a direct result of Proposition 209, these disadvantaged groups have experienced abhorrent discrimination and disparity in access to public contracting, work and education. Specifically, Proposition 209 “reduces the graduation rates of students of color” and has led to a fatal loss of



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diversity on the state's college campuses. These fabricated claims, based on cherry-picked partial facts, are inflammatory and politicized rhetoric.

From a broad perspective of statewide public higher education, underrepresented student groups have seen rising trends in graduation and enrollment following the passage of Proposition 209. In the University of California system, 4-year graduation rates of underrepresented racial minorities (URMs) rose from 31.3% during the 1995-97 period (preceding Prop-209) to 36.6% during 1998-2000, then to 43.3% during 2001-03. In 2014, URMs' 4-year graduation rate rose to a record high of 55.1%. The 6-year graduation rate has fared even better: 66.5% in 1998 and 75.1% in 2013. Minority admissions at UC exceeded those of 1996 both in absolute numbers and as a percentage of all admits. Latino admissions went from 15.4% (5,744 students) in 1996 to 23% (14,081) in 2010; Asian-American admissions rose from 28.8% (11,085) to 37.47% (22,877), while black admissions from 4% (1,628) to 4.2% (2,624). In 1999, URMs' enrollment at the UC system stood at a meager 15%, while in 2019 this figure increased to 26%. The allegation in ACA-5's text that "since the passage of Proposition 209, diversity within public educational institutions has been stymied" is simply untrue. It is imperative for policy makers to comprehend the whole picture rather than stylized facts in the bill that looks only at "the Berkeley and Los Angeles campuses of the University of California".

Furthermore, ACA-5 baselessly accuses Proposition 209 of banning California universities from "engaging in targeted outreach and extra efforts to matriculate high-performing minority students". UC founded the Early Academic Outreach Program (EAOP) in 1976 to increase enrollment of "students from underserved schools and communities". Over the decades, EAOP has evolved into one of UC's "largest and most successful Student Academic Preparational and Educational Partnership programs", adding to its "commitment to diversity and inclusion". Such a commitment, apparently undeterred by Prop-209, has rendered six UC campuses the status of Hispanic Serving Institutions and four campuses as the 2015 recipients of Insight into Diversity Magazine's "Higher Education Excellence in Diversity" awards. In 2012, UC established the UC-HBCU Initiative to boost connections with historically black colleges and universities and funding internships for black graduate students. In addition, UC also boasts its Mathematics, Engineering, Science Achievement (MESA) program to help disadvantaged students develop STEM skills and the Puente Project to improve college-preparatory English skills for Latino students. The assertion that outreach efforts are hampered by Prop-209 is simply unfounded.

Proposition 209 Does Not Categorically Prohibit Affirmative Action

The initiative Proposition 209, the constitutional provisions ACA-5 is challenging to repeal, was passed in November 1996 with 54.5% of total votes in California. It is a just and eloquently clear measure, putting a stop on the state government to using different rules for different races and mandating it to give equal treatment in public employment and education regardless of race. Specifically, Prop-209, which amended the California State Constitution and added one section (Section 31 of Article I) to the State Constitution, prohibits the state 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. In other words, public programs cannot use race or gender to select a less qualified applicant for public jobs, contracts, or higher education admissions. Since the late 1990s, Prop-209 has withstood legal scrutiny and challenges.



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Notably, Prop-209 by no means sought an end to the state's affirmative action programs. According to Section 31, “ (c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.” Instead, this legislation pursues narrow tailoring of such affirmative measures to remedy sufficiently documented discrimination on the basis of race or gender while not creating preferential treatment. Race-based preferential treatment, *de jure*, involves acting unfairly and outside the appropriate legal process to award an advantage to an individual on the sole basis of race. It is a much narrower concept than good-faith, reasonable affirmative action, which is not excluded by Prop-209. Therefore, from a perspective of promoting diversity and equity in the public domain, ACA-5 is jurisprudently unnecessary.

ACA-5's Actual Implementation Would Most Likely Violate Federal Laws And U.S. Supreme Court Rulings

ACA-5 equates diversity and affirmative action with increased representation of underrepresented racial and gender groups in California. ACA-5's narrative indicates a short-sighted focus on pegging specific representation in public employment, education and contracting to general population and demographics. Once codified, the bill's implementation will mostly likely involve practices of racial balancing, which would violate the following.

First, according to the 2014 U.S. Supreme Court decision on Schuette v. Coalition to Defend Affirmative Action, affirmative action must survive the scrutiny of the intrinsic/extrinsic test, meaning that public institutions granting affirmation in education and employment must only consider race extrinsically as a quality contributing to and evidencing other intrinsically valuable qualities of an applicant. It cannot be considered as a plus factor in and out of itself. Race being a sole-qualifying factor is much narrower than race being an intrinsic quality.

Second, since ACA-5 falsely traces discrimination in public employment and education to Prop-209 and explicitly singles out “Black Americans and Latino Americans” as victims, passing it would greatly encourage racial fissures among minority groups and perpetuate racial discrimination against Asian Americans. As such, ACA-5 also violates the Fourteenth Amendment to the U.S. Constitution granting the equal protection of the laws, as well as Title VI of the Civil Rights Act of 1964 prohibiting discrimination on the basis of race in federally funded programs. Additionally, it fails to observe the current federal guidance on the use of race in college admissions that tailors race among other factors for strict justifications of compelling government interests after serious race-neutral alternatives have been sought and exhausted.

ACA-5's Actual Implementation Would Contravene The California Constitution & Laws

In addition to its trespasses into federal legislations, ACA-5's implementation would most certainly violate the California State Constitution and a series of state laws pertaining to civil rights, discrimination, and affirmative action.

1. Beyond seeking to repeal Article I Section 31, the bill violates California State Constitution's prohibition on discrimination and special privileges. Article I Section 7 explicitly reaffirms the U.S. Constitution's principle of equal protection of the laws and equal opportunity. According to Article I Section 7 (b), “citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.” In addition, Article I Section 8 states that “A person may



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not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.”

2. It breaches the California State Education Code (EDC), Article 3 Section 220: “No person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation”.

3. It also contravenes Donahoe Higher Education Act, Article 2 Section 66010.2 (C): “The public elementary and secondary schools, the California Community Colleges, the California State University, the University of California, and independent institutions of higher education share goals designed to provide educational opportunity and success to the broadest possible range of our citizens, and shall provide... Educational equity not only through a diverse and representative student body and faculty but also through educational environments in which each person, regardless of race, gender, gender identity, gender expression, sexual orientation, age, disability, or economic circumstances, has a reasonable chance to fully develop his or her potential.”

4. It disrespects the California court opinions on Coalition to Defend Affirmative Action v. Brown (2012) which upheld the constitutional law created by Prop-209 as well as the California Supreme Court Ruling in Pacific Legal Foundation v. City of San Francisco (2010) which ruled that Prop-209 does not violate the federal constitution. Justice Kathryn Mickle Werdegar wrote, "Even in the rare case in which racial preferences are required by equal protection as a remedy for discrimination, the governmental body adopting such remedies must undertake an extraordinary burden of justification."

In conclusion, the legislative reform in the area of civil rights, affirmative action, and public institutions that ACA-5 seeks is unconstitutional and illegal at both the federal and state levels. Ultimately, the catalysts for such problematic changes disguise themselves as tokens of diversity, equity, and inclusion to sell a political agenda of discrimination, unjust preferences, and double standards. For over five millions of Asian Americans who proudly call California their home state, their equal education rights are on the line as the ACA-5 proposal pits racial groups against each other by replacing merit with racial categorization. For all Californians, ACA-5 does nothing to promote true, long-lasting diversity or to address the root cause behind failing public education in many minority communities. This politically expedient yet impractically shortsighted act only exacerbates educational inequalities across the great state of California. In this spirit, we urge you and your colleagues to support diversity, fairness, and merit by voting “no” on ACA-5.

Sincerely,

Yukong Zhao,
President, Asian American Coalition for Education