

BILL: ASSEMBLY CONSTITUTIONAL AMENDMENT 5
AS AMENDED MAY 4, 2020

AUTHOR: ASSEMBLYMEMBER SHIRLEY WEBER (D – SAN DIEGO)

SUBJECT: GOVERNMENT PREFERENCES.

STATUS: PASSED – ASSEMBLY APPROPRIATIONS COMMITTEE
ASSEMBLY – SECOND READING FILE

ACTION: SUPPORT

RECOMMENDATION

Staff recommends that the Board of Directors adopt a SUPPORT position on Assembly Constitutional Amendment 5 (Weber) as amended. This action would also authorize support for the potential ballot measure (Proposition TBD) to repeal Prop 209 and to enact ACA 5.

ISSUE

This bill was introduced on March 9, 2020 to amend the California State Constitution by repealing Section 31 of Article I.

Specifically, this Constitutional Amendment:

- Repeals provisions enacted pursuant to Proposition 209 in 1996 that prohibit the state and all institutions and political subdivisions thereof 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.

DISCUSSION

Assembly Constitutional Amendment 5, as amended, would repeal Section 31 of Article I of the California Constitution. Section 31 of Article I was added to the Constitution through the passage of Proposition 209 in 1996. The text of Section 31 of Article I of the California State Constitution begins: *“SEC. 31. (a) 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.”*

This bill was introduced by Assemblymembers Shirley Weber (D-San Diego), Mike Gipson (D-Carson), and Miguel Santiago (D-Los Angeles), with Assemblymembers Autumn Burke (D-Marina Del Rey), Jim Cooper (D-Elk Grove), Lorena Gonzalez (D-San Diego), Chris Holden (D-Pasadena), Reggie Jones-Sawyer (D-Los Angeles), Sydney Kamlager (D-Los Angeles), Kevin McCarty (D-Sacramento), and Mark Stone (D-

Monterey Bay) as coauthors. Senators Steven Bradford (D-Gardena), Holly Mitchell (D-Los Angeles) and Ben Hueso (D-San Diego) are coauthors in the Senate.

According to the author, California is only 1 of 8 states that have a similar ban on preferential treatment based on race, sex, color, ethnicity or national origin in public employment, education and public contracting. In an effort to promote social equity and to reverse the legacy and impacts of past racism and discrimination – affirmative action on the federal level has been codified into law. California is home to over 1.5 million women owned firms – however, participation by women-owned firms in public contracting continues to decline.

The Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex, or national origin. California law has similar provisions, including employee protections against discrimination codified under the California Fair Employment and Housing Act of 1959. Proposition 209 is distinct in that in addition to banning discrimination, it added a ban on granting preferential treatment based on those same categories. This ban on preferential treatment is also referred to as the “affirmative action ban.” ACA 5 is similar in intent to SCA 5 (Hernández), which in the 2013-2014 legislative session would have amended the Constitution to remove Proposition 209 provisions related to public education only. However, SCA 5 failed to advance in the Assembly.

This bill has several potential impacts to Metro’s work in the areas of procurement, equal opportunity in employment and equity, particularly with respect to Minority and Women-owned Business Enterprise programs. These impacts are outlined below.

Impact on Metro’s Vendor/Contract Management & Diversity and Economic Opportunity Programs

The possible repeal of Proposition 209 would have a significant impact on Metro’s locally-funded procurements. The enactment of the repeal would allow for Metro to implement programs and preferential selection in the agency’s public contracting practices. The passage of Proposition 209 in 1996 is the reason that Metro was required to cancel its Minority Business Enterprise (MBE) and Women-owned Business Enterprise (WBE) certification and goal programs (race and gender-conscious) and change to race-neutral and gender-neutral small business programs on non-federally funded procurements. In effect, race and gender could no longer be taken into account in our non-federally funded contracting program. This would allow Metro to potentially create MBE/WBE programs once again on our locally funded contracting program.

Participation by minority and women owned businesses plummeted after passage of Proposition 209 in 1996. Proposition 209 does not affect Metro’s federal procurements and the Disadvantaged Business Enterprise program remains unaffected, yet on the local side, minority and female owned businesses have had to compete against Prime contractors for state/local procurements over the last 24 years. Metro’s Small Business Enterprise program was created to fill the void created by the passage of Prop 209 and while the SBE program has aided a number of minority and women-owned business, it is fundamentally a race-neutral program. Because of the way Proposition 209 is structured, we have limitations on our state/locally funded procurements. We believe that

the program would see increased participation by Women owned and minority-owned businesses and continued success for these businesses if the Proposition was repealed.

With respect to federally funded procurements, since establishing a DBE program is a condition of receiving federal financial assistance, compliance with Proposition 209's prohibition against gender and racial preferences would result in Metro being ineligible for federal assistance.

Impact on Metro's Human Capital & Development and Civil Rights Employment Policies

As a recipient of federal funding, Metro is required to submit an Equal Employment Opportunity Program (EEO) to the Federal Transit Administration (FTA) every four years. In order to meet this requirement, Metro needs to provide a written, detailed, results-oriented set of procedures designed to achieve prompt and full utilization of people within a protected class at all levels and in all parts of Metro's workforce, including compensation. This requirement is in line with ACA 5.

In addition, *Public Utilities Code-Section 1300051.19-Adoption of Affirmative Action Plan* states: "Metro shall adopt an affirmative action plan for its management positions which reflects the ethnic demographics of the county, taking into consideration the availability of the workforce in the various ethnic groups."

These requirements are necessary. Overall, the transit industry is a male-dominated industry. At Metro, we currently have 70% male and 30% female represented in the workforce. Even with EEO goals, we have only increased the overall female percentage by 1.6% since 2005. Currently, of the 8 EEO job categories that all Metro positions fall into, 4 of those EEO job categories are underutilized for women. Simply put, Metro needs to hire more women in certain job categories. We are also required to prevent concentration of minority groups in particular positions, cost centers and departments. As such, Metro's goal is to not only increase underutilization, but its goal is to also prevent concentration of minority groups in lower level positions. Metro has utilized EEO goals to resolve the above disparities and meet the aforementioned requirements. Passing ACA 5 would be in line with these efforts to rectify disparities.

What's most important is that the efforts to meet Equal Employment Opportunity Program goals, which are aligned with ACA 5, are working, as shown in the chart below. Since the implementation of a streamlined Equal Employment Opportunity concurrence process in 2016, Metro has increased the hire rate of women each year. In the figure below, rates of women in the workforce are shown increasing year over year due to the policies that Metro has implemented.

| | |
|------|-----|
| FY16 | 33% |
| FY17 | 35% |
| FY18 | 41% |
| FY19 | 42% |

Removing these EEO efforts at Metro, by not supporting ACA 5, would not only eliminate the progress we've made, but would cause it to continue to go in a negative direction.

In addition, if Metro does not meet FTA EEO requirements and fails to take correction action, the FTA can initiate the suspension, termination, refusal to grant or continue Federal financial assistance for Metro. FTA can also make a referral to the Department of Justice with a recommendation that appropriate proceedings be brought against Metro to enforce any rights of the United States (U.S.) under any law.

Metro has also created the Women and Girls Governing Council (WGGC) and incorporated a number of hiring practices to encourage the advancement and continued increases in hiring of women in the Metro's workforce. For non-represented employees, staff has found that there is a clear disparity between women and men in the workforce and the WGGC has done work and is studying how to address this disparity. ACA 5 would continue in that same vein.

Any hiring related language in the Collective Bargaining Agreements with Metro's unions is negotiated, and the language usually focuses on using seniority as the primary factor promotion after the job's minimum qualifications are met. Even if ACA 5 were to pass, if race or sex were to be included as a factor in hiring for union represented jobs, Metro would not be able to supersede any contract language that conflicts with it without negotiation.

Chapter 2 of the FTA EEO Circular states, in part: *Both agencies and unions are responsible for nondiscrimination under federal equal employment opportunity laws and regulations. An agency cannot evade nondiscrimination responsibilities on the basis of union contract terms covering employees. When agencies are negotiating or amending union agreements, FTA requires agencies to review and revise the agreements wherever current provisions are identified as barriers to equal employment.*

Alignment with Metro's Equity Platform

The goal of ACA 5 is aligned with Metro's Equity Platform. Under the platform, Metro is tasked with reducing racial, socioeconomic, and gender disparities to increase access to opportunity. As explained in the preamble of ACA 5, Article 1, Section 31 has exacerbated those disparities and made them much more difficult to address. The constitutional amendment proposed under ACA 5 would expand the tools available to accomplish the goals of Metro's equity platform.

ACA 5 has received substantial support from nonprofit organizations around the state, as well as unions and educational associations. The bill has also received opposition from various stakeholder groups, although no official opposition was recorded as of May 5th, 2020.

The bill recently was approved by the Assembly Appropriations Committee and now moves forward to the Assembly floor for consideration. The bill needs to receive at least two-thirds approval by the Assembly to move forward. For ballot measures to be included in the November 2020 ballot, initiatives need to qualify by June 25, 2020.

Staff recommends that the Board adopt a SUPPORT position on ACA 5 and the potential Proposition TBD to enact ACA 5.

DETERMINATION OF SAFETY IMPACT

Passage of the legislation would not have an immediate impact on safety.

FINANCIAL IMPACT

The estimated financial impact of this action is still being evaluated.

IMPLEMENTATION OF STRATEGIC PLAN GOALS

Staff recommendation supports strategic plan goal #5.5, Metro will expand opportunities for businesses and external organizations to work with us. To maximize our engagement with traditional and non-traditional business partners, Metro will re-examine contracting rules, policies, and regulations to minimize requirements that unnecessarily restrict creativity and create barriers to entry for emerging and small businesses.

ALTERNATIVES CONSIDERED

Staff has considered adopting either an oppose or work with author position on the bill. However, an oppose position would be counter to the agency's goals to increase participation by women and minorities in public contracting and in hiring.

NEXT STEPS

Should the Board approve the adoption of a SUPPORT position on the legislation; staff will communicate the Board's position to the author and work to ensure its passage. Staff will continue to keep the Board informed as this issue is addressed throughout the legislative session.