IN THE SUPREME COURT OF
THE STATE OF FLORIDA

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC EDUCATION	CASE NO. 97,086
ADVISORY OPINION TO THE ATTORNEY GENERAL RE: AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC EMPLOYMENT	CASE NO. 97,087
ADVISORY OPINION TO THE ATTORNEY GENERAL RE: AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC CONTRACTING	CASE NO. 97,088
ADVISORY OPINION TO THE ATTORNEY GENERAL RE: END GOVERNMENTAL DISCRIMINATION AND PREFERENCES AMENDMENT	CASE NO. 97,089

INITIAL BRIEF OF THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS

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I. STATEMENT OF THE CASE

On October 26, 1999 the Secretary of State submitted to the Office of the Attorney General four initiative petitions seeking to amend the Florida Constitution. Three of the initiatives claim to seek to bar the government from treating people differently based on race, color, ethnicity, or national origin in (1) public education, (2) public employment, and (3) public contracting, respectively. The fourth initiative (the "omnibus initiative") claims to seek to end governmental discrimination and preferences based on race, sex, color, ethnicity, or national origin in public education, employment, and contracting. On November 23, 1999, the Attorney General petitioned this Court for advisory opinions regarding whether the proposed amendments comply with the requirements of Article XI, Section 3 of the Florida Constitution and Section 101.161, Florida Statutes. The titles of the proposed amendments are as follows:

AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC EDUCATION.

AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC EMPLOYMENT.

AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC CONTRACTING.

END GOVERNMENTAL DISCRIMINATION AND PREFERENCES AMENDMENT.

By order dated December 2, 1999 this Court, sua *sponte*, consolidated these four cases for all appellate purposes. By interlocutory orders of the same date, the Court ordered interested parties to file their briefs on or before December 22, **1999** .[1]

A. **THE FOUR INITIATIVES**

The titles, summaries, and texts of three of the four proposed amendments, concerning public education, public employment, and public contracting, respectively, are identical, except for the above-listed subject areas. Thus, the summary of the proposed amendment concerning public education, as quoted below, is identical to the ones concerning public employment and public contracting, except for the substitution of "public employment" and "public contracting" for "public education":

> Amends Declaration of Rights, Article I of the Florida Constitution, to bar state and local government bodies from treating people differently based on race, color, ethnicity, or national origin in the operation of public education, whether the program is called "preferential treatment," "affirmative action," or anything else. Does not bar programs that treat people without regard to race, color, ethnicity, or national origin. Exempts actions needed for federal funds eligibility.

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[1] Counsel has confirmed that briefs for In re Amendment To Bar Government From Treating People Differently Based On Race In Public Employment, Case No. 97,087, are due on December 22, 1999 and not December 21, 1999 as stated in the Order.

The full text of the proposed amendment concerning public education provides as follows:

ADD SECTION 26 TO ARTICLE 1, FLORIDA CONSTITUTION AS FOLLOWS:

(1) The state shall not treat persons differently based on race, color, ethnicity, or national origin in the operation of public education.

(2) This section applies only to action taken after the effective date of this section.

(3) This section does not affect any law or governmental action that does not treat persons differently based on the person's race, color, ethnicity, or national origin.

(4) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

(5) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

(6) For the purposes of this section, "state" includes, but is not necessarily limited to, the state itself, any city, county, district, public college or university, or other political subdivision or governmental instrumentality of or within the state,

(7) The remedies available for violations of this section shall be the same, regardless of the injured party's race, color, ethnicity, or national origin, as are otherwise available for violations of then existing Florida education discrimination law.

(8) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the,United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

The "public employment" and "public contracting" initiatives are identical, except for substituting those terms for "public education" in paragraph one and substituting "employment" for "education" in paragraph 7.

The ballot initiative entitled "End Governmental Discrimination and Preferences Amendment" varies in several ways from the above three proposed amendments. Its summary is as follows:

> Amends Declaration of Rights, Article I of Florida Constitution, to bar government from treating people differently based on race, sex, color, ethnicity, or national origin in public education, employment, or contacting, whether the program is called "preferential treatment," 'affirmative action," or anything else. Does not bar programs that treat people equally without regard to race, sex, color, ethnicity, or national origin. Exempts bona fide qualifications based on sex and actions needed for federal funds eligibility.

The full text of this proposed amendment also differs somewhat from the other three initiatives. The differences in language are highlighted below.

> ADD SECTION 26 TO ARTICLE 1, FLORIDA CONSTITUTION AS FOLLOWS:
>
> 1) 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.**
>
> 2) This section applies only to action taken after the effective date of this section.
>
> 3) This section does not affect any law or governmental action that does not **discriminate against,**

or grant preferential treatment to, any person or group on the basis of race, sex, color, ethnicity, or national origin.

4) **This section does not affect any otherwise lawful classification that: (a) Is based on sex and is necessary for sexual privacy or medical or psychological treatment; or (b) Is necessary for undercover law enforcement or for film, video, audio, or theatrical casting; or (c) Provides for separate athletic teams for each sex.**

5) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

6) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

7) For the purposes of this section, "state" includes, but is not necessarily limited to, the state itself, any city, county, district, public college or university, or other political subdivision or governmental instrumentality of or within the state.

8) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, **as** are otherwise available for violations of then existing Florida antidiscrimination law.

9) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section 1.

B. **INTEREST OF THE AMICUS CURIAE**

The Leadership Conference on Civil Rights ("Leadership Conference") is a coalition of more than 185 national

organizations representing persons of color, women, labor unions, individuals with disabilities, older Americans, major religious groups, gays and lesbians, and civil liberties and human rights groups. Together, over 50 million Americans belong to the organizations that comprise the Leadership Conference. There are active state chapters of Leadership Conference organizations in every state in the Nation, including Florida.

For almost a half century the Leadership Conference has led the fight for equal opportunity and social justice. The Leadership Conference has and continues to coordinate the campaign to make equal justice the law of the land. The Civil Rights Acts of 1964 and 1991, the Voting Rights Act of 1965, the Fair Housing Act of 1968 and its 1988 Amendment Act, the Family and Medical Leave Act, the Americans with Disabilities Act and Title IX, among others — all were pushed to passage with the help of the Leadership Conference and the national coalition it mustered and mobilized.

II. SUMMARY OF ARGUMENT

The initiatives do not satisfy the requirements of section 101.161, Florida Statutes, because their titles and summaries do not fairly apprise the voters of the subjects and effects of the proposed amendments. By using vague and highly charged language, the initiatives obscure their effects, causing voters to cast their ballots without understanding what they are

voting on, and potentially causing voters to believe that they must engage in the very "logrolling" proscribed by Article XI, Section 3 of the Florida Constitution.

First, the initiatives' summaries misleadingly suggest that Florida governmental entities – the legislature, state and local executive bodies, and the courts – can be precluded from adopting affirmative race- and gender-conscious remedies. This flies in the face of well-established federal statutory and constitutional precedent that such remedies are permissible and may be required for past discrimination or to serve other compelling governmental interests. Although all Florida governmental entities are obliged to consider and undertake such measures where appropriate, the courts, in particular, are required by the Supremacy Clause to do so. The summaries' acknowledgment of an exception for "actions needed for federal funds eligibility" is thus woefully underinclusive. It is also hopelessly uninformative, given the breadth of programs that are subject to federal constraints.

Second, the initiatives' titles and summaries use vague and ambiguous language that fail to apprise the electorate of the proposed amendments' subjects and effects. They use the terms "preferential treatment" and "affirmative action," but those terms are indeterminate and might be construed by voters as meaning anything from quotas to mentoring or outreach

programs to even data collection and record-keeping requirements. Indeed, Governor Jeb Bush's "One Florida Initiative" purports to distinguish 'preferences," which he eschews, from "affirmative action properly understood," which he claims to embrace. It is impossible to determine from the text of the proposed amendments, let alone from their summaries, which types of actions would be permitted and which would be prohibited. Experience under similarly worded initiatives in other states demonstrates that these terms are ambiguous and do not fairly apprise voters of the intended effects of the initiatives.

Uncertainty also inheres in the summaries' use of the terms "public education," "public employment," and "public contracting," as what is comprehended within them is not explained. Similarly, use of "government" and "state or local government bodies" in the titles and summaries to describe the non-exclusive array of entities affected by the proposed amendment is not informative. The titles and summaries likewise use "people" to describe those to be protected from discrimination, but the initiatives refer to "persons," a potentially more comprehensive term that leads to another misleading ambiguity.

The initiatives also "fly under false colors," a practice this Court has previously disallowed. Three of the

initiatives refer exclusively to race in their titles, yet all three affect classifications based on ethnicity, national origin, and color, too; the fourth initiative decries simply "discrimination," without explaining that it concerns discrimination based only on race, gender, color, ethnicity, or national origin. So, too, the initiatives fail to acknowledge that the Florida Constitution already includes protections against discrimination, potentially misleading voters to believe that the initiatives add protections that in reality they take away. Finally, the omnibus initiative summary's reference to "bona fide qualifications based on sex" is an ambiguous and inaccurate description of the exceptions provided in the proposed amendment.

For all of these reasons, the titles and summaries fail to provide fair notice of their multiple subjects and effects. Accordingly, the initiative petitions and ballot summaries should be stricken for failure to comply with the requirements of Article XI, Section 3 of the Florida Constitution and Section 101.161, Florida Statutes.

III. **ARGUMENT**

Each of the initiatives is defective because the summaries and titles do not fairly describe for the voters the subjects and effects of the proposed constitutional amendments. They misleadingly suggest that State bodies can avoid their

federal obligations to consider and to implement affirmative race- and gender-conscious remedies where appropriate. Their ambiguous and simplistic terms also serve to mask the complex and far-reaching consequences of the amendments. None of the initiatives should be permitted to be placed on the ballot.

Section 101.161(1), Florida Statutes, **provides in** pertinent part as follows:

> Whenever a constitutional amendment . . , is submitted to the vote of the people, the substance of such amendment . . . shall be printed in clear and unambiguous language on the ballot . . . . The substance of the amendment . . . shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

The purpose of Section 101.161, Florida Statutes, is "to assure that the electorate is advised of the true meaning, and ramifications, of an amendment." Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982). See also Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1022 (Fla. 1994). "[S]ection 101.161, requires that the ballot title and summary state in clear and unambiguous language the chief purpose of the measure." Askew, 421 So. 2d at 154-155. See also Advisory Opinion to the Attorney General Re Florida Locally Approved Gaming, 656 So. 2d 1259, 1262 (Fla. 1995). Ballot summaries are not required to include all

possible effects, Grose v. Firestone, 422 So. 2d 303, 305 (Fla. 1982), nor must ballot summaries "explain in detail what the proponents hope to accomplish." Advisory Opinion to the Attorney General English - The Official Lansuase of Florida, 520 so. 2d 11, 13 (Fla. 1988). The ballot titles and summaries, however, must be "accurate and informative" and "give voters sufficient notice of what they are asked to decide to enable them to intelligently cast their ballots." Advisory Opinion to the Attorney General Re Casino Authorization, Taxation and Regulation, 656 So. 2d 466, 468 (Fla. 1995) (quoting Smith v. American Airlines, Inc., 606 So. 2d 618, 620-621 (Fla. 1992)). This Court "can not approve [a ballot summary that contains] an ambiguity that will in all probability confuse the voters who are responsible for deciding whether the amendment should be included in the state constitution." Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, 632 so. 2d at 1021. The proposed initiatives do not satisfy the pertinent requirements.[2]

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[2] Our argument focuses primarily on violations of the requirements of Florida Statutes, Section 101.161. In doing so, we also demonstrate that the initiatives violate the single-subject rule of Article XI, Section 3 of the Florida Constitution. Because the Attorney General's petitions addressed the latter requirement, and we understand that other interested parties intend to do so, too, we will not repeat arguments concerning the single-subject rule here.

A. THE SUMMARIES MISLEADINGLY SUGGEST THAT THE STATE, AS A MATTER OF STATE LAW, CAN AVOID ITS FEDERAL LEGAL RESPONSIBILITIES

It is by now clear that the federal constitution and laws permit, and in some instances require, remedies that take account of race, color, gender, ethnicity, or national origin. In Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995), the United States Supreme Court held that racial classifications are constitutional 'if they are narrowly tailored measures that further compelling governmental interests."[3] This is true whether the classification is imposed by a federal, state, or local actor. Id. By implying that the State and its subdivisions may avoid the need to consider and to implement such remedies in appropriate cases, the initiatives' summaries are quite misleading.

Race-conscious remedies have been sanctioned, to one degree or another, in each of the areas addressed by the initiatives: public education, public contracting, and public employment. In one of the Court's earliest such cases, concerning higher education, for example, it concluded that a public university's race-conscious admissions policy could be constitutionally permissible where "race or ethnic background

[3] Cf. Craig v. Boren, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

[is] deemed a 'plus' in a particular applicant's file" but is not the sole basis used for determining admission. See Resents of the University of California v. Bakke, 438 U.S. 265, 317 (Powell, J.); id. at 296 n.36 ('As I am in agreement with the view that race may be taken into account as a factor in an admissions program, I agree with my Brothers BRENNAN, WHITE, MARSHALL, and BLACKMUN that the portion of the judgment that would proscribe all consideration of race must be reversed.").

Similarly, in public employment, the Court has sustained a local governmental agency's affirmative action plan that set goals to increase the representation in the workforce of women and racial and ethnic minorities by taking their gender, race, and ethnic background into account as one factor, but not the only one, in hiring and promotion decisions. See Johnson v. Transportation Agency, 480 U.S. 616 (1987). The plan at issue had as its goal the remediation of substantial underrepresentation of women and minorities in certain job categories, measured relative to the proportion of women and minorities in the relevant labor pool. See id. at 631-636.[4] It

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[4] The Court held that a public employer could permissibly adopt such a plan if there were a 'manifest imbalance" in employment of women or minorities in job categories that traditionally have been segregated. See id. at 631-32. Such an imbalance could be shown by evidence that would amount to proof of a *prima facie* case of past discrimination, as was suggested by Justice O'Connor, id. at 649 (O'Connor, J., concurring), but

was also important that the plan "expressly directed that numerous factors be taken into account in making hiring decisions, including specifically the qualifications of female applicants for particular jobs." Id. at 637 (O'Connor, J., concurring). Because no specific jobs were set aside exclusively for women or minorities, and because the plan did not establish fixed quotas for hiring or promotion of women and minorities, it was found not to disturb unnecessarily the rights of men or non-minorities. See id. at 637-638 (O'Connor, J., concurring). It **was** also important to the Court that the plan was not permanent, reflecting its remedial character. See id. at 639-640 (O'Connor, J., concurring).

The Court has likewise sustained affirmative action in the field of public contracting. In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Court upheld a congressional program that required that at least 10% of federal public works block grant funds be expended in contracts with minority-owned businesses. The program was established to break the historic pattern of egregious exclusion of minority-owned firms from federal contracting. Seed . at 459-463 (Burger, C.J.). It "was designed to ensure that . . . [grantees] would not employ procurement practices that Congress had decided might result in

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the Court did not embrace that standard of proof as a necessary condition precedent, id. at 632-33.

perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority business to public contracting opportunities." Id. at 473 (Burger, C.J.). In his plurality opinion for three Justices, Chief Justice Burger expressly "reject[ed] the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion," id. at 482, as did a clear majority of the Court, see id. at 517 (Marshall, J.) ("'racial classifications are not per se invalid under [the Equal Protection Clause of] the Fourteenth Amendment'" (quoting Bakke, 438 U.S. at 356 (Brennan, J.)).[5]

The Court's action in approving race-conscious remedies has not been limited to those voluntarily adopted by executive or legislative bodies, but has also embraced judicially imposed remedies. In United States v. Paradise, 480 U.S. 149 (1987), for example, the Court sustained a district court order requiring the Alabama Department of Public Safety to

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[5] Justice Powell wrote separately to affirm that his concurrence was based on his assessment that the program could withstand, in effect, the strict scrutiny later clearly mandated by Adarand, which he articulated as whether the program was "a necessary means of advancing a compelling governmental interest," id. at 496, and that it was narrowly tailored, id. at 510-515. In her opinion for the Court in Adarand, Justice O'Connor took special note of and relied upon Justice Powell's concurrence, see 515 U.S. at 219, 235, and expressly disavowed the implication, if any, in Fullilove that any less rigorous standard is appropriate, id. at 235. The Adarand Court expressed no view on whether the program addressed in Fullilove would meet the strict scrutiny standard. Id.

promote one black trooper for each white promoted, as long as there were qualified black candidates, until the department submitted a promotion procedure of its own that did not perpetuate the effects of its past discrimination. Although she dissented in Paradise, Justice O'Connor cited it as an instance where "every Justice of this Court agreed that the Alabama Department of Public Safety's 'pervasive, systematic, and obstinate discriminatory conduct' justified a narrowly tailored race-based remedy." Adarand, 515 U.S. at 237 (citations omitted), Conversely, in United States v. Fordice, 505 U.S. 717 (1992), which considered how Mississippi should remedy its history of de jure segregation of its public university system, the Court rejected the lower courts' views "that adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system" of institutions of higher education for whites and blacks. Id. at 729 (emphasis added). These are but a few of the examples of the Court's recognition that race- or gender-conscious remedies may be directed by a court. See, also, United States v. Virginia, 518 U.S. 515 (1996) (remedy for exclusion of women from Virginia Military Institute).

Thus it is far too late to dispute that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is

an unfortunate reality, and government is not disqualified from acting in response to it." Adarand, 515 U.S. at 237. By purporting to eliminate "'preferential treatment,' 'affirmative action,' or anything else," the initiatives can mislead the voters to believe that they can, contrary to federal law, "disqualify" the various levels of government of Florida from acting to remedy invidious discrimination and its effects. The misleading nature of the initiatives can have pernicious results for the voters and for the State.

As the Supreme Court has just recently reaffirmed, the States are not free "to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal laws that comport with the federal design. We are unwilling to assume the States will refuse to honor the Constitution or obey binding laws of the United States." Alden v. Maine, 119 S. Ct. 2240, 2266 (1999). Yet the initiatives mislead voters to think that the State will undertake just such a refusal. Moreover, assuming arguendo that the initiatives could disable the Florida legislature or other governmental bodies within Florida from adopting affirmative race- or gender-conscious action where appropriate to remedy discrimination or serve other compelling governmental interests, the initiatives would lead to highly irrational and inefficient results, of which the voters are not

fairly and adequately apprised. For example, they might preclude voluntary actions to resolve litigation, forcing the State or other entities to incur unnecessary expense and to accept a remedy imposed by the judiciary, rather than having the opportunity to shape a remedial course that makes sense to and is adopted by the people's representatives or other members of the political branches of government. The voters are given no hint of this potential result.

Further, Florida state courts are bound by the Supremacy Clause of the United States Constitution: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI. Thus even assuming arguendo that the initiatives could permissibly limit the ability of State and local executive and legislative bodies to fashion race- or gender-conscious remedies that federal law requires, the initiatives clearly cannot so constrain the powers of the State's courts. Again, however, the summaries will mislead the voters to believe that the initiatives impose just such a constraint.

The initiatives' summaries do contemplate an exception for "actions needed for federal funds eligibility," but this

term is vague and ambiguous and risks misleading the voters. For one thing, affirmative action may be necessary under federal law for reasons other than funding eligibility, and the voters are not so apprised, as just discussed. For another, a plethora of federal programs require that participating agencies or recipients of federal funds undertake actions that could potentially be found to run afoul of the initiatives. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to 2000d-4, for example, generally conditions the receipt of any federal funds on the recipient's commitment not to discriminate in the conduct of the recipient's program. Title VI's reach is necessarily vast, and it is understood to implicate the full range of rights and remedies under the Equal Protection Clause of the Fourteenth Amendment. See, e.g., United States v. Fordice, 505 U.S. 717, 732 n.7 (1992); Sandoval v. Hagan, 1999 WL 1075102 (11th Cir. Nov. 30, 1999). Which Florida state programs will be permitted to engage in which activities that might otherwise be prohibited by the initiatives is thus nowhere delineated for the voters. In effect, the initiatives would create a two-tier system of disparate standards for permissible governmental conduct, and voters will have no way to know what they are enacting if they vote for them.

Finally, in light of the foregoing, the initiatives' explicit treatment of remedies is hopelessly vague, and no fair

description of it is provided in the summaries. The initiatives have a provision stating that "[t]he remedies available for violations of this section shall be the same, regardless of the injured party's race, color, ethnicity, or national origin, as are otherwise available for violations of then existing Florida" discrimination law respecting education and employment.[6] The initiatives give no notice of what those remedies are; whether the remedies could expand or contract is also unclear, because "then existing" could refer to the time of enactment of the initiative or the time of the violation. And of course, as has already been discussed extensively, various forms of remedies that might be argued to be "affirmative action," "preferential treatment," or "anything else" are now well established in the law - yet the summary purports in each case to bar such actions. What remedies are left is thus totally unclear. In any event, by not discussing the issue of remedies at all, each of the initiatives' summary fails to give fair notice of the substance and effect of the initiative.

In sum, "[t]he critical issue concerning the language of the ballot summary is whether the public has 'fair notice' of

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[6] The public contracting initiative provides for the remedies available under "then existing Florida employment discrimination law." The omnibus initiative makes reference additionally to gender and provides more generally for the remedies "otherwise available for violations of then existing Florida antidiscrimination law."

the meaning and effect of the proposed amendment." In re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1021 (Fla. 1994). For all the reasons outlined above, the ballot summaries in these initiatives fail to do so.

B. THE PROPOSED BALLOT SUMMARIES AND TITLES DO NOT APPRISE THE VOTERS OF THE TRUE MEANINGS AND RAMIFICATIONS OF THE PROPOSED AMENDMENTS

The titles and summaries of each of the four initiatives fail to meet the requirements of Section 101.161, Florida Statutes. Important terms used in the titles and summaries are ambiguous, yet not defined or even found within the texts of the respective initiatives. These vague terms do not provide voters with the true meaning or consequences of the proposed amendments. They are inherently confusing and are not a fair means of describing the initiatives.

For example, the summaries use the terms "preferential treatment," "affirmative action," and 'anything else" to describe the types of programs to be prohibited under the proposed amendments. These three catch phrases are indeterminate and could be broadly construed in a manner that is neither described in the summaries nor intended by those who may vote for the initiatives. Though placed in quotation marks as if to imply that these are terms of art employed in the actual text of the proposed amendments, neither the summaries nor the

texts define "preferential treatment" or "affirmative action" or explain the emphasis given to them in the summaries.[7] Those terms could be construed to include such varied matters as quotas, mentoring or outreach programs, or even data collection. Based upon the summaries, a voter could not possibly understand the true meaning or possible impact of the proposed amendments. One voter might vote for an initiative thinking it dealt only with quotas, for example, without knowing that others could interpret the same initiative to have a much broader reach.

Governor Jeb Bush's recent "One Florida Initiative" respecting public employment, education, and contracting exemplifies how terms such as "preferences" and "affirmative action" are used in many different ways, rendering the initiatives' summaries ambiguous and potentially misleading. Governor Bush's initiative, as he described it, purports, in some respects, to be affirmatively race-conscious – for example, by continuing to certify minority businesses, spending more resources on "matchmaking" between minority businesses and state procurement agents, and enhancing technical and financial

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[7] Those terms do not even appear in the four initiatives, with the exception of 'preferential treatment," which appears in but is not defined by the "End Government Discrimination And Preferences Amendment." "Anything else" by its very terms is so expansive as to give voters no opportunity to evaluate the initiatives on their merits.

assistance to minority businesses. See Remarks by Governor Jeb Bush, Announcement of the One Florida Initiative, at 6-7 (Nov. 9, 1999) <http://www.state.fl.us/eog/one_florida/remarks.html> (attached hereto as Ex. A). While he intends to "end[] racial preferences," he claims to continue "affirmative action properly understood." Id. at 6. Some voters might believe Governor Bush's proposals would be permitted by the initiatives; others might believe the opposite. No one would be able to ascertain from the texts of the initiatives, much less from their titles and summaries, who was correct. As this Court has noted, "[t]he voters should never be put in a position of voting on something that, while perhaps appearing to do only one thing, actually will also result in other consequences that may not be readily apparent or desirable to the voters." Advisory Opinion to the Attorney General-Restricts Laws Related to Discrimination, 632 so. 2d 1018, 1023 (Fla. 1994) (C.J. Barkett concurring).

These defects can also be seen from the experience with a similar proposition circulated in California and adopted by the voters of that state as Article I, section 31, California Constitution, popularly known as Proposition 209. It provides that "[t]he 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." Cal. Const. Art. I, § 31(a).

Polling of voters in California before and after Proposition 209's adoption indicated that they did not want to eliminate all affirmative action programs. Despite this history, proponents of Proposition 209 are now arguing that "preferential treatment," as used in that provision, includes any race-conscious effort. See Equal Rights Advocates, "The Wake of Prop 209: Courts to Define 'Preferential Treatment"' at 1 <http://www.equalrights.org/AFFIRM/ wake.htm> (attached hereto as Ex. B). For example, after the passage of Proposition 209, the governor of California ordered all state agencies to stop even collecting data on the number and value of public procurement contracts awarded to minority- and women-owned businesses. See id. at 2; Chinese for Affirmative Action and Equal Rights Advocates, "Opportunities Lost – The State of Public Sector Affirmative Action in Post Proposition 209 California," at 10 <http://www.equalrights.org/survproj> ("Opportunities Lost") (attached hereto as Ex. C). State and local agencies also reported declines in outreach efforts and in certification of minority and women owned businesses. See "Opportunities Lost" at 10-11. These responses certainly went well beyond the electorate's common understanding of Proposition

209 and demonstrate how the initiatives at issue here do not fairly describe their purposes or effects.

The ambiguity of the proposed language in these initiatives can also be seen in divergent judicial interpretations of comparable language in Proposition 209 since its passage. For example, in AMPCO System Parking v. Los Angeles, Cal. Super. Ct. No. DC189-541 (L.A. May 20, 1998) (attached hereto as Ex. D), the court upheld a minority and women business enterprise ("M/WBE") program as constitutional. Under the challenged program, bidders were required to "strive to adhere to levels of participation for each project and . . . demonstrate that a 'good faith' effort was made to secure MBE/WBE subcontractors sufficient to reach these levels." Id. at 1. In upholding the program, the court "noted that Proposition 209 does not prohibit Affirmative Action Programs, ***per se,***" and it held that "[t]he subject policies do little more than require prime contractors to provide equal opportunity to all to compete for public contracts." Id. at 2. Conversely, in High-Voltage Works, Inc. v. San Jose, 72 Cal. App. 4th 600 (Cal. App. 6th Dist. 1999), review granted and depublished, 88 Cal. Rptr. 2d 776 (Cal. 1999), the court found that a similar M/WBE program impermissibly accorded an advantage to certain subcontractors based upon their race or sex, which it held violated the "broad terms" of Proposition 209. See id. at 891-

92. This sort of ambiguity and confusion is precisely what this Court's pre-ballot review function is intended to help avoid. cf. Fine v. Firestone, 448 So. 2d 984, 989 (Fla. 1984) (constitution does not permit initiatives that would require extensive judicial interpretation after adoption).'

There are numerous other problems with the initiatives' titles and summaries. First, they refer to "public education," "public employment," and "public contracting," which could potentially include all levels and types of public education, public employment, and public contracting. For example, the summaries of the initiatives do not make it clear what types of schools and programs are affected by their use of the term "public education." Some voters might guess that the initiatives concern the consideration of race, gender, or ethnic background in university admissions. Others might guess that "public education" includes schools from pre-school on up, while others still might intend such different types of schools and

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[8] A further divergence can be seen in the State of Washington, where Initiative 200 recently added Wash. Rev. Code § 49.60.400, containing language nearly identical to Proposition 209 and the initiatives at issue here. Contrary to California's governor, Washington Governor Gary Locke interpreted Initiative 200 to permit non-binding affirmative action plans and goals, as well as outreach and recruiting efforts targeted at women and underrepresented minorities. See Governor's Directive No. 98-01 (Dec. 3, 1998) <http://www.governor.wa.gov/eo/i200.htm> (attached hereto as Ex. E).

educational programs as magnet schools, military schools, charter schools, English as a second language programs, and bilingual programs, and the accommodations that these schools and programs might provide for such groups as minorities, women, and foreign-language speaking students based on their differing needs.

While the ballot summary need not provide an explanation of all of a proposed amendment's details or every ramification, Advisory Opinion to the Attorney General re Funding for Criminal Justice, 639 So. 2d 972, 974 (Fla. 1994), Section 101.161 requires that voters be informed of the chief purpose of the amendment in clear and unambiguous language. This essential requirement is not met where, as here, material terms of the initiatives are vague and can be easily misperceived by voters as being more or less restrictive than what the initiatives truly intend. This case is thus different from such cases as Advisory Opinion to the Attorney General re Limited Casinos, 644 So. 2d 71 (Fla. 1994), where this Court found that the summary of the proposed initiative was not misleading, even where it failed to reveal very specific facts about the number and location of authorized casinos and failed to provide definitions for terms such as "riverboat casinos." Id. at 75. Unlike the collateral details at issue in Limited Casinos, the undefined and ambiguous terms in this case

constitute *material* information that relate directly to the chief purposes of the initiatives.

Second, the use of the undefined terms "government" and "people" in the titles and summaries of the initiatives might easily mislead voters about the constitutional changes that are being proposed. The titles and summaries of the initiatives concerning public education, public employment, and public contracting, respectively, refer to "government," whereas their summaries refer to "state and local government bodies." In turn, the texts of these initiatives define "state" as being "not necessarily limited to the state itself, any city, county, district, public college or university, or other political subdivisions or governmental instrumentality of or within the state." In effect, these initiatives appear to affect many more layers and varieties of governmental entities than what the titles or even the summaries purport to disclose. Voters would be left guessing as to how broadly or narrowly "government" or "state" should be interpreted, since the definition of "state" itself provides only a non-exclusive list of examples.

The use of the term "people" in the titles and summaries of these same three initiatives is also misleading, since their texts use the term "persons." The summary of the omnibus proposal likewise uses "people," while its text uses the terms 'individual or group" and "person or group." "Individual"

generally connotes natural persons. "Person" often encompasses both natural persons and bodies corporate and politic. "People" in this context is a vague term that might refer either to natural persons or to both natural persons and corporations. See Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 566 (Fla. 1998) ("This discrepancy between 'natural person' [in the amendment] and 'citizens' [in the summary] is material and misleading."); Advisory Opinion to the Attorney General re Tax Limitation, 644 So. 2d 486, 495 (Fla. 1994) ("[T]he term 'owner,' as used in the summary of the proposed initiative, includes natural persons and businesses . . . . [A]s a result of these circumstances, the ballot title and summary are misleading.").

Third, although the summaries of the three initiatives concerning public education, public employment, and public contracting, respectively, refer to "race, color, ethnicity, or national origin" as prohibited bases for discrimination, the titles of the first three initiatives refer only to "race." Similarly, in the case of the omnibus initiative, the summary refers to "race, sex, color, ethnicity, or national origin," while its title does not mention any basis for discrimination at all. Such omissions are material and fatally misleading, in that they would leave some voters to misconstrue the first three

initiatives as dealing only with "race," while misconstruing the omnibus initiative as addressing discrimination or preference based on a host of characteristics not addressed by it at all.

Fourth, the initiatives run afoul of this Court's admonition in Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982), that "[a] proposed amendment cannot fly under false colors . . . . The burden of informing the public should not fall only on the press and opponents of the measure - the ballot title and summary must do this." In this case, the summaries of the initiatives merely state that they would "amend Declaration of Rights, Article I of the Florida Constitution." Thus, a voter might conclude from the summary that there are no anti-discrimination provisions in the existing Florida Constitution, and that the amendments would create new rights not already established by the Florida Constitution. See Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984) (holding that failing to mention a long established provision in the state constitution that directly related to the proposed amendment did not satisfy requirements of Section 101.161). Yet, Florida Constitution, Article I, Section 2 already prohibits discrimination based on race, religion, national origin, and disability.

Even if a knowledgeable voter might be aware that Article I, Section 2 of the Florida Constitution already prohibits governmental discrimination against certain classes,

the titles and summaries of the initiatives do not explain how the proposed amendments relate to the provisions of Article I, Section 2. This omission is similar to the one in Askew v. Firestone, where a ballot summary that purported to prohibit certain government officials from certain lobbying activities failed to advise the public that the state constitution already contained an absolute ban on certain lobbying. The effect of the omission was to leave the impression that the amendment's chief purpose was to impose restrictions on lobbying, when in reality it relaxed the existing ones. 421 So. 2d at 155-156. Here, too, the ballot summaries are defective because they represent the amendment "as granting citizens greater protection against . . . government[al discrimination] without revealing that it has also removed an established constitutional protection." Evans v. Firestone, 457 So. 2d 1351, 1355 (Fla. 1984) (discussing Askew v. Firestone) .

Finally, the omnibus initiative's summary refers to exemptions for "bona fide qualifications based on sex," but that is neither a clear nor an accurate description of what the initiative provides. The text of the initiative does not use the term "bona fide qualification," and its exceptions extend beyond classifications based on gender. The initiative "does not affect any otherwise lawful classification that: (a) Is based on sex and is necessary for sexual privacy or medical or

psychological treatment; or (b) Is necessary for undercover law enforcement or for film, video, audio, or theatrical casting; or (c) Provides for separate athletic teams for each sex." Omnibus Initiative ¶ 4. A voter has no way to know what an "otherwise lawful classification" is. Moreover, different voters may view "bona fide classifications based on sex" to be either more or less inclusive than those encompassed by the limitations provided in the initiative, but would not know from the title and summary that the initiative has such limitations. Similarly, they would not know that the initiative has exceptions for classifications based on factors other than gender.

As can be seen from all these examples, the aim and substance of the initiatives involve multiple subjects that contemplate a myriad of complex results, yet those subjects and results are obscured by the ambiguous and simplistic language used in the titles and summaries. As this Court stated in Askew v. Firestone, voters must be able to "comprehend the sweep of each proposal from a fair notification in the proposition itself that is neither less nor more extensive than it appears to be." 421 So. 2d at 155 (quoting Smathers v. Smith, 338 So. 2d 825, 829) (Fla. 1976)). Because the terms used in the titles and summaries are highly subjective, this case is analogous to Advisory Oninion to the Attorney General re People's Property

Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects, 699 So. 2d 1304, 1309 (Fla. 1997) (where terms create a subjective standard, does not meet the requirements of Section 101.161). Indeed, the complexities of the proposed initiatives implicate the purposes underlying the single-subject requirement of Article XI, Section 3 of the Florida Constitution: "to avoid voters having to accept part of a proposal they oppose in order to obtain a change which they support." Fine v. Firestone, 448 So. 2d 984, 993 (Fla. 1984); see supra note 2. In the present case, the ambiguities in the language are such that the voters may well have to accept parts of the proposal that they oppose without even knowing that those parts exist.

Oral Argument

Pursuant to the Court's scheduling orders, Amicus Curiae Leadership Conference on Civil Rights hereby requests the opportunity to be heard during oral argument of these cases.

CONCLUSION

For all the foregoing reasons, the initiative petitions and ballot summaries should be stricken from the ballot for failure to comply with the requirements of Article XI, Section 3 of the Florida Constitution and Section 101.161 of the Florida Statutes.

Respectfully submitted,

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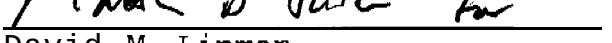

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served, by Federal Express, overnight delivery, this 29th day of December, 1999, upon the following:

Hon. Bob Butterworth
Attorney General
Office of the Attorney General
State of Florida
The Capitol
Tallahassee, FL 32399-1050

Matthew D. Slater

I hereby certify that the enclosed brief has been printed using font style/size Courier 12.

Appendix A

Remark by Governor Jeb Bush
Announcement of the One Florida Initiative
Tallahassee, Florida
November 9, 1999

Since the people of Florida gave me the privilege of serving them as their Governor one year ago, I have worked hard to address the many challenges facing our state.

I'm proud of our efforts to create a world-class educational system through the Bush/Brogan A+ Plan. We now have the toughest sentencing laws in the nation, we've ensured the preservation of hundreds of thousands of acres of environmentally valuable lands through Florida Forever, we've increased resources and are implementing needed reforms for our state's child welfare and developmentally disabled social service systems, and we've helped continue Florida's current prosperity by providing Floridians with the largest tax relief package in state history.

While these actions bode well for the future of our state, certain questions continue to challenge us: will the promise of Florida's future be shared by all of its residents, regardless of their race, ethnicity, neighborhood or background? Will the diversity that makes Florida strong be manipulated by divisive forces to make us weak?

Unfortunately, while Florida is a place of incredible opportunity for many, still too many are at risk of being left behind. For instance, seventy-four percent of the children attending Florida's D and F graded schools are minorities.

If we allow such an intolerable dichotomy to continue, we will be at risk of creating two Floridas a Florida of hope, and another Florida of despair.

To unite Floridians behind a shared vision of opportunity and diversity for our state, today I am announcing my One Florida initiative.

This new initiative will increase opportunity and diversity in the state's universities and in state contracting without using policies that discriminate or that pit one racial group against another.

As I prepare to discuss the specifics of the initiative with you, I want to emphasize that I do not question the previous need for policies that we are moving beyond today.

These policies were intended to deal with the real and tragic legacy of more than a century of segregation in our state. That legacy kept Virgil Hawkins out of the University of Florida law school, and it prevented minorities from obtaining a fair share of state contracts for an even longer period.

Floridians should acknowledge the affirmative action that has been taken in our state to right those historic wrongs.

But we should also ask whether we can do better and if new solutions are needed as we begin a new millennium.

After much thought and discussions with a broad range of Floridians, I have come to believe that Florida needs new solutions for at least two reasons.

First, the old solutions have become increasingly controversial and divisive.

What is viewed as an opportunity by one Floridian is too often correctly viewed as an unfair advantage by another Floridian. And in the heat of the controversy too many of our citizens are forgetting the shared values that bind us all together.

Second, the old solutions are no longer producing the kinds of results Floridians deserve.

Preferences in higher education are being used to mask the failure of low performing schools in our K- 12 system. Social promotion and race-based preferences for admissions to higher education have made the need to address the deficiencies in our K- 12 system less urgent. These subtle tools have the unintended effect of enabling schools to pass some students along without addressing our failure to teach them the skills they need. They make it easier to overlook the disparity in opportunities, play down the pleas of help from these low-performing schools, and set these children up for failure. Our state university system's graduation rates of students admitted who did not meet basic admissions criteria are significantly less than that of well-prepared students. This cycle of failure must be broken.

Likewise, preferences in contracting are failing to increase economic opportunities for minorities in a meaningful way, while discriminating against nonminorities who simply want a level field of competition.

On the surface, the State's race- and gender-conscious minority business program appears to have substance. But the deeper one digs, the less substance one finds.

Under the current statutory program, the law sets voluntary goals for each agency, stated as a percentage of State contract dollars that should go to minority businesses in four categories: construction, architectural and engineering, commodities, and contractual services, Under the law, each agency is "encouraged" to spend with certified minority businesses 2 1 percent of its construction expenditures, construction contracts, 25 percent for architectural and engineering contracts, 24 percent for commodities expenditures, and 50.5 percent for contractual services expenditures. For each of these four categories, the goals are further subdivided by race and gender.

Closer examination, however, reveals that these voluntary percentage goals are illusory and misleading, because they are applied to a "base" figure that is much smaller than an agency's total spending on goods and services.

Take, for example, the 1998-99 goals for the Department of Children and Family Services (DCF). Last year, DCF had a minority business spending goal of $6 million. DCF reached that figure by applying the percentage goals stated above to a minority business spending **"base"** of $19 million. In reality, though, DCF spent approximately $1.7 billion on goods and services last year. DCF was allowed to reduce its base from $1.7 billion to $19 million by exempting from its "base" many types of projects, such as emergency procurements, State term contracts, single-source vendor contracts, and projects deemed 'too difficult" for a minority vendor. So when DCF reported last year that it reached 95% of its goal, it did not mean 95% of all available spending; it meant 95% of a greatly reduced amount of money.

For DCF, the difference between total spending ($1.7 billion) and the minority spending "base" ($19 million) was approximately $1.68 billion. The current minority business program keeps this amount hidden.

The Department of Children and Family Services is no exception; the same dynamic applies to every agency in State government. In fact, when all agencies are combined, the State spent over $12.6 billion procuring goods and services in FY 98/99. Yet the collective minority spending "base," for purposes of calculating the goals, was less than $627 million only 5.0% of total available spending.

Using this artificially reduced spending **base** of $627 million, State agencies had a collective minority business spending **goal** of $178 million in FY 98/99. But considering the actual spending base of $12.6 billion for all agencies, the $178 million goal only equals 1.4% of available State spending. The State exceeded this goal by spending $257 million with certified minority businesses, thus allowing it to declare success. But considering the fact that the total spent was only 2.0% of available State spending, the results can hardly be deemed a "success."

My One Florida initiative acknowledges the shortcomings of these policies and seeks to increase opportunity and fairness through a "third way."

I present this initiative with confidence, because I know diversity can be achieved without set-asides and preferences. I know because I have achieved it in my administration, and in my appointments. The diversity that we have achieved adds genuine value to my administration, and proves that we can do better with strong, committed leadership.

African-Americans, Asian-Americans and Hispanics account for 30 percent of the my Senior Management and Select Exempt staff. Since taking office, 39 percent of my new Senior Management and Select Exempt hires have been African-American, Asian-American or Hispanic.

Since I entered office on January 5, 1999, 48 percent of my new appointments to Senior Management and Select Exempt positions in the Executive Office of the Governor have

been women. Overall, women represent 46 percent of all Senior Management and Select Exempt staff in my office.

Appointments of African- Americans, Asian-Americans, Hispanics and Native-Americans to boards and commissions since I took office equal 22 percent of all boards and commissions appointments.

Judicial appointments of African-American and Hispanics total 40 percent of all my judicial appointments. Also, women represent 40 percent of all my judicial appointments.

I intend to continue to provide this leadership, and will do so without waiting for a court or petition drive – because it is the right thing to do.

The education portion of the One Florida Initiative includes the following components:

- Working in close coordination with Chancellor Herbert and the Board of Regents, today 1 am proposing the elimination of race and ethnicity as a factor in university admissions. Other race-neutral factors such as income level, whether an applicant is a first generation college student and geographical diversity will continue to be used as factors in admissions decisions something that will enable Florida to continue its current level of minority enrollment in our State University System. It is my understanding that the Board of Regents will address this policy change at their November 18, 1999, meeting.

- To further increase minority enrollment in the state university system, we will implement the Talented 20 Program This program will guarantee state university admission to the top 20 percent of students in every Florida high school senior class, regardless of one's SAT or ACT scores. Even with the elimination of race and ethnicity as a factor in admissions, the Talented 20 program will result in a net increase in minority enrollment in the state university system.

- As part of my One Florida initiative, today I am proposing to increase need-based financial aid by 43 percent – a $20 million increase. Those in the top 20 percent with need will move to the front of the line so that they may take advantage of our admissions guarantee. This funding increase will help more students get the financial assistance they need to attend college.

But admissions policies must come secondary to the real matter at hand our failure to provide low income minority students in our low performing schools with the same educational opportunities as those children in higher performing schools. Today, we will take dramatic steps to close the gap and level the playing field so that achievement can be realized by all Floridians.

- As the gap in SAT scores between African Americans and whites has widened over the last decade, it has become increasingly obvious that few children in low performing schools are encouraged to take the Preliminary Scholastic

Achievement Test (PSAT) In A and B schools four times as many students take the PSATs compared with students in our state's D and F schools. Today, I am recommending to the Legislature $1.6 million in funding to pay for every high school 10th grader to take the PSAT in order to improve readiness for the SAT exam. Increased availability of Advanced Placement courses in low performing schools.

- Based on my review of the K- 12 educational system, it appears that another inequity among high and low performing schools is the availability of Advanced Placement (AP) courses. These are college level course taught in high school that enable students to earn college credit and save money on tuition. The College Board and admissions officers also recognize that such high level courses are among the best preparation for the SATs and success in college. However, AP courses are rarely offered in schools serving low income and minority populations. Schools that do offer AP courses receive $850 for every student who scores a three out of five or better on their AP tests. Teachers currently do not see this money. Today I am recommending that AP teachers now receive 20 percent of the additional funds generated by students who score a three or better, and in D and F schools these teachers will receive 30 percent. This means that if half the students in a class of 16 pass the AP exam, the direct financial benefit to the teacher would be more than $2,000. If that teacher teaches two AP courses, then the financial incentive would double. Such a direct financial boost will encourage teachers to recruit students and sponsor AP courses in their respective low performing schools.

- I am proud to be joined today by Gaston Caper-ton, the former Governor of the State of West Virginia, and the current president of the College Board, the organization that administers the Scholastic Aptitude Test. Gaston is here to help me announce Florida's partnership with the College Board to assist in identifying, motivating, and better preparing students in low performing schools. Florida will become only the fourth state in the nation to have such a partnership. Through this partnership, the College Board will provide training to all teachers in Florida's 65 D and F high schools. Schools will be provide with software that can be used to track performance, and they will receive assistance in offering pacesetter courses that are designed to improve academic readiness for college. These strategies have proven successful in significantly raising SAT achievement in inner city and high poverty schools elsewhere in the nation.

- Today, I will sign an Executive Order creating a 17-member task force that will be charged with evaluating the inequities in opportunity between Florida's K- 12 public schools. The task force will determine the extent to which some public schools receive less financial support and less intangible support than others. This will include looking at the experience level of teachers in a school, the levels of funding a particular school receives as well as the disparity in opportunities among schools, such as AP courses. I have asked State Senator Daryl Jones of Miami to serve as the Chair of the Task Force and I am grateful for his acceptance of this appointment.

The complete One Florida initiative contains other educational elements that are explained in the plan we are releasing today. I encourage everyone to take the time to review the One Florida position paper that provides more detail about these other initiatives.

The state contracting component of my One Florida initiative includes the following:

- The elimination of racial set-asides and racial price preferences. The time has come to eliminate these legally suspect practices that never fully achieved their purpose to begin with. These programs are constitutionally suspect and as I discussed previously, they account for a miniscule amount of money for minority businesses each year.

- We will reform the procurement process to encourage the pursuit of diversity by making the state's procurement agents more accountable for their purchasing decisions. Today they operate in the shadows, leaving too much of an enticement to perpetuate a "good old boy" system of awarding contracts. Procurement officers will report directly to the Governor and their agency heads and their positions will be reclassified from Civil Service to another status so that they will serve at the pleasure of the Governor. All key procurement agents in my agencies will now report to me and their agency heads on the amount of minority business spending for which they are personally responsible.

- We will implement a universal registration system where all minority vendors arc registered and all minority spending is tracked. We will keep the certification process for the time being, however, we will streamline the certification process and make the requirements less rigid so that more businesses are encouraged to become certified.

- We will reprioritize the Minority Business Advocacy and Assistance Office, at the Department of Labor and Employment Security, presently spends most of its time certifying businesses and setting misleading spending goals. By making certification easier and by eliminating misleading goals, this office will spend more of its time and resources in the most productive activity possible – facilitating relationship between minority business owners and state procurements agents, otherwise known as "matchmaking," And by moving the Office to the Department of Management Services, where the majority of the State's procurement activities take place, the Office will be more successful in helping the State's procurement agents find and recruit minority businesses.

- We are proposing the adoption of a program to stimulate economic development and create jobs via special contracting opportunities for businesses that are located in Historically Underutilitized Business Zones. ("HUBZones") and that hire employees who live in these communities. Florida's program should be narrowly tailored to cover Florida Front Porch communities and other truly disadvantaged urban communities, and should require business owners to create jobs in these communities. Urban HUBZone businesses would be awarded bonus

points in competitive bid scoring because of the community-enriching value of their employment practices. This approach should result in more jobs for minorities throughout the State of Florida and increased State contracting with minority business owners – without racial quotas or set asides.

- We will enhance financial and technical assistance programs that target the legitimate development needs of emerging minority businesses, minority construction firms, and minority franchisees, including the Bond Guarantee Program at Florida A&M University and the minority franchising program of the Black Business Investment Board. We will implement an aggressive diversity strategy for the $8 billion Everglades Restoration Project, one of the largest public works projects in history. We will recognize private sector businesses hat excel in diversity. And we will partner with Black Enterprise Magazine, the Florida Chamber of Commerce and the Florida Council of 100 in enhancing minority entrepreneurship opportunities statewide.

- We will boost the state's anti-discrimination efforts. At the present time, there exists no well-defined mechanism for fielding and investigating complaints of race and gender discrimination by State procurement agents. I support legislation that will set up a system under which the Governor's Chief Inspector General, the agency Inspectors General and the Minority Business Advocacy and Assistance Office thoroughly investigate complaints of discrimination. We will also support legislation banning from State contracts, when appropriate and just, individuals and businesses found guilty in a court of law of race or gender discrimination.

Through the implementation of these policies, I am confident and committed to creating an environment where more minority businesses will sell more goods and services to state government.

Many will ask, "Does this initiative end the state's affirmative action policies'!" The answer to this question is that my One Florida initiative ends racial preferences, racial set-asides and race-based university admissions, not affirmative action properly understood. The One Florida initiative transcends traditional notions of affirmative action and will increase opportunities for Floridians of all racial backgrounds in ways that unite us, not divide us.

I firmly believe that with the One Florida initiative, we can prevent our state from being divided along racial lines. It is my hope that my One Florida initiative can replace conflict with consensus in providing opportunity with diversity and fairness in our state.

Those of us in public service can lead, or we can be led. With the One Florida initiative, I have chosen to lead. As we look ahead to the new millennium, I ask all Floridians to join me in creating a shared vision of opportunity, diversity and fairness that will allow every child from every background the ability to enjoy the future prosperity of One Florida.

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Appendix B

Equal Rights Advocates

A women's law center: litigating, educating and organizing for your rights

CELEBRATING OUR TWENTY-FIF 2

The Wake of Prop 209: Courts to Define "Preferential Treatment"

Two years ago August, Proposition 209, the California initiative that prohibited preferential treatment on the basis of race or gender in public education, employment and contracting. went into effect. The initiative affected more than $4 billion in public procurement contracts distributed annually, 193,152 state employees, two million students in California's three higher education systems, and countless state, county, and municipal programs and policies. Since then, ERA has worked in the courts and through administrative, legislative and executive channels to narrow the initiative's interpretation and limit its scope. To date, the results have been disheartening.

The key issue that has evolved is the definition of "preferential treatment." Does the term ban outreach and recruitment efforts to ensure equal education, employment and contracting opportunities for all California citizens? Or does it only prohibit the more traditional affirmative action programs which use goals and timetables? The courts are divided on this issue. Recently, Governor Davis joined affirmative action foes and vetoed a bill (SB 44) that stated that outreach and recruitment employment programs were permissible under 209. As a result, ERA joined other advocacy groups and the parties in two separate cases, *Hi- Voltage Wire Works* v. *San Jose* and *Connerly v. State Personnel Board,* in asking the California Supreme Court to resolve this question.

Perniciously, the proponents of 209, specifically Ward Connerly and the Pacific Legal Foundation, have done a bait and switch on this issue. During the campaign, they argued repeatedly that 209's ban on "preferential treatment" should be narrowly construed; the prohibition was not meant to eliminate all affirmative action. In particular, they claimed, it was not intended to disband outreach and recruitment programs, even those targeting women and minorities.

In the current litigation, however, they have adopted the opposite tact. In court papers and letters threatening governmental agencies with lawsuits should they fail to demur, the proponents now argue that "preferential treatment" encompasses any race-conscious effort. They now contend that modest efforts designed to equalize the playing field and reverse documented discrimination, such as targeted recruitment of those historically excluded, should fall. So be it that governmental agencies, who can be legally liable if they fail to remedy discrimination in their hiring and procurement practices, are left with no alternative. They are stuck between a rock and a hard place.

California voters, of course, did not intend such a result when they passed the initiative. Polling data taken both before and after 209's enactment reveals that most voters did not want to eliminate all affirmative action programs. A pm-election survey of California voters conducted by Hewlett-Packard and Kaiser Permanente found that 70 percent supported outreach programs to expand minority enrollment in colleges and 68 percent supported targeted outreach efforts to recruit women and minorities for employment. Exit polls taken on election day similarly show that a substantial number of even those who voted for the initiative did not intend to ban all forms of affirmative action. Yet the proponents of 209, *some* of the courts that have considered the issue, and *now* the Governor have ignored the public's perception and intent.

Equally pernicious is the proponents' assault on data collection efforts For decades, government agencies have collected information on the amount of public procurement contracts awarded to minority- and women-owned businesses. They have tracked the race, ethnicity and gender of job applicants and promotions to ensure that publicly funded opportunities are awarded equitably. These statistics are used to identify discriminatory practices and, where they exist, fashion ways to eliminate them. This use of data has long been the accepted way to enforce our basic laws against intentional race and sex

discrimination – laws the public broadly supports.

Nonetheless, in March 1998, then-Governor Wilson ordered all California agencies to cease collecting data on the amount of public procurement contracts awarded to minority- and women-owned businesses. In the wake of 209, state agencies, which the Legislature requires to collect and report information on the racial and gender composition of their work forces and promotion rates, stopped producing this information in any meaningful form. Their annual report went from 200 pages of detailed analysis to 1 S pages of near useless statistics.

To date, Governor Davis has failed to assume any leadership on this issue. He has neither issued an executive order directing the agencies to reinstate data collection, supported related legislation or budgetary efforts, nor reversed Governor Wilson's position in the litigation, *Barlow* v. *Wilson*, challenging the 1998 order.

By eliminating data collection, the proponents of 209 are in effect crippling anti-discrimination laws. Without reliable statistics, how can we know that publicly funded education, jobs and contracts are equitably awarded? How can we ensure that Proposition 209's prohibition against discrimination, the initiative's other prong, will be respected and enforced? More fundamentally, as one commentator has said, "We simply cannot know as a society how far we've come in conquering racial [and gender] discrimination and inequality without accurate information about the health, progress and opportunities available to communities of different races."

The battle over Proposition 209's scope is not yet over. Ultimately, the California Supreme Court will decide what types of programs and policies the initiative's ban on "preferential treatment" covers. The Legislature, if not the Governor, will decide whether to reinstate data collection. ERA, and others in the civil rights community, will continue to monitor for discriminatory practices and, if necessary, file affirmative litigation. And, if the Supreme Court eliminates the ability of governmental agencies to equalize opportunities and remedy documented discrimination practices, we may be forced to return once again to the voters.

Affirmative Action

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Appendix C

Opportunities Lost

The State of Public Sector Affirmative Action in Post Proposition 209 California

A Joint Project of
Chinese for Affirmative Action
and Equal Rights Advocates

November 1998

Opportunities Lost

The State of Public Sector Affirmative Action in Post Proposition 209 California

A joint project of Equal Rights Advocates and Chinese for Affirmative Action

Made possible in part by grants from the Van Loben Sels Foundation and the Deer Creek Foundation

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Chinese for Affirmative Action's mission is to defend and promote the civil and political rights of Chinese and Asian Americans within the context of. and in the interest of advancing multiracial democracy in the United States.

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Equal Rights Advocates is dedicated to ending discrimination against women and girls through litigation, legislative advocacy, public education. and advice and counseling.

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INTRODUCTION

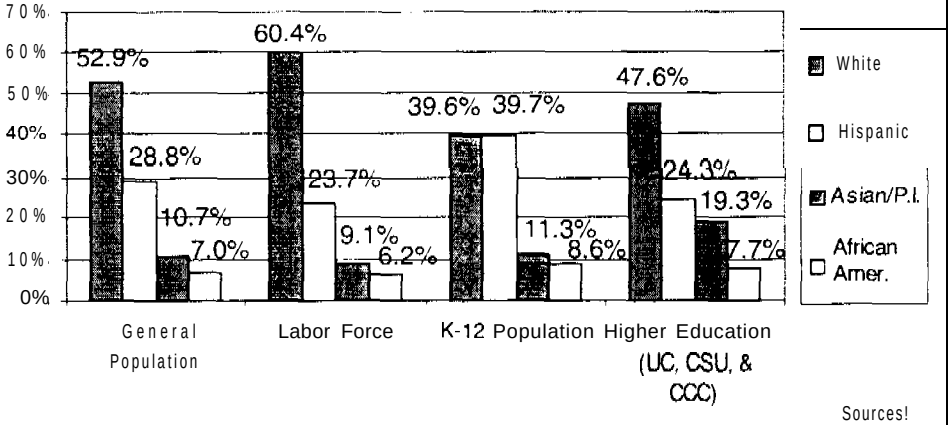
In November 1996, California voters passed Proposition 209, which amended the California Constitution to ban preferences based on race or gender in public sector education, employment, and contracting. Initially enjoined from implementation by a federal district court, the initiative did not go into effect until August 28, 1997, when the Ninth Circuit overturned the lower court decision. One year later, the scope of the Proposition remains largely undefined. Although several lawsuits have been filed to clarify the meaning and intent of the Proposition, many questions, such as the definition of preferential treatment, remain unanswered by the courts. As a result, the full impact of Proposition 209 on affirmative action in California remains unclear.

Chinese for Affirmative Action (CAA) and Equal Rights Advocates (ERA) are concerned about the absence of efforts to measure the effect of Proposition 209 and the repercussions of drastic policy shifts in response to the initiative. We designed and conducted this survey to evaluate the effect of Proposition 209 and other similar policies on public sector affirmative action programs. We surveyed 68 government agencies across California to (1) find out what kinds of policy changes were being made in response to Proposition 209, and (2) evaluate the impact of these changes 'on minorities and women. We looked at both anecdotal evidence garnered from our interviews and statistical data when such data was available.

The passage of Proposition 209, combined with court actions, policy statements, and executive orders, has begun to seriously erode the gains made by minorities and women in California. These actions have resulted in failures to comply with anti-discrimination laws, cutbacks in affirmative action programs, and the dismantling of systems designed to collect data on race and gender. Many race- and gender-conscious affirmative action programs now focus on economic and educational disadvantage. Minority participation in post-secondary education and public contracting opportunities for women and minorities have decreased since Proposition 209 went into effect.

In light of California's increasingly diverse population, it is imperative that our government addresses the presence and pernicious effects of race- and gender-based discrimination. Affirmative action programs were created as a deliberate effort of our government to address discrimination, confront and eventually overcome our history of inequality, and work to achieve equality of opportunity for all. Blatant discrimination and discriminatory practices continue to permeate our society and limit the opportunities available to women and minorities. California's government and public institutions have a responsibility to all of the state's residents. Only with increased government efforts will equal access and op-

California Population Distribution'



portunity become a reality for all Californians.

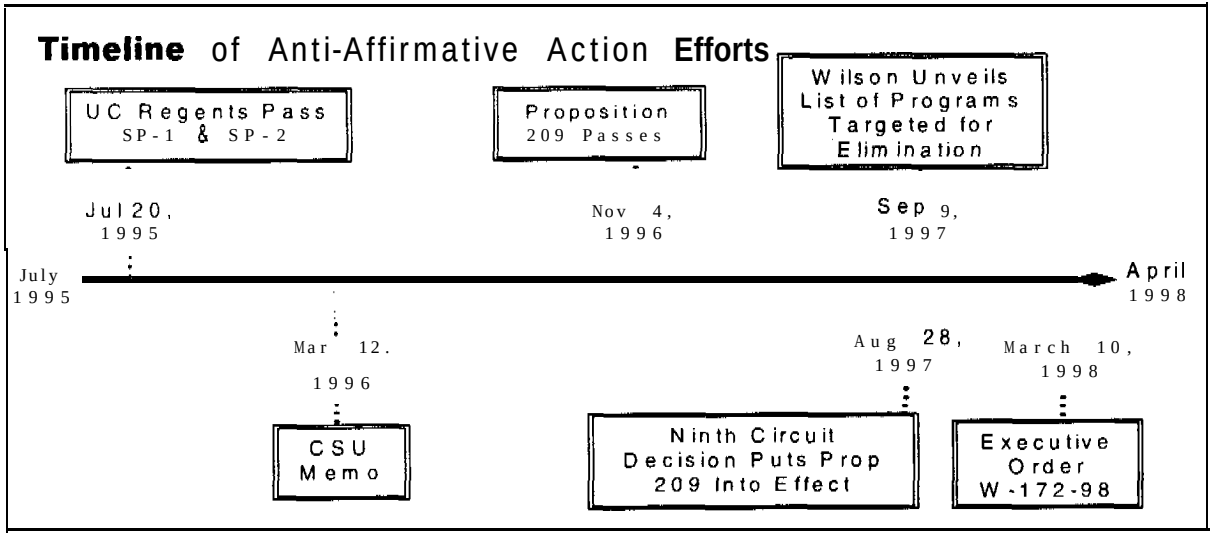
The Attack of California% Affirmative Action Programs

In response to a hostile political environment created in large part by California Governor Pete Wilson and University of California Regent Ward Connerly, a number of California's public institutions began repealing affirmative action programs even before the passage of Proposition 209. For instance, in 1995, Governor Wilson filed suit against the State Personnel Board, the California Lottery, the Department of General Services, and the California Community Colleges, arguing that the legislatively mandated affirmative action employment and contracting programs operated by these agencies were unconstitutional. *Wilson* v. *State Personnel Board* is still pending in Sacramento Superior Court.[3]

On July 20, 1995, the University of California Regents passed the Policy Ensuring Equal Treatment in Admissions (SP- 1) and the Policy Ensuring Equal Treatment in Employment and Contracting (SP-2). The passage of these policies and their implementation decimated affirmative action at the University of California (UC). SP- 1 led UC officials to change admissions criteria and eliminate any consideration of race, religion, sex, color, ethnicity, or national origin throughout the admissions process. SP-2 ended most affimative action programs in contracting and employment at the University of California.

Also prior to the passage of 209, on March 12, 1996, California State University (CSU) revised its affirmative action outreach programs to move away from race and gender and toward economic and educational disadvantage.' Some of the programs affected were the Student Academic Services Outreach Program, formerly known as the Student Affirmative Action Program, which changed its focus from under-represented minorities, women, disabled, and low-income students to educationally and economically disadvantaged students. Most of CSU's outreach programs had provisions to address economic and educational disadvantage before these changes took place.'

In March 1998, Governor Wilson issued an Executive Order that directed state agencies to immediately cease the implementation and enforcement of the Minority and Women Business Enterprise Program. As part of its mandate, the order directed all state agencies and officials to stop tracking information about the utilization of Minority Business Enterprises (MBEs) and Women Business Enterprises (WBEs) in public contracting.[6] This order



came on the heels of the Ninth Circuit decision in *Monterey Mechanical Co. v. Wilson,*[7] in which the court held that the 15% minority and 5% women participation goals in California's Public Contract Code violated the equal protection clause. Wilson's order exceeded the scope of the *Monterey Mechanical* decision by eliminating the state's data collection strategies necessary to monitor whether contracts are equitably awarded. Wilson also has vetoed an attempt by the legislature to restore data collection.

We acknowledge the absence of statistic information about Native Americans and Arab Americans from this report and the aggregation of Asian American. Pacific Islander, and South Asian communities. This is a result of the absence of this data in several of the sources we utilized.

[2] Sources: California Department of Finance Dcmogaphic Research Unit, *Race/Ethnic Population Estimated with Age and Sex Detail 1970-1996* (visited Nov. 4, 1998) <http://www.dof.ca.gov/drftp/byage90s.xls>; State of California, Employment Development Department. Labor Market Information Division, *Table 3: Total Civilian Labor Force 16 years and Over by Race/Ethnicity within Occupational Group* (visited Nov. 4. 1998) <http://www.calmis.cahwnet.gov/file/demoaa/cal$nd3.xls>; California Department of Finance Demographic Research Unit. *K-12 Graded Public School Enrollment By Ethnicity, History and Projection* - 1997 *Series* (visited Nov. 4. 1998) <http://www.dof.ca.gov/html/Demograp/k12ethtb.htm>; University of California. *Statistical Summary of Students and Staff, Table VIIj: Enrollment by Campus, Ethnicity, Gender and Level, Total University* (visited Nov. 4. 1998) <http://www.ucop.edu/ucophome/uwnews/stat/enr97/97sst7j.html>; California State University. *Table 2A CSU Enrollment by Campus and Ethnic Group, Fall* 1997, (visited Nov. 3. 1998) <http:// www.co.calstate.edu/asd/HTML/97e2.html>; California Community Colleges Management Information Scrviccs Statistical Library, *California Community College Statewide Enrollment*, (visited Nov. 4, 1998) <http://www.cccco.edu/cccco/mis/statlib/stw/studF97.htm>.

[3] *Wilson v. State Personnel Board.* No. 96CS01082 (Cal. Super. Ct. filed 1996).

[4] The new definition of educational and economic disadvantage includes students who arc the first in their family to go to college; have a migrant family pattcm, a large family. or a difficult home situation: come from a low-income family: or did not rcccivc higher education counseling. It also includes students whose high school has a low percentage of college eligible students. has a low participation rate in post-secondary institutions. is located in a low-income area, *or* is located in a community where a high percentage of the residents are on public assistance.

[5] While we believe that programs focusing on economically and educationally disadvantaged students meet important needs, the fact remains that such programs do not address race- and gender- bnscd discrimination. (For more information and further analysis of class-based affirmative action *see* Appendix I).

[6] ERA. together with other civil rights groups, imtncdiatcly filed suit to enjoin implementation of this order as it pcrtuins to the state's data collection requirement. *Barlow v. Wilson*, No. 796308-9 (Cal. Super. Court filed April I, 1998). The Alameda Superior Court denied the request for preliminary injunction; that decision is now on appeal.

[7] *Monterey Mech. Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997), *reh 'g, en banc, denied,* 138 F.3d 1270 (9th Cir. 1998).

SURVEY METHODOLOGY

Chinese for Affirmative Action and Equal Rights Advocates interviewers surveyed representatives of state agencies, counties, cities, and school districts. Each interviewee was asked three sets of questions.

- The first set sought information on the content of the agency's policies, recent or proposed changes to affirmative action programs, reasons for those changes, and whether lawsuits had been filed against the policies.
- The second set of questions attempted to ascertain the level of support for these programs within each agency. We asked about monitoring and enforcement responsibilities, the number of employees who implement or monitor the policies, data collection capabilities, and whether the agency planned to study its policies' impact on minorities and women in the near future.
- The third set of questions tried to ascertain the effects of Proposition 209 on minorities and women in California. We asked agencies whether they had observed changes in behavior in the implementation of affirmative action programs and whether the level of minority and women participation had changed. We also asked whether the passage of Proposition 209 had affected programs outside its intended scope.

In addition to these interviews, we reviewed institution memoranda, affirmative action or EEO programs, and gathered information from various organizational websites.'

For higher education programs, WC contacted the University of California (UC), California State University (CSU), California Community Colleges (CCC), California Student Aid Commission, and the California Commission on Post-Secondary Education.' We interviewed legal counsel, analysts, admissions officers, public information officials, and administrators.

For kindergarten through high school (K- 12) programs, we contacted Berkeley, Fresno, Los Angeles, Oakland, San Diego, and San Francisco Unified School Districts. Academic Partnership Program; Commission on Teacher Credentialing; and the California Department of Education. We spoke with curriculum experts, program coordinators, administrators, and legal counsel."

For public employment, we contacted the State Personnel Board," Caltrans, California Department of Education, East Bay Municipal Utilities District, University of California, California Community Colleges, and California State University at the state level.' The counties of Alameda, Butte, Contra Costa, Fresno, Kings, Orange, Los Angeles, Riverside, Sacramento, San Bernadino, San Diego, San Francisco, San Joaquin, and Santa Clara participated in our survey." The cities of Fresno, Los Angeles, Oakland, Richmond, Sacramento, San Diego, San Francisco, and San Jose also participated.' In addition, we interviewed representatives from the Port of Oakland and the Berkeley, Oakland, and Los Angeles School Districts. We interviewed Equal Employment Opportunity Officers, Affirmative Action Officers, Directors of Human Resources, and Human Resources Senior Analysts at these various agencies.

For public contracting, we attempted to contact and interview every state and local agency that operated a Minority and Women Business Enterprise (M/WBE) program prior to the passage of Proposition 209. These included the State of California, the California State Lottery, the California Community Colleges, and California State University; the Counties of Alameda, Contra Costa, Los Angeles, Sacramento, and San Francisco; the Cities of Frcsno, Hayward, Oakland, Richmond, Los Angeles, Sacramento, San Diego, and San Jose; the Port of Oakland, Bay Area Regional Transit (BART), and East Bay Municipal Utilities District (EBMUD).[8] Most of the people whom we interviewed either directed or enforced their

agency's M/WBE program. Some performed legal or public communications duties. In a few instances, lawyers outside of, but familiar with the agencies of interest, provided information.

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[1] See Appendix 2 for a complete list of survey questions.

[2] UC. CSU. and CCC arc California's public post-secondary education institutions. California's Student Aid Commission offers financial aid to low-income students and operates programs intended to increase the number of minorities and women in post-secondary education. The California Commission on Post-Secondary Education studies California's changing demographics. education system, student body, and equal access to educational opportunities.

[3] Although these school districts represent a small percentage of the entire state. they educate a majority of California's students. Wc decided to contact thcsc agencies because of the number of students they serve, their diverse student populations. and to identify any regional variations.

[4] The State Personnel Board is responsible for monitoring and advising EEO and Affirmative Action policies and plans for the entire civil service employment system. Therefore, by contacting SPB, we were able to learn about affirmative action policies that apply throughout state government.

[5] UC, CSLJ, and CCC are among California's largest public employers.

[6] These fourteen counties were chosen out of California's 58 counties to learn if affirmative action in employment has been affected by Proposition 209 in some of the largest counties and in different regions of our state.

[7] We contacted thcsc cities because of their size and location.

[8] The University of California was not contacted because it eliminated its affirmative action contracting program on January I, 1996, eleven months before the passage of Proposition 209. *See* University of California Board of Regents Resolution SP-2 (Jul. 20, 1995).

CONTRACTING

Affirmative Action Programs

In 1988, the California Legislature enacted contracting goal programs specifically for women-owned business enterprises (WBEs) and minority-owned business enterprises (MBEs). This law required that all contracts awarded by state agencies have statewide contracting participation goals of at least 15% for MBEs and 5% for WBEs. For each applicable contract, prime contractors had to achieve the minimum WBE and MBE participation goals or demonstrate that they made a good faith effort to achieve the required participation level.' Public Contract Code § 2000 was added to give local agencies the authority to enact their own contracting goal programs.'

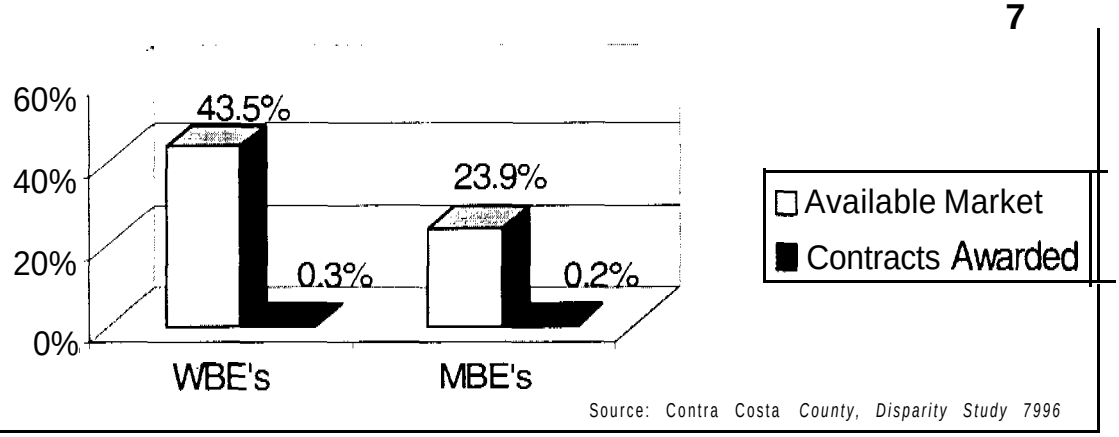
As with other affirmative action efforts, the contracting programs achieved some of their intended effects. Historically, many governmental entities awarded contracts based on political patronage or social connections rather than on a bidder's qualifications or price quote.' As a result, the overwhelming majority of state contracts were awarded to businesses owned by White males. Over time, due to the implementation of M/WBE contracting goal programs, these numbers began to shift. By 1996, for example. community colleges awarded approximately 4.6% of their more than $590 million in annual contracts to WBEs and 4.8% to MBEs.[4] The Department of Corrections awarded WBEs 6.6% of its nearly $460 million in annual contracts.[5]

The need for these programs, however. continues. In 1996, women-owned businesses accounted for one-third (38%) of all firms in California and employed 27% of all of California's workers.[6] If contracts were awarded equitably, WBEs and MBEs would receive a far greater share of state-awarded contracts than they currently receive. Ordinarily, it would be expected that the proportion of contract dollars awarded to WBEs and MBEs would in time equal their proportion in the relevant market.

Local agencies contract with minority firms at a much lower rate than would be expected in the absence of discrimination.

This market parity has not come close to being achieved. Studies repeatedly have shown that local agencies contract with minority and women firms at a much lower rate than would be expected in the absence of discrimination A 1994 study conducted by Los Angeles County found that approximately 95 cents of every dollar spent on county public works went to White-owned construction firms. Another

Public Contracting in Contra Costa County, 1996



Source: Contra Costa *County, Disparity Study 7996*

recent disparity study, conducted by the City of San Francisco, found that only 1.69% of the City's construction prime contracts were awarded to WBEs in 1996-97, although they constituted 7.06% of the relevant market. As a result, WBEs lost more than $28 million in potential revenues.' Similar findings were recorded in Contra Costa County. A study measuring the availability for service contracts found that MBEs and WBEs represented 23.9% and 43.5% of the relevant market.[8] Yet in 1996, MBEs received only 0.2% and WBEs 0.3% of $59 million in service contracts awarded by the County.'

Impact of Proposition 209

Proposition 209 has significantly limited the ability of public agencies to implement Minority and Women Business Enterprise (M/WBE) programs. Specifically, Proposition 209 threatens three general types of M/WBE policies: (I) *hid* preferences, which attempt to offset the effects of discrimination by granting minority or women businesses a small advantage in contract bids; (2) *goals and good faith efforts,* where government agencies usually set minority and women participation goals for specific contracts, and prime contractors arc required to either meet these goals or make good faith efforts to obtain minority and women participation;"' and (3) *outreach,* which generally requires targeted advertising and contacting minority and women businesses to inform them of contracting opportunities.

General Findings

The implementation of Proposition 209 and related court decisions have caused a number of problems for public agencies:

- *Widespread confusion about the meaning and scope of Proposition 209 und fear of lawsuits.*

  Many agencies, such as the California Community Colleges and the City of San Jose, are in a state of uncertainty about the impact of Proposition 209 on their contracting programs. Lawsuits filed against Los Angeles, San Francisco, and San Jose have added to the confusion by resulting in inconsistent outcomes. For instance, the City of Los Angeles successfully defended its goals and good faith efforts program while a similar program in San Jose was found to violate Proposition 209. Several jurisdictions, including Contra Costa, Fresno, and Hayward, have responded to these potential lawsuits by dismantling or severely weakening their programs without developing new policies for encouraging greater minority or women participation. [11]

- *Elimination of datu collection and the tracking oj' minority and women participalion.*

  In March 1998, Governor Wilson ordered state agencies to stop collecting data on the number of contracts awarded to minority and women businesses." The elimination of this data collection system goes well beyond the mandates of Proposition 209 and undermines the ability of the state to detect and prevent discrimination.

Some contractors have reportedly told monitors that they do not have to follow outreach guidelines because "affirmative action is dead. "

- *Increased resistance to outreach and other affirmative action requirements.*

  Contract compliance officers report increased resistance by contractors to undertake outreach efforts toward minorities and women. [13] Some contractors have reportedly told monitors that they do not have to fol-

low outreach guidelines because "affirmative action is dead."

- *Increased difficulty in enforcing federal affirmative action requirements.*
  The belief that "affirmative action is dead" has led some contractors to even resist outreach and other affirmative action requirements on federally funded projects. Even though Proposition 209 specifically exempts federal projects, contract compliance officers report greater difficulty in enforcing affirmative action requirements on these projects because of contractors' resistance and the lack of support from local government officials.

- *Fewer minority and women business enterprises are being certified.*
  Some agencies report that fewer MBEs and WBEs are seeking certification. Several localities expressed a need to encourage certification because most policies still require some form of outreach to minorities, women, or local businesses. If a minority or women business is not certified, it may be omitted from outreach and informational efforts.

- *Shift from M/WBE to local and small business programs.*
  This trend is an insufficient substitute for current M/WBE policies, because local and small business programs are unlikely to increase minority and women participation in public contracts. Some jurisdictions. such as the City of Hayward, had tried to implement similar policies in the early 1990s but found that the program was largely unsuccessful. Others interviewed expressed concern that these programs would be particularly ineffective in increasing participation by women contractors.

Specific Findings: How Have Agencies Responded?

This study found that agencies typically responded to Proposition 209 and similar policies by doing one of the following:

1. *Retained M/WBE programs without making changes.*
2. *Dismantled ull or significant portions oj their race- and gender-conscious M/WBE policies.*
3. *Restructured M/WBE programs to eliminute preferential provisions, but retuined race- and gender-conscious elements or supplemented the progrums with provisions to increase other forms of diversity.*

1. *No Changes* ***in M/WBE Policies***

The City and County of San Francisco, Los Angeles County, City of Los Angeles, City of Richmond, and California Community Colleges[14] did not make any significant changes to their M/WBE policies. All of these government agencies continue to operate programs that utilize some variation of race- and gender-conscious goals and good faith efforts on individual contracts.[15] At least one entity, the City of Los Angeles, was unsuccessfully sued over its M/WBE policies. In *AMPCO System Parking v. City of Los Angeles'"*, the Superior Court upheld Los Angeles' program, indicating that neither the city's goals nor its good faith efforts policies provided a preference based on race or gender. In October 1998, the City and County of San Francisco re-authorized its program, aftcr collecting a wealth of evidence to show that discrimination still exists in city contracting. A Proposition 209-based lawsuit against San Francisco's former M/WBE policy is pending.[17]

2. *Eliminating M/WBE Policies*

Three local agencies eliminated virtually all of the race- and gender-conscious provisions in their M/WBE programs: Contra Costa County, and the cities of Hayward and Fresno.

All three entities previously allowed departments to set goals and good faith efforts requirements on a contract-by-contract basis. After Proposition 209 took effect, these agencies removed these provisions. Although all three entities purport to encourage minority and women participation, their current policies do not penalize prime contractors who fail to utilize or make outreach efforts to minority or women businesses. Contra Costa currently faces a lawsuit, tiled in July 1998, that alleges it discriminates against women- and minority-owned businesses in the award of public contracts.'*

The City of Sacramento eliminated its bid preference in response to Proposition 209. However, unlike the other three local entities, it continues to require prime contractors to make good faith efforts to meet minority and women participation goals. The contract compliance officer who responded to our interview indicated that the city is considering further changes to its program, including the possibility of removing the goals and good faith efforts provisions and making the program race- and gender-neutral.

The State of California and California State University (CSU) both eliminated their M/WBE policies in response to the *Monterey Mechanical Co. v. Wilson*[19] lawsuit. The *Monterey Mechanical* case held that the statutes requiring state agencies and CSU to utilize goals and good faith efforts violated the United States Constitution. Because this case was filed before the passage of Proposition 209, the decision did not address any Proposition 209 claims. Nevertheless, Governor Pete Wilson used the decision as the basis to order the complete elimination of the state's M/WBE policies, including outreach programs and the tracking of minority and women participation. Under Executive Order No. W-172-98 (March IO. 1998), Governor Wilson not only dismantled the goals and good faith efforts program challenged in *Monterey Mechanical*, but also ordered state agencies to stop maintaining statistical **data** on minority and women participation in state contracting. Governor Wilson's order goes well beyond the requirements of either

*Governor Wilson's order suppresses data that is necessary **for** evaluating the impact of Proposition 209 and the prevalence **of** discrimination against minorities or women.*

Monterey Mechanical or Proposition 209 by suppressing data that is necessary for evaluating the impact of Proposition 209 and the prevalence of discrimination against minorities or women bidding for state contracts. Governor Wilson reiterated this position by vetoing legislation, as part of California's 1998-99 budget, that would have partially restored the tracking of minority and women participation.

3. Restructuring of M/WBE Policies

A number of agencies restructured their M/WBE programs, including the City of Oakland, the East Bay Municipal Utility District (EBMUD), Bay Area Rapid Transit (BART), the City of San Jose, and the Port of Oakland.

The City of San Jose restructured its program by emphasizing the prevention of discrimination and preferences. Citing studies that have documented a pattern of discrimination against minority and women businesses in the San Jose area, the city's revised program had the following provisions: (1) The city continucd to set minority and women participation goals on construction contracts based on availability in the local market. Prime contractors, including minority- and women-owned businesses, had to either meet these participation goals or demonstrate that they had not engaged in discrimination or provided preferences. (2) A prime contractor could demonstrate that it had

not engaged in discrimination or preferential treatment by simply sending four solicitation letters to minority- and women-owned businesses in each applicable trade. This requirement represented a significant scaling back of the previously required good faith efforts. (3) The city also agreed to assume responsibility of targeting advertising at minorities and women. Prime contractors no longer had to advertise subcontracting opportunities.

Despite these changes, San Jose's policy was struck down by a Superior Court judge as violating Proposition 209 in Nigh *Voltage Wire Works v. City of Sun Jose."* The case is currently on appeal.

BART's new program also emphasizes the prevention of discrimination. BART now requires prime contractors to meet minority and women goals only if the contractor chooses to subcontract. Like San Jose, BART's goals are based on local availability of minorities and women in the applicable trades. If the contractor does not meet the goals, it must fill out a document describing its outreach and its efforts to ensure nondiscrimination. Disqualification of a contractor can occur only if BART demonstrates that the contractor *actively discriminated* against minority- and women- owned businesses. This standard is extremely difficult to meet, and our discussions with BART employees suggest that disqualifications would occur very infrequently.

EBMUD's new "Contract Equity Program" targets small businesses by creating a sheltered market for 50% of the agency's contracts under $50,000. However, the program also allows the agency to set "minimum" contract participation goals for three groups: White males, women. and minorities. EBMUD believes that by setting goals for all groups, across racial and gender lines, its policy will result in less discrimination while not violating Proposition 209's prohibition on race and gender preferences. The minimum goals are set below the availability for each of these three groups, and they are meant to be easily achievable absent discrimination." Similarly. the Port of Oakland now gives bid preferences to local and small local business, but also requires that prime contractors make efforts to utilize minorities, women, and White males in approximate proportion to their availability in the local market.

Other agencies also dismantled their goals and good faith efforts policies but decided to target race- and gender-neutral characteristics for outreach and participation. For example, the City of Oakland's proposed new program will focus on local and small local businesses. For construction and professional contracts, Oakland plans to require prime contractors to make good faith efforts to utilize 35% small local business enterprises. Separate goals are set for trucking and other industries. For supplies and procurement contracts, a 5% bid preference is provided for local businesses, and a 10% bid preference is provided for small, local businesses.

Implications of Changes

- *Decreased opportunities for MBEs and WBEs on public projects.*
  MBEs and WBEs did not receive their fair share of contracts even when affirmative action programs were in place. In the absence of these programs, the participation of MBEs and WBEs in the construction industry will decrease. Such decreases were evidenced when cities suspended their affirmative action programs in public contracting as a result *of* the *City of Richmond v. Croson*[22] decision'". Anecdotal evidence and statistical data shows that MBE and WBE participation in public contracting is linked to affirmative action programs.'" Therefore, we can expect a decline in the opportunities available to WBEs and MBEs

in public contracting.

- *Increased resistance to diversification efforts in subcontracting.*
  As our survey has found, the changes in affirmative action contracting programs after Proposition 209 have led to an increased resistance to efforts to diversify subcontracting. This will continue to be the case unless California's government stresses the importance of good-faith efforts, outreach, and other proactive efforts to ensure that public contract dollars are awarded equitably.

- *Suppressed information on potential discrimination in public contracting.*
  The elimination of tracking requirements will lead to difficulties in identifying barriers to M/WBE participation, and determining whether those barriers are intentional or unintentional. The lack of available data will make race- and gender-based discrimination in the awarding of public contracts impossible to assess. In the absence of this data, the impact of these important changes in public policy, and the effects of new outreach programs will not be measurable.

- *Potential decrease in the use of MBEs and WBEs in private projects as a result of the "spill-over" effect.*
  Affirmative action programs in contracting gave MBEs and WBEs a foot in the door to overcome the "old-boy network" and compete for public contracts. Their participation in public contracting led to an increase in their invisibility and credibility. In the absence of these programs, MBEs and WBEs will not benefit from the experience, exposure, and contracts gained on public projects. As a result, their participation in private projects may decrease further.

- *Reduced employment opportunities for minorities.*
  As MBE participation in public contracting decreases, these businesses will be forced to downsize to stay competitive or will be driven out of business. MBEs tend to hire minority employees. Therefore, a decline in opportunities for MBEs will lead to a decrease in opportunities for all minority employees in the construction industry.

Recommendations

Based on this analysis, we suggest that agencies do the following:

- *Monitor MBE and WBE participation in public contracting.*
  The state of California, counties, cities, and education institutions should continue to collect data on the use of M/WBE's and publish reports with this data on a yearly basis. This data is essential to monitor discrimination in the awarding of public contracts and to measure the effects of recent policy shifts. Responsible policy making depends on the availability of data that assesses the impact of decisions and measures the extent to which the desired results are achieved.

- *Measure the equity in the awarding of public contracts.*
  State agencies, counties, cities, and educational entities should conduct disparity studies to measure the effectiveness of their programs and the extent to which their public contracting dollars are equitably awarded to all businesses in the relevant market. If contracts are awarded equitably, MBE and WBE participation in public contracting should reflect their representation in the relevant market. Disparity studies are necessary to monitor whether public contracts are awarded fairly and to challenge

discriminatory practices.

- *Develop effective and equitable public contracting programs that are permissible under Proposition 209.*
  State agencies, counties, cities, educational institutions, civil rights groups, legislators, and those concerned with achieving equal opportunities for all Californians should develop effective outreach and other non-preferential programs that encourage greater participation in public contracting.

Cal. Public Contract Code §§ 101 IS-101 15.15 (state agency contracts); Cal. Gov. Code § 14132 (transportation projects); Cal. Streets & Highways Code § 180.1 (seismic retrofitting projects); Cal. Gov. Code §§ 16850 et *seq.* (bond services); Cal. Educ. Code § 71028 (community college contracts): Cal. Public Contract Code § 10108 (Department of Corrections contracts).

[2] Cal. Public Contract Code § 2000 defines local agencies as including general law and chartered cities and counties. school districts or other districts.

[3] See. *e.g.*, San Francisco. Cal. Admin. Code §12D.2(IO) (1995) (concluding that "some City departments continue to operate under the 'old boy network' when awarding contracts"): Jean Merl, *Affirmative Action Backers Angry at Riordan's Silence*, L.A. Times. Feb. 13, 1996. at Al, A10 (citing a city audit that found that a group of former Mayor Bradley's supporters obtained airport concession contracts but did little or no work).

[4] Peter Y. Sussman. ACLU-No. Cal.. ACLU-So. Cal., CAA. Cal. Women's Law Center. ERA, Lawyers' Committee for Civil Rights, *Reaching for the Dream: Profiles in Affirmative Action*, at 23 (March 1998).

[5] Id at 25.

[6] National Foundation for Women Business Owners, *Women-Owned Business in California: 1996 A Fact Sheet.*

[7] City and County of San Francisco, *Disparity Analysis 1996-97.*

[8] Contra Costa Cou nry. *Disparity Study 1992.*

[9] Contra Costa County. *Disparity Study 1996.*

[10] Under the state's Public Contract Code, "good faith efforts" include conducting outreach to minority and women husincsscs. negotiating in good faith with minority or women subcontractors. providing business assistance when feasible, and not rejecting a bid from minority- and women-owned businesses without a reasonable justification.

[11] In September of 1997, Contra Costa County suspended its entire M/WBE program for professional services and purchasing. These programs rcprcscnt the bulk of the city's contractin g dollars. In August of 1998. it reinstated a much weaker version of this program, which lacked any numerical goals. As the aforementioned disparity study suggests, Contra Costa County never effectively enforced its M/WBE program.

[12] Under Executive Order No. W-I 72-98 (March IO. 1998). Governor Wilson not only dismantled the goals and good faith efforts program challenged in *Monterey Mechanical*, hut hc also ordered state agencies to stop maintaining statistical data on participation by minorities and women in state contracting.

[13] Interviews conducted with California State Lottery, Richmond, County of Sacramento, City of San Jose, Oakland, City of San Diego, Los Angeles County, and the City of Sacramento.

[14] The Community Colleges are bound by section 71028 of the California Education Code to continue operating their M/WBE program (code requires the Community Colleges to use outreach , goals. and good faith efforts to increase minority and women business participation). Article 3. section 3(a) of the California Constitution allows state agencies to disregard a state statute only w hen an appellate court has held that the provision is unlawful. No court has yet to address whether scction 7 1028 violates Proposition 209. and the California legislature has rejected attempts to amend this statute. However, see *Wilson v. State Board of Per-*

sonnel, No. 96CS01082 *(Cal.* Super. **Ct. filed 1996) (pcnding lawsuit challenging** section 71028's legality under **Proposition** 209).

[15] **San Francisco and the City of Richmond have also** maintained **a hid** preference program **for local-, minority-. and** women-owned **businesses.**

[16] *AMPCO System Parking v. Los Angeles (Cal.* **Super. Ct. No. DC** 189-54 **I 1998).**

[17] *Schindler Elevator Corp. v. San Francisco, No.* A0818 **I I (Cal. Super. Ct.).**

[18] *Lucy's Sales v. County of Contra Costa, No.* C982955 **SBA (D. No. Cal. filed July 29.** 1998).

[19] *Monterey Mech. Cm. v. Wilson.* 125 F.3d **702** (9th **Cir. 1997).** *reh'g, en banc, denied,* 138 F.3d **1270 (9"' Cir.** 1998).

[20] *High Voltage Wire Works v. San* **lose. No.** CV 768694 **(Cal. Super. Ct.** 1998), **on appeal. No.** H018407 **(Ct. App.. 6th App. Dist.).**

[21] EBMUD's **goals in the construction industry are** the following: **25% for white males, 25% for racial minorities. and 9% for white women.**

[22] *City of Richmond v. Croson,* 488 U.S. 469, 509 (1989).

[23] **A study conducted on** the **impact of eliminating hiring goals for municipal contracts in San Diego found that** after the **City's Equal Opportunity Contracting Program was struck down, the number of city contracts awarded to** MBEs **and** WBEs **sharply declined.** The **study** concluded **that this drop was not due to unavailability or small size of minority firms. Ronald W. Powell.** *Women Trail in City's Projects,* **San** Diego **Union-Tribune. April 2** 1, **1998. at B** 1.

[24] *Reaching for the Dream: Profiles in Affirmative Action; supra* **note 4, at 2 I. 24, and 27 (March** 1998).

EMPLOYMENT

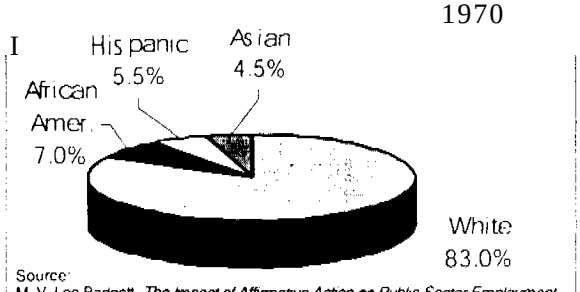
Affirmative Action Programs

Affirmative action in employment is rooted in a series of Executive Orders issued by Franklin Delano Roosevelt in the 1940s that prohibited discrimination on the basis of race, creed, national origin, and color by the federal government or federal defense contractors. Governor Reagan signed equal employment opportunity (EEO) and affirmative action programs in the public employment arena into law in California on February 1, 1974. These programs include goals and timetables, hiring and recruitment, upward mobility, and outreach efforts in California's public institutions. They also involve monitoring workforce composition and measuring representation of minority groups and women at all levels of employment. Affirmative action programs in employment require public agencies to determine if particular groups are under-represented in their workforce. If groups are under-represented, the agencies arc to devise specific recruiting, training, and career advancement tools to ensure equal opportunities for all qualified applicants.

Goals and timetables programs address under-representation in specific levels of employment or at particular agencies. Agencies or departments that have identified an area of under-utilization establish a series of goals to remedy the under-utilization and a timetable to meet their goals. Hiring and recruitment affirmative action programs typically involve widely publicizing all available opportunities, evaluating of minimum qualifications, interviewing a diverse pool of candidates that is representative of the available workforce, and considering under-utilization when making final decisions. In some cases, when under-utilization of a particular group has been identified, departments compile a list of all the candidates for a position who are women and minorities. If one of these candidates is not hired, a justification for the decision must be submitted in writing to the State Personnel Board, county or city Affirmative Action Office. Upward mobility programs develop candidate skills to increase their rates of promotion and progress within the civil service system. Outreach efforts target groups under-represented in specific fields, educate them about available possibilities, develop necessary skills, and strive to increase their participation in areas where they have been under-represented.

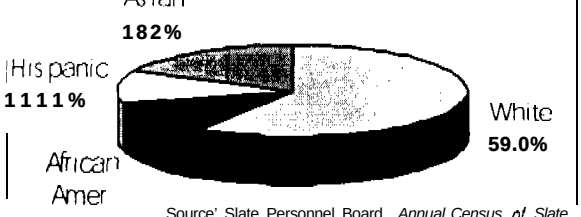
State Civil Service Workforce Composition[2]

1970



Source:
M. V. Lee Badgett, *The Impact of Affirmative Action on Public Sector Employment and Contracting in California, 1970-1990,* at 81 (Paul Ong, ed., 1997).

1996-97



Source' Slate Personnel Board. *Annual Census of Slate Employees and Affirmative Action Report* (March 1998)

In 1970, the state civil service workforce was approximately 45% female and 55% male. African Americans represented 7% of the workforce, Asian Americans 4.5%, Hispanics 5.5%, and whites 83%.[2] In 1996-97 women were 47.3% of the work force, whites were 57.5%, African Americans 1 I .5%, Hispanics 17.7%, and Asian Americans were 10.8%.[3] Affirmative action programs have effectively increased the number of minorities in state government at all levels of employment. California's workforce was diversified as a result of these programs. In the absence of affirmative action, the opportunities available for women and minorities in California will dimin-

ish.

Although California's workforce has become more diverse, parity has not been achieved at all levels of employment. Women and minorities are still concentrated in the lower paying positions and occupations within the public employment system. Blacks and Hispanics are over-represented in the hiring for lower-end positions, while whites are over-represented among new hires at the top of the career ladder.' Women, Blacks, Hispanics, Asians, and American Indians, on average earned $6.220 less a year than white men in 1993." Affirmative action programs in employment exist to guarantee equal employment opportunity for all Californians, and are necessary to achieve a workforce representative of the state's population.

Women and minorities are still concentrated in the lower paying positions and occupations within the public employment system.

Impact of Proposition 209

The impact of Proposition 209 in public employment will remain unclear for some years. Workforce composition change, both in terms of entry-level hiring and advancement opportunities, will be relatively slow, and numerical data will not be available until these changes occur. Our research suggests that several public employment affirmative action programs may be affected by Proposition 209. Goals and timetables, outreach, publicity, and upward mobility programs are under scrutiny for compliance with Proposition 209.

General Findings

- *Increased resistance to comply with anti-discrimination laws and affirmative action requirements*

  Affirmative Action and Equal Employment Opportunity officers report an increased resistance by departments to engage in outreach efforts, publicize available opportunities, monitor workforce composition, and compare workforce to market availability. Departments ignore their responsibilities, refuse to comply with existing policies, and resist EEO and AA officers' efforts to ensure equal opportunities far all potential applicants. Most officers interviewed felt that their responsibilities have increased as departments fail to comply with federal requirements and follow current EEO policies.

- *Widespread confusion about the meaning and scope of 209 und fear of liability*

  Some agencies, such as the State Personnel Board and California Community Colleges, are in a state of uncertainty regarding what actions they can take to promote workforce diversification under proposition 209. The legality of their affirmative action employment programs is being challenged in *Wilson v. State Personnel Board, et al.,* a lawsuit filed by Governor Wilson before the passage of 209. These entities are continuing their outreach, goals and timetables, and other elements of their affirmative action programs pending the resolution of the aforementioned suit.

- *Variances in the monitoring of workforce composition and market availability throughout the entities interviewed*

  Most state agencies record the race, ethnicity, and gender of their applicants. They measure under-utilization by comparing their workforce composition at all categories of employment to similarly qualified candidates working in relevant markets. Some counties and cities so similar data collection to determine under-utilization.

However, other counties do not collect information regarding the race and gender of their applicants and only collect information about their actual workforce. The way in which under-utilization is calculated also varies throughout the state. Some counties compare their workforce to the entire relevant market. Others look at the pool of workers who are similarly qualified to those in specific public employment categories.

- *Changes in agency name from "affirmative action" to "equal employment"*
  Many agencies have supplemented or substituted the term affirmative action with equal employment opportunity in the names of their offices, policies, plans, and job titles. These changes strive to convey the importance of equal employment opportunity and distance the programs from affirmative action. Specific entities that have changed their name arc Kings County, San Bernadino County, and San Joaquin County. The City of San Jose is considering changing the name of its agency as well.

- *Modification of agency progrums or consideration of changes in light of Proposition 209.*
  Program changes involve modifications in the language of their Affirmative Action and Equal Employment Opportunity Plan. substitution of goals and timetables with outreach and publicity efforts, and in one case, San Diego, elimination of all affirmative action programs. Most EEO and Affirmative Action offices now focus on widely publicizing available opportunities, recording workforce representation, measuring under-utilization, and conducting targeted outreach in areas of underrepresentation. Some counties, like Orange County. encourage their departments to reopen the search process when the interview pool does not reflect market availability.

- *Varying level of commitment among EEO and AA officers to their employment programs*
  Although most officers we spoke to expressed concerns about recent changes to their affirmative action programs and the implications of these changes, some expressed relief that "WE don't have to worry about any of that EEO stuff." The majority of officers were strong advocates and enforcers of Affirmative Action and Equal Employment Opportunity programs. They advised their departments to continue these programs, monitor EEO and AA efforts, and work to achieve parity between market availability and workforce composition at all occupational levels. However, a surprising number of officers interpreted 209 to mean that most of their EEO responsibilities associated with race and gender diversity in their workforce were no longer important. Some interviewees stated they now were able to hire the people they wanted to hire and "didn't have to worry about anything else."

Specific Findings:

How Have Agencies Responded?

This study found that agencies typically responded to Proposition 209 and similar policies in the following ways:

1 *Retained their AA and EEO progrums without making changes.*
2 *Restructured AA and EEO progrums.*
3 *Dismantled all or a significant portions of their AA and EEO policies und programs.*
4 *Eliminated their AA and EEO office.*
5 *Currently evaluating their policies and are in the process of making changes.*

1. Retained their AA und EEO programs without making changes.

The State Personnel Board and California Community Colleges are defending their affirmative action programs. Both of these entities have goals and timetables, outreach and publicity, hiring and recruitment, and upward mobility affirmative action programs. They contend that federal and state statutes oblige the continuation of their affirmative action programs, and have stated they will not make program changes unless ordered by the court. The constitutionality of these programs is being challenged in *Wilson v. State Personnel Board,* et *al.,* a case pending in the Sacramento Superior Court. Under the direction of the State Personnel Board, state agencies will continue to implement their programs until new guidelines are issued regarding EEO and AA programs. The Counties of Butte, Fresno and Orangc, as well as the City of Richmond and Sacramento are also continuing their affirmative action programs.

2. Restructured AA nnd EEO programs.

The counties of San Bernadino and Contra Costa, and the City of Oakland have restructured their affirmative action programs in employment. The counties of Contra Costa and San Bernadino have eliminated the goals and timetables component of their affirmative action and equal employment opportunity programs. Their policies and plans now focus on outreach and publicity. Under-utilization is not monitored as closely as before, and the county no longer engages in specific steps to address under-utilization at any or all levels of employment.

3. Dismantled all or significant portions of their AA and EEO policies and programs.

UC and CSU have radically changed their affirmative action programs in employment. Since the passage of SP-2, UC no longer considers race and gender in hiring and promotion decisions. UC has eliminated goals and timetables programs at all levels of employment, and has curtailed many of their affirmative action efforts. However, UC is in the process of expanding race- and gender-neutral outreach, publicity efforts, and upward mobility programs.

The UC faculty has traditionally been overwhelmingly male and white. In 1977, men were 91.2% of all ladder rank faculty and 94% of all tenured faculty.[6] 91 .8% of all faculty, and 92.4% of tenured faculty were white at this time.[7] Affirmative Action programs had increased the number of women and minority professors at the associate professor level, and the lecturer level. However, parity was far from being achieved. In 1996, men still were 77.1% of all ladder rank faculty, and 79.9% of tenured rank faculty.* Minorities represented 17.5% of all ladder rank faculty and 14.9% of tenured ladder rank faculty.'

CSU has undergone similar changes in their affirmative action and equal employment opportunity programs in employment since March of 1996. Both UC and CSU continue to measure market availability and identify areas of under-representation.

4. Eliminated their AA and EEO office

The County of San Diego eliminated its Affirmative Action and Equal Employment Opportunities program. The county eliminated the entire EEO Office. All monitoring of workforce composition and market availability has ceased to occur. No county office is currently responsible for conducting diversity and sexual harassment trainings. Discrimination complaints are now filed with the Department for Internal Affairs. The county will continue to meet federal requirements in order to guarantee federal funding. It is in the process of developing a diversity program that seeks to achieve occupational, religious, and class diversity.

5. Currently evaluating their policies and are in the process of making changes

The cities of Los Angeles and San Francisco, and the counties of Santa Clara and Sacramento are evaluating their policies to ensure compliance with Proposition 209. Most of the revisions being considered have to do with the language of policies and plans rather than the implementation of these programs. These programs will most likely shift their focus from affirmative action to equal employment opportunity, and outreach efforts will become the most important component. These revisions are in very preliminary stages.

Implications of these changes

Given the rate at which public employees are hired and promoted, the impact of most of these changes, in terms of workforce composition, will not be seen for a few years.

Californians are being told anti-discrimination laws, equal opportunity, and affirmative action programs are no longer necessary or important

- *Shrinking public sector employment opportunities for women and people of color*
  Women and minorities, since the inception of affirmative action programs, have had more opportunities in public sector employment than they have had in the private sector. Women and minorities have progressed more quickly within the public sector than the private sector. They also have occupied positions outside their traditional fields of employment. In the absence of affirmative action programs and structures that address race- and gender-based discrimination, women and people of color will experience a decrease in their employment possibilities.

- *Decreased public support and implementation of anti-discrimination laws*
  In addition to the direct impact of Proposition 209 and similar institution-specific policies, these policies and the ways in which they are being interpreted affect public opinions. Given the absence of data collection and efforts to monitor discrimination, individuals are not held accountable for their actions, and the government has weakened its enforcement of anti-discrimination. Californians are being told anti-discrimination laws, equal opportunity, and affirmative action programs are no longer necessary or important. This shift in message, which ignores existing discrimination, will change public opinion and reduce public commitment to pursuing equal employment opportunities for California's diverse population.

- *Possible re-segregation of California's workforce and loss of the diversity achieved*
  Affirmative action programs worked to ensure that California's workforce was representative of California's population. With affirmative action programs in effect, women and minorities were still underrepresented at many levels of employment, and in various occupations. In the absence of these programs, state civil service employment will become less diverse, the rate of promotion of women and minorities will stagnate.

- *Inability of government agencies to meet all community needs*
  Diverse workforces have proven to be effective and valued by our society. Police departments have proved the efficacy of women officers dealing with domestic violence situations, and the effectiveness of minority officers serving their ethnic communities. This diversification was resisted by agencies and was made possible by court

challenges of discriminatory practices and affirmative action programs. In the absence of affirmative action programs, workforces will become less diverse affecting the extent to which government agencies can effectively meet all community needs.

Recommendations

- *Improve public understanding of Proposition 209's impact of equal employment opportunity programs*
  The state must develop an education and outreach program to inform EEO officers, department heads, and the general public about the effects of 209 on equal employment opportunity. This should be undertaken with input from community based organizations, and must also convey ongoing federal EEO responsibilities.
- *Develop effective affirmative action and equal employment opportunity policies that are permissible Proposition 209*
  Civil rights attorneys should assist EEO offices and Human Resources Departments in the development of model EEO and AA policies that will ensure the continued diversification of California's public sector labor force. The development of such policies, coupled with their widespread distribution and implementation, will work to achieve equal employment opportunities for all Californians.
- ***Develop** a uniform system for data collection and method for monitoring underutilization of women and minorities*
  Counties and cities must use a standard system to measure workforce composition at all levels of employment to monitor discrimination and ensure the diversification of their workforces.
- *Monitor the effect of any and ail changes to EEO programs and practices*
  The State Personnel Board, and local governments, under the direction and supervision of the state, should be responsible for measuring the impact of these changes to public sector employment opportunities.
- *Work to increase minority and women representation in public sector employment*
  Local and state agencies should expand outreach efforts, and other such programs, to increase minority and women representation in civil service professions where they have been traditionally under-represented. Publicly funded agencies have the responsibility of ensuring equal employment opportunities for all Californians and should work to ensure that California's civil service workforce is representative of the diversity of our state.
- *Focus on increasing workforce diversity at all levels of public sector employment*
  Local and state agencies should develop upward mobility programs to increase the rate of promotion of women and minorities, and ensure workforce diversity at all levels of state, county, and city civil service employment. Effective upward mobility programs are necessary to shatter glass ceilings and fight gender- and race-based discrimination.

Sw. *e.g.*, Cal. Educ. Code §§ 44100-04 (establishing affirmative action employment program for state's school system); Cal. Educ. Code §§ 87100-07 (extending affirmative action hiring to community colleges); Cal. Gov. Code §§ 19790-99 (requiring each state agency and department to establish affirtnativc action programs for civil service employment).

[2] M. V. Lee Badgett, *The Impact of Affirmative Action on Public-Sector Employment* in *California, 1970- 1990*, The Impact of Affirmative Action on Public-Sector Employment and Contracting in California, 1970-1990, at 81 (Paul Onp. cd., 1997).

[3] State Personnel Board. *Annual Census of State Employees and Affirmative Action Report* (March 1998).

[4] California Senate Office of Research. *The Status of Affirmative Action in California,* (March 1995). at 30.

[5] *Id.* at 32.

[6] University of California. *Tenured Women Faculty as a % of All Tenured Faculty and All Women Faculty as a % of All Faculty* (visited Nov. 4, 1998) <http://www.ucop.edu/acadadv/datamgmt/9697stat/appen-c.gif>.

[7] University of California. *Tenured Minority Faculty as a % of All Tenured Faculty and All Minority Faculty as a % of All Faculty* (visited Nov. 5. 1998) <http://www.ucop.edu/acadadv/datamgmt/9697stat/append-d.gif>.

[8] *Supra* note 6.

[9] *Supra* note 7.

EDUCATION

Affirmative Action Programs

Affumative action programs in education were created to remedy historic discrimination and overcome the impact of racism and sexism to the opportunities of women and minorities. These programs were developed as a way of addressing both blatant discrimination, and unintentional discriminatory practices, to make our public institutions more equitable and accessible. During the past twenty-five years, the University of California, California State University, and California Community Colleges have operated a series of affirmative action programs to address race- and genderbased discrimination and increase access to educational opportunities for all Californians. These programs stem from a commitment to serving California's diverse population and an understanding that education is the major determinant of an individual's economic and social achievement. These programs consist of special considcrations in admissions for students from under-represented minorities and women, financial aid programs to increase the participation of under-represented minorities and women in higher education, and race- and gender-conscious outreach programs.

Affirmative action programs in admissions vary throughout the different institutions and departments within those institutions. Most of these programs take the race, erhnicity, and gender of an applicant into consideration along with their grade point average, standardized test results, socioeconomic background, special talents, legacy, and past financial support of the institution. These programs dramatically increased the number of women and minorities who attended these institutions and reduced some of the detrimental effects of race- and gender-based discrimination as they affect the educational opportunities of women and minorities. Women have been the largest beneficiaries of affirmative action programs. Between 1970 and 1990, the number of women age 25 and older who had completed four years of college had more than doubled to 18.4 %. In 1997, women earned 52.9 % of the bachelor degrees awarded by the University of California. Also as a result of these programs, the number of under-represented minorities at the University of California doubled between 1976 and 1997. Although the number of African American, Latino, and Native American students at UC has vastly increased, it has not reached parity to California's population. In 1997, under-represented minorities were 17.5 % of UC's student body and 39 % of California's high school graduates.

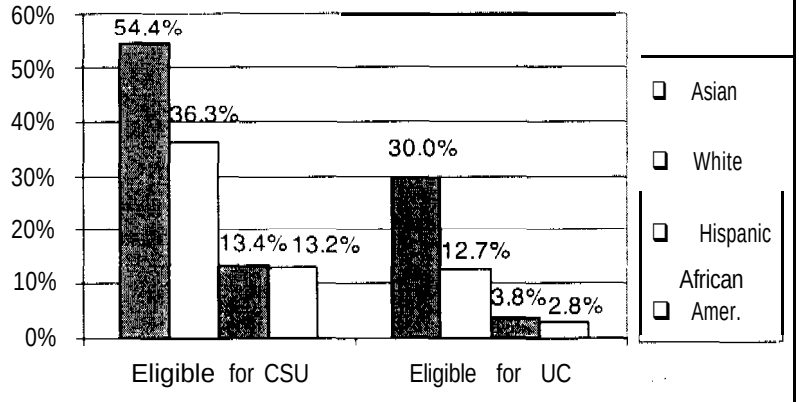
Affirmative action programs dramatically increased the number of women and minorities who attended these postsecondary schools.

Financial aid affirmative action programs encourage low-income under-represented minority participation in higher education. UC, CSU, CCC, and the Student Aid Commission had race-and gender-conscious financial aid programs. These programs increased access to post-secondary institutions for minorities, women, and low-income students who could not afford to attend without this financial support. The need for these programs has increased over the past twenty years as tuition rates have risen much quicker than inflation to reach double their 1976 cost. This particularly has been the case in California where the fraction of state funds devoted to higher education spending has decreased during this time.

The majority of affirmative action programs in education consist of outreach and retention programs. At the University of California, these programs are categorized into one of four areas: School-centered Partnerships, Academic Development (Student Centered), Informational Outreach, and Research and Evalua-

tion. School-centered Partnership programs are partnerships between universities, colleges and school districts to improve K- 12 education and college preparation, and increase college participation rates and eligibility. Academic Development programs work with individual students to improve their eligibility and their competitiveness. Informational outreach programs consist of efforts to educate families and students throughout the entire education process about college eligibility requirements and the importance of supporting school improvement. These programs also include recruitment efforts and publicity to educate students about postsecondary education opportunities. Research and Evaluation programs focus on understanding the root causes of educational disparity within California's educational pipeline from K-12 through undergraduate and graduate instruction. Most of these outreach programs place greatest emphasis on women and under-represented ethnic minorities, as well as educationally and economically disadvantaged students.

Eligibility of 1996 High School Graduates for CSU & UC Admission[13]



Source: California Postsecondary Education Commission, *1996 Eligibility Study*

Outreach programs at UC vary throughout the eight campuses. Each campus has diffcrent outreach budgets and programs. The responsibility for the creation, enforcement, and evaluation of these programs is assigned to a different department at each campus. The UC President ultimately is responsible for the supervision and implementation of all UC Outreach programs. Examples of these programs are the Early Academic Outreach Program which operates in 452 California middle and senior high schools; the Mathematics. Engineering, Science Achievement program which serves 242 California middle and senior high schools and 11 community colleges; the Gateway program designed to make UC program data more accessible by placement of information on the Internet; and the Berkeley Pledge designed to maintain student diversity on campus.

California State University's outreach programs are part of the Access and Retention unit of the Office of Academic Affairs. Examples of these programs are the University Academic Development Program, Faculty and Student Mentoring Programs, Teacher Diversity Program, and the Student Academic Services Outreach Program.

Affirmative Action programs in education have been effective and have increased educational opportunities for all Californians. However, inequalities in the access to and quality of education still exist. According to the California Postsecondary Education Commission, students who attend K- 12 schools in low-income communities and communities of color have lower rates of college attendance because graduates have lower levels of UC and CSU eligibility and do not know of the higher education opportunities available in California. Among 1996 California high school graduates, only 2.8 % of Blacks, and 3.8% of Hispanics were eligible to the University of California, compared to 12.7 % of whites and

30 % of Asians. These affirmative action programs are necessary to comply with the California Master Plan, achieve equal educational opportunities, and assist California's public higher education institution to serve all Californians.

Impact of Proposition 209

Proposition 209, SP- 1, and similar institution-specific policies have had an enormous impact on universities and colleges, causing a great number of cutbacks in affirmative action programs. These programs improved not only the diversity of the student body, but the faculty, administrators, and other personnel as well. SP-1 eliminated affirmative action in UC admissions and led to a 10% decrease in the number of under-represented minorities admitted to UC for the 1998-99 school year; the first year it went into effect. Proposition 209 also threatens affirmative action outreach, retention, and financial assistance programs in California's higher education institutions. SP-2 eliminated affirmative action in UC employment and contracting. Proposition 209 also purports to eliminate employment programs at CSU and CCC.

UC Berkeley experienced a 57% decrease in the number of under-represented minority students admitted for the fall.

General Findings

- *Decrease in the number of under-represented minorities admitted to the University of California for the fall of 1998*
  The 1997-98 pool of applicants was one of the most diverse in UC history. Even with this increase in minority applications to UC, the number of under-represented minorities admitted to UC for the fall of 1998 decreased by 10%. The UCLA and UC Berkeley student bodies have been impacted the most by this shift in admission criteria. UC Berkeley experienced a 52% decrease in the number of under-represented minority students planning to attend Berkeley in the fall. UCLA experienced a 36% decrease of this number.

- *Shift from a consideration of race and gender to an emphasis on economic and educational disadvantage*
  Many outreach, retention, financial assistance, and admissions affirmative action programs have changed their criteria to focus exclusively on economic and educational disadvantage instead of race and gender. For example, CSU's Future Scholars Scholarship Program, which previously served African American and Latino students, now awards renewable scholarships to incoming freshmen and transfer students who are educationally and economically disadvantaged. California Student Opportunity and Access Program (CalSOAP), administered by the Student Aid Commission, formerly offered services to under-represented minorities and women seeking post-secondary degrees. Now CalSOAP will serve students from low-income backgrounds, who are the first in their family to attend college, who attend schools with a low eligibility rate for post-secondary institutions, and whose schools have low college and university participation rates. Most outreach, retention, and financial aid programs previously served women and racial minorities in addition to economically and educationally disadvantaged students. Now they solely focus on the latter group. Although these programs have been redirected, they have not been restructured to adapt to their new constituency. The structures necessary to support these program changes also have not been developed or instituted.

- *Widespread confusion about the kinds of programs that can be affected by Proposition 209 and institution specific initiatives*
  Interviews with the varying institutions showed that there are many different interpretations of the scope and implications of 209 throughout UC, CSU, and CCC. These inconsistent and varying interpretations have resulted in a great deal of confusion about the kinds of programs that should be affected by Proposition 209. For example, whether 209 prohibits race- and gender-conscious outreach programs remains undecided. Institutions have interpreted 209 differently and made changes according to their interpretations. For instance, the UC Regental Counsel stated that outreach and retention programs were permissible, both under 209 and SP-I , as long as they included disadvantaged students. By contrast, CSU has redirected most of its outreach programs and eliminated all that were race- and gender-conscious.

- *Call for the re-examination of ethnic and gender studies programs*
  Ward Connerly has launched an attack on all ethnic and gender studies programs, including graduation and special cultural ceremonies. These programs are far beyond the scope of 209 and should not be subject to additional scrutiny since the passage of this initiative.

Specific Findings

- *UC admissions process radically changed since the passage of SP-I*
  UC continues to accept the top 12.5 % of California high school graduates who are college eligible. However, the number of students who are accepted purely on their academic records has increased and the admissions criteria have changed. Prior to SP-I, admissions decisions were based on grade point average, high school performance and standardized test results. Special consideration in admissions was given to students from under-represented minorities and women. The groups considered under-represented minorities by UC are Latinos, African Americans, and Native Americans. For graduate admissions under-represented minorities are defined according to each discipline. Special consideration also was given to students with special talents, legacy, economic or educational disadvantages, athletes, and upon the request of "very important people".

  Today, 50% to 75% of students are admitted to UC based on their grade point average, standardized test scores, rigorousness of their high school program, quality of their academic performance relative to the opportunities available at the school they attended, and exceptional performance in a single subject area. Grades obtained in Advanced Placement and Honors classes are increased by 1.0 when calculating a student's GPA. Special consideration is given to economic and educational disadvantages, special talents, and location of an applicant's school to admit the remaining 25% to 50% of the class. Admissions standards and procedures vary across UC Campuses. University of California at Los Angeles and University of California at Berkeley are the most competitive campuses in the UC system, and both rely heavily on test scores, GPAs, and rigorousness of an applicant's high school program.

- *Additional funding provided by the state for Outreach and Retention programs at UC*
  On August 21, 1998, the University of California was awarded, by the state legislature, an additional $33.5 million for outreach programs to K-12 students. The University will add $5 million to this amount. The state budget requires a match of funds for K-l 2

spending totaling $31 million. Spending on UC Outreach programs thus is anticipated to reach $135 million in 1998-99, more than double the $65 million spent in 1997-98. This increased funding will support the expansion of targeted outreach efforts to increase the number of students who are UC eligible. UC has yet to define the specific programs that will gain from this increase in funding. $250,000 has been allocated for scholarships for economically and educationally disadvantaged students. To date, most UC outreach programs consist solely of publicity efforts to increase the number of students who know about available educational opportunities. Whether UC will establish race- and gender-conscious outreach and retention programs remains undecided.

- *Race- and gender-conscious firzancial aid programs are being restructured in a way that significantly reduces the benefits for women and minorities*

  The Extended Opportunity Programs and Services (EOPS) served 83,171 students in 1996-97. This program targets students who are affected by language, social, and economic disadvantages with the aim of increasing their rates of matriculation, graduation, academic success and transfer to four-year institutions. This program always has served economically and educationally disadvantaged individuals. EOPS was one of the programs targeted for elimination by Governor Wilson. Another scrutinized program is CSU's Forgivabla Loan Program. which aids doctoral students who arc disabled or are pursuing degrees in fields for which they have been historically under-enrolled. Most of the students who previously gained from this program were women and minorities. This program is being pressured to change. Since 209 passed, the program has been restructured to support students who are under-represented in their field of interest: for example, it helps men who are interested in nursing.

- *Decrease in under-represented minority student applications to the California Pre-Doctoral Program*

- This program seeks to increase the diversity of CSU students who will continue their studies at the doctoral level. The 1997-98 applicants to this program were 3.7% Native American, 18.9% Asian American, 24.6% African American, and 30.9% Hispanic. In 1998-99, the applicant pool was 5.9% Native American, 15.5% Asian American, 15.5% African American, and 25.8% Hispanic. The number of women who applied to this program also decreased from 68.3% in 1997-98 to 62.9% in 1998-99.

Implications of these changes

- *California 's higher education institutions will not serve California's citizens equally*

  Proposition 209, SP-1 and similar institution-specific policies challenge the extent to which California's public education institutions will serve the diverse population of the state. As evidenced in UC admissions, there is an increased disparity in the population of our state and the population of our college campuses. While California is becoming increasingly diverse, some of its higher education institutions are becoming less diverse. Affirmative action programs in education are necessary to remedy past discrimination, ensure equal opportunities for all California, and achieve the diversity representative of our state at all public higher education institutions. In the absence of affirmative action programs and structures designed to address race- and gender-based discrimination, under-represented minorities and women will be subjected to the inequities embedded within our education system.

- *Decrease in the quality of education received at UC us a result of the declined campus diversity*. Many scholars, students, policymakers, and businesses speak of the benefits of diversity and its many contributions to the quality of education. This valuable diversity is being threatened by Proposition 209. The decreased diversity of UC campuses will affect the kind and quality of education UC students receive and the extent to which they will be prepared to face the challenged posed by California's diversification.

- *Reduction in the number of candidates qualified to meet the needs of California's booming economy*
  According to the California Postsecondary Education Commission, California's continued economic development is contingent on the availability of a qualified, diverse group of candidates who can meet the needs of developing and growing industries for workers, The decreased enrollment of under-represented minority students at UC, CSU, and CCC will limit the number of potential candidates who can serve this need.

- *Increase in the wage gap between members of different ethnic groups*
  Educational attainment has become an increasingly important determinant of an individual's income. Individuals with a low level of attained education have experienced substantial reductions in their real wages, while the wages of those who would graduate degrees have skyrocketed. This has led to an increase in the disparity of income between the wealthy and the poor. Proposition 209 and its effect on equal access to education will continue to increase the disparity between the rich and the poor and will increase the wage gap between members of different ethnic groups.

- *Race- and gender-based discrimination will not be examined or addressed*
  While programs focusing on economically and educationally disadvantaged students meet important societal needs, the fact remains that such programs do not address race- and gender-based discrimination. Socioeconomic based affirmative action programs do not serve the needs of under-represented minorities and women, lack the necessary structures to guarantee their success, and are not an adequate substitute for race- and gender-based affirmative action programs.

  Race- and gender-based discrimination continues to permeate our public institutions and limit the opportunities available to women and minorities. UC and CSU rely heavily on several admission criteria that have a discriminatory impact on minority applicants. These criteria include standardized test scores and Advanced Placement tests which are not good predictors of future academic performance and do not adequately measure desirable characteristics such as diversity of perspective, experience with particular communities, and the fortitude to overcome oppression. Advanced placement classes are not accessible to all students and standardized test scores correlate the highest with parental educational attainment and socioeconomic income. Affirmative action alleviated the negative impact of the heavy reliance on criteria, such as standardized tests, and took into consideration the full potential and positive attributes of all applicants. In the absence of affirmative action, race- and gender-based discrimination will remain largely unexamined and unchallenged within California's public institutions for higher education.

Recommendations

UC Regent Ward Connerly and California Governor Pete Wilson argued that SP-1 and 209 would not have a discriminatory impact on women and minorities in California. Our research proves that this has not been the case and that race- and gender-based discrimination continue to be a part of California's public education institutions. To improve the quality of and access to California's public institutions for higher education, we recommend:

- *Use effective, state-financed, data collection and monitoring processes at UC, CSU, and CCC to measure the effect of changes made to outreach, retention, and finuncial aid, as well as the CSU and UC admissions process*

  It is imperative to measure the effect of policy decisions and program changes to ascertain whether the desired outcome was achieved. It also is important to determine if additional changes or programs are necessary, and community needs are being addressed adequately. Qualitative and quantitative analysis of the impact of these changes is necessary to measure equal educational opportunity and access to these opportunities. In the absence of data, it will become increasingly difficult to monitor and combat discrimination.

- *Measure the impact of admissions requirements and all elements of the admissions process*

  The California Postsecondary Education Commission (CPEC) should receive additional governmental funding to monitor the impact of these recent policy shifts and the extent to which these institutions are meeting their responsibilities as defined in the California Master Plan. CPEC should also be commissioned to study the necessity and validity of specific admission criteria, and whether changes in the way criteria are evaluated could alleviate their negative adverse impact on under-represented minority students. Although UC, CSU, and CCC have a commitment to serve all of California's population, we are witnessing a reduction in the educational opportunities available to some members of our society. The effect of changes in the admissions process have had on the opportunities available for women and minorities in California must be measured to assess the extent to which UC, CSU, and CCC meet the educational needs of California's student body.

- *Engage in proactive efforts to guarantee equal opportunity and access to education for all Californians.* UC, CSU, and CCC should diversify outreach programs to reach all populations, as there is no monolithic response to different means of communication. Many outreach programs focus on printed publications written only in English. Recent efforts use the Internet to reach large numbers of people. However, these means of communication only reach certain members of our population. They do not reach low-income people, students who do not have access to these means of communication, parents who are monolingual in languages other than English and illiterate parents. Effective outreach to California's diverse population depends on the use of available means of communication and the existence of audience specific messages. For example: the use of mainstream and ethnic radio and television, and outreach efforts based out of community centers.

- *UC, CSU, und CCC should expand outreach efforts to include race- and gender-targeted programs*

  These programs are necessary to combat the pernicious effects of race- and gender-based discrimination that permeate California's public education system. Without

these UC, CSU, and CCC can not fulfill their institutional pledges to offer equal educational opportunities and adequately educate California's diverse K- 12 student population.

- *Develop a consistent, state-wide definition of economic and educational disadvantage as it applies to admissions, outreach, and financial assistance programs and communicate this definition to all those who work on these programs*

  The University of California, California State University, and California Community Colleges currently operate programs that use a myriad of definitions and do not share a target population. All programs must use the same definition of economic and educational disadvantage to serve the same population and develop consistent programs.

- *Develop structures necessary to support the recent policy shifts.* Major changes should not occur without having structures necessary for their support. For instance. the amount of financial assistance available to ensure that low-income students who are admitted to these institutions can afford to attend must be increased. This is the responsibility of the University of California, California State University, and California Community Colleges, as well as the state and federal governments.

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[1] The University of California, California State University. and California Community Colleges arc California's public post-secondary education institutions. UC scrvcs the top 12.5% of California's high school graduates who have completed eligibility requirements. CSU scrvcs eligible students who fall between the top 12.5 and 33% of California's high school graduates. Both serve transfer students who have successfully completed specified college work. CCC scrvcs the remainder of high school graduates seeking a post-secondary education.

[2] Peter Y. Sussman. ACLIJ-No. Cal., ACLU-So. Cal.. CAA, Cal. Women's Law Center, ERA. Lawyers' Commitleo for Civil Rights. *Reaching for the Dream: Profiles in Affirmative Action*, at 30 (March 1998).

[3] The definition of under-represented minorities varies across institutions and has changed throughout time. Currently UC considers Latinos. Native Americans, and African Americans under-rcprescntcd minorities throughout the undergraduate admission process. In the past Filipino. Southeast Asian. and East-Asian students have been considered under-represented minorities. Under-representation is determined by comparing the institution's student body to high-school graduates. or the applicant pool in terms of ethnicity and gendcr. If the representation of students from a certain group is lower at the institution than the applicant pool. or high school graduates, that group is considered an under-rcprcscntcd minority.

[4] Refers to students whose parents, siblings, or relatives arc alumni who contribute significantly to the university.

[5] Citizen's Commission on Civil Rights, *Affirmative Action: Working and Learning Together*, at 13 (Oct. 1996).

[6] University of California. *Statistical Summary of Students and Staff Table X: Degrees Conferred By Academic Year and Gender* (visited Nov. 3. 1998) <http://www.ucop.edu/ucophome/uwnews/stat/degrees/9697deg.html>.

[7] University of California. *Statistical Summary of Students and Staff, Table VIIj: Enrollment by Campus, Ethnicity, Gender and Level, Total University* (visited Nov. 4, 1998) <http://www.ucop.edu/ucophome/uwnews/stat/enr97/97sst7j.html>.

[8] California Department of Finance Demographic Research Unit. *K-12 Public High School Graduates By Ethnicity, History and Projection 1997 Series* (visited Nov. 4. 1998) <http://www.dof.ca.gov/html/Demograp/k12ethtb.htm>.

[9] Eligibility for all financial aid programs is determined on the basis of family income. In the past. students who came from low-income families and were under-represented minorities were eligible for race- and gender-conscious financial aid programs.

[10] Joseph L. Dionne and Thomas Kean. *Breaking the Social Contract: The Fiscal Crisis in Higher Education*. (*1997*), at 10, (visited Nov. 4. 1998) <http://www.rand.org/publications/CAE/CAE100/>.

[11] George S. Park and Robert J. Lemper, Rand Education. *The Class of 2014: Preserving Access to California's Higher Education*. (1998) at x-i, (visited Nov. 4. 1998) <http://www.rand.org/publications/MR/MR971.pdf/>.

[12] The University of California classifies research and evaluation programs as student outreach. We challenge that classification. These programs do not appear to be linked directly to increased access to California's public higher education institutions.

[13] We acknowledge the absence of statistical information about Native Americans and Arab Americans from this report and the aggregation of Asian American, Pacific Islander, and South Asian communities. This is a result of the absence of this data in several of the sources we utilized.

[14] California Postsccondary Education Commission, *What Are The Eligibility Rates of 1996 Public High School Graduates for the University of California?*, 1996 Eligibility Study, at 9.

[15] In 1960, California developed its Master Plan for Higher Education where it defined the missions of the University of California. California State University, and California Community Colleges. As part of the plan, California committed to guarantee cqual access to higher education for every California citizen who could benefit from that education. Since its inception, this plan has guided higher education institutions in California.

[16] Table I, University of California, Statement of Intent to Register for Adrnittcd Freshmen Fall 1998 and Fall 1997 (visited Nov. 3, 1998) <http://www.ucop.edu/ecophome/commserv/admissions/sirtable1.html>.

"Employment programs in higher education institutions are discussed in the employment section of this report.

[18] All UC Admissions, Ethnic Distribution of Freshmen Admitted to the University of California Fall 1998 and Fall 1997 (visited Nov. 3. 1998) <http://www.ucop.edu/ecophome/commserv/adtab.html>.

[19] *Id.*

[20] The new definition of educational and economic disadvantage includes students who are the first in their family to go to college; have a migrant family pattern, a large family, or a difficult home situation: come from a low-income family; or did not receive higher education counseling. It also includes students whose high school had a low percentage of college eligible students. a low participation rate in post-secondary institutions, or is located in a low-income area. or where a high percentage of the community is on public assistance.

[21] For information about changes in admission criteria. please *see* the specific findings section,

[22] CSU's outreach and retention programs were redirected before the passage of 209 as a result of a memo issued by the Senior Vice-Chancellor of Academic Affairs on March 1?. 1996. As a result of this memo, the Student Academic Services Outreach Program, formerly known as the Student Affirmative Action Programs. changed from focusing on under-represented minorities. women. disabled. and low-income students to focusing on educationally and economically disadvantaged students. The Teacher Diversity Project, which was originally Intended to attract minority students to a career in teaching and offer jobs as teacher aides, now focuses on student:, from environments in which teaching has not been a common career goal.

[23] Most UC Outreach Programs that existed during the 1997-98 school year were not race- and gender-conscious. Existing programs consist of publicity efforts to better inform students about the educational opportunities available through Internet web sites and lengthy brochures. The means of communication employed by UC arc not available to all students equally.

[24] *Supra* note 3.

"This policy is highly controversial given the disparity in the schools that offer Honors and Advanced Placcmcnt courses. California students do not have equal access to these classes; however. enrolling in such courses greatly affects their chances of admission to UC,

[26] Please *see* Appendix I for more information on and an analysis of class-based affirmative action programs.

EDUCATION

Kindergarten through high school

Affirmative Action Programs

School districts operated a series of desegregation programs that include transit plans, magnet schools, and outreach. Most of these programs were the result of court-ordered consent decrees, but some cities voluntarily engaged in these efforts. These programs pursued a more equitable education system for all Californians. Schools also developed race- and gender-conscious curricula to better educate all students and increase cultural awareness.

Other affirmative action programs at the K-l 2 level focused on achieving diversity among teachers. During the 1996-97 school year, the California student body was 39.68% Hispanic, 39.58% White, 8.6% Black, 8.28% Asian, 2.4 1% Filipino, .86% American Indian, and .59% Pacific Islander. By contrast, the teacher population was 78.8% White, 10.6% Hispanic, 5.1% Black, 3.8% Asian, .8% American Indian, .8% Filipino, and .2% Pacific Islander. This disparity between the teacher and student population arguably decreases the effectiveness of teachers and the quality of the education all students receive. The California Department of Education and California school districts operated a series of outreach and affirmative action programs in employment to narrow the gap between the student body and teacher population. These programs aimed to achieve a teacher population that could better serve the needs of California's increasingly diverse student population,

According to the California Postsecondary Education Commission the quality of a student's K-l 2 education is determined by the social and demographic context of the community in which they live and where the school is located. Students who attend schools in low-income areas, communities of color, and geographically isolated communities have less chances of taking Advanced Placement courses. meeting UC and CSU eligibility requirements. attending college, and graduating from college. Affirmative action programs at the kindergarten through high school level are necessary to address these inequalities. The K-12 education provides the foundation necessary to attend post-secondary institutions, participate in the workforce, contribute to California's economy, and earn a self-sufficient wage in this state. The presence of race- and gender-based discrimination within this system affects the opportunities of all students. Therefore, affirmative action programs and other proactive efforts are necessary to increase access to equal opportunities for all Californians.

Impact of Proposition 209

The impact of Proposition 209 on K- 12 education has been relatively low. Voluntary desegregation programs, race- and gender-conscious curricula, outreach programs, magnet schools, and transit plans are some of the programs that may be affected by 209. School district and statewide affirmative action teacher employment programs may also be subject to change as a result of 209.

General Findings

- *Few changes in district desegregation programs.* Many school districts had court-ordered consent decrees which require race-conscious programs, including transit plans, magnet schools, and outreach. These programs are explicitly exempted from the mandate of Proposition 209. The initiative stated that its prohibitions do not apply to programs authorized by a court order or consent decree. Most school districts that have voluntary desegregation programs are adopting a "wait and see" policy given the abundance of unanswered questions about the implications of 209. Only one school district, San Diego Unified School District,

had a court ordered consent decree terminated. However, the SDUSD plans to continue all of its integration programs, at least for the 1998-1999 school year.

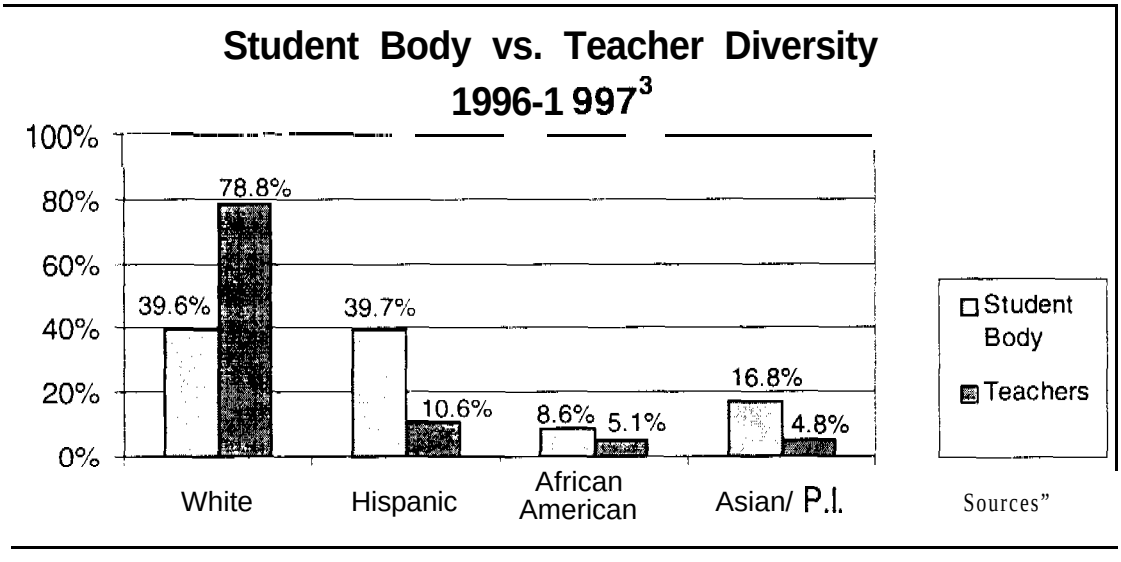
- [illegible] *about funding for race- and gender-conscious curricula.* Most districts are interested in continuing and expanding race- and gender-conscious programs. However, they are concerned about the feasibility of doing so given potential decreases in funding available for these types of programs. Some of these programs include race or gender focused curricula, single sex math and science classes, and curriculum efforts to address the repercussions of white flight to suburban schools from urban schools.

- *Scrutiny of the legality of curriculum and special programs created to address issues of* de facto *segregation in urban city schools.* Some districts, like the Oakland and Berkeley Unified School Districts, have designed race-conscious curricula to address issues that arise when schools that used to be integrated become segregated as some students move to the suburbs or switch to private schools. Districts are concerned about the fate of these programs.

- *Decreased efforts for teacher. affirmative action employment programs*
  Since 1977, the California Department of Education and California's school districts have operated a series of affirmative action programs in employment to increase the number of minority teachers, administrative staff, and administrators. The goals and timetables component of these programs was repealed in 1994, but the commitment to equal opportunity in employment for all persons, and achieving workforce diversity remained. Since the passage of 209, these programs have been weakened. California's Department of Education is not addressing the increased disparity between minority students and teachers at this time. The Department is now only peripherally involved in school district affirmative action programs in employment.

Specific Findings

- *Changes to school district advisory boards*



In the Los Angeles Unified School Districts, seven education commissions previously represented the interests of disenfranchised groups within the community, including girls, African Americans, Mexican Americans, gays and lesbians, and special education. The commissions informed the School Board on pertinent issues, such as hate crimes and racism within the schools. After Proposition 209, a single commission, the Human Relations Commission replaced the original seven commissions. The transition from seven commissions to one has not been smooth.

Implications of these changes

- *increased disparity between the teacher and student population.* Affirmative action programs in employment contributed to the diversification of the K-12 faculty. Even with these programs in place, the disparity between the teacher and student populations was significant. In the absence of these programs this difference will continue to increase.

- *Reduction in the number of race- and gender- conscious curricula, and voluntary desegregation programs.* Most schools who currently operate race- and gender-based criteria are adopting a wait and see policy. Some are considering the elimination of these curricula, and none arc considering expansions of these programs. Therefore. ax a result of 209, there will be a decrease in the number of race- and gender- conscious curricula.

- *Isolation **of** minority and female students within the K-12 system.* Over the past 25 years, schools have worked to diversify their curricula and include the history of women and minorities within the K- 12 education system. These race- and gender-based curricula increased the extent to which minorities and girls learned about their history. Without these curricula, the experiences of minorities and girls will become increasingly isolated from the material taught in California's K- 12 classrooms.

Recommendations

- *Strengthen, enforce, and expand affirmative action and diversity **programs** in the hiring **of** teachers* to meet California's need for more minority teachers. The California Department of Education should work to decrease this disparity between the teacher and student population. California's teachers must be able to adequately teach California's increasingly diverse K- 12 student population.

- *Develop necessary structures to monitor **the effects of** any policy changes, **curriculum** revisions, and elimination of consent **decrees.*** These programs should not be eliminated in the absence of structures that monitor the occurrence of hate crimes on campus, changes in racial tension and climate in schools, variations of student populations, changes in the quality of students' education, and potential re-segregation of the K-12 school system.

Enrollment in CA Public Schools by Ethnic Group. 1981-82 through 1997-98, <http://www.cde.co.gov/ftpbranch/sbsdiv/demographics/reports/stateaide/ethstud.htm>.

[2] Numbers of Tcachcrs in CA Public Schools by Ethnic Group, 1981-82 through 1997-98, <http://www.cde.co.gov/ftpbranch/sbsdiv/demographics/reports/stateaide/ethteach.htm>.

Opportunities Lost

The State of Public Sector Affirmative Action
in Post Proposition 209 California

(Executive Summary)

A Joint Project of
Chinese for Affirmative Action
and Equal Rights Advocates

November 1998

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Chinese for Affirmative Action's mission is to defend and promote the civil and political rights of Chinese and Asian Americans within the context of. and in the interest of advancing multiracial democracy in the United States.

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INTRODUCTION

In November 1996, California voters passed Proposition 209, which amended the California Constitution to ban preferential treatment based on race or gender in public sector education, employment, and contracting. Initially enjoined from implementation, the initiative did not go into effect until August 28, 1997, when the Ninth Circuit upheld the proposition's constitutionality. The United States Supreme Court declined to review that decision in November 1997.

One year later, the full impact of Proposition 209 on affirmative action in California remains largely unknown. There have been no publicly-funded efforts to measure the effect of Proposition 209 and the repercussions of related policy and programmatic shifts in response to the initiative. Several lawsuits have been filed to clarify the meaning and intent of the initiative's language, such as the definition of "preferential treatment" and whether outreach and recruitment programs are prohibited. None of those, however, has been resolved at the appellate level.

As a result, Chinese for Affirmative Action (CAA) and Equal Rights Advocates (ERA) designed and conducted a survey to evaluate the effect of Proposition 209 and other, similar policies on public sector affirmative action programs. We surveyed sixty-eight government agencies across California to find out the policy and programmatic changes that have occurred in response to Proposition 209 and evaluate their impact on minorities and women. We examined both anecdotal evidence garnered from the interviews and statistical data when such data was available.

This report analyzes the impact of Proposition 209 on public contracting, employment, and educational opportunities for women and minorities in California. For each area, it summarizes the key findings, details how individual agencies have responded, and sets forth the implications of the changes. We also provide recommendations for agencies and other policy makers to ensure that minorities and women continue to enjoy equal opportunities despite the passage of Proposition 209.

In summary, we found that Proposition 209, combined with court actions, policy changes, and executive orders, has begun seriously to erode the gains made by minorities and women in California. Minority participation in post-secondary education and public contracting opportunities for women and minorities, in particular, has decreased dramatically since Proposition 209 went into effect. This impact has resulted from the failure of state agencies to comply with anti-discrimination laws, cutbacks in affirmative action programs, and the dismantling of systems designed to collect data on race and gender.

Many race- and gender-conscious affirmative action programs now focus instead on economic and educational disadvantage. This report concludes that this shift is an inadequate substitute because affirmative action was designed to address discrimination and a class-based analysis does not. Economic disadvantage, while laudable as an *additional* factor, addresses a different set of problems, produces a different set of results, and presents serious logistical problems in interpretation.

CONTRACTING

In 1988, the California Legislature enacted contracting goal programs to ensure that state agencies would contract more equitably with women-owned and minority-owned business enterprises (WBEs and MBEs). Before that time, state agencies had overwhelmingly awarded their publicly-funded contracts to white, male-owned businesses. Many county and local agencies also adopted WBE/MBE programs.

Over time, these programs had a significant effect. By 1996, many state agencies were awarding some percent of their publitally-funded contracts to MBEs and WBEs. Market parity had not, however, remotely been achieved. In 1996, for example, WBEs accounted for over one-third of all California firms, yet they rarely received more than 5% of a state or local agency's contracting dollars.

Proposition 209 has significantly limited the ability of public agencies to implement these programs. Specifically, Proposition 209 threatens: (1) ***hid** preferences,* which attempt to offset the effects of discrimination by granting minority or women businesses a small advantage in contract bids; (2) *goals **und good** faith efforts,* where prime contractors are required to either meet set participation goals or make good faith efforts to obtain minority and women participation: and (3) *outreach,* which generally requires informing minority and women businesses of contracting opportunities.

Survey Findings

- Widespread confusion about the meaning and scope of Proposition 209 and fear of lawsuits
- Elimination of data collection and the ability to track minority and women participation in the awarding of public contracts
- Increased resistance to outreach and other affirmative action requirements by both public agencies and prime contractors
- Resistance to local enforcement of federal affirmative action requirements
- Declining certification of minority and women business enterprises
- Shift from M/WEE to local and small business programs

Implications of Changes

- Decreased opportunities for MBEs and WBEs on public projects
- Increased resistance to efforts to diversify subcontracting
- Potential decrease in the use of MBEs and WBEs in private projects as a result of "spill-over" effect
- Reduced employment opportunities for minorities and women in the construction trades

Report Recommendations

The State of California, counties, cities, and educational institutions should:

- Monitor MBE and WBE participation in public contracting
- Measure the effectiveness and equity in the awarding of public contracts
- Develop effective and equitable public contracting programs that are permissible under Proposition 209
- Ensure that discriminatory practices do not creep back into the awarding of public contracts

EMPLOYMENT

Governor Reagan signed equal employment opportunity and affirmative action programs in the public employment arena into law in California on February 1, 1974. These programs included goals and timetables, hiring and recruitment, upward mobility, and outreach efforts in California's public institutions. They also involved monitoring workforce composition and measuring representation of minority groups and women at all levels of employment.

As in contracting, these programs achieved significant results. The number of minorities increased in all levels of state government employment. California's public workforce diversified dramatically. Yet parity was not reached at all levels of employment. Women and minorities are still concentrated in the lower paying positions and occupations. A noticeable wage gap still exists.

All of these programs are threatened by the passage of Proposition 209.

Survey Findings

- Increased resistance by public employers to complying with anti-discrimination laws and affirmative action requirements
- Widespread confusion about the meaning and scope of 209 and fear of lawsuits
- Variances in the monitoring of workforce composition and market availability throughout the entities interviewed
- Modification and reevaluation of programs and policies in light of 209
- Varying level of commitment among EEO and AA officers to their employment programs

Implications of Changes

- Shrinking public sector employment opportunities for women and people of color and possible re-segregation of California's workforce
- Potential decrease in the enforcement of anti-discrimination laws
- Inability of government agencies to meet community needs through a representative workforce

Report Recommendations

- The State of California should develop an education program aimed at EEO officers, government officials and the public about the continuing obligations under federal and state laws, not to discriminate
- Government agencies should increase their outreach and recruitment efforts to increase minority and women representation in public sector employment
- Local and state agencies should focus on developing upward mobility programs to increase workforce diversity at all levels of public sector employment
- The State should develop a uniform system for data collection and method for monitoring under-utilization of women and minorities
- The State Personnel Board and local governments should monitor the effect of all changes to EEO programs and practices

EDUCATION

Postsecondary Education

During the past twenty-five years, the University of California (UC), California State University (CSU), and California Community Colleges (CCC) have operated a series of affirmative action programs to address race- and gender-based discrimination and increase access to educational opportunities for all Californians. These programs consist of special considerations in admissions for students from under-represented minorities and women, financial aid programs to increase the participation of under-represented minorities and women in higher education, and race- and gender-conscious outreach programs.

These programs drastically increased the number of women and minorities who attended California's postsecondary institutions. Women, in particular, were the largest beneficiaries; by 1997, they earned the majority (52.9%) of UC bachelor degrees Yet parity with California's increasingly diverse population has not remotely been achieved. In 1997, under-represented minorities were 17.5% of UC's student body yet 39% of California's high school graduates.

Proposition 209, UC's SP-1, and other, institution-specific policies have had an enormous impact on California's public universities and colleges. They have caused extensive cutbacks in affirmative action programs, in particular admissions policies and procedures. The initiative also threatens affirmative action outreach, retention, and financial assistance programs in California's higher education institutions and attempts to diversify both faculty and administrative staff. SP-2 curtailed affirmative action in UC employment; Proposition 209 threatens to eliminate employment programs at CSU and CCC as well.

Survey Findings

- Fifty-seven percent (57%) decrease in the number of under-represented minorities admitted to UC Berkeley and thirty-six percent (36%) decrease admitted to UCLA, the two most-coveted UC schools
- Ten percent (1 0%) decrease in the number of under-represented minorities who planned to enroll in the UC system in the fall of 1998
- Shift in the admissions process from a consideration of race and gender to an emphasis on economic and educational disadvantage
- Restructuring of financial aid programs to reduce the benefits for women and minorities
- Widespread confusion about the kinds of programs that can be affected by Proposition 209 and institution-specific initiatives
- Call for the reexamination of ethnic and gender studies programs

Implications of Changes

- Inequality of post-secondary educational opportunities for California's diverse population
- Decrease in the quality of education received at post-secondary institutions due to the decline in student diversity
- Reduction in the number of minority candidates qualified to meet the needs of Califomia's booming economy
- Increase in the wage gap between members of different ethnic groups
- Limitation of remedies available to address race- and gender-based discrimination in education

Report Recommendations

- UC, CSU, and CCC should use effective, state-financed data collection and monitoring processes to measure the effect of changes made to outreach, retention, and financial aid, as well as the CSU and UC admissions process
- The California Commission on Post-Secondary Education should receive additional government funding to monitor the impact of the recent policy shifts on admissions requirements and the admissions process
- UC, CSU, and CCC should engage in proactive efforts to guarantee equal opportunity and access to education for all Californians
- UC, CSU, and CCC should expand outreach efforts to include race- and gender-targeted programs
- All higher education institutions should develop a consistent, state-wide definition of economic and educational disadvantage as it applies to admissions, outreach, and financial assistance programs
- **The** State and its higher education institutions should develop the structures necessary to support the recent policy shifts, including increased financial aid programs

EDUCATION

Kindergarten through high school

The impact of Proposition 209 has been relatively low on K- 12 education. The majority of desegregation programs are court ordered; they are explicitly exempted from 209's coverage. Voluntarily adopted programs may, however, be impacted as will the attempts to diversify the teaching and administrative staffs

Despite the advent of these programs, the diversification of the teaching staff has only begun. A significant disparity still exists between the demographics of the student body and their teachers. In 1996-97, for example, 78.8% of teachers were white but only 39.6% of students were. Only 10.6% of the teachers were Hispanic compared to 39.6% of the student body.

Affirmative action programs at the elementary and high school level have consisted primarily of desegregation programs, such as transit plans, magnet schools, and outreach. In addition, affirmative action employment programs focused on achieving diversity among teachers and administrative staff to improve the effectiveness of the teaching and the quality of education all students receive.

Survey Findings

- Few changes in district desegregation programs
- Concerns about funding for race- and gender-conscious curricula
- Increased scrutiny of the legality of programs created to address *de facto* segregation in urban city schools
- Decreased efforts for teacher affirmative action employment programs

Implications of the Changes

- Increased disparity between the racial and gender demographics of the teaching staff and their student bodies
- Reduction in the use of race- and gender-conscious curricula and in voluntary desegregation programs
- Isolation of minority and female students within the K- 12 system

Report Recommendations

- The California Department of Education should strengthen, enforce, and expand equal employment and diversity programs in the hiring of teachers to meet California's need for more minority teachers
- The Department of Education should develop the structures necessary to monitor the effects of any policy changes, curriculum revisions, and elimination of consent decrees
- Individual school districts should ensure the continuation of programs designed to prevent the isolation and resegregation of girls and minority students

Appendix D

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

AMPCO SYSTEM PARKING, a California corporation, Petitioner/Plaintiff, vs. CITY OF LOS ANGELES, a municipal corporation; DEPARTMENT OF AIRPORTS; BOARD OF AIRPORT COMMISSIONERS; and DOES 1 through 50, inclusive, Respondents/Defendants.	Case No. BC 189 541 ORDER

This ordinary mandamus petition (Code Civ. Proc., § 1085) asserts that the respondents unconstitutionally use a policy to provide Minority Business enterprises ("MBE's"), Women Business Enterprises ("WBE's"), and other business enterprises the opportunity to participate in the performance of all Department contracts, including the subject contract with the Department of Airports (see 0088 of Ex. 1 to petition). Bidders must "strive to adhere to levels of participation for each project and must also demonstrate that a 'good faith' effort was made to secure MBE/WBE subcontractors sufficient to reach these levels (0089-0090, Ex. 1 to petition). The constitutional argument

stems from recently adopted Article I, § 31 to the California Constitution (Proposition 209).

In effect, Proposition 209 prohibits "discrimination against, or grant of preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin" in, inter alia, public contracting.

Petitioner has standing to bring this action as it is affected by respondents' policy; and, if the policy is unconstitutional, plaintiff stands to be in a position to be able to bid and re-bid on the subject contracts and be in a more competitive mode.

Notwithstanding *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161 and *Domar* (1995) 41 Cal.App.4th 810, holding that the City's MBE/WBE/OBE policies does not violate equal protection of the laws, Proposition 209, adopted after these decisions, must be evaluated. The policies themselves have not changed after the adoption of Proposition 209.

There is no showing of any "discrimination" by the subject policies. The issue is whether there is "preferential treatment," with or without any general constitutional argument. Article I, § 31, stands independent of any other constitutional provision.

First, it is noted that Proposition 209 does not prohibit Affirmative Action Programs, *per se*, nor does it prohibit promotion of employment, retention or advancement of any particular class or category of people.

The subject policies do little more than require prime contractors to provide equal opportunity to all to compete for public contracts. These goals are consistent with competitive bidding.

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There is an insufficient showing of any irrationality or otherwise unconstitutional overtones with regard to the worker retention or living wage requirements of the City.

Preliminary Injunction is denied.

Dated: May 20, 1998

Robert H. O'Brien
Judge of the Superior Court

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Appendix E

STATE OF WASHINGTON

OFFICE OF THE GOVERNOR

P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 902-4111 • FAA' (360) 753-4110

GOVERNOR'S DIRECTIVE No. 98-01

TO: All Executive Agencies and Institutions of Higher Education

FROM: Gary Locke, Governor

DATE: December 3, 1998

SUBJECT: Implementation of Initiative Measure 200

Initiative Measure 200 (1-200) becomes effective today. When the voters of our state approved 1-200, they were making a statement that they wanted to end preferences based on race or sex while leaving unchanged preferences for people with disabilities, for veterans, and for people over 40 years of age. I-200 is now the law of our state and I will uphold and implement the law as I am sworn to do. This directive is how I believe state agencies should implement 1-200.

We must make sure that everyone is given fair and equal consideration in public employment, public contracting. and public education. Therefore. we must continue and intensify our outreach and recruitment efforts to encourage diversity. Diversity is what makes our state and country unique. And our diversity is a vital source of strength. creativity, and innovation.

I-200 is a new statute and does not repeal or supersede pre-existing statutes. Our task is to harmonize the new and existing laws to the greatest extent possible. In cases of a direct, irreconcilable conflict, I will read I-200 as implicitly repealing or overriding pre-existing law.

To aid in implementing 1-200, J have identified several broad categories of laws, rules, policies and procedures that may be affected. Each of those categories is described below, together with my decision for addressing I-200's impact. All executive agencies are directed to review their rules, policies, procedures and goals and to make changes where necessary to be consistent with this directive. While I cannot direct the actions of our state's institutions of higher education, I encourage them to consider this directive to ensure consistency across state government in the application of 1-200.

I. PUBLIC EMPLOYMENT:

A. Race, Sex, etc. Shall Not Be Considered in Hiring Decisions.

Race, sex, color, ethnicity and national origin may not be used in the final selection of an applicant for public employment, unless allowed under section 4 of I-200 (exempting an action that is "based on sex and is necessary for sexual privacy or medical or psychological treatment; or is necessary for undercover law enforcement. . . ") or section 6 of I-200 (exempting actions "that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state").

B. Plus 3, Exception Testing, and Exam Screening Adjustment Shall Be Discontinued When Based on Race, Sex, etc.

Much debate has occurred over whether the "plus 3 system," "exception testing," and "exam screening adjustment" can be continued under 1-200. The "plus 3 system'! is a program where three additional names of applicants from an under-represented group may be considered for employment if the group of applicants originally referred to the employer lacked adequate representation of the group. "Exception testing" is a process that, under extenuating circumstances, allows people to submit job applications even when the application period has closed. One of those circumstances is when certain groups are under-represented in the eligible applicant pool. "Exam screening adjustment" allows applicants from an under-represented group to take an oral employment exam if the original group of oral exam applicants lacked adequate representation of the group.

The plus 3 system, exception testing, and exam screening adjustment, while clearly not part of the final selection of an applicant, are much closer to the final selection decision than outreach and recruitment programs. Accordingly, use of these tools based on race. sex, color, ethnicity or national origin shall be discontinued unless allowed under sections 4 or 6 of 1-200. At the same time, use of the plus 3 system. exception testing, and exam screening adjustment shall continue for veterans, disabled veterans, people with disabilities, people over 40 years of age, and other groups of people not affected by 1-200.

C. Plans and Goals Shall Remain, but Use of Plans and Goals Shall Not Be Binding.

Affirmative action plans and goals are themselves not in conflict with I-200 and shall be maintained, but shall not be binding unless allowed under sections 4 or 6 of 1-200. Comparison of actual employment data with plans and goals may reveal barriers to equal opportunity or the need to increase outreach and recruitment efforts. However, race, sex, color, ethnicity or national origin shall not be considered in the final selection of an applicant.

D. Outreach and Recruitment Efforts Shall Be Intensified.

Outreach and recruitment programs designed to generate the best pool of qualified applicants for employers are not in conflict with I-200. Efforts to increase the number of applications from under-represented groups shall be intensified to make sure all qualified individuals are included and given fair consideration in public employment.

II. PUBLIC CONTRACTING:

A. Race, Sex, etc. Shall Not Be Considered in Awarding Construction Contracts or Contracts for the Purchase of Goods and Services.

Race. sex. color. ethnicity and national origin may not be used in the final selection of a bidder for a public contract. unless allowed under sections 4 or 6 of 1-200. Adding preference points or price preferences for meeting Minority and Women Business Enterprises (MWBE) goals, requiring attainment of MWBE goals as a condition of responsiveness, or otherwise awarding a contract to a bidder who did not submit the lowest bid but who met MWBE goals, and similar programs shall be discontinued, unless allowed under sections 4 or 6 of 1-200.

B. Laudatory Goals Shall Be Continued.

MWBE purchasing and contracting goals are themselves not in conflict with I-200 and shall be maintained, but shall not be binding unless allowed under sections 4 or 6 of I-200. Otherwise, the goals shall be continued as laudatory goals. Agencies shall continue to establish laudatory goals for specific contracts to encourage participation of MWBE's in state contracting. However, the laudatory goals shall not be mandatory: meeting them shall not be a condition of responsiveness; and there shall be no sanctions for failure to meet them. The Office of MWBE shall also continue to establish annual overall goals that will guide agencies in establishing laudatory goals. Annual overall goals are intended to help

eliminate improper discrimination by identifying disparities between the number of qualified contractors of a particular group able to perform a particular service and the number actually engaged in work under state contracts. Comparison of actual contracting data with goals may reveal barriers to equal opportunity or the need to increase outreach and recruitment efforts. However. race, sex, color. ethnicity or national origin shall not be considered in the final selection of a contractor.

C. Outreach and Recruitment Efforts Shall Be Intensified.

Outreach and recruitment programs designed to broaden the pool of potential contractors and provide notice of public contracting opportunities are not in conflict with 1-200. Efforts to increase the number of contractors from under-represented groups shall be intensified to make sure all qualified contractors are included and given fair consideration in public contracting.

III. PUBLIC EDUCATION:

A. Student Body Diversity is Encouraged.

Diversity of all kinds - racial, gender, ethnic, socio-economic, and geographic to name a few - are vitally important to the educational experience. It is thought-provoking interaction with people different from ourselves that opens our minds, broadens our perspectives and sets a top-quality education apart from a mediocre one. I encourage our state institutions of higher education to intensify recruitment and outreach programs to maintain diversity in our state's educational system. However, preferences in admissions based on race, sex, color, ethnicity and national origin should be discontinued.

B. Hiring and Contracting.

Institutions of higher education that do not use state agencies in employment or contracting are encouraged to consider this directive to ensure consistency across state government in the application of I-200.

IV. CONCLUSION:

The purpose of this directive is to give general guidance to ensure that the new law is applied uniformly across state government. If you have questions regarding specific programs, please contact Dennis Karras, Director of the Department of Personnel, for questions relating to public employment; Marsha Tadano Long, Director of the Department of General Administration, for questions relating to public contracting; Jim Medina, Director of the Office of MWBE, for questions relating to MWBE goals; and Everett Billingslea, my general counsel, for general assistance.

The section headings contained in this directive are for reference purposes only and do not affect in any way the meaning or interpretation of this directive, The text of I-200 is available here.