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16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

17 SENATOR WILLIAM J. KNIGHT, et al.,) **TO BE FILED IN BOTH CASES**
18 Plaintiffs,)
vs.) Consolidated Cases:
19)
20 ARNOLD SCHWARZENEGGER, et al.,) Case No. 03AS05284
Defendants,) Complaint Filed: September 22, 2003
and)
21) Case No. 03AS07035
22 EQUALITY CALIFORNIA, et al.,) Complaint Filed: September 23, 2003
Defendant-Intervenors.)
23 RANDY THOMASSON, et al.,) DEFENDANT-INTERVENORS'
Plaintiffs,) MEMORANDUM OF POINTS AND
24 vs.) AUTHORITIES IN SUPPORT OF
25) MOTIONS FOR SUMMARY JUDGMENT,
ARNOLD SCHWARZENEGGER, et al.,) OR IN THE ALTERNATIVE FOR
26 Defendants,) SUMMARY ADJUDICATION OF ALL
and) CAUSES OF ACTION, IN
27) CONSOLIDATED CASES
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28 Defendant-Intervenor.) Date: July 16, 2004
Time: 9:00 a.m.
Place: Department 54

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1 **I. INTRODUCTION**

2 This Memorandum is submitted in support of motions for summary judgment (or
3 adjudication) in two consolidated cases. The first motion is brought by twelve Defendant-
4 Intervenor couples who are registered domestic partners in the State of California,¹ and by
5 Defendant-Intervenor Equality California, the leading statewide organization advocating for the
6 needs and interests of same-sex couples and their children in California. That motion is brought in
7 Case No. 03AS05284, Knight, et al. v. Schwarzenegger, et al., in which only one Plaintiff
8 remains: Proposition 22 Legal Defense and Education Fund (the “Fund”), following the voluntary
9 dismissal by Plaintiff Senator William J. Knight. The second motion is brought by Defendant-
10 Intervenor Equality California in Case No. 03AS07035, Thomasson, et al. v. Schwarzenegger,
11 et al., which is maintained by Plaintiff Campaign for California Families (“CCF”).² (This
12 Memorandum shall refer to the cases, respectively, as the “Fund” and “CCF” actions.)³

13 Plaintiffs in both lawsuits seek to invalidate Assembly Bill 205, 2003 Cal. Stat. ch. 421
14 (RJN, Ex. C) (“AB 205”), a landmark statute that will provide registered domestic partners many,
15 but by no means all, of the rights, protections, and responsibilities that are afforded those who
16 legally marry. On the same alleged ground, Plaintiff CCF (but not the Fund) separately seeks to
17 invalidate a prior domestic partnership statute, Assembly Bill 25, 2001 Cal. Stat. ch. 893 (RJN,
18 Ex. B) (“AB 25”), that allows domestic partners access to only a dozen or so of the literally
19 hundreds of protections California law extends to married couples. The alleged ground for each

20 _____
21 ¹ The twelve Intervenor couples are listed in the caption and in the Notice of Motion. The
22 Intervenor couples are not parties to the CCF action, and this Memorandum is submitted in the
23 CCF action on behalf of Equality California only. “Intervenors” is used throughout herein to refer
24 collectively to the Intervenors in both the Fund and CCF actions, as applicable.

25 ² As of the date of this Motion, Intervenors have been served with a request for voluntary
26 dismissal of individual Plaintiffs Randy Thomasson, Manuel Aldana, Jr., Betty Cordoba, Liane
27 Galvin, and Clarence Chappell in Case No. 03AS07035, but not with an order of dismissal. Out of
28 an abundance of caution, Intervenor Equality California has noticed its Motion in that case against
the individual Plaintiffs listed here, as well as against the remaining Plaintiff CCF.

³ References herein to Intervenors’ respective Separate Statements of Undisputed Material
Facts in each action shall be as follows: “Sep. St. (Fund)” and “Sep. St. (CCF).” Intervenors have
filed a joint Request for Judicial Notice and Evidence in Support of their respective Motions,
which shall be cited herein as “RJN.” Unless otherwise noted, exhibit page references in citations
to the RJN shall refer to the consecutive pagination supplied by Intervenors.

1 cause of action in the two cases is that the domestic partnership statute at issue impermissibly
2 “amends” a voter-enacted initiative, Proposition 22, without a vote of the people.

3 Plaintiffs’ claims lack any basis in Proposition 22’s text or ballot materials. Moreover, the
4 interpretation of Proposition 22 that they urge would raise serious constitutional problems. As
5 shown below, California’s voters enacted Proposition 22 in March 2000 to change California’s
6 governing law regarding recognition of marriages performed outside the state. The voters’ intent
7 was to protect state sovereignty by providing by initiative that any future decision by another
8 jurisdiction to permit same-sex couples to marry would not require California to treat as valid (or
9 otherwise recognize) marriages of same-sex couples. Proposition 22 is silent, by contrast,
10 regarding any particular legal protections, rights, or benefits that accompany marriage.

11 Proposition 22 is silent as well regarding any family-law relationship other than marriage,
12 including not only domestic partnerships between same-sex couples, but also numerous
13 relationships other than marriage that may exist “between a man and a woman.” Such
14 relationships include domestic partnerships of aged couples, “Marvin” cohabitation agreements,
15 the legal relationship of separated spouses, the status of putative spouses, legal guardianships,
16 conservatorships, or powers of attorney. Notwithstanding Proposition 22’s silence regarding all of
17 these relationships—and its nonapplicability even to marriages entered into within California—
18 Plaintiffs’ lawsuit singles out domestic partnerships and contends that Proposition 22 not only
19 withholds from California’s same-sex couples the legal status of marriage, but also prohibits the
20 Legislature from granting to registered domestic partners some or all of the legal protections that
21 state law also provides to married couples. Given that Proposition 22’s text makes no mention of
22 domestic partnership, of same-sex couples, or of any legal protections that accompany marriage,
23 and given assurances in the ballot materials that Proposition 22 would not take away anyone’s
24 rights, Plaintiffs’ lawsuits plainly seek a judicial transformation of the measure into a non-
25 intended roadblock to legal protections for same-sex couples.

26 Plaintiffs cannot obscure the constitutionally impermissible animus that would be inherent
27 in the various interpretations they proffer for Proposition 22. CCF alleges that Proposition 22
28 prohibits the Legislature from treating same-sex couples and married couples “the same” with

1 respect to any legal protection, while the Fund appears to argue more narrowly that Proposition 22
2 bars AB 205’s total combination of domestic partnership protections because the Legislature
3 granted them by reference to protections that married spouses already enjoy under the law. But
4 both Plaintiffs’ theories amount to mere variations on a single theme: that, even as part of a
5 different status, same-sex couples cannot be provided protections that different-sex couples are
6 offered through marriage. As explained below, any such rule would represent a classification
7 drawn for its own sake simply in order to perpetuate inequality.

8 Plaintiffs’ claims in these two lawsuits are astonishing when placed in historical context.
9 Plaintiffs seek a ruling that California must withhold legal protections from same-sex couples if
10 those protections also happen to be provided to those who are married. In Massachusetts, Oregon,
11 Washington, New York, New Jersey, and many other states, as well as in California’s own
12 Assembly, the courts and policy makers have moved far beyond that possibility to the question
13 whether a state that grants same-sex couples many or all of the legal protections enjoyed by
14 married couples nevertheless still fails to meet its constitutional obligations of fairness and
15 equality if it withholds from same-sex couples the status of marriage. See, e.g., In re Opinions of
16 the Justices to the Senate (2004) 440 Mass. 1201, 1206, 802 N.E.2d 565, 569 (“The history of our
17 nation has demonstrated that separate is seldom, if ever, equal.”).

18 Indeed, nobody other than Plaintiffs seems to have any trouble discerning a basic and
19 fundamental difference between domestic partnership and marriage. Although rights and
20 responsibilities provided to those who are married differ among the states, each and every state
21 reserves for marriage a unique status as the most protected family relationship in the eyes of the
22 law. Accordingly, under no state’s law can it be said that marriage is simply a bundle of legal
23 rights. Rather, the state’s imprimatur on a relationship as a marriage encourages and in many
24 ways guarantees both public and private recognition of that relationship as entitled to the highest
25 degree of respect and protection within and outside the state’s borders. Accordingly, as the Court
26 of Appeal recently reaffirmed, California does not treat a relationship from another jurisdiction as
27 marriage unless that jurisdiction confers on the relationship all of the rights and duties the
28 jurisdiction confers on marriage. See Rosales v. Battle (2003) 113 Cal.App. 4th 1178, 1183.

1 In any event, as explained below, the undisputed material facts show that numerous
2 significant differences between marriage and domestic partnership persist under AB 205 and
3 AB 25, and Plaintiffs cannot show that these statutes “amend” Proposition 22. This Court should
4 thus grant summary judgment in favor of all Defendants and against all Plaintiffs in both cases.

5 **II. PROCEDURAL HISTORY OF THIS LITIGATION**

6 On September 22, 2003, the Fund and California State Senator William J. (“Pete”) Knight
7 (now dismissed) filed suit in Sacramento Superior Court against four state defendants in their
8 official capacities: then-Governor Gray Davis, Secretary of State Kevin Shelley, Director of
9 General Services William J. Jefferds, and Acting State Printer Geoff Brandt. The Fund
10 Complaint’s sole cause of action seeks to eliminate all of the rights, responsibilities, and legal
11 protections afforded domestic partners under AB 205 on the alleged ground that AB 205
12 “amends” Proposition 22 without a vote of the people. See Fund Compl. ¶¶ 38-47.

13 The following day, on September 23, 2003, CCF and five individuals (now dismissed)
14 filed suit in Los Angeles Superior Court. Like the Fund, CCF seeks to invalidate AB 205 on the
15 alleged ground that AB 205 “amends” Proposition 22. CCF Compl. ¶¶ 1, 93. In addition, CCF
16 separately seeks to invalidate AB 25, more than two years after its effective date, on the ground
17 that it, too, “amends” Proposition 22. CCF Compl. ¶¶ 125-126. The CCF Complaint names the
18 same State Defendants as the Fund Complaint, and also seeks both declaratory and injunctive
19 relief. Id. ¶ 1.

20 On November 25, 2003, the Presiding Judge of this Court ordered the CCF action
21 transferred from Los Angeles Superior Court and consolidated with the Fund action for purposes
22 of discovery, law and motion, and trial. See Order entered on Nov. 25, 2003. On December 18,
23 2003, this Court (Judge Cecil presiding) denied preliminary injunction motions and overruled
24 demurrers in both cases. See Orders entered on Dec. 18, 2003. Judge Cecil’s orders denying the
25 preliminary injunction motions stated he was “not convinced that the plaintiffs have demonstrated
26 that it is reasonably probable that they shall succeed on the merits of their action.” Id.

1 **III. STATUTORY BACKGROUND**

2 **A. Domestic Partnership Is A Distinct Legal Status Under California Law.**

3 1. Local Domestic Partnership Registries (1985 Through The Present)

4 Registered domestic partnership has existed as a distinct legal status open to same-sex
5 couples in California cities and counties for nearly two decades. The City of West Hollywood
6 established California’s first domestic partnership registry in 1985—a full fifteen years before
7 Proposition 22 appeared on the March 2000 ballot. Sep. St. (Fund) ¶ 5; Sep. St. (CCF) ¶¶ 5, 42.
8 By the time the voters went to the polls in March 2000, eighteen California cities or counties
9 permitted same-sex couples to register as domestic partners, see Sep. St. (Fund) ¶ 6; Sep. St.
10 (CCF) ¶¶ 6, 43, and provided those families not only with legal rights and protections for their
11 relationships, but also with government sanction and official status as families. California’s local
12 domestic partnership registries thus addressed not only legal vulnerabilities of families headed by
13 same-sex couples, but also the prior legal invisibility of such families. Those local registries
14 thereby paved the way for state-wide recognition of same-sex couples as families entitled to
15 protections other than the limited options available under ordinary contract law.

16 2. Assembly Bill 26 (1999)

17 California created a statewide domestic partnership registry with the enactment of
18 Assembly Bill 26 (“AB 26”) in 1999. See 1999 Cal. Stat. ch. 588; Sep. St. (Fund) ¶¶ 1, 10; Sep.
19 St. (CCF) ¶¶ 1, 10, 38, 48. AB 26 permitted same-sex couples (as well as different-sex couples
20 meeting age requirements and eligibility requirements for federal Social Security benefits) to
21 register with the State and obtain for themselves and their families certain limited rights and legal
22 protections, including reciprocal hospital visitation rights and, for certain government employees,
23 health insurance benefits for an employee’s domestic partner. See Sep. St. (Fund) ¶¶ 2-3; Sep. St.
24 (CCF) ¶¶ 2-3, 39-40. AB 26 also expressly provided that local jurisdictions could continue to
25 provide domestic partnership rights and duties more expansive than provided in the Family Code.
26 See Sep. St. (Fund) ¶ 4; Sep. St. (CCF) ¶¶ 4, 41; AB 26, § 2 (“Any local jurisdiction may retain or
27 adopt ordinances, policies, or laws that offer rights within that jurisdiction to domestic partners . . .
28

1 in addition to the rights and duties set out in this division.”). AB 26 also established a new
2 Division 2.5 of the Family Code devoted exclusively to “Domestic Partner Registration.”

3 3. Assembly Bill 25 (2001)

4 AB 25 was signed into law in October 2001. See Sep. St. (Fund) ¶ 26; Sep. St. (CCF)
5 ¶¶ 26, 63. AB 25 supplemented the rights and protections provided to registered domestic partners
6 in California to include employment, health care, and estate planning rights previously denied to
7 domestic partners and their families. These protections include, among others: (1) the right to sue
8 for infliction of emotional distress or for wrongful death in the event of a partner’s injury or death;
9 (2) the ability to make medical decisions for an incapacitated partner; (3) the right to act as a
10 conservator to tend to an incompetent partner’s medical and financial needs; (4) the ability to use
11 sick leave to care for a partner or a partner’s child; (5) the ability to use existing stepparent
12 adoption procedures to adopt a partner’s child; and (6) the right to cover dependents under
13 employer health plans without additional taxation. RJN, Ex. B at 13-17.⁴

14 4. Assembly Bill 205 (2003)

15 Nearly two years later, on September 19, 2003, the California Legislature enacted AB 205,
16 the “California Domestic Partner Rights and Responsibilities Act of 2003.” Sep. St. (Fund) ¶ 28;
17 Sep. St. (CCF) ¶¶ 28. When AB 205’s major provisions become operative on January 1, 2005, it
18 will further expand the rights, responsibilities, and obligations of registered domestic partners and
19 their families to include: (1) the right to make decisions on death and burial issues for a partner;
20 (2) the right to child custody and visitation, and the ability to authorize medical treatment for a
21 partner’s children; (3) access to family court and to support obligations; (4) shared responsibility
22 for each other’s debts, and consideration of a partner’s income for determining eligibility for state
23 governmental assistance programs and for student aid; (5) the ability to bring legal claims
24 dependant on family status, such as victim compensation claims, and the right not to be forced to
25

26 ⁴ In addition to AB 26 and the two statutes Plaintiffs challenge here—AB 25 and
27 AB 205—the California Legislature has enacted protections for domestic partners in at least eight
28 other statutes: 2000 Stats. ch. 1004 (SB 2011); 2002 Stats. 202, ch. 146 (SB 1049); 2002 Stats. ch.
373 (AB 2777); 2002 Stats. ch. 377 (SB 1265); 2002 Stats. ch. 412 (SB 1575); 2002 Stats. ch. 447
(AB 2216); 2002 Stats. ch. 901 (SB 1661); and 2003 Stats. ch.752 (AB 17).

1 testify in court against a partner; (6) the ability to avoid probate of jointly owned property; (7) the
2 presumption of parenthood of a child born to one partner during the partnership; (8) the right to
3 obtain death benefits for surviving partners of firefighters and police; (9) the ability to request and
4 obtain an absentee ballot for a partner; and (10) access to housing protections, including family-
5 student housing, senior citizen housing, and rent control. See RJN, Ex. C.

6 What AB 205 does not accomplish also is significant. Under AB 205, the procedures for
7 entering and for terminating a California domestic partnership remain different from those
8 governing California marriages. Sep. St. (Fund) ¶¶ 30-32; Sep. St. (CCF) ¶¶ 30-32, 67, 69.
9 Moreover, because AB 205 has no effect whatsoever on federal law, California’s registered
10 domestic partners remain unable to access more than 1,000 federal laws that protect married
11 couples. See Sep. St. (Fund) ¶ 35; Sep. St. (CCF) ¶¶ 35; see General Accounting Office Report
12 entitled “Defense of Marriage Act: Update to Prior Report,” GAO-04-353R Defense of Marriage
13 Act (Jan. 23, 2004), available at <http://www.gao.gov> (describing 1,138 federal laws in which
14 marital status is a factor). In addition, unlike married couples, registered domestic partners must
15 still file as “single” on both their state and federal tax returns. See Sep. St. (Fund) ¶ 33; Sep. St.
16 (CCF) ¶¶ 33, 70. Registered domestic partners who are government employees also are not
17 guaranteed the same long-term care benefits for their partners as are married government
18 employees, see Sep. St. (Fund) ¶ 34; Sep. St. (CCF) ¶¶ 34, and AB 205 does not amend California
19 law regarding which out-of-state marriages are treated as valid or otherwise recognized in
20 California.

21 **B. Enactment of Proposition 22 in March 2000**

22 In March 2000, California’s voters enacted Proposition 22, which provides that “[o]nly
23 marriage between a man and a woman is valid or recognized in California.” Sep. St. (Fund) ¶¶ 11-
24 13; Sep. St. (CCF) ¶¶ 11-13, 48-50. The full text of Proposition 22, which was included in the
25 ballot materials supplied to voters, provided for its own codification as Family Code section 308.5,
26 immediately following section 308. Sep. St. (Fund) ¶ 13; Sep. St. (CCF) ¶¶ 13, 50. Entitled
27 “Foreign marriages; validity,” section 308 provides: “A marriage contracted outside this state that
28 would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this

1 state.” Sep. St. (Fund) ¶ 14; Sep. St. (CCF) ¶¶ 14, 51. Without section 308.5, section 308 had
2 been interpreted to require that marriages of same-sex couples validly entered outside the state be
3 treated as valid marriages here in California. See People v. Badgett (1995) 10 Cal.4th 330, 363.

4 Proposition 22’s ballot materials expressly tied the measure to events concerning marriage
5 outside California. In 1993, the Hawaii Supreme Court ruled under its state constitution that
6 Hawaii could not exclude same-sex couples from marriage unless it could show a compelling
7 reason for doing so. See Baehr v. Lewin (Haw. 1993) 852 P.2d 44; Sep. St. (Fund) ¶ 7; Sep. St.
8 (CCF) ¶¶ 7, 44. In response, Congress enacted the federal “Defense of Marriage Act” (“DOMA”)
9 in 1996. See Sep. St. (Fund) ¶ 8; Sep. St. (CCF) ¶¶ 8, 45. The federal DOMA purports to
10 authorize the states to refuse effect to any other state’s public acts, records, or proceedings
11 “respecting a relationship between persons of the same sex that is treated as a marriage under the
12 laws of such other State . . . or a right or claim arising from such relationship.” 28 U.S.C.
13 § 1738C. The federal DOMA also states that the term “marriage” in federal legislation and
14 regulations “means only a legal union between one man and one woman as husband and wife.”
15 See 1 U.S.C. § 7. The federal DOMA is concerned only with interstate and federal recognition of
16 marriages, and is silent regarding marriage definitions within a state, including whether states
17 might choose for themselves to permit same-sex couples to marry.

18 Several years later, and just months before California voters considered Proposition 22, a
19 holding of the Vermont Supreme Court that it was unconstitutional to deny same-sex couples
20 access to the legal protections available to married couples raised the possibility that the Vermont
21 Legislature might permit same-sex couples to marry in that state. See Baker v. State (Vt. 1999)
22 744 A.2d 864; Sep. St. (Fund) ¶ 9; Sep. St. (CCF) ¶¶ 9, 46. Vermont’s legislature had not
23 reached a decision when California’s voters went to the polls in March 2000. (Ultimately, the
24 Vermont legislature created a separate legal status for same-sex couples—”civil unions”—rather
25 than permit them to marry. See 15 V.S.A. T. 15, ch. 23.)

26 The purpose of Proposition 22 was to ensure that a decision by Vermont or another state to
27 permit same-sex couples to marry would not require California to treat as valid, or otherwise
28 recognize, any such marriage under Family Code section 308. The ballot materials described

1 section 308’s likely effect in the absence of Proposition 22 as a “loophole” that would require
2 California to treat a hypothetical same-sex couple’s marriage performed outside the state as a
3 marriage even though existing law limited in-state marriage to male-female couples. Sep. St.
4 (Fund) ¶ 22; Sep. St. (CCF) ¶¶ 22, 59. The ballot arguments in support of Proposition 22
5 discussed the federal DOMA and told the voters that Proposition 22 was “necessary” to protect
6 state sovereignty. For example:

- 7 • “When people ask, ‘Why is this necessary?’ I say that even though California law already
8 says only a man and a woman may marry, it also recognizes marriages from other states.
9 However, judges in some of those states want to define marriages differently than we do.
10 If they succeed, California may have to recognize new kinds of marriages”
- 11 • “THE TRUTH IS, UNLESS WE PASS PROPOSITION 22, LEGAL LOOPHOLES
12 COULD FORCE CALIFORNIA TO RECOGNIZE ‘SAME-SEX MARRIAGES’
13 PERFORMED IN OTHER STATES.”

14 Sep. St. (Fund) ¶¶ 19, 22; Sep. St. (CCF) ¶¶ 19, 22, 56, 59.

15 Proposition 22’s text does not mention the institution of domestic partnership. Sep. St.
16 (Fund) ¶ 13; Sep. St. (CCF) ¶¶ 13, 50. Nor did the ballot materials mention domestic partnership
17 by name. Sep. St. (Fund) ¶ 15; Sep. St. (CCF) ¶¶ 15, 52. Certain statements in the ballot
18 arguments that could be viewed as referring to the institution of domestic partnership without
19 naming it emphasized that Proposition 22 would not take away people’s rights. For example,
20 hospital visitation rights for domestic partners were in place statewide in 2000 pursuant to AB 26,
21 and the ballot arguments in favor of Proposition 22 stated that the measure “does not take away
22 anyone’s right to inheritance or hospital visitation.” Sep. St. (Fund) ¶ 17; Sep. St. (CCF) ¶¶ 17,
23 54. Similarly, the rebuttal argument in favor of the Proposition appears to have been designed to
24 reassure voters that Proposition 22 would not affect domestic partners’ rights:

25 “Opponents claim 22 will take away hospital visitation and inheritance rights, even throw
26 people out of their homes. THAT’S ABSOLUTELY FALSE! Do they really expect voters to
27 believe that? THE TRUTH IS, PROPOSITION 22 DOESN’T TAKE AWAY ANYONE’S
28 RIGHTS.”

29 Sep. St. (Fund) ¶ 21; Sep. St. (CCF) ¶¶ 21, 58. Neither the text nor the ballot materials gave
30 notice that Proposition 22 might affect the separate status of domestic partnership. The ballot
31 materials instead conveyed that people’s rights created within California would be unaffected.

1 **IV. LEGAL STANDARDS**

2 **A. Summary Judgment Standard Under California Law**

3 Summary judgment is appropriate when “all the papers submitted show that there is no
4 triable issue as to any material fact and that the moving party is entitled to judgment as a matter of
5 law.” Cal. Code Civ. Proc. § 437c. A defendant can satisfy his burden of “showing that a cause
6 of action has no merit if he has shown that one or more elements of the cause of action cannot be
7 established, or that there is a complete defense to that cause of action.” Aguilar v. Atlantic
8 Richfield Co. (2001) 25 Cal. 4th 826, 849 (citing Code of Civ. Proc. § 437c(o)(2)). A defendant
9 moving for summary judgment bears an initial burden of producing evidence either showing that
10 the plaintiff cannot establish an essential element or establishing an affirmative defense. Id. The
11 burden then shifts to the plaintiff to produce evidence raising a triable issue of material fact. Id.

12 The Fund and CCF both allege only one basis for supposed invalidity of the domestic
13 partnership statute(s) at issue in their respective actions: that each statute allegedly “amends”
14 Proposition 22 in violation of Article II, section 10(c) of the California Constitution.⁵ As
15 explained below, the evidence Intervenors have submitted in support of the present Motions
16 demonstrates as a matter of law that Proposition 22 does not mean what Plaintiffs contend (and
17 would be unconstitutional if so construed) and that AB 205 and AB 25 do not in any way amend
18 the initiative. Intervenors have therefore amply met their initial burden both by showing that
19 Plaintiffs cannot establish essential elements of their claims under Article II, section 10, and by
20 establishing complete affirmative defenses to Plaintiffs’ claims (including constitutional bars to
21 Plaintiffs’ proffered interpretations of Proposition 22).⁶

22 **B. Initiative Preemption Analysis Under Article II, Section 10.**

23 Plaintiffs allege that AB 25 and/or AB 205 “amend(s)” an initiative statute, Proposition 22,
24 in violation of Article II, section 10(c) of the California Constitution. That constitutional

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26 ⁵ See Fund Compl. ¶¶ 38-47; CCF Compl. ¶¶ 11:1-2 (First Cause of Action re AB 205),
13:1-2 (Second Cause of Action re AB 25).

27 ⁶ Intervenors, by their Complaints in Intervention, have joined all defenses asserted by all
28 Defendants, including, as potentially applicable to this Motion, Defendants’ First, Fourth, and
Fifth Affirmative Defenses. Timbridge Enters., Inc. v. City of Santa Rosa (1978) 86 Cal. App. 3d
873, 885 (intervenor-defendant “became a party to . . . [defendant’s] answer and . . . defenses”).

1 provision states that, unless an “initiative statute permits amendment or repeal without [the
2 voters’] approval,” the Legislature “may amend or repeal an initiative statute by another statute,”
3 only by sending the second statute to the voters for approval. Cal. Const. art. II, § 10(c); see also
4 People v. Cooper (2002) 27 Cal. 4th 38, 44. A claim that a legislative statute impermissibly
5 amends or repeals an initiative requires a two-step preemption analysis:

6 (1) interpretation of the initiative (here, Proposition 22) under ordinary rules of statutory
7 construction to determine its meaning, scope, and effect, with the goal of effectuating
8 the voters’ intent, “not more and not less,” Hodges v. Superior Court (1999), 21 Cal.
9 4th 109, 114; and

10 (2) analysis of the challenged legislative statute (here, AB 25 or AB 205) to determine
11 whether the legislative statute amends the initiative, as that initiative has been
12 construed in step (1).

13 These steps are further explained below.

14 1. Initiative Construction Follows Ordinary Interpretive Rules And Must Not
15 Effectuate A Purpose As To Which The Text and Ballot Materials Are Silent.

16 In applying general principles of statutory interpretation to construction of voter initiatives,
17 recent Supreme Court opinions emphasize four key inquiries, in the following order.

18 a. The Initiative’s Text, Including Determination of Any Textual Ambiguity: The starting
19 point is the language of the initiative itself. “[G]iving the words their ordinary meaning,” People
20 v. Rizo (2000) 22 Cal. App. 4th 681, 685, the Court must first determine whether, as relevant to
21 the preemption question at issue, the meaning of the initiative is clear from the initiative’s text, or
22 whether instead there exists an ambiguity on a relevant point. See Hodges, 21 Cal. 4th at 113. A
23 determination of ambiguity may be based not simply on the initiative’s language, but also on how
24 that language is used in “the legal and broader culture.” Id. at 114 & n.4. If there is no ambiguity
25 as to the meaning of an initiative’s text as relevant to the preemption issue, then the Court’s
26 interpretation of the initiative is complete, and the voters’ intent is rightly deemed to be the
27 unambiguous meaning of the initiative’s text. See Day v. City of Fontana (2001) 25 Cal. 4th 268,
28 274 (inquiry into initiative’s meaning may “stop” where “the facts do not appear to raise any

1 ambiguity or uncertainty as to the statute’s application”; Court’s further inquiry into “extrinsic
2 aids that bear on the enactors’ intent” was conducted solely out of “an abundance of caution”).

3 b. Official Ballot Materials as Indicia of Voter Intent. If a court determines that an
4 initiative’s text is ambiguous on a material point, the court should consider the official ballot
5 materials presented to the voters as indicia of the voters’ intent and purpose. See Hodges, 21 Cal.
6 4th at 114-15. The ballot materials may reveal the system, problem, or aspect of California law
7 that the voters deemed “in need of change,” id. at 115, and courts “are obliged to interrogate the
8 electorate’s purpose, as indicated in the ballot arguments and elsewhere” in the ballot materials, id.
9 at 114. The official materials “provided directly to the voters” are the only materials courts may
10 consult in “interrogating the electorate’s purpose.” Horwich, 21 Cal. 4th at 277 n.4.⁷

11 c. Possible Resolution of Remaining Ambiguity Based on Public Policy Considerations.
12 If textual analysis and the ballot materials leave an ambiguity unresolved, a court may consider
13 public policy concerns. The California Supreme Court has expressly held that in such
14 circumstances, a court should reject a “broad literal interpretation” of an initiative that would raise
15 “substantial policy concerns.” Hodges, 21 Cal. 4th at 118.

16 d. Construction to Avoid Absurd Results and Constitutional Difficulties. Finally, if
17 necessary and if possible, the Court must interpret an initiative to avoid absurd results and
18 constitutional difficulties. See People v. Amor (1974) 12 Cal. 3d 20, 30 (“California courts must
19 adopt an interpretation of a statutory provision which, ‘consistent with the statutory language and
20 purpose, eliminates doubt as to the provision’s constitutionality.’”); Horwich, 21 Cal. 4th at 280
21 (“Principles of statute construction also counsel that we should avoid an interpretation that leads to
22 anomalous or absurd consequences”).

23 This California Supreme Court’s opinion in Hodges illustrates key steps in this interpretive
24 process that are relevant to the present analysis of Proposition 22. Hodges considered a provision

25 _____
26 ⁷ Even where a court may be required or permitted under the Evidence Code to take
27 judicial notice of “nonofficial election materials,” “matters [that] were not directly presented to the
28 voters” are “not relevant to [the voter intent] inquiry.” Horwich, 21 Cal. 4th at 277 n.4. Thus,
“statements by individual drafters of a measure’s likely or ‘reasonable’ application” are “not
considered as grounds upon which to construe a statute” because “[t]here is no necessary
correlation between what the drafters understood the text to mean and what the voters enacting the
measure understood it to mean.” Hodges, 21 Cal. 4th at 118 n.6.

1 of Proposition 213, now codified in Civil Code section 3333.4, which provides that uninsured
2 motorists may not recover non-economic damages “in any action to recover damages arising out
3 of the operation or use of a motor vehicle.” 21 Cal. 4th at 112. The issue in Hodges was whether
4 the damages limitation in Proposition 213 should apply to a product liability action brought by an
5 uninsured motorist against an automobile manufacturer. Id. at 112-13. In considering this
6 question, the Hodges Court started by examining the initiative’s text, focusing on the “literal
7 words of the statute,” id. at 113, and concluding that the phrase “any action to recover damages
8 arising out of the operation or use of a motor vehicle” could literally apply to a product liability
9 action but that the statutory language had been understood to have different meanings in different
10 legal contexts, thus rendering the initiative ambiguous. Id. at 114 & n.4. Notably, having
11 identified an ambiguity, the Court refused to apply the initiative’s text as broadly as a literal
12 interpretation of the words would permit. As the Court explained: “[W]e may not properly
13 interpret the measure in a way that the electorate did not contemplate: the voters should get what
14 they enacted, not more and not less.” Id. at 114.

15 The Hodges Court next considered the official ballot materials and found no indication in
16 those materials that the voters intended the initiative to apply to products liability actions given
17 that product liability lawsuits were not mentioned in the ballot materials. Id. at 115-17.
18 Illustrating the third step of the analysis, Hodges then considered the parties’ proposed
19 interpretations of Proposition 213 in light of “the long-standing public policy goal of requiring
20 manufacturers to bear the costs of injuries from defective products,” and concluded that reading
21 Proposition 213 to “limit[] damages against manufacturers of dangerous vehicles” would be
22 inconsistent with that policy. Given that “[n]othing in the legislative history of the initiative
23 suggests that the voters intended that result,” id. at 118, the Hodges Court concluded that
24 Proposition 213 could not be given a meaning to which the ballot materials did not alert the voters,
25 notwithstanding that the text of Proposition 213 lent itself to such an interpretation. Id. at 115-18.

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27
28

1 2. Preemption Analysis Must Guard The People’s Initiative Power, Yet
2 Preserve The Legislature’s Power To Legislate In “Related But Distinct
3 Areas.”

4 Once a court has properly determined an initiative’s meaning, the court can consider
5 whether the legislative statute at issue can be deemed an “amendment” of the initiative for
6 purposes of Article II, section 10. “An amendment is a legislative act designed to change an
7 existing initiative statute by adding or taking from it some particular provision.” Cooper, 27
8 Cal.4th at 44 (citing Proposition 103 Enforcement Project v. Quackenbush (1998) 64 Cal. App.
9 4th 1473, 1485). An “amendment” also includes legislation that would change the “scope or
10 effect” of a voter-enacted initiative. Mobilepark West Homeowners Ass’n v. Escondido
11 Mobilehomepark West (1995) 35 Cal. App. 4th 32, 40 (internal citation and quotation omitted).
12 The “scope or effect” analysis, however, is limited; provided that the voters’ purpose in enacting a
13 given ballot initiative remains undisturbed, Article II, section 10(c) does not preclude the
14 Legislature from acting in a “related but distinct area” of the law. Id. at 43 (contrasting “the heart
15 of the coverage of the initiative measure” and a “related but distinct” area of the law). Although
16 courts are charged with guarding the people’s initiative power against legislative encroachment,
17 even in the preemption analysis under Article II, section 10, the courts “apply the general rule that
18 a strong presumption of constitutionality supports the Legislature’s acts.” Amwest Surety Ins. Co.
19 v. Wilson (1995) 11 Cal. 4th 1243, 1253 (internal quotation and citation omitted).

20 Suggestions by Plaintiffs in earlier papers that initiatives should be construed as broadly as
21 possible reflect a failure to keep separate the two steps of the initiative preemption analysis. The
22 hazard of blurring the two steps is as follows: In the second step of the analysis, when the court is
23 actively comparing the provisions of an initiative statute and a legislative statute, the court’s role
24 includes guarding the people’s initiative power against legislative encroachment and considering
25 whether a legislative statute does, or even may, conflict with an initiative’s meaning. The courts
26 occasionally have expressed this point using broad language calling for protection of an
27 initiative’s meaning, scope, and effect to the fullest extent possible. Those instructions, however,
28 all presuppose that the court has first settled on what the meaning of the initiative is. It confuses

1 and distorts the analysis to apply such instructions to the initial step of determining under ordinary
2 rules of construction what the initiative means. In that first step, the California Supreme Court has
3 emphasized equally the dangers of giving voters more than they thought they were getting and the
4 dangers of giving them less than they intended. See Hodges, 21 Cal. 4th at 114.

5 To be effective, legislative power must include the power to choose between broad and
6 narrow measures. The people’s initiative power is weakened, not protected, when the people’s
7 enacted words are taken out of context—whether by overly broad or by overly narrow
8 construction. Preemption analysis pursuant to Article II, section 10, cannot fulfill its purpose of
9 protecting the people’s power unless that analysis begins with a faithful construction of the
10 language of an initiative so to effectuate what the voters can properly be deemed to have intended.

11 **V. ARGUMENT: PROPOSITION 22 CONCERNS ONLY THE STATUS OF**
12 **MARRIAGE, NOT DOMESTIC PARTNERSHIP, AND NEITHER AB 25 NOR**
13 **AB 205 AMENDS IT.**

14 The present case is easily and properly resolved in Defendants’ favor based solely on an
15 initial textual inquiry regarding Proposition 22’s meaning. Proposition 22’s text is silent as to
16 domestic partners and as to the possible provision of legal protections and responsibilities to same-
17 sex couples, including those protections and responsibilities that may be provided to couples who
18 marry. Even considering the text’s usage in the legal and broader context, there is no ambiguity in
19 Proposition 22’s text that raises a possibility that the voters intended the measure to restrict the
20 legal protections available to the families of same-sex couples who register with the State as
21 domestic partners (as opposed to same-sex couples who marry out of state). Although this Court’s
22 analysis could stop at this point, out of an abundance of caution this Memorandum considers in
23 turn other materials and arguments relevant to construing Proposition 22 to determine whether it
24 may operate to bar legislation protecting same-sex couples who register as domestic partners in
25 California.

26 **A. Proposition 22 Does Not Concern The Institution Of Domestic Partnership.**

27 The plain meaning of Proposition 22, its placement in the Family Code, the official ballot
28 materials provided to the voters, and relevant public policy and constitutional concerns all confirm

1 that the purpose of Proposition 22 was to prevent the validation or recognition of out-of-state
2 marriages between persons of the same sex. Proposition 22 does not in any way address or
3 regulate the separate institution of domestic partnership. Rather, voters were promised that the
4 measure’s intent was not to harm lesbian and gay couples and their families, encourage
5 discrimination, or stand in the way of protecting same-sex couples other than through marriage.

6 1. The Text Of Proposition 22 Is Silent As To Domestic Partnerships.

7 As enacted by Proposition 22, the text of Family Code section 308.5 is a single sentence:
8 “Only marriage between a man and a woman is valid or recognized in California.” Cal. Fam.
9 Code § 308.5; Sep. St. (Fund) ¶ 13; Sep. St. (CCF) ¶¶ 13, 50. Those fourteen words focus
10 exclusively on marriage, and more specifically, on marriage as a status or institution. The text
11 does not in any way refer to domestic partnerships or even to the rights and responsibilities
12 afforded married couples under California law at any given time. Cf. Horwich, 21 Cal. 4th at 280
13 (“Since the initiative . . . contains no mention of heirs or those who might sue for loss of the care,
14 comfort, and society of their uninsured decedents, we are not at liberty to apply” the initiative to
15 preclude wrongful death suits by such individuals).

16 The “context of the statute as a whole and the overall statutory scheme,” Horwich, 87 Cal.
17 Rptr. 2d at 225, confirm that Proposition 22’s subject matter was limited to marriage, and more
18 particularly to placing a limit on the out-of-state marriages that California would be required to
19 treat as entitled to the status of marriage. Proposition 22 provided for its own codification in
20 Division 3 of the Family Code (“Validity of Marriage”)—rather than in the separate Family Code
21 Division 2.5, which is devoted exclusively to “Domestic Partner Registration” and which is the
22 only Family Code division devoted in prominent part to the relationships of same-sex couples.
23 See 1999 Cal. Stat. ch. 588 (AB 26) (establishing Division 2.5); Sep. St. (Fund) ¶ 13; Sep. St.
24 (CCF) ¶¶ 13, 50. Moreover, as explained above in Part III.B, Proposition 22’s self-provision for
25 placement immediately following section 308, as well as the events in Hawaii, Vermont, and
26 Congress (the federal DOMA) that preceded Proposition 22 confirm its focus on the prospect that
27 developments elsewhere would force California to treat out-of-state marriages of same-sex
28 couples as entitled to the legal status of marriage or otherwise recognize such marriages.

1 Proposition 22 is unambiguous in its non-applicability to the separate status of domestic
2 partnership. The voters in March 2000 were given no reason to think that Proposition 22 applied
3 to any family-law status or institution other than marriages from out-of-state, and Hodges teaches
4 that the courts cannot interpret Proposition 22 to mean something contrary to what the voters
5 intended or as to which the voters were given no notice. See Hodges, 21 Cal. 4th at 114-16;
6 Horwich, 21 Cal. 4th at 276. Like the relationships between putative spouses, legally separated
7 couples, and cohabitating couples within California, domestic partnerships are relationships that
8 California law protects, in addition to protecting the relationship of marriage—and sometimes that
9 protection includes rights, benefits, and responsibilities that also come with marriage.⁸

10 Because there is no ambiguity on the issue of whether Proposition 22 has application to
11 domestic partnerships, the Court need not proceed any further in considering the scope and effect
12 of Proposition 22. See Day, 25 Cal. 4th at 274 (when “facts do not appear to raise any ambiguity
13 or uncertainty as to the statute’s application” it is not necessary to consider “extrinsic aids that
14 bear on the enactors’ intent.”). Plaintiffs’ claims are meritless.⁹

15 _____
16 ⁸ Ironically, the literal language of Proposition 22—“ [o]nly marriage between a man and a
17 woman is valid or recognized in California” (emphasis added)—would just as easily or more
18 readily support invalidation of various non-marital relationships “between a man and a woman” as
19 compared to restricting the legal protections available to same-sex couples who are registered as
20 domestic partners. No one seriously contends that the voters intended to say anything at all about
21 such non-marital relationships—such as “Marvin” cohabitation agreements, the relationship of
22 separated spouses, the status of putative spouses, legal guardianships, conservatorships, or powers
23 of attorney. Proposition 22’s equal silence regarding domestic partnerships has equal significance.

24 ⁹ Because Proposition 22 cannot be construed to limit the protections the Legislature
25 may grant to domestic partners, this Court can (and should) grant summary judgment in favor of
26 Defendants and Intervenors without resolving what is likely the most serious ambiguity in the text
27 of Proposition 22: the meaning of the phrase “valid or recognized in California.” In an effort to
28 construe Proposition 22 not only as limiting California’s treatment of out-of-state marriages, but
also as restating Family Code section 300, Plaintiffs have suggested that Proposition 22’s phrase
“valid or recognized in California” should be construed as though the term “valid” applies to in-
state marriages and the term “recognized” applies to out-of-state marriages.

A different reading of the text, however, finds considerably more support in legal context,
in the ballot arguments, and in considerations of public policy and constitutional law. Indeed, on
April 20, 2004, notwithstanding Proposition 22, the California Assembly Judiciary Committee
became the first legislative body in the nation’s history to give approval to a measure that would
permit same-sex couples to marry. See Sep. St. (Fund) ¶ 37; Sep. St. (CCF) ¶¶ 37. In the analysis
of AB 1967 (2004), the Marriage License Non-Discrimination Act, Judiciary Committee counsel
advised that “the text of Proposition 22 uses language long used by courts in California and
elsewhere to describe two different ways that a state may regard an out-of-state marriage The
state may choose to treat the out-of-state marriage as a ‘valid’ marriage for all purposes, or the
state may choose to ‘recognize’ the marriage for certain limited purposes (such as inheritance

1 (the Honorable James T. Ford presiding) rejected a challenge to the title brought by the campaign
2 manager for the official “Yes on 22” campaign. That challenge sought to restore the initiative’s
3 original title, “Definition of Marriage.” See Sep. St. (Fund) ¶ 12; Sep. St. (CCF) ¶¶ 12, 49; RJN,
4 Ex. I, at 168-78. Attorney General Bill Lockyer had substituted the title “Limit on Marriages” on
5 the ground that Proposition 22 did not purport to define marriage, but instead to limit the out-of-
6 state marriages that California would treat as valid marriages or otherwise recognize. Judge Ford
7 ruled in Lockyer’s favor, and Proposition 22 appeared on the ballot with the title Lockyer chose:
8 “Limit on Marriages.” Sep. St. (Fund) ¶ 12; Sep. St. (CCF) ¶¶ 12, 49. A title conveying a purpose
9 to limit one status (marriage), would in no way signal to voters that Proposition 22 might also
10 limit a separate institution (domestic partnership) not even mentioned in the initiative’s text or
11 title.

12 The Official Attorney General Summary in the ballot materials also made no mention of
13 domestic partnerships or benefits. See Sep. St. (Fund) ¶ 15; Sep. St. (CCF) ¶¶ 15, 52.

14 b. Analysis By The Legislative Analyst

15 The Analysis by the Legislative Analyst (“Legislative Analysis”) similarly provided voters
16 with no indication that Proposition 22 might restrict the Legislature’s ability to provide
17 California’s same-sex couples and their families with legal protections of any kind. Instead, the
18 Legislative Analysis was worded in manner likely to be understood as guaranteeing that
19 Proposition 22 would have no such effect:

20 Under current California law, “marriage” is based on a civil contract between a man and a
21 woman. Current law also provides that a legal marriage that took place outside California
22 is generally considered valid in California. No state in the nation currently recognizes a
23 civil contract or any other relationship between two people of the same sex as marriage.
24 Sep. St. (Fund) ¶ 16; Sep. St. (CCF) ¶¶ 16, 53. The first two sentences briefly informed voters of
25 then-existing California law regarding marriage, including California’s treatment of marriages
26 performed outside California. The third sentence, however, highlighted that there existed legal
27 relationships other than marriage between same-sex couples, but that no state then “recognize[d]
28 . . . as marriage” any such “civil contract or any other relationship between two people of the same
sex.” This single reference did not indicate in any way that Proposition 22 would affect any of

1 these relationships other than marriage. Regardless of the voters’ actual or imputed knowledge of
2 California’s domestic partnership laws, the most reasonable conclusion for a voter to have drawn
3 from the Legislative Analysis was that such “other relationship[s] between two people of the same
4 sex” would not be affected by Proposition 22, given that Proposition 22’s text concerns “[o]nly
5 marriage” and that same-sex couples were unable to marry in any state in March 2000.

6 Even though California’s statewide domestic partnership registry was in place when voters
7 went to the polls in March 2000, the Legislative Analysis provided voters with no information
8 regarding California’s domestic partnership laws or any other type of legal relationships available
9 to same-sex couples under California law, such as powers-of-attorney. If the purpose of
10 Proposition 22 had included any intent to restrict the Legislature’s power to grant legal protections
11 to registered domestic partners, as Plaintiffs must show for their claims to survive, the Legislative
12 Analysis presumably would have provided voters with background information on domestic
13 partnership law comparable to the background provided on California’s marriage laws. The
14 silence of the Legislative Analysis regarding California’s domestic partnerships in this critical
15 document is telling as to the baselessness of Plaintiffs’ claims.

16 c. Ballot Arguments

17 The ballot arguments also provided no notice to voters that Proposition 22 might cut off
18 the ability of the Legislature to confer rights and legal protections on members of California
19 families headed by same-sex couples. Although Proposition 22 does not contain a formal
20 “statement of purpose” setting forth the so-called “problem” that the initiative was intended to
21 cure, the official “Argument in Favor of Proposition 22” nonetheless made plain the “express
22 goal” of the initiative, Hodges, 21 Cal. 4th at 117, by explaining to voters that Proposition 22 was
23 “necessary” in light of judicial opinions from outside of California concerning so-called “same-
24 sex marriage.”“ Sep. St. (Fund) ¶ 19; Sep. St. (CCF) ¶¶ 19, 56. The “Rebuttal to Argument
25 Against Proposition 22” repeated this emphasis, responding to the charge that Proposition 22 was
26 unnecessary by pointing again to the possibility that absent Proposition 22, “LEGAL
27 LOOPHOLES COULD FORCE CALIFORNIA TO RECOGNIZE ‘SAME-SEX MARRIAGES’
28 PERFORMED IN OTHER STATES.” Sep. St. (Fund) ¶ 22; Sep. St. (CCF) ¶¶ 22, 59. The

1 Rebuttal then made reference to the federal DOMA, state laws passed pursuant to it, and the
2 importance of state sovereignty, stating: “That’s why 30 other states and the federal government
3 have passed laws closing these loopholes. California deserves the same choice.” RJN, Ex. D, at
4 84. As noted earlier, the federal DOMA concerns only interstate and federal recognition of
5 marriage. See 1 U.S.C. § 7; 28 U.S.C. § 1738C; RJN, Ex. H, at 166-67. The federal DOMA
6 speaks neither to the marriages a state itself might wish to recognize, nor to any other type of
7 relationship, including domestic partnerships, civil unions, or any other family relationship. The
8 ballot arguments’ reference to the federal DOMA would have assured voters that Proposition 22’s
9 focus was solely on issues arising out of our federal system—that is, issues concerning whether
10 one state’s decision to permit same-sex couples to marry would require either another state or the
11 federal government to honor that marriage—as a valid marriage or otherwise.

12 Nothing in the ballot arguments informed the California electorate that Proposition 22
13 would have any impact on the separate state institution of domestic partnership. To the contrary,
14 in the “Rebuttal to Argument Against Proposition 22,” the initiative’s proponents specifically
15 reassured voters that “PROPOSITION 22 DOES NOT TAKE AWAY ANYONE’S RIGHTS.”
16 Sep. St. (Fund) ¶ 21; Sep. St. (CCF) ¶¶ 21, 58. Indeed, as noted above, the only arguable
17 reference to domestic partnership rights in the “Argument in Favor of Proposition 22” was a
18 reference to the fact that Proposition 22 “does not take away anyone’s right to inheritance or
19 hospital visitation.” Sep. St. (Fund) ¶ 17; Sep. St. (CCF) ¶¶ 17, 54 (emphasis in original). The
20 “Rebuttal to Argument Against Proposition 22” also reassured voters that Proposition 22 would
21 not “take away hospital visitation and inheritance rights.” Sep. St. (Fund) ¶ 21; Sep. St. (CCF)
22 ¶¶ 21, 58. Hospital visitation, of course, was a right that AB 26 provided to registered domestic
23 partners in March 2000. See Sep. St. (Fund) ¶¶ 3, 10; Sep. St. (CCF) ¶¶ 3, 10, 47.

24 d. The “Quick Reference Voter Guide”

25 The March 2000 official ballot materials also contained a document entitled “Quick
26 Reference Voter Guide” (hereinafter “Guide”). See Sep. St. (Fund) ¶¶ 24-25; Sep. St. (CCF)
27 ¶¶ 24-25, 61-62; RJN, Ex. D, at 87-89. The ballot materials expressly advised voters to take this
28 Guide to the polls with them on Election Day. See Sep. St. (Fund) ¶ 24; Sep. St. (CCF) ¶¶ 24, 61.

1 The page of the Guide discussing Proposition 22 again emphasized that its purpose was to prevent
2 “interference from judges in other states trying to change that definition and force us to recognize
3 ‘same-sex marriages.’ 30 states already protect marriage. Now California can too. Our State.
4 Our Choice. Yes on 22.” See Sep. St. (Fund) ¶ 25; Sep. St. (CCF) ¶¶ 25, 62 (emphasis in
5 original). Those statements reinforced the state-sovereignty-based aim of Proposition 22 in
6 connection with the possibility of same-sex couples being permitted to marry in other states.

7 3. Public Policy Concerns Further Underscore That Proposition 22 Has No
8 Impact on Domestic Partnerships or Domestic Partner Benefits.

9 California’s substantial public policy of protecting families centered on legal relationships
10 other than marriage further compounds the significant difficulties posed by Plaintiffs’ proffered
11 interpretation of Proposition 22. Not only is Plaintiffs’ proposed construction at odds with the text
12 of section 308.5 and the ballot materials presented to the voters, it also contravenes fundamental
13 public policy goals of California as recognized by the Supreme Court and by the Legislature.

14 The Supreme Court has repeatedly acknowledged California’s public policy of extending
15 protections to families not headed by married couples. Indeed, within the past year, in Sharon S.
16 v. Superior Court (Annette F.) (2003) 31 Cal. 4th 417, the Supreme Court reaffirmed California’s
17 commitment to protecting and strengthening the bonds of all California families in holding that
18 domestic partners can utilize second-parent (also known as “limited consent”) adoption procedures
19 under the independent adoption laws. See id. at 438-39. Sharon S. follows a long tradition of
20 California judicial decisions recognizing the importance of protecting numerous non-marital
21 family relationships. For example, since its 1932 decision in Trutalli v. Meraviglia (1932) 215
22 Cal. 698, the California Supreme Court has “recognized the principle that nonmarital partners may
23 lawfully contract concerning the ownership of property acquired during the relationship.” Marvin,
24 18 Cal. 3d at 667 (discussing and citing Trutalli). In Marvin, the California Supreme Court
25 expanded its holding in Trutalli to make clear that unmarried cohabitating adults are free to make
26 contractual agreements regarding property, earnings, and palimony support. Id. at 683. The right
27 to enter into and enforce a Marvin agreement applies with equal force to same-sex and different-
28 sex couples who live together. See Whorton v. Dillingham (1988) 202 Cal. App. 3d 447, 453.

1 The Legislature also has extended protections to families headed by nonmarried couples through
2 power of attorney statutes, which grant broad authority to an agent “to act on the principal’s behalf
3 with respect to all lawful subjects” including financial and healthcare decisions. Cal. Probate
4 Code § 4123; see also id. § 4711 et seq. (providing for healthcare power of attorney). Through
5 powers of attorney, two unmarried persons can effectively secure for themselves many of the legal
6 rights that married couples enjoy, albeit without the status of marriage and resulting benefits. Any
7 suggestion by Plaintiffs that married couples have a monopoly on any right, benefit, or legal
8 protection—or any collection thereof—is as inconsistent with California policy as it is inaccurate.
9 Indeed, the Legislature expressly so recognized and provided in section 1(c) of AB 205 that:

10 [t]his act is not intended to repeal or adversely affect any other ways in which relationships
11 may be recognized or given effect in California, or the legal consequences of those
12 relationships, including, among other things, civil marriage, enforcement of palimony
13 agreements, enforcement of powers of attorney, appointment of conservators or guardians,
14 and petitions for second parent or limited consent adoption.

15 The purported countervailing policy proffered by Plaintiffs in earlier proceedings in these
16 cases is that to protect one set of California families, such as registered domestic partners and their
17 children, will somehow harm married couples or devalue the institution of marriage. The Fund
18 advanced a similar argument last summer in Sharon S., and the Supreme Court soundly rejected it:
19 “Amicus curiae Proposition 22 Legal Defense and Education Fund suggests that to affirm the
20 statutory permissibility of second parent adoption ‘would offend the State’s strong public interest
21 in promoting marriage.’ We disagree.” Sharon S., 31 Cal. 4th at 438. The Supreme Court
22 explained that its “decision encourages and strengthens family bonds.” Id. at 439; see also id.
23 (“As Justice Scalia has noted, the ‘family unit accorded traditional respect in our society . . .
24 includes the household of unmarried parents and their children.’” (quoting Michael H. v. Gerald
25 D. (1989) 491 U.S. 110, 123, fn. 3).¹⁰ The Supreme Court’s policy pronouncements in Sharon S.
26 confirm the soundness of the Legislature’s enacted findings in AB 205 that “[e]xpanding the rights
27 and creating responsibilities of registered domestic partners would further California’s interests in

28 ¹⁰ Although Sharon S. upheld a second-parent adoption procedure first utilized prior to
AB 25’s passage, the Supreme Court’s affirmation of second-parent adoption by domestic
partners, and the Court’s express recognition that such adoptions further California’s strong public
policy of strengthening family ties, render remarkable Plaintiff CCF’s attempt in this litigation to
invalidate AB 25 in its entirety, including its provision for second-parent adoption.

1 promoting family relationships and protecting family members during life crises.” 2003 Cal. Stat.
2 ch. 421, § 1(b) (AB 205) (emphasis added).

3 4. Proposition 22 Must Be Construed To Avoid Constitutional Difficulties
4 Posed By Plaintiffs’ Proffered Constructions.

5 Although Intervenors have shown that Proposition 22’s meaning is clear from its text, from
6 the statutory context, from the official ballot materials presented to the voters, and from public
7 policy considerations, were there any doubt remaining as to the initiative’s meaning, the Court
8 would be obligated to interpret Proposition 22 to avoid constitutional difficulties. See Amor, 12
9 Cal. 3d at 30. This interpretive canon would certainly apply here given that Plaintiffs’ proposed
10 interpretations of Proposition 22 would violate federal and state equal protection guarantees.

11 As noted in the Introduction, CCF and the Fund both contend that this Court should
12 construe Proposition 22 so as to bar the Legislature from granting to one class of persons—same-
13 sex couples and their families—any subset of the legal protections that have been granted to
14 married couples (which currently means different-sex couples). In other words, Plaintiffs
15 complain not about the substance of any protections at issue, but about the possibility that married
16 couples might not be guaranteed some sort of monopoly on those protections. The state and
17 federal constitutions, however, do not permit classifications that are driven by a desire simply to
18 maintain distinction between two classes of families, with no justification offered for such
19 distinction other than the majority’s supposed desire for it.

20 To Intervenors’ knowledge, no admissible evidence exists that the electorate in March
21 2000 harbored or expressed any such desire to prevent the California Legislature from providing
22 aid and legal protections to same-sex couples and their families. As the U.S. Supreme Court
23 explained in overturning the Colorado-enacted initiative at issue in Romer v. Evans:

24 [i]t is not within our constitutional tradition to enact laws of this sort. Central both to the
25 idea of the rule of law and to our own Constitution’s guarantee of equal protection is the
26 principle that government and each of its parts remain open on impartial terms to all who
27 seek its assistance. . . . A law declaring that in general it shall be more difficult for one
group of citizens than for all others to seek aid from the government is itself a denial of
equal protection of the laws in the most literal sense.

28 (1996) 517 U.S. 620, 633 (emphases added). Romer’s admonitions under the federal Equal

1 Protection Clause would only be stronger under California’s two guarantees of equality in
2 Article I, Section 7—California’s equal protection and privileges and immunities clauses.

3 The purpose that the Plaintiffs put forward for Proposition 22—to seal off one group of
4 families from legal protections and from access to legal protections—would constitute animus
5 against those families. See Romer, 517 U.S. at 632 (invalidating voter-enacted state constitutional
6 amendment the “sheer breadth” of which was “so discontinuous with the reasons offered for it”
7 that the amendment “seem[ed] inexplicable by anything but animus toward the class it affects” and
8 therefore “lack[ed] a rational relationship to legitimate state interests”). And if animus lies behind
9 Proposition 22, then the measure as a whole is invalid—including any of its meanings that might
10 otherwise be permissible objects of legislation—given that there would be no doubt regarding the
11 intent and the effect of such a measure to classify based on sex and sexual orientation.

12 In sum, Proposition 22 cannot permissibly be read to restrict the Legislature’s power to
13 provide rights and protections to families headed by same-sex couples, as Plaintiffs suggest. More
14 fundamentally, nothing in the text of Proposition 22 or its ballot materials suggests the voters
15 intended anything of the sort. Proposition 22 has nothing to say about the legal protections that
16 the Legislature may grant domestic partners, and Plaintiffs’ claims all must fail as a matter of law.

17 **B. Because Proposition 22 Does Not Concern Domestic Partnership And Neither**
18 **AB 25 Nor AB 205 Affects Marriage, Article II, Section 10(C) Is Not**
19 **Implicated, Much Less Violated, By AB 25 Or AB 205.**

20 Because it is clear, as set forth above, that Proposition 22 does not concern either the
21 institution of domestic partnership or the particular legal protections accorded registered domestic
22 partners under California law, it is readily apparent that Plaintiffs cannot establish that either
23 AB 25 or AB 205 (neither of which has any effect on any marriages) “amends” Proposition 22.

24 1. Because AB 25 Confers Only A Small Set Of Rights And Protections,
25 AB 25 Simply Cannot Be Deemed To “Amend” Proposition 22.

26 It is telling that CCF is the sole Plaintiff to challenge the validity of AB 25. AB 25
27 concerns only domestic partnerships and does not affect the institution of marriage that
28 Proposition 22 addresses. AB 25 has no impact whatsoever on the validation or recognition of

1 marriages performed in other states—the sole purpose of Proposition 22. In addition, AB 25
2 confers only a limited number of rights—nothing comparable to what is available under marriage.
3 Moreover, AB 25 has been in effect for over two years, with no suggestion by the courts that it
4 might “amend” or run afoul of Proposition 22.

5 Notably, the text of Proposition 22 and the official ballot materials are completely silent as
6 to the effect of Proposition 22 on each of the specific rights set forth and extended to registered
7 domestic partners by AB 25.¹¹ CCF’s charge is merely that “AB 25 grants registered domestic
8 partners several rights previously afforded only to spouses under California law.” Id. ¶ 114.

9 As an initial matter, CCF’s allegation that the rights extended to registered domestic
10 partners through AB 25 were “previously afforded only to spouses under California law,” CCF
11 Compl. ¶ 114 (emphasis added), is inaccurate. For example, a cause of action for negligent
12 infliction of emotional distress or wrongful death may be asserted not only by a “decedent’s
13 surviving spouse or domestic partners,” but also by a decedent’s children and others. See Cal
14 Code Civ. Proc. § 377.60 (as amended by AB 25). Similarly, “an employer who provides sick
15 leave for employees” must permit an employee to use sick leave to care not only for a spouse or
16 domestic partner, but also for a child or parent. See Cal. Labor Code § 233.

17 CCF’s repeated underscoring of the phrase “the same” in the Complaint’s enumeration of
18 AB 25’s substantive protections suggests that what CCF truly finds objectionable in AB 25 may
19 simply be AB 25’s express language in several provisions stating that a given protection being
20 provided to same-sex couples is “the same” right that married couples enjoy. As explained

21 ¹¹ As pled by CCF, AB 25 supplements AB 26 by providing registered domestic partners
22 and their families with the following rights: (1) “the same right to sue for negligent infliction of
23 emotional distress and wrongful death as spouses” (CCF Compl. ¶ 23) (emphasis in original);
24 (2) “the same adoption rights as applicable to stepparent adoption” (Id. ¶ 24) (emphasis in
25 original); (3) “government employees eligib[ility], on the same terms as spouses, for continued
26 health care coverage upon the death of the government employee” (Id. ¶ 25); (4) “the same right
27 as spouses to make health care decisions for their domestic partners” (Id. ¶ 26); (5) entitlement
28 “to use sick leave to care for an ill domestic partner or child of a domestic partners” (Id. ¶ 27);
(6) “rights concerning conservatorships, trusts and management of estates” (Id. ¶ 28); (7) “certain
tax benefits to domestic partners on the same terms as spouses based on medical and health care
costs available to domestic partners” (Id. ¶ 29); (8) “[f]or purposes of qualifying for
unemployment benefits . . . the [good cause] right to leave one’s employment to accompany a
domestic partner to a place from which it is impractical to commute and to which a transfer by the
employer is not available” (Id. ¶ 30); and (9) “the same rights as spouses to make a disability
claim on behalf of a partner” (Id. ¶ 26) (emphasis in original).

1 previously, married couples in California for many years have had nothing even closely
2 resembling a monopoly on the rights and responsibilities of marriage, and Proposition 22’s
3 purpose did not include creation of any such monopoly. Accordingly, AB 25’s limited extension
4 of protections to domestic partners cannot be regarded as an “amendment” of Proposition 22. If it
5 were, then Proposition 22 presumably would bar the Legislature from extending any further
6 benefits to families headed by same-sex couples, a position which finds no support in the text of
7 Proposition 22 or in the official ballot materials, and which runs counter to California public
8 policy as declared in Sharon S. and AB 205.

9 In sum, because it is plain that the Legislature may grant domestic partners some legal
10 protections, and because it is undisputed that AB 25 does not grant domestic partners all of the
11 legal protections that marriage affords, it is impossible to discern what limiting principle could be
12 placed on any theory under which Proposition 22 restricts the Legislature’s ability to extend a
13 limited set of legal protections (as in AB 25) to same-sex couples. Plaintiffs have not articulated
14 any such limiting principle, and it is not credible that the California voters had any such principle
15 in mind when they enacted Proposition 22. Furthermore, any such cap selectively imposed only
16 on a particular set of families would raise serious constitutional questions, as previously discussed.

17 2. AB 205 Falls Far Short Of Giving Domestic Partners All The Rights and
18 Responsibilities Of Marriage, And Would Not Amend Proposition 22 If It Did.

19 The premise of Plaintiffs’ challenges to AB 205 is that by allegedly conferring on domestic
20 partners all the rights and duties of marriage, AB 205 amends Proposition 22 by establishing a
21 status equivalent to marriage for same-sex couples. This argument is fundamentally flawed.

22 Plaintiffs acknowledge that there are numerous differences between marriage and domestic
23 partnership. See, e.g., CCF Compl. ¶ 82 (“Other than the name and certain tax benefits, the
24 Domestic Partner Act [AB 205] grants registered domestic partners all of the rights afforded to
25 spouses under California law.”) (emphasis added). Plaintiffs’ concessions regarding the
26 differences between marriage and domestic partnership doom their challenge to AB 205 because
27 California does not recognize a legal relationship as a “marriage” unless that relationship confers
28 all of the rights and benefits of marriage. See Rosales, 113 Cal. App. 4th at 1183. In Rosales, the

1 Court of Appeal considered whether to recognize the Mexican relationship of “concubinage” as a
2 marriage for purposes of California’s wrongful death statute, which authorizes suit by a surviving
3 “spouse.” Under Mexican law, a concubinage is a union between a man and a woman declared in
4 a formal civil court judgment when certain preconditions are met, such as having children together
5 or residing together for the preceding five-year period. Id. Concubinage under Mexican law
6 confers numerous rights following the death of the male partner, including rights to inheritance,
7 alimony, insurance proceeds, and retirement funds. Id. The plaintiff argued that concubinage was
8 the equivalent of common-law marriage, but conceded “that a concubinage does not confer all the
9 rights or duties as a legal marriage.” Rosales, 113 Cal. App. 4th at 1184 (emphasis added).

10 The Court of Appeal held that the plaintiff was not eligible to bring a wrongful death as a
11 “spouse” because she could not satisfy the meaning of “marriage” in Family Code section 308. Id.
12 at 1183; Cal. Fam. Code §§ 308, 308.5. The Court of Appeal specifically identified only two
13 differences between concubinage and common-law marriage (different rules regarding use of last
14 names and different termination procedures) and focused on only one of those (termination
15 procedures). See id. (noting that a concubinage, unlike a common-law marriage, can be
16 terminated by a single partner without the other’s consent). Although alluding to the existence of
17 other differences, the Court regarded the difference in manner of termination enough to disqualify
18 the plaintiff’s relationship with the decedent from being a “marriage” as the term is used in the
19 Family Code. Id. (“The trial court correctly found concubinage is not equivalent to a common law
20 marriage because it does not confer on the parties all of the rights and duties of marriage.”).

21 The holding of Rosales disposes of Plaintiffs’ contention that domestic partnership in
22 California, by virtue of AB 205, is equivalent to “marriage” under the Family Code. As in
23 Rosales, Plaintiffs’ concession that there are numerous differences between domestic partnership
24 and marriage is alone sufficient to illustrate that AB 205 does not render domestic partnership
25 equivalent to marriage and to establish that Plaintiffs cannot state a cause of action. Indeed,
26 although Plaintiffs try mightily to minimize the differences between marriage and domestic
27 partnership, the differences are far greater than the two identified by the Court of Appeal in
28 Rosales: different termination procedures and different rules regarding use of last names. Id. at

1 1184. Among the differences that will remain in 2005 are the following items applicable to
2 marriage but not domestic partnership: (1) issuance of licenses by county clerks. See Fam. Code
3 §§ 300-01; (2) submission of certificates of registry to county clerks containing vital statistics (see
4 Fam. Code §§ 350-60); (3) solemnization by government or religious officials (see Fam. Code §§
5 400-02, 420-25); (4) ability to file joint state income tax returns (see Rev. & Tax. Code §§ 18521-
6 22); (5) access to the same long-term care benefits for partners as provided to married government
7 employees (see Cal. Fam. Code § 297.5(h)); (6) coverage of relationship under conflict of interest
8 rules governing Coastal Commission members and employees (see Pub. Res. Code § 27231);
9 (7) requirement to file court proceedings in all terminations (see Fam. Code § 2000-2129); and
10 (8) provisions under 1,138 federal statutes. Sep. St. (Fund) ¶¶ 30-36; Sep. St. (CCF) ¶¶ 30-36.

11 Plaintiffs’ arguments as to why the differences between marriage and domestic partners
12 should not be considered as rendering the two statuses different are meritless. First, Rosales
13 forecloses Plaintiffs’ efforts to ignore “technical and procedural” differences, for the difference
14 that the Rosales Court emphasized was a difference in termination procedures. Second, Plaintiffs’
15 argument selectively relies on provisions reciting “the same rights, protections, and benefits,” see
16 Fam. Code § 297.5(a), (b), (c), while ignoring AB 205’s numerous express exceptions.

17 Third, Plaintiffs incorrectly contend that California law is not responsible for the different
18 treatment that domestic partners will receive from jurisdictions other than California, including the
19 federal government. California’s designation of domestic partners using a term other than
20 “marriage” may, for some jurisdictions, be sufficient to deny California domestic partners the
21 rights and benefits of marriage under those jurisdictions’ laws. Approximately a dozen states have
22 not adopted any laws such as Proposition 22 purporting to limit recognition of out-of-state
23 marriages to different-sex marriages. By enacting into law distinctions between domestic
24 partnerships and marriages, California is the jurisdiction that will be responsible for the denial of
25 marriage rights to California domestic partners by jurisdictions that choose to recognize foreign
26 marriages between same-sex couples but not other statuses—just as differences in Mexican law
27 between concubinage and marriage were responsible for the outcome in Rosales.

28 Finally, as explained in the Introduction, wholly apart from possible comparisons of the

1 sets of legal protections available under the separate institutions of marriage and domestic
2 partnership, California's denial to same-sex couples of the status of marriage is itself a distinction
3 of enormous importance and consequence. Reserving the word "marriage" and the status of
4 marriage for relationships between a man and a woman was greatly emphasized in Proposition
5 22's ballot materials, and is consistent with the Proposition 22's focus on validity and recognition.

6 Indeed, Massachusetts' highest court recently held that access to the status of marriage is
7 of such import that even if same-sex couples were accorded identical legal rights and benefits
8 through a truly parallel institution it would nonetheless violate the Massachusetts constitution to
9 deny same-sex couples access to the actual institution of marriage and the very label "marriage."
10 802 N.E. 2d at 527. As the Court explained, "forbid[ding] same-sex couples entry into civil
11 marriage . . . continues to relegate same-sex couples to a different status. . . . The history of our
12 nation has demonstrated that separate is seldom, if ever, equal." Goodridge II, 820 N.E. 2d at 569.

13 Given that teaching of our nation's history and the obvious import of the status of marriage
14 in our society, Plaintiffs' efforts to obtain an injunction preventing the state's domestic partners
15 from having access to any of the legal protections in AB 205 on the (manifestly erroneous) ground
16 that AB 205 "amends" Proposition 22 by creating "marriage by another name" simply reflects that
17 Plaintiffs, far from being defenders of civil marriage, seek to misuse Proposition 22 as a weapon
18 in their fight to deny rights to Californians who unquestionably are not married.

19 **VI. CONCLUSION**

20 In each case, Intervenors respectfully request entry of summary judgment, or orders summarily
21 adjudicating all causes of action, in all Intervenors' and Defendants' favor, against all Plaintiffs.

22 Dated: April 23, 2004

Respectfully submitted,

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