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

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

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1 **I. INTRODUCTION**

2 The twelve Defendant-Intervenor couples, who are California registered domestic partners
3 and whose rights Plaintiffs seek to eliminate through this case, and Defendant-Intervenor Equality
4 California, on behalf of itself and its members whose rights also are at stake here, (collectively,
5 “Intervenors”) submit this Memorandum in reply to the respective oppositions of Plaintiffs
6 Proposition 22 Legal Defense and Education Fund (“Fund”) and Campaign for California Families
7 (“CCF”) to Intervenors’ motions for summary judgment or adjudication in two consolidated cases:
8 No. 03AS05284, Knight, et al. v. Schwarzenegger, et al., and No. 03AS07035, Thomasson, et al.
9 v. Schwarzenegger, et al.

10 Disposition of both motions is a straightforward matter at this point, as both Plaintiffs have
11 admitted that all of the material facts supporting Intervenors’ motions for summary judgment are
12 undisputed, and have failed to refute Intervenors’ showing that Proposition 22 concerns only the
13 status of marriage and that neither AB 25 nor AB 205 amends it.

14 **II. ARGUMENT**

15 A. Plaintiffs Concede That There Are No Triable Issues of Material Fact That Would
16 Preclude Granting Summary Judgment In Intervenors’ Favor.

17 In both Plaintiffs’ responses to Defendant-Intervenors’ Separate Statement of Undisputed
18 Material Facts, Plaintiffs admit that all of the material facts on which Intervenors rely are
19 undisputed.¹ Indeed, the Fund expressly states twice in its opposition brief that “[t]he material

20 ¹ In Plaintiff Fund’s Response to Defendant-Intervenors’ Separate Statement of
21 Undisputed Material Facts in Support of Summary Judgment, or in the Alternative Summary
22 Adjudication of All Causes of Action, in Case No. 03AS05284 (Knight) (“Fund Opp. Stmt.”), the
23 Fund describes as “Undisputed” every material fact listed in Intervenors’ Separate Statement
24 except for number 11 (“California voters enacted Proposition 22 on March 7, 2000”), as to which
25 the Fund’s response, in an apparent oversight, leaves a blank. *Id.* at 3:20-24. In Plaintiff CCF’s
26 Opposing Statement to Defendant-Intervenor Equality California’s Separate Statement of
27 Undisputed Facts in Support of Motion for Summary Judgment, or in the Alternative Summary
28 Adjudication of All Causes of Action in Case No. 03AS07035 (Thomasson) (“CCF Opp. Stmt.”),
CCF likewise concedes that every one of the material facts listed in Intervenors’ Separate
Statement is “Undisputed.” While the Fund also has submitted a document entitled “Plaintiff’s
Response to Defendants’ and Intervenors’ Separate Statement of Undisputed Facts in Support of
Motion for Summary Judgment,” incorporating as additional purported “Undisputed” facts matters
that the Fund submitted in support of its own motion for summary judgment, this practice is
unauthorized and improper under California’s procedural law, and the Court should therefore

1 facts are undisputed.” See Plaintiff Fund’s Opposition to Defendants’ Motion for Summary
2 Judgment (“Fund Opp.”) 1:24, 24:27-28. Accordingly, there is no barrier to this Court deciding
3 the legal issues presented by Intervenors’ motions.

4 B. Proposition 22 Addresses Only Marriage, And Therefore AB 205 And AB 25,
5 Which Concern Domestic Partnerships And Not Marriage, Cannot Be Found To
6 Amend The Initiative.

7 Both the Fund and CCF concede, in response to the Separate Statement of Defendants
8 Davis (Schwarzenegger), Jefferds and Brandt, that it is “Undisputed” that Proposition 22
9 “addressed only the subject of marriage.”² This concession should be the end of the inquiry about
10 whether AB 25 and AB 205 improperly amend Proposition 22, since these statutes do not regulate
11 marriage (apart from AB 205’s provision, consistent with Proposition 22, that marriages of same-
12 sex couples entered outside California will not be recognized in California, see Intervenors’
13 Request for Judicial Notice in Support of Motions for Summary Judgment, or in the Alternative
14 Summary Adjudication of All Causes of Action in Consolidated Cases Nos. 03AS05284

15 disregard that filing. See Cal. Code Civ. Proc. § 437; Cal. Rules Ct., rule 342 (allowing party
16 opposing summary judgment to include additional disputed facts in separate statement to defeat
17 summary judgment but, unlike federal practice, not providing for submission of additional
18 purportedly undisputed facts). Should the Court nevertheless consider the Fund’s additional
19 filing, Intervenors hereby request that the Court take judicial notice of the responses Intervenors
20 submitted to those purportedly “undisputed facts” in opposition to CCF’s motion for summary
21 judgment, which Intervenors incorporate herein by reference. CCF also inappropriately has listed
22 one “Additional Undisputed Fact” (see CCF Opp. Stmt. 40:1-6) that actually is a disputed legal
23 issue and not an undisputed fact; CCF further has submitted an additional inadmissible
24 Declaration (of Lynn D. Wardle) and inappropriately seeks to rely on declarations submitted in
25 support of its motion for summary judgment that CCF has failed to submit in opposition to
26 Equality California’s motion. None of these declarations are even referenced in CCF’s Opposing
27 Statement, and all improperly present the respective declarants’ opinions regarding the meaning of
28 Proposition 22 – opinions that are neither legally relevant nor cognizable by this Court. See
Horwich v. Superior Court (1999) 21 Cal. 4th 272, 277 n.4 (only materials “provided directly to
the voters” may be considered in determining meaning of initiative); Hodges v. Superior Court
(1999) 1 Cal. 4th 109, 118 n.6 (drafters’ intent is not probative).

² See Plaintiff Fund’s Response to Defendants Davis, Jefferds and Brandt’s Separate
Statement of Undisputed Facts in Support of Motion for Summary Judgment 2:4-8, and Plaintiff
CCF’s Opposing Statement to Defendants’ Davis, Jefferds and Brandt’s Separate Statement of
Undisputed Facts in Support of Motion for Summary Judgment 2:23-26. Intervenors respectfully
request that the Court take judicial notice of these documents for purposes of Intervenors’
Motions.

1 and 03AS07035 (“Intervenors’ RJN”), Ex. C at 71 (AB 205 § 9 (codified as Cal. Fam. Code
2 § 299.2 (2004))). See Day v. Fontana (2001) 25 Cal. 4th 268, 274 (inquiry into initiative’s
3 meaning may “stop” where “the facts do not appear to raise any ambiguity or uncertainty as to the
4 statute’s application”).

5 Should the Court nonetheless wish to proceed with further inquiry beyond the language of
6 Proposition 22 out of “an abundance of caution,” as was done in Day, id., Plaintiffs’ opposition
7 papers themselves confirm that the Legislature did not amend Proposition 22 by passing either
8 AB 25 or AB 205. Plaintiffs concede that it is undisputed that the phrases “domestic partner,”
9 “domestic partners,” “domestic partnership,” “domestic partnerships,” and “domestic partner
10 benefits” (the subjects of AB 25 and AB 205) do not appear anywhere in the text of Proposition 22
11 or any of the official ballot materials that were distributed to voters. See Fund Opp. Stmt. 5:3-17;
12 CCF Opp. Stmt. 8:20-9:23, 28:20-29:10. While Plaintiffs try to argue that the voters meant to
13 grant to married couples a monopoly on the various rights that happens to accompany marriage,
14 the text of Proposition 22 and the official ballot materials speak only about the status of
15 “marriage” itself, not about rights or benefits that may be granted to married couples. See
16 Defendant-Intervenors’ Memorandum of Points and Authorities in Support of Motions for
17 Summary Judgment, or in the Alternative, for Summary Adjudication of All Causes of Action in
18 Consolidated Cases Nos. 03AS05284 and 03AS07035 (“Intervenors’ Mem.”), at 16:6–17:14.

19 Moreover, as Plaintiffs further concede, Proposition 22’s official ballot materials expressly
20 provided that Proposition 22 would not take away “anyone’s rights,” and specifically promised
21 this with regard to “inheritance” rights. Fund Opp. Stmt. 6:3-8, 7:9-18; CCF Opp. Stmt. 10:13-20,
22 12:14-27. Inheritance rights of course include rights to intestate inheritance, the right to be
23 included in the state’s statutory will form, the right to have priority in being selected as
24 administrator of an estate, and the right to protection against disinheritance. See Cal. Prob. Code
25 §§ 100 et seq., 6401 et seq., 6420 et seq., 8461, and 21610. Contrary to the promise of the ballot
26 materials supporting the initiative, the injunctive relief Plaintiffs seek in this case would take away
27 these inheritance rights that the Legislature has provided to domestic partners through AB 25 and
28 AB 205. See Intervenors’ Mem. at 21:12-23; 25:20–27:17. The ballot materials expressly

1 promised that Proposition 22 would have no such effect.

2 Notwithstanding that the fourteen words that Proposition 22 enacted into law address the
3 limited subject of the validity or recognition of certain “marriage[s],” Plaintiffs argue that
4 Proposition 22 should be interpreted to include words not mentioned in the initiative itself or in
5 the official information presented to the electorate about the initiative. Examining the language
6 used in Plaintiffs’ arguments and the declarations on which they rely is revealing, for Plaintiffs’
7 arguments and declarations reveal how Proposition 22 would have needed to have been phrased
8 and what the ballot materials would have had to explain to the voters if the measure were to have
9 the meaning (or even the ambiguity) ascribed to the measure by Plaintiffs.³ Of course

10 _____
11 ³ See, e.g., Fund. Opp. 4:5-7 (“Proposition 22 ... assures that the legal institution of
12 marriage, along with its rights, benefits, and obligations is limited to opposite-sex couples.”)
13 (emphasis added); *id.* at 4:27-28 (Proposition 22 ... limits the extension of marital rights and
14 benefits to domestic partners”) (emphasis added); *id.* at 6:8-9 (“under Proposition 22, marital
15 benefits are to be generally reserved to opposite-sex couples”) (emphasis added); *id.* at 6:18
16 (Proposition 22 would limit radical expansion of domestic partner benefits”) (emphasis added); *id.*
17 at 7:15-20 (“voters received the clear message that Proposition 22 would ... prevent marital
18 benefits from being extended to domestic partners”) (emphasis added); *id.* at 8:22-23
19 (“Proposition 22 was created to prohibit California’s recognition of same-sex marital type
20 relationships”) (emphasis added); Memorandum of Points and Authorities of CCF in Opposition
21 to Motions for Summary Judgment (“CCF Opp.”) 5:19-21 (Proposition 22 prohibited “the
22 Legislature from substantially broadening . . . the grant of marital rights upon domestic partners”)
23 (emphases added); *id.* at 8:8-10 (assertion of “Yes on 22” campaign manager that “she was certain
24 ‘the passage of Proposition 22 would eradicate all further debate over granting marital benefits to
25 same-sex couples”) (emphasis added); *id.* at 8:11-14 (assertion of Executive Director of CCF that
26 “[n]ever in [his] wildest imagination did [he] think that after Proposition 22 there would be any
27 further legislative debate over granting spousal benefits to same-sex couples”) (emphasis added);
28 *id.* at 10:9-10 (“Proposition 22 reserved ‘marriage’ and its rights for opposite sex couples”)
(emphasis added); *id.* at 14: 13-14 (“In passing Proposition 22, the people of California made very
clear that they no longer wanted the Legislature to define and regulate who may marry and who is
eligible for marital benefits”) (emphasis added); Declaration of Lynn D. Wardle submitted as part
of CCF’s Declaration in Opposition to Motions for Summary Judgment 2:26-27 (“the drafters
intended the initiative to protect the rights, benefits and responsibilities of marriage”) (emphasis
added); *id.* at 3:16-18 (“One of the goals of Proposition 22 ... was to ... ensur[e] that same-sex
relationships were not legally treated as, or the same as, conjugal marriage.”) (emphasis added).
Indeed, although (as Plaintiffs concede is undisputed, Fund Opp. Stmt. 6:8-15, CCF Opp. Stmt.
10:24 – 11:10) the supporting ballot materials emphasized that Proposition 22 was “exactly 14
words long” and contained no “hidden agenda,” the message the Fund contends the voters
received is that Proposition 22 would accomplish four different objectives that it takes Plaintiff
Fund 52 words to describe. Fund Opp. 7:15-20. (For purposes of clarity, Intervenor do not
concede that the declarations quoted from above are admissible for purposes of construing
Proposition 22; Intervenor include quotations from the declarations merely to highlight the

1 Proposition 22 and the accompanying ballot materials included none of these terms.

2 The law is clear that reading Proposition 22 to include the many words and concepts
3 Plaintiffs seek to add that were not part of its statutory text or supporting ballot materials would be
4 improper. An initiative must be interpreted by giving its terms “their ordinary meaning,” see
5 People v. Rizzo (2000) 22 Cal. App. 4th 681, 685, and the “ordinary meaning” of “marriage” does
6 not include domestic partnerships, which had and continue to have a different legal and social
7 construction than marriages. Indeed, while Plaintiff CCF argues that “the ordinary meaning of
8 ‘marriage’ refers to the whole package – the name, status, and rights,” CCF Opp. 9:23-25
9 (emphasis added), AB 205 neither grants domestic partners that “whole package” nor any part of
10 the name or status of marriage, and it affords domestic partners only some of the rights spouses
11 receive under California law. Likewise, CCF’s argument that “when I purchase a car from a
12 dealer, it is understood that my new car will come with an engine, tires and steering wheel,” id. at
13 3:15-19, the existence of engines, tires, or steering wheels cannot turn a motorcycle or a riding
14 lawnmower into a car or make them subject to all laws governing cars. In the same way,
15 Proposition 22 simply does not address legal relationships (like domestic partnerships) that may
16 share some characteristics with marriages, but that are not themselves marriages.

17 In fact, both Plaintiffs concede that it is undisputed that, even after AB 205 becomes fully
18 operative in January 2005, there will be different eligibility requirements for marriage and
19 domestic partnership (Fund Opp. Stmt. 12:19-24; CCF Opp. Stmt. 17:7-14); the processes for
20 registering as domestic partners and terminating a domestic partnership will be different than the
21 processes for entering into and for terminating a marriage (Fund Opp. Stmt. 10:3-23; CCF Opp.
22 Stmt. 17:16-19:3); domestic partners will not have all of the state-law rights California grants to
23 spouses (Fund. Opp. Stmt. 10:23 – 11:9 and 11:19-23; CCF Opp. Stmt. 19:4-20 and 20:18-21)
24 (domestic partners may not file their state income taxes jointly, receive long-term care benefits for
25 partners of government employees equal to those provided spouses of government employees or
26 obtain a certificate of registry of marriage); and domestic partners will not be eligible for

27 _____
28 distinctions between what Proposition 22 says and how Plaintiffs’ declarations describe
Proposition 22.)

1 recognition by the federal government as married couples for more than 1,000 federal laws in
2 which marital status is a factor. (Fund. Opp. Stmt. 11:10-19; CCF Opp. Stmt. 19:25 – 20:17).

3 Given these concessions, Plaintiffs’ many hyperbolic assertions that, through AB 205, the
4 Legislature has bestowed on domestic partners “every benefit, every obligation, and every element
5 that defines the marital relationship” (Fund Opp. 4:16-17) (emphasis in original), that AB 205
6 “expressly gives all the same rights, benefits, and responsibilities of marriage to domestic
7 partners” (id. at 8:6-7(emphasis added); see also id. at 15:3, 18:3, 24:21-22), and that AB 205
8 elevates “domestic partnerships to the same status of marriage” (CCF Opp. 18:12-13) (emphasis
9 added) are inexplicable. These assertions further ignore the express limitations of new Fam. Code
10 §§ 297.5(g), (h), (j), and (k) (added by AB 205, § 4) and are contradicted by Plaintiffs’ own
11 papers, which admit (although sometimes even then inaccurately minimizing) differences between
12 marriage, the procedures governing marriage, and the rights afforded spouses, on the one hand,
13 and domestic partnerships, the procedures governing domestic partnership, and the rights afforded
14 domestic partners, on the other hand. See, e.g., Fund. Opp. 13:26-27, 16:12-13; CCF Opp. 17:11-
15 15. In addition, Plaintiffs’ arguments that the federal government and other states would not
16 respect either marriages or domestic partnerships between same-sex couples (see Fund Opp.
17 13:11-26 and CCF Opp. 17:15 – 18:4) is both incorrect and misses the point. First, some states do
18 honor marriages of same-sex couples from other jurisdictions. See, e.g., New York Attorney
19 General, Informal Op. No. 2004-1, at 28 (Mar. 3, 2004) (available at
20 http://www.oag.state.ny.us/press/2004/mar/mar3a_04_attach2.pdf). Even more importantly, it is
21 California’s decision not to make domestic partnerships fully equivalent to marriages that places
22 California domestic partners in a less strong position to obtain the benefits the federal government
23 and other states reserve to those who are married, particularly should current federal or state
24 restrictions on honoring marriages of same-sex couples be repealed or struck down in the future.

25 Plaintiffs’ construction of Proposition 22 turns on their contention that “marriage” as used
26 in Proposition 22 must be interpreted to have changed California law so as to prevent the
27 Legislature from granting “marital benefits” afforded to spouses at the time the measure was
28 enacted to anyone other than a married, different-sex couple. Of course, neither the initiative’s

1 text nor, if one were to get beyond the text, the ballot materials available to voters in any way
2 disclosed that objective.⁴ But, more fundamentally, under California law there simply is no such
3 concept as marital or spousal benefits that must belong only to married couples. Many rights that
4 spouses enjoy are equally available to others. For example, California law protects spouses
5 against domestic violence, but our state’s domestic violence laws equally protect current and
6 former cohabitants, those with whom the victim has had a child or dating relationship, children,
7 and “any other person related by consanguinity or affinity within the second degree.” Cal Fam.
8 Code § 6211. Likewise, confidential marital communications are privileged, Cal. Evid. Code §
9 980, but so are those between a lawyer and client or doctor and patient. Id. §§ 954, 994. Married
10 couples have a constitutional right to obtain contraceptives, but so do unmarried couples.
11 Eisenstadt v. Baird (1972) 405 U.S. 438. Plaintiffs’ reasoning thus entirely fails. That California
12 affords an adult child rights with regard to a possible conservatorship over her father and a right to
13 sue for his wrongful death, see Cal. Code Civ. Proc. § 340(3); Cal. Prob. Code § 1812(b), does not
14 make them married or somehow interfere with marriage as an institution. See Judith T. Younger,
15 Responsible Parents and Good Children (1996) 14 Law & Ineq. J. 489, 499 (“The visions of
16 marriage as an exclusive ... status ... [have] all but vanished from the law.”).

17 Further, contrary to Plaintiffs’ reliance on California public policy, there is no free-
18 wheeling ability of courts to interpret initiatives in ways that might further particular policy
19 objectives. Rather, what the California Supreme Court has advised is that, if a measure is
20 ambiguous, a court should reject a “broad literal interpretation” that would raise “substantial
21 policy concerns.” Hodges, 21 Cal. 4th at 118. In any event, while California may have a
22 legitimate interest in promoting marriage, the State has no current public policy in favor of
23 furthering this interest by denying unmarried couples rights. Rather, notwithstanding the interest
24 in promoting marriage, “California statutory and decisional law also recognizes domestic
25 partnership and prohibits discrimination based on marital status, which indicates that laws

26 _____
27 ⁴ Again and again, Plaintiffs resort to materials other than the initiative’s text and the
28 official ballot materials supporting the measure to make their argument about voter intent,
reaching so far as to rely on the wholly non-probative and inadmissible view of a minority of the
members of California Legislature. See CCF Opp. 7:19-25.

1 supporting nonmarital relationships are neither inimical to State marriage laws nor contrary to
2 State policy favoring marriage.” S.D. Meyers v. City and County of San Francisco (N.D. Cal.
3 1999) 1999 U.S. Dist. LEXIS 8748, aff’d on other grounds (9th Cir. 2001) 253 F.3d 461; see also
4 Sharon S. v. Superior Court (2003) 31 Cal. 4th 417, 438-39 (rejecting argument of Plaintiff Fund
5 (offered as amicus curiae) that interpreting California law to provide rights to households of
6 unmarried couples would “offend the State’s strong public interest in promoting marriage”).
7 Indeed, after Lawrence v. Texas (2003) 539 U.S. 558, any purported state interest premised on
8 denying autonomy to unmarried couples, stigmatizing and demeaning them, or denying respect to
9 their intimate choices could not be considered legitimate.⁵

10 In addition, as Intervenors previously have pointed out, the Court is obligated, if possible,
11 to avoid an interpretation of Proposition 22 as having such a blatantly unconstitutional objective as
12 sealing off one group of families (particularly one defined by the sex and sexual orientation of the
13 families’ members) from even being able to seek access to legal protections from the Legislature.
14 Intervenors’ Mem. 24:5–25:16.⁶ Indeed, because Proposition 22 enacted a statute (and not a
15 constitutional amendment), Proposition 22 could not have abrogated the Legislature’s state-
16 constitutional power to take steps to ameliorate the sex and sexual orientation discrimination the
17 Legislature found AB 205 necessary to address. See AB 205, § 1(b) (enacting into law findings of
18 discrimination based on sex and sexual orientation that AB 205 would “reduce,” though not
19 completely eliminate); Catholic Charities of Sacramento, Inc. v. Superior Court (2004) 32 Cal. 4th

21 ⁵ For all these reasons, it is questionable whether cases like Elden v. Sheldon (1988) 46
22 Cal.3d 267, and Hinman v. Dept. of Personnel Admin. (1985) 167 Cal. App. 3d 516, on which
23 Plaintiffs rely, are still good law. Certainly the public policy discussions in those cases no longer
24 accurately describe California public policy with respect to relationships of same-sex couples, as
25 explained in cases such as Sharon S. See also Developments in the Law, Sexual Orientation and
the Law (1989) 102 Harv. L. Rev. 1584, 1622 (criticizing notion that state’s interest in promoting
marriage could be undermined by granting rights to same-sex couples who are not allowed to
marry).

26 ⁶ Contrary to Plaintiff CCF’s argument (see CCF Opp. 2:22-27), application of this
27 mandatory principle of statutory interpretation does not require that such an interpretation of
28 Proposition 22 have been raised as an affirmative defense. Even if it did, however, Defendants
adequately raised it through their affirmative defenses that Plaintiffs failed to state claims upon
which relief could be granted.

1 527, 564 (holding that the State has a compelling interest in ending gender discrimination and
2 emphasizing the courts’ deference to “the Legislature’s competence” to “identify subtle forms of
3 gender discrimination”); Romer v. Evans (1996) 517 U.S. 620, 632 (holding that removing
4 legislative power to address sexual orientation discrimination would not “even” meet the
5 deferential standards of rational basis review but (contrary to the assertion of Plaintiff Fund, Fund
6 Opp. 23:18-20) not reaching issue of level of scrutiny applicable to sexual orientation
7 discrimination); Citizens for Responsible Behavior v. Superior Court (1991) 1 Cal. App. 4th 1013,
8 1026 (same); Children’s Hospital and Medical Center v. Belshe (2002) 97 Cal. App. 4th 740, 769
9 (referring to sexual orientation as a “suspect classification” under California law).

10 The Legislature’s inherent power to correct unconstitutional discrimination is among its
11 most important powers. See, e.g., Cal. Const., art. 20, § 3 (requiring state legislators to “support,”
12 “defend,” and “bear true faith and allegiance to” State and Federal Constitutions). The Legislature
13 made plain that AB 205 was an exercise of just such power. See AB 205, § 1(a) (“This act is
14 intended to help California move closer to fulfilling the promises of inalienable rights, liberty, and
15 equality contained in Sections 1 and 7 of Article 1 of the California Constitution by providing all
16 caring and committed couples, regardless of their gender or sexual orientation, the opportunity to
17 obtain essential rights, protections, and benefits and to assume corresponding responsibilities,
18 obligations, and duties and to further the state’s interests in promoting stable and lasting family
19 relationships, and protecting Californians from the economic and social consequences of
20 abandonment, separation, the death of loved ones, and other life crises.”) In this regard,
21 particularly important is the Legislature’s enacted finding—to which this Court must give
22 deference under Catholic Charities—that AB 205 “would reduce discrimination on the bases of
23 sex and sexual orientation in a manner consistent with the requirements of the California
24 Constitution.” See AB 205, § 1(b) (emphasis added). This Legislative finding alone makes plain
25 that Plaintiffs’ preemption challenges must fail. Abrogation of the Legislature’s power to
26 guarantee equal protection of the laws would have required a state constitutional amendment (and
27 even then would be subject to federal constitutional challenge), but Proposition 22 only adopted a
28 statute (Cal. Fam. Code § 308.5), not a change to the California Constitution.

1 In sum, because Proposition 22 addresses only marriage and AB 205 and AB 25 concern
2 the separate and different institution of domestic partnership,⁷ those domestic partnership statutes
3 – which, at most, regulate in a “related but distinct area” of the law, see Mobilepark West
4 Homeowners Assn’s v. Escondido (1995) 35 Cal. App. 4th 32, 43 – cannot be found improperly to
5 have amended Proposition 22.

6 C. Plaintiffs Have Not Rebutted Intervenors’ Alternative Showing That Proposition 22
7 Has No Applicability To Marriages Entered In California And Thus Cannot Apply
8 To Other Relationships Entered In California, Including Domestic Partnerships.

8 Intervenors’ Opening Memorandum demonstrated that Plaintiffs’ claims are utterly
9 implausible for the additional reason that Proposition 22 has no applicability even to marriages
10 entered into within California (as opposed to marriages entered into out-of-state) and thus cannot
11 possibly have any meaning that would preempt statutes governing domestic partnerships entered
12 into in California, which is what is at issue in these actions. See Intervenors’ Mem. 17 n.9. As
13 Intervenors previously emphasized, their motions by no means hinge on this question of
14 Proposition 22’s application to statuses entered within the state; rather, this argument provides an
15 additional, and alternative, ground for granting Intervenors’ Motions.

16 There can be no doubt that the interpretation of Proposition 22 that Intervenors have
17 advanced is reasonable. Counsel for the California Assembly Judiciary Committee has
18 acknowledged the merits of the position Intervenors have taken here, see Intervenors’ Mem. 17
19 n. 9; Intervenors’ RJN, Ex. J, 183-85, and, in a recent hearing concerning San Francisco’s issuance
20 of marriage licenses to same-sex couples, questions raised by Justices of the California Supreme
21 Court acknowledged the existence of doubt as to whether Proposition 22 has any application to

22 ⁷ The fact that fewer rights were afforded domestic partners at the time Proposition 22
23 passed than thereafter is irrelevant to Intervenors’ position. Domestic partnership long had existed
24 as a legal status in California prior to the voters’ consideration of Proposition 22 and, just as the
25 rights afforded and responsibilities imposed on spouses have changed over time, so too have the
26 legal rules relating to domestic partnerships. In addition to the many local ordinances providing a
27 variety of domestic partner rights and the hospital visitation and government employee health
28 insurance rights provided by AB 26, other California laws addressed domestic partnerships at the
time of the Proposition 22 election. See, e.g., Cal. Pen. Code §§ 11643.4, 13700 (defining
domestic violence to include violence against domestic partners and cohabitants); 16 Cal. Code
Regs. § 1833 (providing that counseling of spouses or domestic partners counts toward marriage,
family, and child counselors licensure hours).

1 marriages entered into within California. See Audio Recording of Hearing on Writ Petitions,
2 Lockyer v. City and County of San Francisco (No. S122923) & Lewis v. Alfaro (No. S122865)
3 (May 25, 2004) (avail. at <http://www.courtinfo.ca.gov/courts/supreme/sfmarriages/broadcast.htm>).

4 Moreover, Plaintiffs’ efforts to rebut Intervenors’ showing regarding Proposition 22’s
5 meaning fail. For example, Plaintiff Fund’s attempted reliance on a paragraph about what the
6 voters must have intended in passing Proposition 22 contained in the Legislative Counsel’s
7 opinion regarding AB 205, see Fund Opp. 9:18-10:7, is improper according to the Fund’s own
8 papers.⁸ Even if it properly could be considered, the reasoning of the Legislative Counsel’s
9 AB 205 opinion regarding Proposition 22’s application to marriages entered within the state is
10 manifestly faulty. As the official ballot materials regarding the initiative indicate, the problem
11 addressed by Proposition 22 was one of state sovereignty: whether, by virtue of Family Code
12 section 308, California would essentially abdicate to other states the decision whether California
13 would treat as valid, or otherwise recognize, marriages of same-sex couples.⁹ There is nothing
14 inconsistent with the voters not wanting to be dictated to by other states regarding marriages

15 ⁸ The Fund argues elsewhere in its opposition memorandum that the Legislative
16 Counsel’s opinion with respect to AB 205 cannot be indicative of the electorate’s intent in
17 previously enacting Proposition 22. See Fund Opp. 19:13-16 (“[T]he Opinion is merely
18 speculating on the intent of the voters.”). The Fund is correct that, apart from the language of an
19 initiative (including how such language is used in “the legal and broader culture,” Hodges, 21 Cal.
4th at 114 & n. 4), the official materials “provided directly to the voters” are the only materials
courts may consult in “interrogating the electorate’s purpose.” Horwich, 21 Cal. 4th at 277 n.4.

20 ⁹ Plaintiff Fund argues that, since California law already limited California marriages to
21 being between a man and a woman, the voters must have intended the measure to accomplish
22 something else, and concludes that the measure as a result should be understood to have limited
23 “the extension of marital rights and benefits to domestic partners.” Fund Opp. 4:1-7, 25-28. This
24 conclusion does not follow from the premise because, as Plaintiffs concede is undisputed, the
25 official ballot materials did not explain this as a reason for supporting the measure, but instead told
26 voters that the reason the measure was necessary was that California “recognizes marriages from
27 other states” and that, because “judges in some of those states want to define marriages differently
28 than we do ... California may have to recognize new kinds of marriages.” Fund Opp. Stmt. 6:15-
23; CCF Opp. Stmt. 11:11-27. Plaintiff Fund’s argument that these “new kinds of marriages”
meant domestic partnerships rather than marriages between same-sex couples, Fund Opp. 5:26 –
6:2, lacks any support and is contradicted by other ballot arguments supporting the measure that
Plaintiffs concede talked about making sure that California was not forced “to recognize ‘same-
sex marriages’ performed in other states,” not domestic partnerships. Fund Opp. Stmt. 7:18-25,
8:16-24; CCF Opp. Stmt. 13:5-16, 14:20–15:10.

1 outside California, but not seeking to limit the ability of their own representatives to respond to
2 changing public opinion, or clearer understanding of important public policies and the demands of
3 the Constitution, with regard to marriages entered in California.¹⁰

4 The Fund also suggests that interpreting Proposition 22 to apply only to out-of-state
5 marriages would raise a constitutional difficulty because it would irrationally “differentiate
6 between in-state same-sex couples and out-of-state same-sex couples in that context.” Fund Opp.
7 11:26-27. The Fund is mistaken, however, that any such distinction between in-state and out-of-
8 state couples would be drawn. Rather, California law would not distinguish between couples
9 based on residence or domicile, but instead would distinguish between marriage ceremonies based
10 on the situs of those ceremonies. The Fund has not shown how this distinction is constitutionally
11 impermissible.

12 In any event, the constitutional avoidance doctrine does not provide an end-run around the
13 proper task of statutory construction. Rather, the avoidance doctrine, as described by the
14 California Supreme Court, requires that “California courts must adopt an interpretation of a
15 statutory provision which, ‘consistent with the statutory language and purpose, eliminates doubt as
16 to the provision’s constitutionality.’” People v. Amor (1974) 12 Cal. 3d 20, 30 (internal citations
17 omitted; emphasis added). If the voters did not intend Proposition 22 to speak to marriages
18 entered into within California, the avoidance doctrine provides no basis for reading such a
19 meaning into Proposition 22.

24 ¹⁰ To the extent that Plaintiff CCF tries to find support in the title of Division 3, section 1
25 of the Family Code —“Validity of Marriage,” see CCF Opp. 12:9-21—Family Code section 5
26 squarely forecloses such efforts by providing that “division, part, chapter, article, and section
27 headings do not in any manner affect the scope, meaning, or intent of this code.” Cf. Pepper v.
28 Board of Directors (1958) 162 Cal. App. 2d 1, 5 (holding, with respect to an identical provision of
the California Public Utilities Code, that “[i]n the face of such a provision the headings may not be
considered in construing the code and the several sections must be given the construction which
their language demands”).

1 **III. CONCLUSION**

2 For the reasons set forth above and in their moving papers, Intervenor respectfully request
3 entry, in each case, of summary judgment, or orders summarily adjudicating all causes of action,
4 in all Intervenor's and Defendants' favor, against all Plaintiffs.

5 Dated: June 14, 2004

Respectfully submitted,

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PROOF OF SERVICE

I am an active member of the Bar of the State of California and am not a party to this cause of action. My business address is Law Office of David C. Codell, 9200 Sunset Boulevard, Penthouse Two, Los Angeles, California 90069.

On June 13, 2004, I served on each interested party in Consolidated Cases Nos. 03AS05284 and 03AS07035 the foregoing document described as DEFENDANT-INTERVENORS' MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO OPPOSITIONS TO MOTIONS FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ALL CAUSES OF ACTION IN CONSOLIDATED CASES NOS. 03AS05284 AND 03AS07035 by depositing a true copy of the foregoing document in a box or other facility regularly maintained by an express carrier service in a sealed envelope or package designated by the express carrier service, with delivery fees paid or provided for, addressed as follows.

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Executed on June 13, 2004 at West Hollywood, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

David C. Codell

(Signature)