David C. Codell (SBN 200965)
Aimee Dudovitz (SBN 203914)
Law Office of David C. Codell
9200 Sunset Boulevard, Penthouse Two
Los Angeles, California 90069
Telephone: (310) 273-0306 / Facsimile: (310) 273-0307

Shannon Minter (SBN 168907)
Courtney Joslin (SBN 202103)
National Center for Lesbian Rights
870 Market Street, Suite 570, San Francisco, California 94014
Telephone: (415) 392-6257 / Facsimile: (415) 392-8442

[Additional attorneys listed on following page]

Attorneys in Case No. 03AS07035 for Defendant-Intervenor Equality California and in Case No. 03AS05284 for Defendant-Intervenors Equality California and Michele Graham-Newlan and Debrah Armitage, Willard Kim Halm and Marcellin Simard, Donna Hitchens and Nancy Davis, Deborah Lynn Johnson and Valarie Joi Fiddmont, Christine Kehoe and Julie Warren, Phyllis Lyon and Del Martin, and William Rogers and John Griffith Symons

Jon W. Davidson (SBN 89301)
Jennifer C. Pizer (SBN 152327)
Lambda Legal Defense and Education Fund
3325 Wilshire Boulevard, Suite 1300, Los Angeles, California 90010
Telephone: (213) 382-7600 / Facsimile: (213) 351-6063

Attorneys in Case No. 03AS07035 for Defendant-Intervenor Equality California and in Case No. 03AS05284 for Defendant-Intervenors Brittany Bouchet and Deven Bouchet, Christopher G. Caldwell and Richard H. Lewellyn, Jr., Frederick Echeverria and Clinton Oie, Mina Meyer and Sharon Raphael, and Kay B. Smith and Carolyn Confer

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

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

Additional Attorneys in Case No. 03AS07035 for Defendant-Intervenor Equality California and in Case No. 03AS05284 for Defendant-Intervenors Equality California and Michele Graham-Newlan and Debrah Armitage, Willard Kim Halm and Marcellin Simard, Donna Hitchens and Nancy Davis, Deborah Lynn Johnson and Valarie Joi Fiddmont, Christine Kehoe and Julie Warren, Phyllis Lyon and Del Martin, and William Rogers and John Griffith Symons

Martha Matthews (SBN 130088)
ACLU Foundation of Southern California
1616 Beverly Boulevard
Los Angeles, California 90026
Telephone: (213) 977-5269 / Facsimile: (213) 250-3919

Tamara Lange (SBN 177949)
Alan L. Schlosser (SBN 49957)
ACLU Foundation of Northern California
1663 Mission Street, Suite 460
San Francisco, California 94103
Telephone: (415) 621-2493 / Facsimile: (415) 255-1478

Jordan C. Budd (SBN 144288)
ACLU of San Diego
110 West C. Street, Suite 901
San Diego, California 92101
Telephone: (619) 232-2121 / Facsimile: (619) 232-0036

James D. Esseks (SBN 159360)
American Civil Liberties Union Foundation, Lesbian & Gay Rights Project
125 Broad Street, 18th Floor
New York, New York, 10004
Telephone: (212) 549-2627 / Facsimile: (212) 549-2650

I. INTRODUCTION

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

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

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[1] The twelve Intervenor couples are listed in the caption and in the Notice of Motion. The Intervenor couples are not parties to the CCF action, and this Memorandum is submitted in the CCF action on behalf of Equality California only. "Intervenors" is used throughout herein to refer collectively to the Intervenors in both the Fund and CCF actions, as applicable.

[2] As of the date of this Motion, Intervenors have been served with a request for voluntary dismissal of individual Plaintiffs Randy Thomasson, Manuel Aldana, Jr., Betty Cordoba, Liane Galvin, and Clarence Chappell in Case No. 03AS07035, but not with an order of dismissal. Out of 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.

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

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

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

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

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

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

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

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

II. PROCEDURAL HISTORY OF THIS LITIGATION

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

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

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

III. STATUTORY BACKGROUND

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

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

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

2. Assembly Bill 26 (1999)

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

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

3. Assembly Bill 25 (2001)

AB 25 was signed into law in October 2001. See Sep. St. (Fund) ¶ 26; Sep. St. (CCF) ¶¶ 26, 63. AB 25 supplemented the rights and protections provided to registered domestic partners in California to include employment, health care, and estate planning rights previously denied to domestic partners and their families. These protections include, among others: (1) the right to sue for infliction of emotional distress or for wrongful death in the event of a partner's injury or death; (2) the ability to make medical decisions for an incapacitated partner; (3) the right to act as a conservator to tend to an incompetent partner's medical and financial needs; (4) the ability to use sick leave to care for a partner or a partner's child; (5) the ability to use existing stepparent adoption procedures to adopt a partner's child; and (6) the right to cover dependents under employer health plans without additional taxation. RJN, Ex. B at 13-17.[4]

4. Assembly Bill 205 (2003)

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

[4] In addition to AB 26 and the two statutes Plaintiffs challenge here—AB 25 and AB 205—the California Legislature has enacted protections for domestic partners in at least eight 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).

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

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

B. Enactment of Proposition 22 in March 2000

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

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

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

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

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

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

- "When people ask, 'Why is this necessary?' I say that even though California law already says only a man and a woman may marry, it also recognizes marriages from other states. However, judges in some of those states want to define marriages differently than we do. If they succeed, California may have to recognize new kinds of marriages . . . ."

- "THE TRUTH IS, UNLESS WE PASS PROPOSITION 22, LEGAL LOOPHOLES COULD FORCE CALIFORNIA TO RECOGNIZE 'SAME-SEX MARRIAGES' PERFORMED IN OTHER STATES."

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

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

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

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

IV. LEGAL STANDARDS

A. Summary Judgment Standard Under California Law

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

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

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

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

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[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).

[6] Intervenors, by their Complaints in Intervention, have joined all defenses asserted by all 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 ").

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

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

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

These steps are further explained below.

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

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

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

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

b. Official Ballot Materials as Indicia of Voter Intent. If a court determines that an initiative's text is ambiguous on a material point, the court should consider the official ballot materials presented to the voters as indicia of the voters' intent and purpose. See Hodges, 21 Cal. 4th at 114-15. The ballot materials may reveal the system, problem, or aspect of California law that the voters deemed "in need of change," id. at 115, and courts "are obliged to interrogate the electorate's purpose, as indicated in the ballot arguments and elsewhere" in the ballot materials, id. at 114. 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.[7]

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

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

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

[7] Even where a court may be required or permitted under the Evidence Code to take judicial notice of "nonofficial election materials," "matters [that] were not directly presented to the 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.

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

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

2. Preemption Analysis Must Guard The People's Initiative Power, Yet Preserve The Legislature's Power To Legislate In "Related But Distinct Areas."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[9] Because Proposition 22 cannot be construed to limit the protections the Legislature may grant to domestic partners, this Court can (and should) grant summary judgment in favor of Defendants and Intervenors without resolving what is likely the most serious ambiguity in the text of Proposition 22: the meaning of the phrase "valid or recognized in California." In an effort to 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

2. The Ballot Materials Did Not Mention Domestic Partnership And Promised Voters That Proposition 22 Would Not "Take Away Anyone's Rights."

a. Official Title And Summary Prepared By The Attorney General

Courts repeatedly have recognized that the official title and summary are important tools in determining an initiative's scope and effect. See, e.g., Center for Public Interest Law v. Fair Political Practices Comm'n (1989) 210 Cal. App. 3d 1476, 1485. In this case, the title is especially instructive both because it makes clear the subject matter of Proposition 22, and because the title itself was the subject of litigation before the voters went to the polls.

The title of the initiative was "LIMIT ON MARRIAGES," with no mention whatsoever of "domestic partnerships," which existed both statewide and in numerous localities throughout California at the time of the March 2000 election. See Sep. St. (Fund) ¶ 12; Sep. St. (CCF) ¶¶ 12, 49. Furthermore, litigation about Proposition 22's title that concluded just months before voters went to the polls confirmed that the initiative was not a broad definitional measure, but instead a measure that would restrict the class of marriages that California would recognize or treat as valid. Before Proposition 22 was presented to the voters in March 2000, the Sacramento Superior Court

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rights) even if the marriage will not be treated as valid for other purposes. Proposition 22 used precisely this language—'valid or recognized in California.'" Sep. St. (Fund) ¶ 37; Sep. St. (CCF) ¶¶ 37 (RJN, Ex. J, at 184 (California Assembly Committee on Judiciary, Analysis of AB 1967 (2004)); In re Bir's Estate (1948) 83 Cal.App.2d 256, 259 (holding that even though California would not regard decedent's polygamous marriage entered into in India as marriage under California law, it would not offend California public policy to "recognize" that marriage for the limited purpose of permitting both wives to share decedent's estate)).

Under Hodges, courts require that even a literal reading of an initiative's text must find support in the ballot materials. The central emphasis of Proposition 22's ballot materials was on purported threats to California's sovereignty posed by the possibility that other states would permit same-sex couples to marry. See RJN, Ex. J, at 6 (Assembly Committee on Judiciary, Analysis of AB 1967) (referring to "a host of instances when proponents for Proposition 22 stated in the ballot arguments in support that the measure was intended to focus solely on marriages from other states"). The ambiguity noted in this footnote is therefore appropriately resolved by construing Proposition 22 as having no application to any marriage entered into within California, which Family Code section 300 already limited to a relationship between a man and a woman when Proposition 22 was enacted. Proposition 22's non-applicability to domestic partnerships and other non-marital relationships within California is thus all the more clear. As noted above, however, this question does not need to be reached on Intervenors' or Defendants' motions for summary judgment because Proposition 22 is otherwise inapplicable to domestic partnerships. By contrast, Plaintiffs will not be able to prevail on their own motions for summary judgment given that the better reading of the phrase "valid or recognized in California" confirms that Proposition 22 has no meaning applicable even to marriages that are entered into within the state.

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

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

b. Analysis By The Legislative Analyst

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

> Under current California law, "marriage" is based on a civil contract between a man and a woman. Current law also provides that a legal marriage that took place outside California is generally considered valid in California. No state in the nation currently recognizes a civil contract or any other relationship between two people of the same sex as marriage.

Sep. St. (Fund) ¶ 16; Sep. St. (CCF) ¶¶ 16, 53. The first two sentences briefly informed voters of then-existing California law regarding marriage, including California's treatment of marriages performed outside California. The third sentence, however, highlighted that there existed legal relationships other than marriage between same-sex couples, but that no state then "recognize[d] . . . 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

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

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

c. Ballot Arguments

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

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

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

d. The "Quick Reference Voter Guide"

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

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

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

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

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

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

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

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

[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.

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

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

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

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

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

> [i]t is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who 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.

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

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

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

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

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

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

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

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

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

Notably, the text of Proposition 22 and the official ballot materials are completely silent as to the effect of Proposition 22 on each of the specific rights set forth and extended to registered domestic partners by AB 25.[11] CCF's charge is merely that "AB 25 grants registered domestic partners several rights previously afforded only to spouses under California law." Id. ¶ 114.

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

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

[11] As pled by CCF, AB 25 supplements AB 26 by providing registered domestic partners and their families with the following rights: (1) "the same right to sue for negligent infliction of emotional distress and wrongful death as spouses" (CCF Compl. ¶ 23) (emphasis in original); (2) "the same adoption rights as applicable to stepparent adoption" (Id. ¶ 24) (emphasis in original); (3) "government employees eligib[ility], on the same terms as spouses, for continued health care coverage upon the death of the government employee" (Id. ¶ 25); (4) "the same right as spouses to make health care decisions for their domestic partners" (Id. ¶ 26); (5) entitlement "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).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. CONCLUSION

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

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Respectfully submitted,

By: _____
David C. Codell
Attorneys in No. 03AS05284 for Intervenors Equality California, Graham-Newlan, et al. and in No. 03AS07035 for Intervenor Equality California

By: _____
Jon W. Davidson
Attorneys in No. 03AS05284 for Intervenors Bouchet, et al. and in No. 03AS07035 for Intervenor Equality California