No. C048378

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

SENATOR WILLIAM J. KNIGHT, et al.
Petitioners,
v.
THE SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent.

ARNOLD SCHWARZENEGGER, as Governor, et al.
Real Parties In Interest.

Sacramento County Superior Court Case No. 03AS05284
Honorable Loren E. McMaster, Judge

RETURN TO ALTERNATIVE WRIT OF MANDATE AND TO VERIFIED PETITION FOR EXTRAORDINARY RELIEF BY DEMURRER AND VERIFIED ANSWER OF REAL PARTIES IN INTEREST EQUALITY CALIFORNIA, BRITTANY BOUCHET ~~and DEVEN BOUCHET, CHRISTOPHER G. CALDWELL and RICHARD H. LEWELLYN, JR FREDERICK ECHEVERRIA and CLINTON OIE, MICHELE GRAHAM-NEWLAN and DEBRAH ARMITAGE, WILLARD KIM HALM and MARCELLIN SIMARD, DONNA HITCHENS and NANCY DAVIS, DEBORAH LYNN JOHNSON and VALERIE JOI FIDDMONT, CHRISTINE KEHOE and JULIE WARREN, PHYLLIS LYON and DEL MARTIN, MINA MEYER and SHARON RAPHAEL, WILLIAM ROGERS and JOHN GRIFFITH SYMONS, and KAY B. SMITH and CAROLYN CONFER;~~ et al. MEMORANDUM OF POINTS AND AUTHORITIES

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The Fund's Petition is correct about one important point: "This case concerns the preservation of the initiative power of the people of California." (Petr.'s Mem. 12.) What the Fund's Petition ignores, however, is that the people's power to legislate, in order to be effective, must include not only the power to enact broad measures, but also the power to legislate more narrowly to address a particular concern. Accordingly, the people's initiative power is damaged, not enhanced, by a judicial construction of an initiative that is broader than what the electorate contemplated. As the California Supreme Court has 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." (*Hodges v. Superior Court* (1999), 21 Cal. 4th 109, 114.)

In March 2000, the people of California enacted Proposition 22, which provided for a new section 308.5 of the Family Code, immediately

following the Family Code's provision regarding recognition of out-of-state marriages, section 308. As enacted by Proposition 22, section 308.5 reads simply, "Only marriage between a man and a woman is valid or recognized in California." The ballot materials explained the purpose of Proposition 22 as follows: "THE TRUTH IS, *UNLESS WE PASS PROPOSITION 22, LEGAL LOOPHOLES COULD FORCE CALIFORNIA TO RECOGNIZE 'SAME-SEX MARRIAGES' PERFORMED IN OTHER STATES.*" (Petr.'s App., Ex. 27, at 711.) Since the enactment of Proposition 22, same-sex couples have been permitted to marry under the laws of Massachusetts, Canada, Belgium, and the Netherlands. True to Proposition 22's stated goal, however, California still today does not treat as valid or otherwise recognize marriages of same-sex couples entered into in any other jurisdiction in the world. In other words, the people have gotten precisely what Proposition 22's ballot materials told them they were enacting.

The Fund, however, insists that the fourteen simple words of Proposition 22 regarding marriage have a far broader meaning than either the initiative's words or its ballot materials can support. In particular, the Fund remarkably contends that Proposition 22 accomplishes the following array of purposes:

> "(1) [it] protect[s] the institution of marriage from dilution; (2) [it] prevent[s] other states' contrary marriage laws from being recognized in California as well as prevent[s] the California legislature from creating same-sex marriage; (3) [it] preserve[s] the benefits for domestic partners *as they existed* in March 2000; and (4) [it] prevent[s] *future* marital benefits from being extended to domestic partners."

(Petr.'s Mem. 25.) Domestic partnership existed statewide at the time the voters went to the polls in March 2000, and the Proposition 22 ballot

materials stated unequivocally that the initiative would not impair protections extended to same-sex couples through means other than marriage. Under these circumstances, it is inconceivable that the electorate can be deemed to have intended Proposition 22 to have the complicated, four-fold set of meanings on which depends the Fund's attempt to invalidate Assembly Bill 205 (2004), the California Domestic Partner Rights and Responsibilities Act of 2003 ("AB 205"). (Stats. 2003, ch. 421.) Accordingly, it is not AB 205 that poses a threat to the people's initiative power. Rather, it is the Fund's own lawsuit that poses such a threat, by seeking through judicial construction an elaborate set of meanings for Proposition 22 that were never presented to the voters in March 2000.

Indeed, the notion on which the Fund bases its lawsuit—that Proposition 22 divests the Legislature of power to provide any legal protections to same-sex couples beyond the protections that existed in March 2000—would have repercussions extending far beyond AB 205. The Legislature has enacted more than a dozen statutes since March 2000 granting legal protections to (and imposing responsibilities upon) domestic partners, including new statutes signed into law by Governor Schwarzenegger in 2004 that went into effect earlier this month. One of those measures, the California Insurance Equality Act, Assembly Bill 2208 (2004), is a landmark provision requiring all insurance policies issued or offered in the state of California to treat married spouses and registered domestic partners equally. (Stats. 2004, ch. 488.) There is no reason to think that the voters who enacted Proposition 22 had any desire to prevent

the Legislature and the Governor from providing such protections for any of California's families.[1]

Indeed, the Fund's contention that same-sex couples are required, following the enactment of Proposition 22, to rely upon the initiative process to obtain any legal protections beyond those provided in March 2000 is utterly repugnant to the California and Federal Constitutions. This Court thus has an obligation to protect the people's exercise of the initiative power by construing Proposition 22 in a manner that will avoid the serious constitutional difficulties created by the Fund's proffered construction of the measure.

Moreover, as explained below, this Court lacks jurisdiction to grant the relief requested by the Petition—namely, an order requiring the Respondent Superior Court to enter summary judgment in favor of the Fund. For the reasons explained herein and in Real Parties' Preliminary Opposition (filed December 7, 2004), Real Parties respectfully request that this Court discharge the alternative writ of mandate and deny all relief that the Fund's Petition requests.

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[1] Real Parties wish to advise this Court that on December 1, 2004, the California Supreme Court ordered the parties in *Koebke v. Bernardo Heights Country Club*, Case No. S124179, to address the following question regarding a provision of AB 205: "What impact does Family Code section 297.5, operative January 1, 2005, have on plaintiffs' marital status discrimination claim under the Unruh Act?" (*See* http://www.courtinfo.ca.gov/courts/minutes/documents/SDEC0104.DOC.)

DEMURRER OF REAL PARTIES IN INTEREST EQUALITY CALIFORNIA, ET AL. TO ALTERNATIVE WRIT OF MANDATE AND VERIFIED PETITION FOR EXTRAORDINARY WRIT

Real Parties (as defined above), and each of them, by way of return to the alternative writ on file in this action and to the Verified Petition for Extraordinary Writ ("Petition") of Petitioner Proposition 22 Legal Defense and Education Fund ("Petitioner" or "Fund"), hereby demur jointly and severally to the alternative writ of mandate and to the Petition on the following grounds:

A. Real Parties' Joint and Several Demurrer to the Alternative Writ and the Fund's Petition

1. The Court has no jurisdiction over the subject of the Petition.
2. A person who filed the Petition does not have the legal capacity to sue.
3. There is a defect or misjoinder of parties.

4. The Petition fails to state sufficient facts to constitute a cause of action.

Dated: January 10, 2004

Respectfully submitted,

David C. Codell
LAW OFFICE OF DAVID C. CODELL

Jennifer C. Pizer
LAMBDA LEGAL DEFENSE AND EDUCATION FUND

Shannon Minter
Courtney Joslin
NATIONAL CENTER FOR LESBIAN RIGHTS

Peter J. Eliasberg
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ACLU OF SAN DIEGO AND IMPERIAL COUNTIES

James D. Esseks
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, LESBIAN & GAY RIGHTS PROJECT

By: 

David C. Codell
Attorneys for Real Parties in Interest
Equality California, et al.

ANSWER OF REAL PARTIES IN INTEREST EQUALITY CALIFORNIA, ET AL. TO ALTERNATIVE WRIT OF MANDATE AND VERIFIED PETITION FOR EXTRAORDINARY WRIT

Real Parties (as defined above), and each of them, by way of return to the alternative writ on file in this action and to the Verified Petition for Extraordinary Writ ("Petition") of Petitioner Proposition 22 Legal Defense and Education Fund ("Petitioner" or "Fund"), admit, deny, and allege as follows:

1. Real Parties and each of them ADMIT the allegations contained in paragraphs 2, 3, 8, 9, 10, 11, 12, and 18 of the Petition.

2. Real Parties and each of them DENY each and every allegation of the following numbered paragraphs of the Petition: 4, 13, 14, 15, and 16.

3. Answering paragraph 1 of the Petition, Real Parties and each of them ADMIT the allegations contained in the first and second sentences of paragraph 1 and DENY each and every allegation contained in the third sentence of paragraph 1 and each and every allegation contained in the fourth sentence of paragraph 1. Further answering paragraph 1 of the Petition, Real Parties and each of them affirmatively allege that the late Senator William J. Knight voluntarily dismissed his claims by a Request for Dismissal that the clerk of the Superior Court entered on April 19, 2004. (Real Parties' Prelim. Opp., Ex. D.)

4. Further answering paragraph 3 of the Petition, Real Parties and each of them affirmatively allege that the Real Parties who are individuals who intervened in the Superior Court in this action as registered domestic partners are the twenty-four individuals who are listed in the introductory paragraph of this Answer; Real Parties and each of them

expressly incorporate herein the document a copy of which is included as Exhibit 22 of Petitioner's Appendix, at pages 523-27.

5. Answering paragraph 5 of the Petition, Real Parties and each of them ADMIT the allegations contained in the first and third sentences of paragraph 5 of the Petition and DENY each and every allegation contained in the second sentence of paragraph 5 of the Petition.

6. Answering paragraph 6 of the Petition, Real Parties and each of them ADMIT the allegations contained in the first sentence of paragraph 6 of the Petition and DENY each and every allegation contained in the second sentence of paragraph 6 of the Petition and each and every allegation contained in the third sentence of paragraph 6 of the Petition.

7. Answering paragraph 7 of the Petition, Real Parties and each of them DENY each and every allegation contained in the portion of paragraph 7 of the Petition that reads as follows: "its enactment without voter approval was an unconstitutional violation of the Petitioner's and the California electors' rights under article II, Section 10(c) of the California Constitution. (Ex. 3, v. I, p. 9.)."

8. Answering paragraph 17 of the Petition, Real Parties and each of them ADMIT that "Notice of Entry of Judgment was served in this case on October 26, 2004" and that the Petition was filed within 60 days of such service, but Real Parties and each of them DENY that the Petition is timely filed.

9. Except as otherwise admitted or denied herein, Real Parties and each of them DENY each and every allegation contained in paragraphs 1, 4, 5, 6, 7, 13, 14, 15, 16, and 17.

10. All Exhibits filed with Real Parties' Preliminary Opposition to Verified Petition for Extraordinary Writ and Request for Interim Stay (filed Dec. 7, 2004) are incorporated herein by reference as though fully set forth herein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Real Parties and each of them allege that the Petition fails to state a claim on which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Real Parties and each of them allege that the late Senator William J. Knight is not a proper party to this action because he lacks capacity to sue and/or lacks standing to bring this action.

THIRD AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Real Parties and each of them allege that Petitioner Fund lacks standing to bring this action.

FOURTH AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Real Parties and each of them allege that the Petition does not satisfy the statutory deadline provided for in section 437c, subdivision (m)(1), of the California Code of Civil Procedure and is therefore jurisdictionally barred.

FIFTH AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Real Parties and each of them allege that this Court lacks jurisdiction to hear the Petition and/or to grant the relief requested by the Petition

SIXTH AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Real Parties and each of them allege that the Petition is barred by the doctrine of estoppel, laches, and/or waiver.

SEVENTH AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Real Parties and each of them allege that neither Petitioner Fund nor the late Senator Knight is entitled to attorney fees or costs.

PRAYER

WHEREFORE, Real Parties pray as follows:

1. That this Court discharge the alternative writ of mandate;

2. That this Court dismiss and/or deny in full the Petition for extraordinary relief, including without limitation for a peremptory writ of mandate;

3. That this Court affirm the judgment of Respondent Superior Court;

4. That Petitioner take nothing by its action;

5. That Real Parties recover costs and attorney fees in this action; and

6. That the Court order any other appropriate relief as justice may require.

Dated: January 10, 2004

Respectfully submitted,

David C. Codell
LAW OFFICE OF DAVID C. CODELL

Jennifer C. Pizer
LAMBDA LEGAL DEFENSE AND EDUCATION FUND

Shannon Minter
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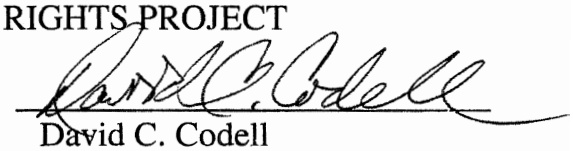
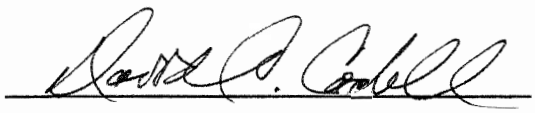
By: 
David C. Codell
Attorneys for Real Parties in Interest
Equality California, et al.

VERIFICATION

I, David C. Codell declare as follows:

I am one of the attorneys for Real Parties in Interest Equality California, Brittany Bouchet and Deven Bouchet, Christopher G. Caldwell and Richard H. Lewellyn, Jr., Frederick Echeverria and Clinton Oie, Michele Graham-Newlan and Debrah Armitage, Willard Kim Halm and Marcellin Simard, Donna Hitchens and Nancy Davis, Deborah Lynn Johnson and Valerie Joi Fiddmont, Christine Kehoe and Julie Warren, Phyllis Lyon and Del Martin, Mina Meyer and Sharon Raphael, William Rogers and John Griffith Symons, and Kay B. Smith and Carolyn Confer ("Real Parties"). I have read the foregoing DEMURRER OF REAL PARTIES IN INTEREST EQUALITY CALIFORNIA, ET AL. TO ALTERNATIVE WRIT OF MANDATE AND VERIFIED PETITION FOR EXTRAORDINARY WRIT and the foregoing ANSWER OF REAL PARTIES IN INTEREST EQUALITY CALIFORNIA, ET AL. TO ALTERNATIVE WRIT OF MANDATE AND VERIFIED PETITION FOR EXTRAORDINARY WRIT and the exhibits referenced therein and lodged with this Court, and I know their contents. The facts alleged in the foregoing documents, not otherwise supported by citations to the record, exhibits, or other documents, are true of my own personal knowledge. Because of my familiarity with the relevant facts pertaining to the Superior Court proceedings based on my participation in those proceedings as counsel for Real Parties, I, rather than Real Parties, verify these pleadings.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on January 10, 2004, at West Hollywood, California.



David C. Codell

MEMORANDUM OF POINTS AND AUTHORITIES

The Fund's Petition is procedurally barred, is based on fundamental misconceptions regarding initiative preemption analysis, and proffers a construction of Proposition 22 that would render the initiative invalid under both the Federal and California Constitutions. As explained below, this Court should therefore discharge the alternative writ of mandate on file in this action and deny all relief that the Petition requests.

STATUTORY BACKGROUND

A. Domestic Partnership Is A Distinct Legal Status Under California Law That Predates Proposition 22.

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. (*See* Petr.'s App., Ex. 27, at 808.) By the time the voters went to the polls in March 2000, eighteen California cities or counties had established domestic partnership registries, including cities as diverse as Palm Springs and Sacramento and the State's largest local government: Los Angeles County (*see* Petr.'s App., Ex. 25, ¶ 6, at 574), and provided those families not only with legal rights and protections for their relationships, but also with *government sanction* and official status as families.

2. Assembly Bill 26 (1999)

California created a statewide domestic partnership registry with the enactment of Assembly Bill 26 (1999) ("AB 26"). (*See* Stats. 1999,

ch. 588).) 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 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* Fam. Code § 297, subds. (a), (b), (b)(6) (2000); Health & Saf. Code § 1261 (2000); Gov. Code §§ 22867-22877 (2000).) 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* Cal. Fam. Code § 299.6, subd. (c).). AB 26 also established a new Division 2.5 of the Family Code devoted exclusively to "Domestic Partner Registration."

3. Assembly Bill 25 (2001)

Assembly Bill 25 (2001) ("AB 25") (Stats. 2001, ch. 893), which became effective on January 1, 2002, supplemented the rights and protections provided to registered domestic partners in California to include tort-law, employment, health care, and estate planning rights previously denied to domestic partners and their families. The protections added by AB 25 included, among others: (1) the right to sue for infliction of emotional distress or for wrongful death (Civ. Code § 1714.01; Code Civ. Proc. 377.60, subds. (a), (f) (2002)); (2) the ability to make medical decisions for an incapacitated partner (Prob. Code § 4716); (3) the right to act as a conservator to tend to an incompetent partner's medical and financial needs (Prob. Code § 1812, subd. (a)(1)); (4) the ability to use sick leave to care for a partner or a partner's child (Lab. Code § 233, subd. (a)); (5) the ability to use existing stepparent adoption procedures to adopt a partner's child (Fam. Code § 9000, subd. (b)); and (6) the right to cover

dependents under employer health plans without additional taxation (Rev. & Tax. Code § 17021.7).

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. When AB 205's major provisions became operative on January 1, 2005, it further expanded the rights, responsibilities, and obligations of registered domestic partners 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 mutual 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 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 either partner during the partnership; (8) the right to obtain death benefits for a surviving partner of a firefighter or police officer; (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.

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. In addition, unlike married couples, registered domestic partners must still file as "single" on both their state and federal tax returns. (*See* Fam. Code § 297.5, subd. (g).) 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 id.* § 297.5, subd. (h).) Moreover, because AB 205 has no effect whatsoever on federal law, California's registered domestic partners remain unable to access more than 1,100 federal laws that protect married couples. *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). AB 205 likewise does not amend California law regarding which out-of-state marriages are treated as valid or otherwise recognized in California.[2]

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." (Fam. Code § 308.5.) 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. (Petr.'s App., Ex. 27, at 713.) Entitled "Foreign marriages; validity," section 308 provides: "A marriage contracted outside this state that would be valid by the laws of the jurisdiction in

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[2] In addition to AB 26, AB 25, and AB 205—the California Legislature has enacted protections for domestic partners in at least ten other statutes: Stats. 2000, ch. 1004 (SB 2011); Stats. 2002, ch. 146 (SB 1049); Stats. 2002, ch. 373 (AB 2777); Stats. 2002, ch. 377 (SB 1265); Stats. 2002, ch. 412 (SB 1575); Stats. 2002, ch. 447 (AB 2216); Stats. 2002, ch. 901 (SB 1661); Stats. 2003, ch.752 (AB 17); Stats. 2004, ch. 488 (AB 2208); Stats. 2004, ch. 947 (AB 2580). The Fund has not challenged any of these.

which the marriage was contracted is valid in this state." 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.).) In response, Congress enacted the federal "Defense of Marriage Act" ("DOMA") in 1996. 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." (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.

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.) 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* Vt. Stats., title 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. 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. Specifically, the ballot arguments in support of Proposition 22 stated:

- "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 . . . ." (Petr.'s App., Ex. 27, at 710.)

- "THE TRUTH IS, *UNLESS WE PASS PROPOSITION 22, LEGAL LOOPHOLES COULD FORCE CALIFORNIA TO RECOGNIZE 'SAME-SEX MARRIAGES' PERFORMED IN OTHER STATES."* (*Id.*, Ex. 27, at 711.)

Neither Proposition 22's text nor the ballot materials mentioned domestic partnership by name. (*Id.*, Ex. 27 at 705-17.)

STANDARD OF REVIEW

Wholly apart from the procedural problems posed by the Fund's Petition, which are discussed below, a writ may only issue if the Fund

demonstrates that the trial court abused its discretion in entering judgment in favor of Real Parties and the State Defendants—that is, only if the Respondent Superior Court "exceed[ed] the bounds of reason, all of the circumstances before it being considered." (*State Farm Mut. Auto. Ins. Co. v. Superior Court* (1956) 47 Cal.2d 428, 432.) Moreover, "[a]ppellate courts are reluctant to use the device of an extraordinary writ as a means to review the denials of summary judgment." (*Lompoc Unified Sch. Dist. v. Superior Court* (1993) 20 Cal.App.4th 1688, 1692.)

The Fund must also demonstrate that there is no other adequate remedy at law and that it will suffer irreparable harm if a writ does not issue. (*See* 1 Jon Eisenberg, et al., California Practice Guide: Civil Appeals and Writs, at 15:36 (2003).) As explained in detail below, the Fund is unable to satisfy the threshold requirements for obtaining review by extraordinary writ. Should this Court nevertheless reach the legal issues raised by the summary judgment orders at issue, this Court's review of those legal issues, where there are no disputed, material factual issues, is *de novo*.

LEGAL DISCUSSION

A. The Late Senator Knight Is Not A Proper Party To These Writ Proceedings, And The Petition Is Devoid Of Any Allegations Supporting The Fund's Standing To Assert Voting Rights Harm In Connection With Proposition 22 And AB 205.

Along with the Fund's Petition, this Court's Alternative Writ of Mandate erroneously indicates that there are multiple petitioners in these proceedings, rather than simply the Fund. Real Parties incorporate herein by reference the argument presented in their Preliminary Opposition at pages 17-18 that the late Senator William J. Knight ("Senator Knight") is

not a proper party to these original writ proceedings because he voluntarily dismissed all of his claims in April 2004, prior to his death on May 7, 2004, and therefore lacks standing to file this Petition, and lacks the capacity to sue. Real Parties also incorporate herein the arguments in their Preliminary Opposition at pages 10-12 that the only real Petitioner here, the Fund, has not presented any evidence in support of its standing to assert any voting-rights harm as a result of AB 205 (much less, irreparable voting rights harm) in this *original* proceeding.

B. This Court Lacks Jurisdiction To Grant The Relief Sought By The Petition—Namely, An Order Directing The Superior Court To Enter Summary Judgment In Favor Of The Fund.

The Fund's Petition expressly prays that this Court issue an order requiring the Superior Court to "enter summary judgment for Petitioners, declaring [AB 205] an invalid and *ultra vires* act of the legislature in violation of Section 10(c) of article II of the California Constitution." (Petn. 9, Prayers 2, 3.) In other words, the Petition expressly seeks reversal of the Superior Court's order *denying the Fund's motion for summary judgment*. The Fund, however, is jurisdictionally barred from seeking such relief because of its failure timely to seek review of the denial of the Fund's motion for summary judgment. Real Parties hereby incorporate by reference it's the argument presented in Real Parties Preliminary Opposition at pages 6-7 that this Court *lacks jurisdiction* to order the Superior Court to enter summary judgment in the Fund's favor and to enter injunctive and declaratory relief invalidating AB 205—given that the Fund waited a full *83 days* before filing its Petition on December 1, 2004 after the Respondent Superior Court served its summary judgment order on September 8, 2004. (*See Bensimon v. Superior Court* (2003) 113 Cal.App.4th 1257, 1259 [holding that section 437c(m)'s time limit is

jurisdictional]; *see also People v. Superior Court* (1992) 2 Cal.App.4th 675, 684 [holding that "the failure to file the writ petition even by a single day is fatal because the time limits for writ review are jurisdictional"].)

This Court's jurisdiction in these writ proceedings is therefore limited to reviewing the propriety of the Respondent Superior Court's entry of summary judgment *in favor of Real Parties and the State Defendants*. This distinction is critical because Real Parties were under no obligation to include in their affirmative motion for summary judgment all of their legal defenses to the Fund's claims. Thus, even were this Court to reject all of the legal defenses on which Real Parties based their summary judgment motion in the Superior Court, Real Parties would be entitled, on remand, to assert additional legal arguments in defense against the Fund's claim that Proposition 22 requires the invalidation of AB 205.

This point is far from academic. Were this Court to reject the legal defenses that were offered by Real Parties in their affirmative motion for summary judgment, Real Parties would be entitled to contend on remand, and would contend, that Proposition 22 itself must be invalidated in its entirety because it impermissibly denies to members of same-sex couples the fundamental right enjoyed by members of different-sex couples to marry the person of one's choice, in violation of the California Constitution's Equal Protection Clause, (art. I, §§ 7(a)), Privileges and Immunities Clause (art. I, §§ 7(b)), Due Process Clause (art. I, § 7(a)), Privacy Clause (art. I, § 1), and free speech and association protections (art. I, §§ 2-3).

The Real Parties sensibly chose not to include these constitutional arguments in their summary judgment motions before Respondent Superior Court in light of separate litigation challenging the constitutionality of California's marriage statutes, including Proposition 22. In particular, the California Judicial Council has ordered that all pending state-court actions

challenging the constitutionality of the marriage statutes' exclusion or treatment of same-sex couples be coordinated before a single San Francisco Superior Court judge. (Cal. Jud. Council Coordination Proceeding No. 4365 ("Marriage Cases").) The coordinated Marriage Cases include an affirmative constitutional challenge to the marriage statutes that was brought at the express invitation of the California Supreme Court, which declined to address the constitutionality of the marriage statutes in a case regarding the County of San Francisco's issuance of marriage licenses to same-sex couples in 2004. (*See Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055, 1073-74 (2004).)

In light of these circumstances, and given the Real Parties' numerous other meritorious arguments in defense against the Fund's challenge to AB 205, it was not only permissible, but also respectful of judicial economy, for Real Parties to bring a motion for summary judgment in the present case that was limited to defenses short of requiring resolution of the ultimate question of whether the California Constitution requires that same-sex couples be permitted to marry and/or have their out-of-state marriages treated as valid or otherwise recognized within California. (*Cf. id.* at 1132 (conc. and dis. opn. of Kennard, J.) ["Recognizing the difficulty and seriousness of the constitutional question, which is now presented in pending superior court actions, this court has declined to address it in this case."]

Indeed, there can be little doubt that resolution of the constitutionality of California's statutory prohibition of marriage by same-sex couples is one of the most important and weighty constitutional questions of our day, as evidenced by the extreme caution with which the California Supreme Court and the California Judicial Council have proceeded toward a resolution of this issue. It is accordingly difficult to imagine a more appropriate context for application of the constitutional

avoidance doctrine than here, where the State's highest court and the Judicial Council have set forth instructions on how resolution of constitutional questions implicated here should proceed statewide. This Court has an obligation to adopt a reasonable construction of Proposition 22 that will permit it to avoid the serious substantive constitutional questions posed by the marriage statutes' discriminatory treatment of same-sex couples.

Nevertheless, if this Court were to decide that the Superior Court's entry of summary judgment in favor of Real Parties and the State Defendants in this action must be vacated, Real Parties must be permitted to present their affirmative constitutional challenges to Proposition 22 on remand to the Superior Court. It would thus be impermissible for this Court to order the Respondent Superior Court to enter summary judgment in favor of the Fund or otherwise to order any injunctive or declaratory relief invalidating AB 205.

C. Initiative Preemption Analysis Under Article II, Section 10, Requires A Court First To Construe The Initiative At Issue And Then To Determine Whether The Challenged Legislative Statute Actually Conflicts (Not Simply Whether It "May" Conflict) With The Initiative As Properly Construed.

The Fund alleges that AB 205 "amend(s)" an initiative statute, Proposition 22, in violation of article II, section 10(c) of the California Constitution. That constitutional 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 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 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. As is plain from the discussion which follows, there is no merit to the Fund's repeated argument that this Court essentially can skip the initial step of authoritatively construing Proposition 22 and instead invalidate AB 205 if the statute even "may" conflict with any plausible construction of Proposition 22.

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 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 court may determine that an initiative is ambiguous 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, 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".)

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 is "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.)

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"].)

The California Supreme Court's opinion in *Hodges* illustrates key steps in this interpretive process that are relevant here. *Hodges* considered a provision of Proposition 213 that 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 & fn.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 literal 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 Assn. 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. (*Mobilepark West Homeowners Assn.*, 35 Cal. App. 4th 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).)

3. There Is No Merit To The Fund's Contention That This Court Can Sidestep The Task Of Authoritatively Construing Proposition 22 By Instead Considering Simply Whether AB 205 "May" Conflict With A Plausible Construction Of Proposition 22.

Pervading the Fund's arguments are two erroneous notions regarding initiative preemption analysis—namely, that the language of initiatives should be construed as broadly as possible, and that any statute that *potentially* could conflict with *any* construction of an initiative is invalid. Both of those notions reflect a failure properly to apply the two distinct steps in 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 conflicts with an initiative's meaning. The courts have described this *second* inquiry 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 regarding the broad protection of an initiative's meaning to the initial step of determining *under ordinary rules of statutory construction* what the initiative's meaning is in the first place. In that primary 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.)

For this reason, there is no merit to the Fund's argument that AB 205 must be deemed to amend Proposition 22 if it can be said that AB 205 simply "may" conflict or "potentially conflict[s] with" Proposition 22. (Petn. 33; *see also* Petn. 3.) The Fund's contention—that the Court should broadly interpret the scope of both the initiative and the legislative statute and hold that AB 205 is an amendment of Proposition 22 if it is at all arguable that the statute "may" or could "potentially conflict" with any plausible construction of the initiative—betrays a fundamental misunderstanding of initiative preemption analysis under the California Constitution.

Contrary to the Fund's repeated suggestion, the Court of Appeal's opinion in *Proposition 103 Enforcement Project* does not hold otherwise. In *Proposition 103 Enforcement Project*, the initiative at issue, Proposition 103, expressly permitted the Legislature to enact amendments that "further[ed] its purpose." (64 Cal. App. 4th at 1484.) The analysis required in *Proposition 103 Enforcement Project* thus differed in a critical respect from the analysis that is appropriate here. In *Proposition 103 Enforcement Project*, the Court needed to determine not only whether the Legislature's enacted statute constituted an amendment to Proposition 103, but also whether that amendment could be said to "further [Proposition 103's] purposes." (*See id.* at 1486 [concluding first that the statute was "an attempted amendment of Proposition 103, because the [challenged statute] both 'takes away' from the provisions of the Proposition and changes its scope and effect"]; *id.* at 1490-94 [thereafter considering whether the statute found to have amended the initiative did so in a manner consistent with the initiative's requirement that any legislative amendment "further [the initiative's] purposes"].)

It was with respect to the latter inquiry—that is, the inquiry required after determining that a challenged statute did in fact constitute an attempted amendment to an initiative—that the Court in *Proposition 103 Enforcement Project* stated that "*amendments* which *may* conflict with the subject matter of initiative measures must be accomplished by popular vote." (*Id.* at 1486 (first emphasis added; second emphasis in original).) The "may conflict" language concerned the analysis that is appropriate after finding that a statute is an "amendment" to an initiative. In no way did the Court of Appeal suggest that the courts should sidestep the initial task of authoritatively construing an initiative and settling on its meaning before considering whether a challenged statute constitutes an amendment to the initiative.

The Fund's reading of *Proposition 103 Enforcement Project*—which would require the invalidation of any legislatively enacted statute that could be said *possibly* to conflict with any plausible construction of an initiative statute—is utterly incompatible with the instruction in *Hodges*, noted above, that the courts "may not properly interpret the [initiative] 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.) Indeed, were the Fund's suggested rules for initiative preemption analysis actually the law, it would not have been possible for the Supreme Court to have concluded as it did in *Hodges*—that the initiative there at issue should not be given a broad interpretation to which its language lent itself, but should instead be given a narrower reading limited to the matters discussed in the initiative's ballot materials. (*Id.* at 118.) The Court's instruction in *Hodges* warrants emphasis here:

> Nothing in the legislative history of the initiative suggests that the voters intended that result. In the absence of a clear expression of such intent, we decline to adopt a broad literal

> interpretation of the initiative that would raise such "substantial policy concerns."

Id. (citation omitted).

The Fund's misreading of *Proposition 103 Enforcement Project* is, quite simply, an attempt to slip past the first step in initiative preemption analysis: authoritative construction of the initiative at issue. It is the Supreme Court's opinion in *Hodges* that provides the appropriate analysis here. Under that analysis, it is plain that AB 205 does not amend Proposition 22.

D. Proposition 22 Concerns Only The Status Of Marriage, Not 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 Mentions Only The Status Of Marriage And Is Silent Regarding Domestic Partnerships.

The fourteen words of Family Code section 308.5 as enacted by Proposition 22 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. This is so even

though the state domestic partnership registry went into effect more than two months before the voters enacted Proposition 22. There is thus no basis for the Fund's contentions that Proposition 22 prevents the Legislature, apart from the referendum process, from granting rights and creating responsibilities through the status of domestic partnership, or from granting to unmarried persons any of the rights that accompany marriage. (*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 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'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.

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.

Because there is no ambiguity on the issue of whether Proposition 22 has application to domestic partnerships, the Respondent Superior Court rightly concluded that it need not proceed any further in considering the

scope and effect of Proposition 22. (Petr.'s App., Ex. 68, at 1830:3-8; *see Day*, 25 Cal. 4th at 274.

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

Notwithstanding that Proposition 22's text unambiguously focuses exclusively on marriage, should this Court, out of "an abundance of caution" (*Day,* 25 Cal. 4th at 274), consider Proposition 22's ballot materials, those materials confirm that Proposition 22 does not prohibit the Legislature from enacting protections for same-sex couples as part of the separate family-law status of domestic partnership.

a. The Official Title, The Summary Prepared By The Attorney General, And The Analysis By The Legislative Analyst

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. The title of Proposition 22 was "LIMIT ON MARRIAGES" (Petr.'s App., Ex. 27, at 708), 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.

In addition, the Official Attorney General Summary in the ballot materials and the Analysis by the Legislative Analyst 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. (*See id.*, Ex. 27, at 708-709.) 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.

(*Id.*, Ex. 27, at 709.) The first two sentences above 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" (emphasis added). This single reference did not indicate in any way that Proposition 22 would affect any of these relationships *other than marriage*. 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.

Indeed, the Legislative Analyst 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, the Legislative Analyst presumably would have provided voters with background information on domestic partnership

law comparable to the background provided on California's marriage laws.

b. 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 same-sex couples. 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.'" (*Id.*, Ex. 27, at 710.) 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." (*Id.*, Ex. 27, at 711.) 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." (*Id.*). 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.) 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—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.

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, the ballot arguments specifically reassured voters that "*PROPOSITION 22 DOES NOT TAKE AWAY ANYONE'S RIGHTS.*" (Petr.'s App., Ex. 27, at 711.) Indeed, as noted above, the only arguable reference to domestic partnership rights was a reference to the fact that Proposition 22 "*does not take away anyone's right to inheritance or hospital visitation.*" (*Id.*, Ex. 27, at 710.) The ballot arguments also reassured voters that Proposition 22 would not "take away hospital visitation and inheritance rights." (*Id.*, Ex. 27, at 711.) Hospital visitation was a right that AB 26 made available to domestic partners starting in January 2000, three months before the voters enacted Proposition 22. (*See* Health & Saf. Code § 1261.)

The Fund's repeated refrain that domestic partners would be limited to rights existing as of March 2000 following enactment of Proposition 22 is belied by the fact that the ballot materials repeatedly focused on "inheritance rights" and homestead protection. Those protections were not afforded to domestic partners as of March 2000. (*See* Petr.'s App., Ex 27, at 711 ["Opponents claim 22 will take away hospital visitation and inheritance rights, *even throw people out of their homes.* THAT'S ABSOLUTELY FALSE!] (emphasis and capitalization in original); *id.*, Ex. 27, at 710 ["*It does not take away anyone's right to inheritance . . . .*"] (emphasis in original). As of March 2000, domestic partners had no statutory inheritance rights under California law and no homestead protections in the event of the death of one partner. *Rather, those protections derive from AB 25, from AB 2216 (2002), and from AB 205, measures enacted after Proposition 22.*

There is no merit to the Fund's other contention that the law should give full realization to the dire warnings of Proposition 22's *opponents* that

Proposition 22 would be used in the courts to deny same-sex couples rights such as hospital visitation rights. (Petr.'s App., Ex. 27. at 710.) The simple fact is that the ballot arguments in support of Proposition 22 responded to such warnings by stating: "THAT'S ABSOLUTELY FALSE! Do they really expect voters to believe that?" (*Id.*) Those arguments in *favor* of Proposition 22 control, rather than the opponents' warnings. (*See California Housing Fin. Agency v. Paitucci* (1978) 22 Cal.3d 171, 177 [voter intent can be derived from ballot arguments "favoring" the measure].)

c. The "Quick Reference Voter Guide"

The March 2000 official ballot materials also contained a document entitled "Quick Reference Voter Guide" (hereinafter "Guide"). (*See* Petr.'s App., Ex. 27, at 714-16.) The ballot materials expressly advised voters to take this detachable Guide to the polls with them on Election Day. (*See id.*, Ex. 27, at 707.) The Guide's discussion of 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." (*Id.*, Ex. 27, at 715.) 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.

Given what the ballot materials consistently communicated regarding the purpose of Proposition 22, it is hardly surprising that the Fund has attempted to rely on "evidence" outside those materials, such as statements made in litigation prior to Proposition 22's enactment regarding the title of the initiative. As noted earlier, [materials "provided directly to

the voters" are the *only* materials to consider in "interrogating the electorate's purpose." (*Horwich*, 21 Cal. 4th at 277 n.4].)

3. Construing Proposition 22 As Prohibiting The Legislature From Enacting Protections For Domestic Partners Would Raise Serious Public Policy Concerns.

California's substantial public policy of protecting families based on legal relationships other than marriage further compounds the significant difficulties posed by the Fund's proffered interpretation of Proposition 22. The Supreme Court repeatedly has acknowledged California's public policy of extending protections to families not headed by married couples. Indeed, in *Sharon S. v. Superior Court (Annette F.)* (2003) 31 Cal. 4th 417, the Supreme Court recently reaffirmed California's commitment to protecting and strengthening the bonds of all California families in holding that domestic partners can utilize second-parent adoption procedures. (*See id.* at 438-39.) In so holding, the Supreme Court singled out and soundly rejected the Fund's meritless argument (offered by the Fund in that case as amicus curiae) that protecting the families of domestic partners would somehow harm married couples or devalue the institution of marriage. (*See Id.* at 438 ["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."].) The Supreme Court explained instead that its "decision encourages and strengthens family bonds." (*Id.* at 439.)

The Supreme Court's policy pronouncements in *Sharon S.* confirm the soundness of the Legislature's enacted findings in section 1 of AB 205 that "[e]xpanding the rights and creating responsibilities of registered domestic partners *would further California's interests in promoting family relationships* and protecting family members during life crises" (emphasis

added). The Supreme Court's discussion of public policy in *Sharon S.* and the Legislature's findings in AB 205 render implausible the Fund's contention before this Court that "[l]ike counterfeit money devalues currency, so does AB 205 devalue the institution of marriage." (Petr.'s Mem. 37.)

The Fund unsuccessfully seeks to bolster its policy arguments with quotations from opinions in a few cases from the 1980s such as *Elden v. Sheldon* (1988) 46 Cal.3d 267, and *Hinman v. Dept. of Personnel Admin.* (1985) 167 Cal. App. 3d 516. It is plain, however, that suggestions in those cases that granting legal protections to unmarried partners somehow undermines or inhibits the state's interest in promoting marriage can no longer be deemed accurate statements of California public policy, not only in light of the Supreme Court's express rejection of that notion in *Sharon S.* and the Legislature's extension of legal protections to same-sex partners in more than a dozen separate statutes since the year 2000, but also in light of the California Supreme Court's opinion nearly a decade ago in *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143. In its opinion in *Smith*, the Supreme Court described as "illogical" the argument that protecting unmarried cohabitants was "inconsistent with the public policy of . . . promot[ing] the stability of marriage and family." (*Id.* at 1259-60 (citation and internal quotation marks omitted).) The Supreme Court explained that "one can recognize marriage as laudable, or even as favored, while still extending protection against housing discrimination to persons who do not enjoy that status." (*Id.* at 1160; *see also Marvin v. Marvin* (1976) 18 Cal. 3d 660, 683 ["The argument that granting remedies to the nonmarital partners would discourage marriage must fail . . . .].)

To construe Proposition 22 as preventing the Legislature from enacting protections for domestic partners would thus plainly raise serious

public policy concerns—not somehow *serve* California's public policies, as the Fund erroneously suggests. Application of the Supreme Court's instruction in *Hodges* that even a broad literal construction of an initiative should be avoided if such construction would raise serious policy concerns is plainly appropriate here. (*Hodges*, 21 Cal. 4th at 118.)

4. Proposition 22 Must Be Construed To Avoid Constitutional Difficulties Posed By The Fund's Proffered Construction.

Because the Fund's proffered construction of Proposition 22 would imperil the initiative's validity under both the Federal and California Constitutions, this Court has an obligation to avoid such constitutional difficulties. (*See Amor*, 12 Cal. 3d at 30.) The Fund contends that this Court should construe Proposition 22 so as to bar the Legislature from granting to one class of persons—same-sex couples—any subset of the legal protections that have been granted to married couples (which currently means different-sex couples), except those few legal protections extended to same-sex couples as of March 2000. In other words, the Fund complains 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. 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.*

Romer v. Evans (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—given that the California Supreme Court has interpreted California's equality protections as broader than their federal counterparts. (*See King v. McMahon* (1986) 186 Cal.App.3d 648, 656-57.)

The purpose that the Fund puts 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"). To be clear, the constitutional infirmity of the Fund's proffered construction of Proposition 22 does not hinge on whether the state of California is required to extend any particular protection or set of protections to same-sex couples. Rather, a central infirmity of the state initiative that the U.S. Supreme Court invalidated in *Romer v. Evans*—Colorado's Amendment 2—was not that it failed affirmatively to offer legal protections to gays and lesbians (something that many states still do not do, and which the *Romer* Court acknowledged was not accomplished by common-law rules, *see* 517 U.S. at 627-28), but that the initiative sought essentially to *freeze the law in place* for gay men and lesbians by preventing this minority group in the future from obtaining

legal protections without appealing directly to the popular electorate. That, of course, is the very goal that the Fund (erroneously) proffers as the purpose of Proposition 22. The Court's analysis in *Romer* is instructive on this issue:

> [E]ven if, as we doubt, homosexuals could find some safe harbor in laws of general application, we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability.

(*Id.* at 631.) Plainly, it would be constitutionally impermissible for Proposition 22 to prohibit the Legislature from extending to same-sex couples any legal protections not provided to them as of March 2000.

The Fund's proffered construction of Proposition 22 would render the initiative invalid under California constitutional separation-of-powers principles, as well. In enacting AB 205, the Legislature expressly found that its provisions were necessary to reduce discrimination based on sex and sexual orientation. (*See* AB 205, § 1, subd. (b) [enacting findings of discrimination based on sex and sexual orientation that AB 205 would "reduce," though not completely eliminate]; *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal. 4th 527, 564 [holding that the State has a compelling interest in ending gender discrimination and emphasizing the courts' deference to "the Legislature's competence" to "identify subtle forms of gender discrimination"].)

The Legislature's inherent power to correct unconstitutional discrimination is among its most important powers. *See, e.g.*, Cal. Const., art. 20, § 3 (requiring state legislators to "support," "defend," and "bear true faith and allegiance to" State and Federal Constitutions). The Legislature made plain in section 1, subdivision (a) of AB 205 that the statute was an exercise of just such power by declaring: "This act is intended to help California move closer to fulfilling the promises of inalienable rights, liberty, and equality contained in Sections 1 and 7 of Article 1 of the California Constitution by providing all caring and committed couples, regardless of their gender or sexual orientation, the opportunity to obtain essential rights, protections, and benefits and to assume corresponding responsibilities, obligations, and duties . . . ." Abrogation of the Legislature's power to guarantee equal protection of the laws would have required a state *constitutional amendment* (and even then would be subject to federal constitutional challenge), but Proposition 22 adopted only a *statute* (Cal. Fam. Code § 308.5), not a change to the California Constitution. Plainly, then, this Court must reject the Fund's proffered construction of Proposition 22 as preventing the Legislature from remedying discrimination against same-sex couples.[3]

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[3] The Fund's argument that Proposition 22 does not classify on the basis of sexual orientation (Petr.'s Mem. 40) is untenable. (*See Lockyer*, 33 Cal.4th at 1128 (conc. & dis. opn. of Kennard, J.) [noting that "California law has expressly restricted matrimony to heterosexual couples"].) Indeed, the Court of Appeal has also recently concluded that the statutory exclusion of same-sex couples from marriage constitutes discrimination on the basis of *gender*. (*See Holguin v. Flores* (2004) 122 Cal.App.4th 428, 439 [describing same-sex couples' previous exclusion from the wrongful death statute's protections as an "inequity" imposed on "members of the class of couples who, because of their gender . . . were barred from marrying and thereby barred from bringing a wrongful death action"].)

E. AB 205 Does Not "Amend" Proposition 22 Because Marriage And Domestic Partnership Are Separate And Distinct Legal Statuses.

The premise of the Fund's challenges to AB 205 is that by allegedly conferring on domestic partners *all* the rights and duties of marriage, AB 205 amends Proposition 22 by establishing a status equivalent to marriage for same-sex couples. This argument is fundamentally flawed. As set forth below, marriage and domestic partnership do not confer the same rights and privileges, nor are they "identical institutions," as the Fund erroneously contends.

Even with AB 205 now fully operative, domestic partners still do *not* enjoy the legal status of marriage. In addition to the state-law benefits of marriage that continue to be denied to same-sex couples (including, for example, the right to file taxes jointly, and rights to certain long-term care benefits), California law continues to relegate same-sex couples to a status *other and lesser than marriage*. This distinction in legal status has the practical and harmful result that domestic partners are denied the transportability of legal recognition that the status of marriage would confer for purposes of travel to other jurisdictions that recognize (or that might recognize) the marriages of same-sex couples, such as the state of Massachusetts (and perhaps other states that have not definitively limited marriage to different-sex couples), as well as our nation's nearest neighbor to the north—Canada—and the nations of Belgium and the Netherlands. California's continued distinction between the legal statuses of marriage and domestic partnership also prevents same-sex couples from having standing to challenge the federal government's limitation to different-sex couples of 1,138 federal rights and protections extended to married couples.

The Fund's concession that there are differences between marriage and domestic partnership dooms their challenge to AB 205 because

California does not recognize or treat a legal relationship as a "marriage" or as equivalent to a marriage unless that relationship confers *all* of the rights and benefits of marriage. *See Rosales v Battle* (2003), 113 Cal. App. 4th 1178, 1183. In *Rosales*, the Court of Appeal considered whether to recognize or treat the Mexican relationship of "concubinage" as equivalent to 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, insurance proceeds, and retirement funds. (*Id.*) The *Rosales* Court held that the plaintiff was not eligible to bring a wrongful death action as a "spouse" because her relationship could not satisfy the meaning of "marriage" in Family Code section 308 in light of differences between concubinage and marriage under Mexican law. (*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."] (emphasis added).)

Although the Fund tries 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.) *Rosales* forecloses the Fund' efforts to ignore "technical and procedural" differences, given that the difference that the *Rosales* Court emphasized was a difference in termination procedures.

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 (as conveyed in part by the word "marriage" itself) is a distinction of enormous importance and practical 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 Proposition 22's focus on validity and recognition.

F. Because Proposition 22 Does Not Apply Even To *Marriages* Entered Into *Within* California, It Cannot Be Construed As Limiting The Legislature's Power To Provide Legal Protections For In-State Domestic Partners.

The Fund's contention that Proposition 22 limits the Legislature's power to protect domestic partners within California is faulty for the additional, more basic reason that Proposition 22 does not regulate even *marriages* entered into *within* California, but rather simply concerns which out-of-state marriages California will either treat as valid or otherwise recognize for more limited purposes. It would thus be untenable for Proposition 22 to be construed as limiting the Legislature's power to provide legal protections for same-sex couples within California through a

status other than marriage, such as domestic partnership.

As discussed at length above, Proposition 22's ballot materials repeatedly made plain that its purpose was to ensure that California would not be required under Family Code section 308 to treat as valid or otherwise recognize marriages from out of state. There was no need in March 2000 for a statute to prohibit same-sex couples from marrying within California because Family Code section 300 served that purpose.

Although the text of Proposition 22 could be construed to apply to marriages entered into within California, the text of Proposition 22 equally supports an interpretation with application only to marriages from out-of-state. A recent Assembly Judiciary Committee report discusses this latter construction of the intitiative:

> . . . 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 as entitling a claimant to inheritance rights or other incidents of 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 rights) even if the marriage will not be treated as valid for other purposes. Proposition 22 used precisely this language . . . .

(Petr.'s App., Ex. 27, at 184.)

Indeed, the word "recognize" is a legal term of art long used in judicial opinions in California and in other jurisdictions in considering the question whether a jurisdiction should "recognize" a marriage entered into in another jurisdiction for the limited purpose of granting the participants entitlement to certain rights associated with marriage, even though, for public policy reasons, the jurisdiction will not treat the marriage itself as a valid marriage under its own laws. Thus, California case law has held that even when California, on public policy grounds, will not treat a marriage

entered into elsewhere as a "valid" marriage in this state, California may nonetheless "recognize" the marriage for purposes of enforcing some particular type of right associated with marriage that would not offend California public policy under the applicable circumstances.

For example, the California Court of Appeal held in *In re Bir's Estate* (1948) 83 Cal.App.2d 256, that even though California law would not regard the decedent's polygamous marriage that was entered into in India as a valid marriage under California law, it would not offend California public policy for the courts to "recognize" that marriage for the limited purpose of permitting both wives (neither of whom had cohabited with the decedent in California) to share in the decedent's estate.

The opinion in *In re Bir's Estate* contains a lengthy conflicts-of-law discussion that emphasizes that the laws of American states had led the way in holding that marriages that a jurisdiction would not treat as valid marriages could nonetheless be "recognized" for limited purposes, such as matters of succession. The Court of Appeal explained by quoting from a conflict-of-laws treatise:

> "The American courts both those of the United States and those of Canada, have been much more liberal than those of England in *recognizing* and giving effect to a polygamous marriage or to a marriage which permits free divorce. Thus they have *recognized* a marriage of native tribes, and have given widows of polygamous marriages the legal rights of a widow. ... Thus in a case decided in British Columbia it appeared that a Chinaman, domiciled in China, and legally having two wives under the law of China, died while temporarily in British Columbia, leaving property there. By his will he left the property to his two wives. The question was whether the succession duty should be that due on a gift to a wife. Held, that it should be: that, he being validly married by the law of his domicil, the validity of the marriage should be *recognized* in matters of succession."

(In re Bir's Estate, 83 Cal.App.2d at 257-58 (emphases added; citations omitted).) The Court of Appeal also quoted at length from an Oxford University journal describing the laws of American states on the issue of "recognizing" a marriage entered into in another jurisdiction for the limited purpose of making a particular right associated with marriage applicable to the participants. In the course of that discussion, the Court of Appeal explained that in cases dating from the 1800s in the United States, "disapproval was expressed of the view that polygamous marriages *could not be recognized at all*." *Id.* at 259 (emphasis added).

In determining the meaning of the phrase "valid or recognized" in Proposition 22, it is of course highly significant that the term "recognize" has a particular, longstanding meaning in case law and legal scholarship in California and throughout the English and American legal systems dealing specifically with the issue of a jurisdiction's limited acknowledgment of marriages entered into outside that jurisdiction.

Because Proposition 22's language "valid or recognized," standing alone, lends itself to more than one possible construction, a court interpreting the measure must turn to the initiative's ballot materials and the legal context, both of which support an interpretation of Proposition 22 as applying only to California's treatment of out-of-state marriages. It is clear that voters were informed that the purpose of Proposition 22 was to prevent California from having to recognize marriages of same-sex couples entered into outside California. Neither the text nor the ballot materials of Proposition 22 indicated that the purpose of the initiative was to prevent same-sex couples from marrying within California. Indeed, such a purpose would have been surplusage because, as the ballot materials explained, same-sex couples already were prohibited from marrying in California by Family Code section 300. The only possible purpose for repeating that exclusion in Proposition 22 might have been to remove the Legislature's

power with respect to eligibility for marriage in California. There is no indication in any of the ballot materials, however, that Proposition 22 had any such purpose of limiting the Legislature's authority over marriage eligibility. In light of "the primacy of the Legislature's role" in regulating marriage eligibility (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055,1074), the failure of Proposition 22's ballot materials to alert the voters to any purported need to limit the California Legislature's power over marriage eligibility—as opposed to the power of "out-of-state judges"—is telling. Analysis of the ballot materials and the context of Proposition 22 make clear that the initiative's purpose was limited to *protecting state sovereignty* and did not include any purpose of imposing broad restrictions on the Legislature's authority over marriage eligibility.

The California Supreme Court has made plain that, where an initiative's text lends itself to alternative readings, a court should reject even a "broad literal interpretation" of an initiative that would raise "substantial policy concerns." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 118.) As the Court further explained in *Hodges*, the voters should get what the ballot materials told them they were getting—nothing broader and nothing narrower, even if the words of an initiative could be construed more broadly than suggested by the ballot materials. (*See id.* at 114.)

Of course, this Court would have no need to reach the issue of whether Proposition 22 applies to in-state marriages unless the Court fails to agree with Real Parties that Proposition 22's silence regarding domestic partnership is fatal to the Fund's challenge to AB 205. Should this Court feel the need to reach the issue of whether Proposition 22 applies to in-state marriages, an appropriate approach for the Court would be to permit all parties to submit additional briefing on this issue, given that the Superior Court did not base its grant of summary judgment on this ground. (*See* Code Civ. Proc., § 437c, subd. (m)(2).)

CONCLUSION

Real Parties respectfully request that the Court discharge the alternative writ of mandate on file in this action and deny all relief that the Fund's Petition requests.

Dated: January 10, 2004

Respectfully submitted,

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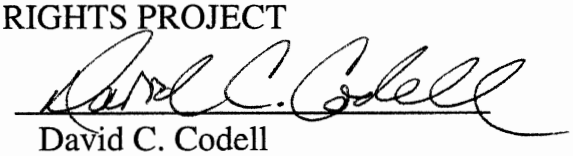
By: 

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CRC 14 (c) CERTIFICATION

I, David C. Codell, certify that this brief contains 13,959 words. In making this certification, I am relying upon the word count of the computer program that I used to prepare this brief, namely Microsoft Word.

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

Executed January 10, 2004 in West Hollywood, California.

David C. Codell (SBN 200965)

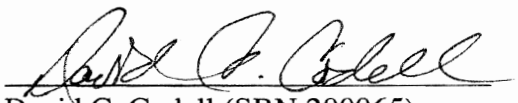
Proof of Service

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

On January 10, 2004, I served the foregoing document, RETURN TO ALTERNATIVE WRIT OF MANDATE AND TO VERIFIED PETITION FOR EXTRAORDINARY RELIEF BY DEMURRER AND VERIFIED ANSWER OF REAL PARTIES IN INTEREST EQUALITY CALIFORNIA, BRITTANY BOUCHET and DEVEN BOUCHET, CHRISTOPHER G. CALDWELL and RICHARD H. LEWELLYN, JR FREDERICK ECHEVERRIA and CLINTON OIE, MICHELE GRAHAM-NEWLAN and DEBRAH ARMITAGE, WILLARD KIM HALM and MARCELLIN SIMARD, DONNA HITCHENS and NANCY DAVIS, DEBORAH LYNN JOHNSON and VALERIE JOI FIDDMONT, CHRISTINE KEHOE and JULIE WARREN, PHYLLIS LYON and DEL MARTIN, MINA MEYER and SHARON RAPHAEL, WILLIAM ROGERS and JOHN GRIFFITH SYMONS, and KAY B. SMITH and CAROLYN CONFER; MEMORANDUM OF POINTS AND AUTHORITIES, on all interested parties in this action by placing a true copy thereof in sealed envelopes addressed as listed on the attached Service List and causing such envelopes with postage thereon fully prepaid to be placed in the United States mail at the Law Office of David C. Codell, located at 9200 Sunset Boulevard, Penthouse Two, Los Angeles, California 90069.

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

Executed on January 10, 2004 in West Hollywood, California.



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Sacramento Superior Court Case No. 03AS05284

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