

1 William C. McNeill, III, State Bar No. 64392
2 Claudia Center, State Bar No. 158255
3 Elizabeth Kristen, State Bar No. 218227
4 LEGAL AID SOCIETY-
5 EMPLOYMENT LAW CENTER
6 600 Harrison Street, Suite 120
7 San Francisco, CA 94107
8 Telephone: (415) 864-8848
9 Facsimile: (415) 864-8199
10 Email: wmneill@las-elc.org
11 ccenter@las-elc.org
12 ekristen@las-elc.org

13 Daniel S. Mason, State Bar No. 54065
14 Patrick Clayton, State Bar No. 240191
15 Zelle Hofmann Voelbel & Mason LLP
16 44 Montgomery St Ste 3400
17 San Francisco, CA 94104
18 Telephone: (415) 693-0700
19 Facsimile: (415) 693-0770
20 Email: pclayton@zelle.com

21 Attorneys for Plaintiffs

22 **UNITED STATES DISTRICT COURT**

23 **NORTHERN DISTRICT OF CALIFORNIA (OAKLAND DIVISION)**

24 MICHAEL DRAGOVICH, MICHAEL
25 GAITLEY, ELIZABETH LITTERAL,
26 PATRICIA FITZSIMMONS, CAROLYN
27 LIGHT, CHERYL LIGHT, JOANNE
28 SCHMIDT, REIDE GARNETT, DAVID
BEERS, and CHARLES COLE, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE
TREASURY, TIMOTHY GEITHNER, in his
official capacity as Secretary of the Treasury,
United States Department of the Treasury,
INTERNAL REVENUE SERVICE, DOUGLAS
SHULMAN, in his official capacity as
Commissioner of the Internal Revenue Service,
BOARD OF ADMINISTRATION OF
CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM, and ANNE
STAUSBOLL, in her official capacity as Chief
Executive Officer, CalPERS,

Defendants.

Case No. CV 4:10-01564-CW

**PLAINTIFFS' OPPOSITION TO THE
FEDERAL DEFENDANTS' MOTION TO
DISMISS**

DATE: June 23, 2011

TIME: 2:00 p.m.

PLACE: Courtroom of the Honorable
Claudia Wilkin, U.S. District Court,
Northern District of California, 1301 Clay
Street, Courtroom 2

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF FACTS 2

 History of 26 U.S.C. § 7702B(f) 2

 The Reenactment of 26 U.S.C. § 7702B(f) 5

ARGUMENT 5

 I. PLAINTIFFS HAVE STATED A CLAIM AGAINST THE FEDERAL
 DEFENDANTS FOR VIOLATION OF THE FIFTH AMENDMENT’S
 GUARANTEE OF EQUAL PROTECTION 6

 A. The Classification at Issue Here is Subject to Heightened Scrutiny. 8

 B. The Challenged Classification Is Not Neutral. 10

 C. Even if Viewed as “Neutral,” the Challenged Classification Reflects
 Invidious Discrimination. 18

 D. Although Heightened Scrutiny Applies Here, The Challenged Law Fails
 Even Rational Basis Review..... 19

 E. The Challenged Law Impermissibly Excludes Legally
 Recognized Same-Sex-Partners Based Upon Animus Against Lesbians
 And Gay Men and Their Relationships. 20

 II. PLAINTIFFS HAVE STATED A CLAIM AGAINST THE FEDERAL
 DEFENDANTS FOR SELECTIVELY BURDENING THEIR
 EXERCISE OF THEIR FUNDAMENTAL RIGHTS TO FAMILY
 AUTONOMY AND DECISIONMAKING..... 22

CONCLUSION 25

1 **TABLE OF AUTHORITIES**

2 **Federal Cases**

3 *Aetna Cas. & Sur. Co. v. British Petroleum*, Civ. A. Nos. 90-4595, 90-5003, 1991 WL
4 148140 (E.D. La. July 30, 1991).....5
5
6 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).....6
7
8 *Bob Jones University v. U.S.*, 461 U.S. 574 (1983).....24
9
10 *Califano v. Goldfarb*, 430 U.S. 199 (1977).....24
11
12 *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977).....22
13
14 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)..... passim
15
16 *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).....22 ,23
17
18 *Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973).....21
19
20 *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010)..... passim
21
22 *Griswold v. Connecticut*, 381 U.S. 479 (1965).....22
23
24 *Hartfield v. Comm’r*, No. 7439-05S, 2006 WL 1280961 (U.S. Tax Ct. May 11, 2006)...4
25
26 *In re Levenson*, 560 F.3d 1145 (9th Cir. Jud. Council 2009)9, 20, 21
27
28 *Lawrence v Texas*, 539 U.S. 558 (2003)..... passim
Lorillard v. Pons, 434 U.S. 575 (1978)17
Loving v. Virginia, 388 U.S. 1 (1967)10, 22
Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976)9
McLaughlin v. State of Fla., 379 U.S. 184 (1964).....10
Meyer v. Nebraska, 262 U.S. 390 (1923)22
Moore v. East Cleveland, 431 U.S. 494 (1977).....22
Moritz v. C. I. R., 469 F.2d 466 (10th Cir. 1972)24

1	<i>Palmore v. Sidoti</i> , 466 U.S. 429 (1984).....	21
2	<i>Perry v. Schwarzenegger</i> , 704 F. Supp.2d 921 (N.D. Cal. 2010).....	passim
3	<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972),	23
4	<i>Personnel Adm'r of Massachusetts v. Feeney</i> , 442 U.S. 256 (1979).....	11, 18
5	<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925)	22
6	<i>Plessy v. Ferguson</i> , 163 U.S. 537 (1896)	8
7	<i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944).....	22
8	<i>Pruitt v. Cheney</i> , 963 F.2d 1160 (9th Cir.1992)	21
9	<i>Rasco v. Comm’r</i> , No. 8935-98, 1999 WL 311796 (U.S. Tax Ct. May 18, 1999)	5
10	<i>Regan v. Taxation with Representation of Wash.</i> , 461 U.S. 540 (1983),	23, 24, 25
11	<i>Rogers v. Lodge</i> , 458 U.S. 613 (1985).....	18
12	<i>Romer v. Evans</i> , 517 U.S. 620 (1996)	passim
13	<i>Schware v. Board of Bar Exam. of State of N.M.</i> , 353 U.S. 232 (1957)	24
14	<i>Speiser v. Randall</i> , 357 U.S. 513 (1958)	24
15	<i>Tucson Woman’s Clinic v. Eden</i> , 371 F.3d 1173 (9th Cir. 2004).....	21
16	<i>U.S. Department of Agriculture v. Moreno</i> , 413 U.S. 528 (1973).....	21
17	<i>United States v. Virginia</i> , 518 U.S. 515 (1996).....	10
18	<i>Village of Arlington Heights v. Metro Housing Dev. Corp.</i>	
19	429 U.S. 252 (1977).....	11, 12, 18, 19
20	<i>Washington v. Davis</i> , 426 U.S. 229 (1996).....	18
21	<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997)	25
22	<i>Watkins v. U.S. Army</i> , 875 F.2d 699 (9th Cir. 1989)	9
23	<i>Weinberger v. Wiesenfeld</i> , 420 U.S. 636 (1975).....	24
24		
25		
26		
27		
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Whalen v. Roe, 429 U.S. 589 (1977).....22
Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008).....9, 25
Yick Wo v. Hopkins, 118 U.S. 356 (1886)11

Federal Statutes

1 U.S.C. § 7 (Defense of Marriage Act, or DOMA)..... passim
26 U.S.C. § 152(b)(1)4
26 USC § 152(d)(2)5, 17
26 U.S.C. § 152(f)(4)4
26 U.S.C. § 501(c)(3).....23
26 U.S.C. § 7702B(f)..... passim
26 U.S.C. § 1041.....8
26 U.S.C. § 2056.....8
26 U.S.C. §2523.....8

Federal Rules

Federal Rule of Civil Procedure 12(b)(6)5

State Cases

Arlington Cnty. v. White, 259 Va. 708 (2000)4
Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).....3, 19

State Constitution and Statutes

Cal. Const. Art. I, § 7.512
Cal. Fam. Code § 297(b)(5)12
Cal. Fam. Code § 308.512

Legislative History

1		
2	138 Cong. Rec. 1712-01 (1992).....	14
3	138 Cong. Rec. 2950-04 (1992).....	14
4	138 Cong. Rec. 6120-02 (1992).....	14
5	138 Cong. Rec. 9356-03 (1992).....	15
6	138 Cong. Rec. 9401-02 (1992).....	11, 15
7		
8	138 Cong. Rec. 10,876-01 (1992).....	13, 14, 14
9	139 Cong. Rec. 4353-01 (1993).....	15, 16
10	139 Cong. Rec. 9501-01 (1993).....	13
11	140 Cong. Rec. 5589-02 (1994).....	16
12	141 Cong. Rec. 11627-0 (1995).....	16, 17
13		
14	142 Cong. Rec. 735-01 (1996).....	13
15	142 Cong. Rec. 3578-01 (1996).....	3
16	142 Cong. Rec. 4851-02 (1996).....	14
17	142 Cong. Rec. 7270-04 (1996).....	19
18	142 Cong. Rec. 7480 (1996).....	13, 19, 20
19	142 Cong. Rec. 7480-05 (1996).....	13, 19
20		
21	142 Cong. Rec. 10,067-01 (1996).....	19
22	142 Cong. Rec. 10,100-02 (1996).....	13
23	142 Cong. Rec. 3578-01 (1996).....	3
24	144 Cong. Rec. 731-02 (1998).....	17
25	144 Cong. Rec. 1959-02 (1998).....	17
26	144 Cong. Rec. 6577-02 (1998).....	16
27		
28		

1 144 Cong. Rec. 7335-03 (1998).....16

2 144 Cong. Rec. 7381-02 (1998).....16

3 144 Cong. Rec. 9597-03 (1998).....16

4 A.B. 2810 (1993)13

5 A.B. 627 (1995)13

6 District of Columbia Appropriations Act, 1993, Pub. L. No. 102-382, 106 Stat. 1422

7 (1992).....14

8 District of Columbia Appropriations Act, 2002, Pub. L. No. 107-96, [section] 118, 115

9 Stat. 923, 950 (2001).....16

10 Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 29, 1953)18

11 H.R. Rep. 107-32116

12 H.R. Rep. No. 102-1097 (1992).....14

13 H.R. Rep. No. 104-664 (1996).....19

14 Joint Committee on Taxation, *Description of Federal Tax Rules and Legislative*

15 *Background Relating to Long-Term Care Scheduled for a Public Hearing Before the*

16 *Senate Committee on Finance on March 27, 2001*, 2001 WL 36044116 (I.R.S.).....3

17 Stats. 1999, ch. 588 (A.B. 26).....12

18 Stats. 2001, ch. 893 (A.B. 25).....12

19 Stats. 2003, ch. 421 (A.B. 205).....12

20

21

22

23 **Other Authorities**

24 Badgett, M. V. Lee, *Unequal Taxes on Equal Benefits: The Taxation of Domestic*

25 *Partner Benefits* (Ctr. for Am. Progress and the Williams Inst.), Dec. 20077

26

27

28

1	Cain, Patricia A., <i>Litigating for Lesbian and Gay Rights: A Legal History</i> , 79 Va. L.	
2	Rev. 1551 (1993)	18
3	<i>D.C. Budget Passes In House By 2 Votes</i> (The Washington Post, July 1, 1993)	16
4	<i>DC Domestic Partners Legislation Struck Down by Senate</i> (A.P., July 27, 1993)	16
5	Department of the Treasury, Internal Revenue Service, Publication 555, Community	
6	Property (Rev. Dec. 2010)	7, 8
7		
8	Gates, Gary J., et al., <i>Marriage, Registration and Dissolution by Same-Sex Couples In</i>	
9	<i>The U.S.</i> (The Williams Institute, 2008)	12
10	GAO, GAO-04-353R, Report on DOMA to the United States Senate (Jan. 23, 2004).....	7
11	Hope, Heather Ann , <i>Rep. Holloway Opposes Health Care Act</i> , States News Service,	
12	June 4, 1990	14
13		
14	Infanti, Anthony C., <i>Deconstructing the Duty to the Tax System: Unfettering Zealous</i>	
15	<i>Advocacy on Behalf of Lesbian and Gay Taxpayers</i> , 61 Tax Law. 407 (Winter 2008).	
16	6
17	McCraw, Vincent & Clardy, Jim, Congress, <i>Crime Dim Luster of Kelly's first year</i> ,	
18	Washington Times, Oct. 5, 1992, at B1	15
19		
20	National Taxpayer Advocate's 2010 Annual Report to Congress, Taxpayer Rights Issues,	
21	<i>State Domestic Partnership Laws Present Unanswered Federal Tax Questions</i>	8
22	NCLR, Summary of State Laws Regarding Same-Sex Couples.....	17
23	Office of the Gen. Counsel, U.S. Gen. Accounting Office (GAO), GAO/OGC-97-16,	
24	Report on DOMA to the House Judiciary Committee (Jan. 31, 1997).....	7
25	Private Ltr. Ruling (PLR) Number 201021048 (May 28, 2010).....	8
26		
27		
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Wolberg, Alan, Morgan Stanley Smith Barney, *New IRS Private Letter Ruling:
Implications for Registered Domestic Partners* (Apr. 2011).....8

1 **INTRODUCTION**

2 Plaintiffs challenge the constitutionality of 26 U.S.C. § 7702B(f), a portion of the federal
3 tax code enacted in 1996, amended by the Defense of Marriage Act (DOMA), and reenacted in
4 2004. With no permissible rationale, this law excludes the legally recognized domestic partners
5 and spouses of gay and lesbian public employees from participation in state-provided long-term
6 care plans, plans which provide benefits and security critical to the physical and financial
7 wellness of families. Because this exclusion is rooted in animosity toward gays and lesbians, and
8 their relationships and families, and bears no rational relationship to any legitimate governmental
9 interest, it cannot pass constitutional muster.

10 This Court has already determined that the married Plaintiffs – those who were married
11 during the 2008 marriage equality “window” in California – have stated claims against the
12 federal defendants for violations of the constitutional guarantees of equal protection and due
13 process. The same analysis and conclusions apply to the claims brought by Plaintiffs Joanne
14 Schmidt and Reide Garnett, two women who are registered domestic partners, on behalf of
15 themselves and others similarly situated. Under California law, domestic partnership is the only
16 legal relationship status currently available to gay and lesbian couples. With the exception of
17 four months and 19 days in 2008, this has been the case since the first domestic partnership
18 registry was made available in California in 2000. Same-sex domestic partners in California are
19 afforded all of the rights and privileges of married persons, other than access to the important
20 institution of marriage. As such, they are legal “spouses,” but are excluded by the DOMA’s
21 definition of “spouse” in an equal fashion as are the gay and lesbian Plaintiffs who were married.

22 Moreover, as with gay and lesbian couples who are married, the federal government has
23 repeatedly excluded domestic partners from the benefits afforded to heterosexual married couples
24 – including a plethora of tax benefits such as the one at issue here. Throughout, and on the basis
25 of express and virulent animosity, Congress has considered and rejected any legal recognition or
26 acknowledgement of committed gay and lesbian relationships, whether the status at issue has
27 been marriage or domestic partnership.

1 Because the challenged exclusion is unfair, irrational and tainted by impermissible
2 animus, Schmidt and Garnett have stated the same viable claims as have the other Plaintiffs.
3 The federal defendants' second motion to dismiss should be denied.

4 STATEMENT OF FACTS

5 Plaintiffs are employees of the State of California and their partners who are in long-term
6 committed relationships legally recognized under California law as marriages and domestic
7 partnerships. As state employees and as members of the California Public Employees'
8 Retirement System ("CalPERS"), Plaintiffs Michael Dragovich, Elizabeth Litteral, Carolyn
9 Light, Joanne Schmidt, and David Beers ("Plaintiff employees") are eligible to apply to join the
10 CalPERS Long Term Care ("LTC") Program. Under California and federal law, members of the
11 Plaintiff employees' extended families are also eligible to apply to the CalPERS LTC Program –
12 but their legally recognized partners of the same sex, Plaintiffs Michael Gaitley, Patricia
13 Fitzsimmons, Cheryl Light, Reide Garnett, and Charles Cole ("Plaintiff partners") are not.
14 Plaintiffs argue that the federal defendants' exclusion of legally recognized same-sex partners
15 from the CalPERS LTC Program – while permitting virtually any other family member to
16 participate – unconstitutionally discriminates against lesbians and gay men, and their families, by
17 denying them the opportunity to plan for long-term care needs afforded to identically situated
18 families of heterosexual couples.

19 **History of 26 U.S.C. § 7702B(f).**¹

20 Recognizing the importance of long-term care insurance in protecting families, the federal
21 government in 1996 adopted certain minimum standards for policies, including important tax

22
23 ¹ Plaintiffs have previously articulated the importance of long-term care insurance, and have
24 explained that it is a critical benefit for individuals, couples, and families – regardless of sexual
25 orientation – to enhance financial security, and to ensure access to appropriate care throughout the
26 life cycle. (Pls.' Opp'n to the Fed. Defs.' [1st] Mot. to Dismiss, Docket No. 43, at 2.) Plaintiffs have
27 previously described the parameters of the CalPERS plan and its characteristics. (*Id.* at 6-7.)
28 Plaintiffs and a putative class member have articulated why they seek to participate in the CalPERS
plan as opposed to other plans. (*See* Decls. of Patricia Fitzsimmons, Charles Cole, Leslie Cooley,
Joanne Schmidt, and Michael Dragovich, in Supp. of Pls.' Mot. for Class Certification, Docket No.
70.) For the reasons stated in the Plaintiffs' first opposition, and in the previously filed declarations
of the named plaintiffs, the CalPERS Long-Term Care Program affords public employees and their
families unique benefits, opportunities, and conveniences.

1 advantages. “The legislation . . . provides tax deductibility for long term care and insurance,
2 making it possible for more Americans to avoid financial difficulty as the result of chronic
3 illness.” 142 Cong. Rec. 3578-01, at 3608 (1996), 1996 WL 185495, at *S3608 (statement of
4 Sen. John McCain); *see also* Joint Committee on Taxation, *Description of Federal Tax Rules*
5 *and Legislative Background Relating to Long-Term Care Scheduled for a Public Hearing Before*
6 *the Senate Committee on Finance on March 27, 2001*, 2001 WL 36044116 at *7 (I.R.S.)
7 (provisions were adopted “to provide an incentive for individuals to take financial responsibility
8 for their long-term care needs.”). Included in the legislation is 26 U.S.C. § 7702B(f), the
9 provision challenged herein, which enables states to offer tax-shielded (“qualified”) long term
10 care insurance programs to public employees and their families. Section 7702B(f), as amended
11 by DOMA, permits states to offer public employees a “qualified,” tax-shielded, long-term care
12 insurance plan that allows an employee to enroll himself or herself, as well as all conceivable
13 family members, *except* legally recognized partners who are the same sex as the employee.

14 Section 7702B(f) was enacted and first amended against a background of considerable
15 congressional debate and agitation about the prospect of state and local governments recognizing
16 the legal validity of the relationships of lesbians and gay men. The 1996 legislative session
17 explicitly considered and reacted to *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), a 1993 decision
18 by the Hawaii Supreme Court indicating that lesbian and gay couples might be entitled to marry
19 under the Hawaii state constitution. *See Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374,
20 377 (D. Mass. 2010) (“In large part, the enactment of DOMA can be understood as a direct
21 legislative response to *Baehr v. Lewin*.”); *id.* at 377-78 (“The House Judiciary Committee's
22 Report on DOMA (the ‘House Report’) referenced the *Baehr* decision as the beginning of an
23 ‘orchestrated legal assault being waged against traditional heterosexual marriage,’ and expressed
24 concern that this development ‘threaten[ed] to have very real consequences... on federal law.’
25 Specifically, the Report warned that ‘a redefinition of marriage in Hawaii to include homosexual
26 couples could make such couples eligible for a whole range of federal rights and benefits.’”).
27 Along with the *Baehr* case, the 1996 Congressional debate occurred in the context of emerging
28

1 legislative models for the legal recognition of such couples on the state and local levels. As
2 reported to Congress, numerous local municipalities had begun to establish domestic partnership
3 registries as a tool for granting lesbian and gay couples some of the legal rights and benefits
4 historically afforded married couples. The 1993 Congress amended the Family and Medical
5 Leave Act to exclude use of the leave entitlement to care for same-sex domestic partners. As
6 well, the District of Columbia adopted such a registry in 1992, which became a topic of intense
7 debate by Congress throughout the annual appropriations process. *See infra*.

8 At issue in this case, the 1996 Congress excluded legally recognized same-sex partners
9 from eligibility for state-sponsored public employee long-term care plans. In enacting section
10 7702B(f) at that time, Congress permitted the participation of “employees and former
11 employees,” “the spouses of such employees,” and “individuals bearing a relationship described
12 in paragraphs (1) through (8) of section 152(a).” 26 U.S.C. § 7702B(f)(2)(C) (1996). In
13 choosing to incorporate these particular subsections of section 152(a), Congress permitted the
14 participation of “an array of relatives,” *see* Fed. Defs.’ Not. of Motion and [1st] Mot. to Dismiss
15 1st Am. Compl. (hereinafter Fed. Defs.’ Mot.), Doc. No. 71, at 1-2, and specifically sons,
16 daughters, stepsons, stepdaughters, grandchildren, sisters and brothers (defined to include half-
17 siblings²), stepsisters, stepbrothers, fathers, mothers, stepfathers, stepmothers, grandparents,
18 nieces, nephews, aunts, uncles, sons-in-law, daughters-in-law, fathers-in-law, mothers-in-law,
19 brothers-in-law, and sisters-in-law.

20 However, Congress declined to include domestic partners such as Plaintiffs Schmidt and
21 Garnett. First, Congress did not include any category that explicitly reached legally recognized
22 same-sex partners. Second, Congress excluded a single subsection, subsection (9), describing
23 “an individual ... who, for the taxable year of the taxpayer, has as his principal place of abode the
24 home of the taxpayer and is a member of the taxpayer’s household.” Subsection (9) would have
25 permitted the enrollment of domestic partners.³ Third, through the DOMA, Congress limited the

26 ² 26 U.S.C. § 152(b)(1) (1996); 26 U.S.C. § 152(f)(4) (2010).

27 ³ *See Arlington Cnty. v. White*, 259 Va. 708, 716 (2000) (Kinser, J., concurring) (“[A]n individual
28 satisfying Arlington County’s definition of ‘domestic partner’ could also qualify as a ‘dependent’
under 26 U.S.C. § 152(a)(9).”); *see also Hartfield v. Comm’r*, No. 7439-05S, 2006 WL 1280961

1 eligible “spouses” to different-sex spouses, thereby foreclosing couples such as Plaintiffs
2 Schmidt and Garnett – registered in a state that accords domestic partners all of the rights and
3 privileges of marriage – from asserting that they are legal spouses.

4 In excluding same-sex partners from the laundry list of permitted relations in section
5 7702B(f), Congress failed to identify any legitimate, rational, or important purpose that would be
6 served. The only interest ever expressed regarding the legal recognition of same-sex
7 relationships has been “the one purpose that lies entirely outside of legislative bounds, to
8 disadvantage a group of which [Congress] disapproves.” *Gill*, 699 F. Supp. 2d at 396.

9 **The Reenactment of 26 U.S.C. § 7702B(f).**

10 Section 7702B(f) was reenacted in 2004, again excluding gay and lesbian partners by
11 adopting subparagraphs (A) through (G) of section 152(d)(2), as amended, but excluding
12 subparagraph (H). By 2004, the existence of legal relationship recognition for gay and lesbian
13 couples at the state level was well established. For example, California, New Jersey,
14 Washington, and Maine had enacted domestic partnership legislation, Vermont created civil
15 unions, Hawaii established reciprocal benefits for gay and lesbian couples, and in Massachusetts
16 gay and lesbian couples were permitted to legally marry. Additionally, municipalities across the
17 country in states without state-wide relationship recognition for gay and lesbian couples
18 continued to adopt their own ordinances. However, Congress, in again excluding legally
19 recognized gay and lesbian couples from this benefit, failed to offer any legitimate government
20 rationale for doing so.

21 **ARGUMENT**

22 Defendants move to dismiss Plaintiffs’ Amended Complaint pursuant to Federal Rule of
23 Civil Procedure 12(b)(6). In denying the federal defendants’ first motion to dismiss, this Court
24 noted that dismissal under 12(b)(6) is appropriate “only when the complaint does not give the
25 defendant fair notice of a legally cognizable claim and the grounds on which it rests.” (Docket

26 (T.C. May 11, 2006); *Rasco v. Comm’r*, No. 8935-98, 1999 WL 311796 (T.C. May 18, 1999); *Aetna*
27 *Cas. & Sur. Co. v. British Petroleum*, Civ. A. Nos. 90-4595, 90-5003, 1991 WL 148140 (E.D. La.
28 July 30, 1991). Through 2004, the provision was found at section 152(a)(9); it is now found at
section 152(d)(2)(H).

1 No. 56 at 12 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).) Here, the federal
2 defendants are well-aware of the factual and legal basis for plaintiffs’ claims. Plaintiffs’ claims
3 are legally cognizable based on precedent establishing that legislative classifications based on
4 sexual orientation may be found to violate the constitutional guarantees of equal protection and
5 due process.

6 **I. PLAINTIFFS HAVE STATED A CLAIM AGAINST THE FEDERAL**
7 **DEFENDANTS FOR VIOLATION OF THE FIFTH AMENDMENT’S**
8 **GUARANTEE OF EQUAL PROTECTION.**

9 Gay and lesbian Americans, and their families, are a discrete and insular minority that has
10 been subjected to a history of purposeful unequal treatment.⁴ This history of purposeful
11 exclusion is fully evident in myriad provisions of the federal tax code. Its provisions reflect “the
12 largely unstated assumption that heterosexuality is the essential and elemental ordering principal
13 of society.” Anthony C. Infanti, *Deconstructing the Duty to the Tax System: Unfettering Zealous*
14 *Advocacy on Behalf of Lesbian and Gay Taxpayers*, 61 Tax Law. 407, 413 (Winter 2008). As a
15 result, “lesbians and gay men do not experience the tax system in the same way that
16 heterosexuals do. In contrast to heterosexuals, lesbians and gay men are in the unique position of
17 being the only group that is the object of both overt and covert invidious discrimination in the
18 application of the tax laws.” *Id.* at 412.

19 The tax code’s explicit discrimination against gay and lesbian couples was accelerated by
20 the 1996 enactment of the “Defense of Marriage Act.” In addition to branding the relationships
21 and families of gays and lesbians as inferior to those of straight couples, the DOMA amended
22 more than 1,000 federal laws, including at least 179 provisions in the federal tax code:

23 The distinction between married and unmarried status is pervasive in federal tax law; this
24 is one of the largest categories, with 179 provisions...[W]e identified 59 provisions in
25 income tax law under which tax liability depends in part on whether a taxpayer is married
26 or single....Marital status also plays a key role in the estate and gift tax laws and in the
27 part of the tax code dealing with taxation on the sale of property.... These provisions
28 permit married couples to transfer substantial sums to one another, and to third parties,

26 ⁴ See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp.2d 921, 981-85 (N.D. Cal. 2010 (reviewing
27 evidence of history of discrimination against gays and lesbians); Expert Affidavit of George
28 Chauncey, Ph.D (Nov. 16, 2009), at ¶ 76, filed in *Gill v. OPM*, No. 1:09-cv-10309 (D. Mass.) (“It is
my professional opinion that the historical record outlined above demonstrates that gay people have
been subject to widespread and significant discrimination and hostility.”).

1 without tax liability in circumstances in which single people would not enjoy the same
2 privilege.

3 Office of the Gen. Counsel, U.S. Gen. Accounting Office (GAO), GAO/OGC-97-16, Report on
4 DOMA to the House Judiciary Committee (Jan. 31, 1997), at Enclosure I, pp. 3-4, *available at*
5 <http://www.gao.gov/archive/1997/og97016.pdf> ; *see also id.* at Enclosure II, pp. 10-18 (listing
6 affected tax code provisions in table format, including provisions challenged herein); GAO,
7 GAO-04-353R, Report on DOMA to the United States Senate (Jan. 23, 2004), at pp. 5-6
8 (Appendix 1, listing statutes), 16 (Appendix 4: “While the distinction between married and
9 unmarried status is pervasive in federal tax law, terms such as ‘husband,’ ‘wife,’ or ‘married’ are
10 not defined. However, marital status figures in federal tax law in provisions as basic as those
11 giving married taxpayers the option to file joint or separate income tax returns. It is also seen in
12 the related provisions prescribing different tax consequences, depending on whether a taxpayer is
13 married filing jointly, married filing separately, unmarried but the head of a household, or
14 unmarried and not the head of a household.”), *available at* <http://www.gao.gov/new.items/d04353r.pdf>.

15 At the same time, several states including California have established legal status for
16 same-sex relationships that entail all of the rights and obligations of marriage. Same-sex couples
17 who marry or enter into a domestic partnership in California are therefore treated the same as
18 married different-sex couples for state tax purposes, but as “single” strangers for federal tax
19 purposes.⁵ Gay and lesbian couples in relationships legally recognized under California law
20 must pay federal income tax on marital and domestic partner benefits like health insurance, and
21 cannot use pre-tax dollars to pay for a partner’s benefits. M. V. Lee Badgett, *Unequal Taxes on*
22 *Equal Benefits: The Taxation of Domestic Partner Benefits* (Ctr. for Am. Progress and the
23 Williams Inst.), Dec. 2007, at 1, 7 (“[E]ven when partners are covered, the partner's coverage is
24 taxed as income to the employee. ... [T]he total tax disadvantage is on average \$1,069, or 11
25 percent of taxes paid by the typical single taxpayer.”). As well, same-sex couples in California
26 cannot claim the benefit of provisions which allow spouses to transfer property within the couple

26 ⁵ See Department of the Treasury, Internal Revenue Service, Publication 555, Community Property
27 (Rev. Dec. 2010), at <http://www.irs.gov/pub/irs-pdf/p555.pdf> (“RDPs (and individuals in California
28 who are married to an individual of the same sex) are not married for federal tax purposes. They can
use only the single filing status, or if they qualify, the head of household filing status.”).

1 tax-free. *See* 26 U.S.C. §§ 1041, 2056, 2523.⁶ Moreover, in many contexts, the application of
2 tax rules to gays and lesbians and their families has remained totally unclear, reflecting covert
3 discrimination and disregard toward gays and lesbians.⁷

4 It is within this social, historical, and legal context of purposeful discrimination that the
5 plaintiffs here – entitled to equal treatment as legally recognized couples under the California
6 state constitution – bring their claim to strike down the arbitrary federal tax law provision that
7 with no legitimate rationale prevents them from participating equally in an important, privately
8 funded benefits program offered and mandated by state law.

9 **A. The Classification at Issue Here is Subject to Heightened Scrutiny.**

10 The guarantee of equal protection found in the Fifth Amendment “neither knows nor
11 tolerates classes among citizens.” *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v.*
12 *Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)); *Gill*, 699 F. Supp. 2d at 386
13 (quoting *Romer*). “No single talisman can define those groups likely to be the target of
14 classifications offensive to the [Constitution] and therefore warranting heightened or strict
15 scrutiny; experience, not abstract logic, must be the primary guide.” *City of Cleburne v.*
16 *Cleburne Living Ctr.*, 473 U.S. 432, 472 n.24 (1985). Key factors are a history of discrimination,
17 and that the status shared by the group bears little relation to an individual’s ability to contribute

18
19 ⁶ Because transactions within a same-sex couple are not disregarded for federal tax purposes, a same-
20 sex couple must annually calculate and document their respective contributions to the economic pool
21 and determine the amount, if any, of the net transfer from the higher-earning partner to the lower-
22 earning partner that results from differing contributions to the pool (the net interspousal transfer). In
23 practice, this task is difficult, if not impossible, for same-sex couples to accomplish. In 2011, this
24 result was only partially remedied by new IRS rules permitting gay couples to “split” their income in
25 three community property states, including California. *See* Dep’t of the Treasury, Internal Revenue
26 Serv., Publication 555, Community Property (Rev. Dec. 2010), available at
27 <http://www.irs.gov/pub/irs-pdf/p555.pdf>; *accord* Private Ltr. Ruling (PLR) Number 201021048 (May
28 28, 2010), available at <http://www.irs.gov/pub/irs-wd/1021048.pdf>; *see also* Alan Wolberg, Morgan
Stanley Smith Barney, New IRS Private Letter Ruling: Implications for Registered Domestic
Partners (Apr. 2011), available at [http://fa.smithbarney.com/public/projectfiles/c6727515-3af1-489e-
a0ca-4b673ffcf0.pdf](http://fa.smithbarney.com/public/projectfiles/c6727515-3af1-489e-a0ca-4b673ffcf0.pdf).

⁷ *See* National Taxpayer Advocate’s 2010 Annual Report to Congress, Taxpayer Rights Issues, “State
Domestic Partnership Laws Present Unanswered Federal Tax Questions,” at
http://www.taxpayeradvocate.irs.gov/files/VOL%201_MSP%206_15_TaxpayerRights.pdf (“The IRS
has not provided answers to these questions, requiring many taxpayers to file returns without
knowing which rules apply and potentially subjecting them to audits and penalties, as well as costs
for tax advice.”).

1 to society. Additional relevant factors include being a minority and/or being relatively politically
2 powerless, and whether the status shared by the group is immutable. *Id.* at 441-42;
3 *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976).

4 Plaintiffs here will present evidence showing that each of these factors counsels in favor
5 of viewing sexual orientation as a suspect or quasi-suspect class. *See, e.g., Perry v.*
6 *Schwarzenegger*, 704 F. Supp. 2d 921, 943, 967, 981, 986 (N.D. Cal. 2010) (fact 74: “Gays and
7 lesbians have been victims of a long history of discrimination.”; fact 75: “Public and private
8 discrimination against gays and lesbians occurs in California and in the United States.”; fact 78:
9 “Stereotypes and misinformation have resulted in social and legal disadvantages for gays and
10 lesbians.”; fact 9: expert testified that “(1) gays and lesbians do not possess a meaningful degree
11 of political power; [and] (2) gays and lesbians possess less power than groups granted judicial
12 protection.”; fact 47.b: “Attorney General admits that sexual orientation bears no relation to a
13 person's ability to perform in or contribute to society.”; *see also* fact 47.f.); *Watkins v. U.S. Army*,
14 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J. concurring in the judgment) (“scientific research
15 indicates that we have little control over our sexual orientation and that, once acquired, our
16 sexual orientation is largely impervious to change.”). Additional legal authority supports the
17 proposition that classifications based upon sexual orientation should be subject to heightened
18 constitutional scrutiny.⁸ The federal defendants agree. Letter from Attorney General Holder,
19 February 23, 2011, Docket No. 64-2 at 2-3.

20 The exclusion challenged here also classifies on the basis of sex, and is subject to
21 heightened scrutiny on that basis. If either plaintiff Schmidt or Garnett were male instead of

22
23 ⁸ *See In re Levenson*, 560 F.3d 1145, 1149 (9th Cir. Jud. Council 2010) (“I believe it likely that some
24 form of heightened constitutional scrutiny applies to Levenson's claims.”); *Perry*, 704 F. Supp. 2d at
25 997 (“Although Proposition 8 fails to possess even a rational basis, the evidence presented at trial
26 shows that gays and lesbians are the type of minority strict scrutiny was designed to protect. ...
27 [S]trict scrutiny is the appropriate standard of review to apply to legislative classifications based on
28 sexual orientation.”); *cf. Witt v. Dep't of the Air Force*, 527 F.3d 806, 816-21 (9th Cir. 2008)
(applying heightened scrutiny on an “as applied” basis to a discharged service member's challenge to
the military's “Don't Ask, Don't Tell” policy, holding that “[T]he Supreme Court applied a
heightened level of scrutiny in *Lawrence*.”); *id.* at 823-26 (Canby, J., concurring in part and
dissenting in part) (arguing that discrimination based on sexual orientation is subject to strict scrutiny
under equal protection and due process analyses).

1 female, the law would permit them to marry and enroll their spouse in the CalPERS LTC plan.
2 The same is true for the married Plaintiffs – if either member of each couple were a different sex,
3 the couple would be included. The equal protection clause prohibits such sex-based
4 classifications unless they are “substantially related” to an “important” government interest.
5 *United States v. Virginia*, 518 U.S. 515, 533 (1996). “The justification must be genuine, not
6 hypothesized or invented *post hoc* in response to litigation.” *Id.* at 533. Defendants may argue
7 that this classification does not treat men and women differently – all are prohibited from
8 enrolling their same-sex partner in the LTC plan. However, the U.S. Supreme Court rejected a
9 similar argument in *Loving v. Virginia*, 388 U.S. 1 (1967).⁹ Similarly here, the challenged tax
10 provision treats couples differently based on the sex of their partner.

11 Even if this Court determines that heightened scrutiny does not apply, the Complaint
12 states a claim that the challenged law fails even rational basis review. *Romer*, 517 U.S. at 634-
13 35. The exclusion of legally recognized same-sex partners from participation in state-provided
14 long-term care plans – while including every other conceivable family member – advances no
15 legitimate goal. The exclusion of only same-sex partners, together with a legislative record
16 replete with venomous and vicious anti-gay remarks, demonstrates that the provision rests upon
17 animus against lesbians and gays and thus is unconstitutional. *See* Docket No. 56 at 24-25
18 (finding that moral condemnation of homosexuality is not a legitimate Constitutional basis for
19 the DOMA).

20 **B. The Challenged Classification Is Not Neutral.**

21 Plaintiffs challenge 26 U.S.C. § 7702B(f) as applied to their family and others similarly
22 situated – that is, same-sex couples in registered domestic partnerships recognized by the State of
23 California who seek equal access to the CalPERS long-term care program. The federal
24 defendants argue that the exclusion of registered domestic partners from the laundry list of

25 ⁹ The state defended its anti-miscegenation law arguing that it equally prohibited “both the white and
26 Negro participants in an interracial marriage.” 388 U.S. at 8. However, the Court found that mere
27 “equal application” did not “immunize the statute from the very heavy burden of justification which
28 the [Constitution] has traditionally required of state statutes drawn according to race.” *Id.* at 9; *see*
also McLaughlin v. State of Fla., 379 U.S. 184, 187 (1964) (striking down statute prohibiting
cohabitation by interracial unmarried couple on equal protection grounds).

1 permitted relations is not a classification based on sex or sexual orientation, or based upon
2 protected family choices, because straight, opposite-sex couples can be registered domestic
3 partners. (Fed. Def.'s Mot. at 13-14.) Under these circumstances, the first question is whether
4 the statutory classification is indeed neutral, or is overtly or covertly discriminatory. *See*
5 *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979) (“When a statute gender-
6 neutral on its face is challenged on the ground that its effects upon women are disproportionately
7 adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory
8 classification is indeed neutral in the sense that it is not gender-based.”); *Village of Arlington*
9 *Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977) (“Sometimes a clear
10 pattern, unexplainable on grounds other than race, emerges from the effect of the state action
11 even when the governing legislation appears neutral on its face.”) (citing *Yick Wo v. Hopkins*,
12 118 U.S. 356 (1886)); *Yick Wo*, 118 U.S. at 374 (“[T]he conclusion cannot be resisted that no
13 reason for it exists except hostility to the race and nationality to which the petitioners belong.”).

14 Here, the exclusion of domestic partners is a proxy for the exclusion of gay and lesbian
15 partners, such that the challenged statute cannot be considered “neutral.” With respect to
16 California’s domestic partnership law, registered same-sex couples are entitled to all of the
17 rights, privileges, and obligations of marriage. But for the DOMA’s restrictive and
18 discriminatory definition of “spouse,” Plaintiffs Schmidt and Garnett could be deemed “spouses”
19 for purposes of section 7702B(f)(2)(C)(iii). Moreover, there can be no serious debate that a
20 primary motivating force behind the establishment and maintenance of domestic partnership laws
21 in California and elsewhere is the exclusion of gay and lesbian couples from the legal status of
22 marriage.¹⁰ In California, with the exception of couples in which one partner is over the age of

23
24 ¹⁰ *Cf. Perry*, 704 F. Supp. 2d at 1001 (“California may determine whether to retain domestic
25 partnerships or eliminate them in the absence of Proposition 8; the court presumes, however, that as
26 long as Proposition 8 is in effect, domestic partnerships and the accompanying administrative burden
27 will remain.”); 138 Cong. Rec. 9401-02, at 9409 (1992), 1992 WL 237539, at *H9409 (statement of
28 Representative Barney Frank during House floor debates regarding D.C. domestic partner registry:
“The question was whether this Government elected by the people of the District of Columbia should
have been allowed some recognition of domestic partnership, particularly between people who are
not legally allowed marriage. People say, ‘Well, why don't people get married if they want those
kind of things?’ Well, because people of the same sex cannot get married.”).

1 62, the relationship status of being registered domestic partners is limited to gay and lesbian
2 couples. Cal. Fam. Code § 297(b)(5). Indeed, about 95 percent of the couples who have
3 registered as domestic partners in California are gay and lesbian couples.¹¹ Presently, the **only**
4 legal relationship status available to gay and lesbian couples in California is that of being
5 registered domestic partners.¹² With the exception of four months and 19 days in 2008, this has
6 been the case since the first domestic partnership registry was made available in California in
7 2000.¹³ Given this “clear pattern,” *see Arlington Heights*, 429 U.S. at 266, the exclusion is not
8 truly neutral and should be viewed as discriminatory.

9 Also unavailing is the federal defendants’ argument that the challenged exclusion cannot
10 be viewed as discriminatory, as it was enacted at a time when domestic partnership registries did
11 not yet exist at the state level. (Fed. Def’s Mot. at 2.) Congressional decisionmaking cannot be
12 presumed to exist in a bubble, separate from all state and local legal developments. In any event,
13 Congress has repeatedly discussed and debated domestic partnership registries from at least 1992
14 to the present. By 1996, Congress was well aware of emerging models for the legal recognition
15 of gay and lesbian couples on the state and local levels.¹⁴ Of course, it was the possibility of
16 such legal recognition – the Hawaii marriage case – that triggered the DOMA’s proposal, debate,
17 and enactment. As well, local municipalities had begun to establish domestic partnership
18 registries as a tool for granting lesbian and gay couples some of the legal rights and benefits
19 historically afforded married couples; these developments were reported to the Congress years

21
22 ¹¹ Gary J. Gates, *et al.*, *Marriage, Registration and Dissolution by Same-Sex Couples in the U.S.*
23 (The Williams Inst.), July 2008, at 2, tbl. 5; *see also id.* at 2 (“In states that allow different-sex
24 couples to enter non-marital forms of recognition, the registration rate has been less than 6% of
25 eligible couples.”).

24 ¹² Cal. Fam. Code § 297(b)(5); Cal. Const. art. I, § 7.5; *see also Perry*, 704 F.Supp.2d at 994
25 (“California allows almost all opposite-sex couples only one option – marriage – and all same-sex
26 couples only one option – domestic partnership. ... [D]omestic partnerships exist solely to
27 differentiate same-sex unions from marriages.”).

26 ¹³ *See id.*; A.B. 26, 1999 Assemb. (Cal. 1999) (enacting Cal. Fam. Code § 297 *et seq.*); A.B. 25, 2001
27 Assemb. (Cal. 2001); A.B. 205, 2003 Assemb. (Cal. 2003); Cal. Fam. Code § 308.5 (added by Prop.
28 22, approved Mar. 7, 2000); *cf. Perry*, 704 F. Supp. 2d at 921.

27 ¹⁴ A Westlaw search of the Congressional record reveals hundreds of references to the issue of the
28 legal status of domestic partnership during the 1990s.

1 before the exclusion challenged here was adopted.¹⁵ In California, bills to establish a state-wide
2 domestic partnership registry were introduced in the Legislature during the 1993-94 and 1995-96
3 sessions. A.B. 2810 (1993); A.B. 627 (1995).

4 During the heated debates regarding the Defense of Marriage Act, the status of domestic
5 partnership was repeatedly referenced. For example, opponents of the DOMA introduced an
6 amendment requiring the GAO to “undertake a study of the differences in the benefits, rights and
7 privileges available to persons in a marriage and the benefits, rights and privileges available to
8 persons in a domestic partnership resulting from the non-recognition of domestic partnerships as
9 legal unions by State and Federal laws.”¹⁶ The amendment was defeated.¹⁷ Also during the
10 1996 debates, Senator Nickles endorsed the DOMA by explaining that, by inserting similar
11 language into the FMLA, the federal government had been able to prohibit the use of the leave
12 entitlement for the care of same-sex domestic partners:

13 Another example of why we need a Federal definition of the terms “marriage” and
14 “spouse” stems from experience during debate on the Family and Medical Leave Act of
15 1993. Shortly before passage of this act, I attached an amendment that defined “spouse”
16 as “a husband or wife, as the case may be.” When the Secretary of Labor published his
proposed regulations, a considerable number of comments were received urging that the
definition of “spouse” be “broadened to include domestic partners in committed
relationships, including same-sex relationships.” When the Secretary issued the final rules

17 ¹⁵ 138 Cong. Rec. 10,876-01, at 10,904 (1992), 1992 WL 180795, at *S10904 (statement of Sen.
18 Brock Adams entering into Congressional record report detailing domestic partnership recognition in
19 the following jurisdictions: Alameda, San Mateo, and Santa Cruz counties in California; Travis
County, Texas; Dane County, Wisconsin; cities Berkeley, Los Angeles, Oakland, San Francisco,
20 Santa Cruz, West Hollywood, New York, Ithaca, Cambridge, West Palm Beach, Ann Arbor, East
Lansing, Madison, Minneapolis, Seattle, and Takoma Park; and the District of Columbia.); 139
21 Cong. Rec. 9501-01, at 9503 (1993), 1993 WL 280854, at *S9503 (statement of Sen. Herb Kohl:
“There are other cities which have domestic partner laws.... The city of Seattle ... [T]he cities of
22 San Francisco, Berkeley, and Santa Cruz have similar laws. . . . In my own State of Wisconsin, the
city of Madison has a similar law. And so do dozens of other cities in other States.”); 142 Cong. Rec.
23 10,100-02, at 10,102 (1996), 1996 WL 511108, at *S10102 (statement of Sen. Edward Kennedy: “In
fact, States and local governments across the country are already dealing with this issue in their own
24 ways. Some have enacted domestic partnership laws.”); *id.* at 10,113, *S10113 (statement of Sen.
Barbara Boxer: “Many communities in my State recognize domestic partnerships for those who
choose to make a commitment.”).

25 ¹⁶ 142 Cong. Rec. 7480-05, at 7504 (1996), 1996 WL 392787, at *H7504; *see id.* (statement of Rep.
Charles Canady in opposition to study: “This motion represents a transparent attempt to give some
26 statutory recognition to domestic partnerships.”).

27 ¹⁷ 142 Cong. Rec. 735-01, at 735 (1996), 1996 WL 392924, at *D735; *see also* 142 Cong. Rec. 7480-
28 05, at 7503 (1996), 1996 WL 392787, at *H7503 (statement of Rep. David Skaggs: “[B]y refusing as
part of this legislation even to permit a formal study of disparate treatment of domestic partnerships
in these areas, the proponents of this legislation may reveal their real motivation.”).

1 he stated that the definition of “spouse” and the legislative history precluded such a
broadening of the definition.

2 142 Cong. Rec. 4851-02, at 4870 (1996), 1996 WL 233584, at *S4870. As with the FMLA,
3 same-sex partners are similarly excluded from state-sponsored long-term care plans.

4 Congress played a particularly active role in responding to the domestic partner registry
5 adopted by the District of Columbia in 1992. Congress immediately barred any local or federal
6 funding of the registry:

7 No funds made available pursuant to any provision of this Act shall be used to implement
8 or enforce any system of registration of unmarried, cohabiting couples whether they are
9 homosexual, lesbian, or heterosexual, including but not limited to registration for the
10 purpose of extending employment, health, or governmental benefits to such couples on
the same basis that such benefits are extended to legally married couples; nor shall any
funds made available pursuant to any provision of this Act otherwise be used to
implement or enforce D.C. Act 9–188, signed by the Mayor of the District of Columbia
on April 15, 1992.

11 District of Columbia Appropriations Act, 1993, Pub. L. No. 102-382, 106 Stat. 1422 (1992); *see*
12 *also* H.R. Rep. No. 102-1097, pt. 4, at 54 (1992) (recounting testimony of Professor Charles
13 Rice, describing the D.C. registry as erecting “discrimination against members of traditional
14 families”). Throughout years of appropriations cycles, Congressional leaders opposing the D.C.
15 domestic partnership registry expressed precisely the same animus towards gays and lesbians and
16 their families as was on view during the DOMA debates.

17 For example, Representative Clyde Holloway, the sponsor of a 1992 resolution
18 disapproving of the D.C. registry, declared on the House floor: “If there ever was an attack on
19 the family in this country, it is this Domestic Partnership Act.”¹⁸ He added:

20 [I]t would undermine the institution of marriage and will send shock waves through
21 society. ... I think the fact that disturbs me the most is the fact that both heterosexual,
22 homosexual, lesbian are all allowed to be, and I think they feel very strongly that the
original intent of this bill was to make it legal to have same-sex marriages in this country.
23 ... Mr. Chairman, I do not think anyone that is homosexual can stand here on this floor
and openly tell me that homosexuality is good for the future of America.

24 138 Cong. Rec. 6120-02, at 6129 (1992), 1992 WL 156371, at *H6129. Supporting the

25 ¹⁸ 138 Cong. Rec. 2950-04, at 2950 (1992), 1992 WL 96521, at *H2950; *see also* Heather Ann Hope,
26 *Rep. Holloway Opposes Health Care Act*, States News Service, June 4, 1990 (“This act would
‘radically alter the cultural values’ of this nation, Holloway said, because ‘it covers shack-ups,
27 homosexuals and lesbians.’”); 138 Cong. Rec. 1712-01, at 1712 (1992), 1992 WL 120746, at *E1712
(statement of Hon. Clyde C. Holloway: “[T]he Congress, as a matter of policy, should not equate gay
28 and lesbian relationships with the relationships between men and women in marriage.”).

1 amendment which banned the use of any federal or local funding to implement the registry,

2 Senator Trent Lott stated:

3 [A]ll lifestyles are not equal. ... The bill is intended as a means to officially recognize
4 and sanction gay unions and cohabitation outside of marriage. That is what the real
5 impact is. ... When we talk in America about traditional family values and traditional
6 families, I think we all know what we are talking about. This legitimizes homosexual and
7 lesbian couples living together, as well as unmarried heterosexuals. ... This is wrong.
8 ... Its real purpose is to serve as the first step toward officially sanctioning homosexual
9 marriages or unions in the Nation's Capital and, indeed, across the country.

10 138 Cong. Rec. 10,876-01, at 10,903-04, 10,906 (1992), 1992 WL 180795, at *S10903-04,
11 *S10906. Additional Congressional leaders expressed much the same sentiment.¹⁹

12 In 1993, Representative Ernest Istook led the House's successful effort to extend the
13 funding ban. He described the domestic partnership law as "abhorrent" for reaching the
14 relationships of gays and lesbians:

15 Now, obviously this was passed by the District of Columbia to enable people, more than
16 anything else, who are in a homosexual relationship to register an equivalent of a gay
17 marriage. That is one of the reasons that this particular proposal is abhorrent, in my view.
18 ... Do not let the District authorize homosexual marriages, or a new concept of
19 heterosexual relations, which is also in their definition of domestic partner.

20 139 Cong. Rec. 4353-01, at 4355, 4358 (1993), 1993 WL 236117, at *H4344, *H4358. In
21 support of the extended funding ban, Representative Tom DeLay similarly stated: "Let us not
22 kid ourselves. What this is all about is this act was promoted by the homosexual lobby in this
23 town as the same-sex marriage act. The intent was and still is to legitimize the concept of same-
24 sex marriage, undermining the traditional marriage of one man and one woman." *Id.* at 4357,
25 *H4357. Other leaders made similar remarks in extending the ban.²⁰

26 ¹⁹ See, e.g., 138 Cong. Rec. 10,876-01, at 10,905 (1992), 1992 WL 180795, at *S10905 (statement of
27 Sen. Dan Coates: "The [D.C. domestic partnership legislation] is a direct attack on the family and its
28 values. ... [I]t undermines the legal importance of marriage. ... What this really is ... is a symbol
... of disdain for the traditional family."); 138 Cong. Rec. 9356-03, at 9360 (1992), 1992 WL
237521, at *H9360 (statement of Rep. Thomas Bliley: "By giving official status to these
relationships, this legislation forces the residents of the District and indeed all Americans to accept
the devaluation of marriage."); *Id.* at 9363 (statement of Rep. Cliff Stearns: "Just as slavery eroded
the freedoms outlined in our Constitution, so too would recognition of domestic partners further
erode the family values so important to Americans."); Vincent McCraw & Jim Clardy, *Congress,
crime dim luster of Kelly's first year*, Washington Times, Oct. 5, 1992, at B1 ("Critics said the
initiative would encourage homosexual lifestyles.").

²⁰ See, e.g., 139 Cong. Rec. 4353-01, at 4357 (1993), 1993 WL 236117, at *H4357 (statement of
Rep. Duncan L. Hunter: "[T]he District action amounts to a societal endorsement of homosexual
marriage."); *id.* at 4356 (statement by Rep. Thomas J. Bliley) ("By giving official status to these

1 The bar on federal and local funding to implement the registry continued to be adopted by
2 Congress on an annual basis until 2002, with similar statements of animus.²¹ The ban continues
3 to this day with respect to federal funding.²² In 1998, Congress similarly sought to prevent San
4 Francisco from spending federal funds on its domestic partnership ordinance.²³ That same year,
5 Senate Wellstone introduced a bill to provide benefits to the domestic partners of federal

6 relationships, this legislation forces the residents of the District and indeed all Americans to accept
7 the devaluation of marriage.”); 139 Cong. Rec. 9501-01, at 9502 (1993), 1993 WL 280854, at
8 *S9502 (statement of Sen. Trent Lott: “[A]ll lifestyles are not equal ... the institution of marriage is
9 preferable and superior, and our policies should reflect that conclusion. . . . The Domestic Partners
10 Act came as a direct result of a D.C. judge's decision not to grant a marriage license to homosexual
11 couples. That is the history on this legislation in the District of Columbia.”); *D.C. Budget Passes In
House By 2 Votes*, Washington Post, July 1, 1993, at A1 (“[O]pponents argued that anyone who
12 supported domestic partners would be voting in favor of homosexual rights.”); *DC Domestic
Partners Legislation Struck Down by Senate*, Associated Press, July 27, 1993 (“Sen. Trent Lott, R-
13 Miss., who led the debate against the measure, called it ‘a precursor to the breakup of American
14 families’ that encouraged nontraditional homosexual and lesbian liaisons.”)

²¹ See, e.g., 140 Cong. Rec. 5589-02, at 5600 (1994), 1994 WL 363727, at *H5600 (Statement of
15 Rep. Robert Dornan: “From my historical knowledge, this business of domestic partner benefits
16 started in Seattle where they were trying to give privileged treatment to lesbian and homosexual
17 partners. . . . This law denigrates marriage and family. . . . Let us get rid of this domestic partnership
18 nonsense.”); *id.* at 5594 (statement of Rep. Joe Barton: “If we go to Webster's Dictionary at the back
19 of this Chamber and look up the definition of family, we do not see the definition that is in this
20 act.”); *id.* at 5607, 5609 (“[W]e are suspending reality to say that there is no organized effort to have
21 some of these domestic partnership agreements recognized somewhere in the country and that there
22 is an organized effort to do that. . . . [T]he definition of family in the ordinance that is on the books
23 in the District of Columbia does not meet any currently acceptable legal definition of family or of
24 marriage anywhere else in the country.”); 141 Cong. Rec. 11,627-02, at 11,657 (1995), 1995 WL
639923, at *H11657 (Rep. Bob Barr opposing law “that places “so-called domestic partners . . . on
25 par with the traditional family structure of men and women, in marriage, with children[.]”); *id.* at
26 11,659 (statement of Rep. Cliff Stearns describing domestic partner laws as “undermin[ing] the
27 traditional moral values that are the bedrock of this Nation.”); 144 Cong. Rec. 7335-03, at 7343
28 (1998), 1998 WL 454432, at *H743 (statement of Rep. Frank Riggs: “[W]e as Federal lawmakers
have a duty to oppose policies and laws that confer partner benefits or marital status on same-sex
couples.”); *id.* (Rep. Frank Riggs opposing DC registry as “wrong ... on the part of those who would
seek to legitimize same-sex activity”); 144 Cong. Rec. 7381-02, at 7383 (1998), 1998 WL 454434, at
*H7383 (statement of Rep. Steve Largent: “But since they can't get same-sex marriage written into
law, ... they work for things like domestic partner benefits.”). *Cf.* 141 Cong. Rec. 11,627-02, at
11,660 (1995), 1995 WL 639923, at *H11660 (statement of Rep. Barney Frank: “This [objection to
the D.C. registry] is about people who want to show a dislike and disapproval of gay men and
lesbians, and for some odd reason, apparently they find gay men and lesbians more obnoxious if we
happen to be in a stable relationship than if we are not.”).

²² District of Columbia Appropriations Act, 2002, Pub. L. No. 107-96, 115 Stat. 923, 950 (2001)
(prohibiting the use of federal funds but allowing the use of District funds to implement the
measure); H.R. Rep. No. 107-321, at 29, 2001WL1554096 (2001) (Conf. Rep.).

²³ See 144 Cong. Rec. 6577-02, at 6578 (1998), 1998 WL 425532, at *H6578 (statement of Rep.
Frank Riggs in support of provision barring the use of federal funding by San Francisco on its
ordinance: “We should not sanction domestic partner relations.”); 144 Cong. Rec. 9597-03 (1998),
1998 WL 689454 (reporting that the House provision regarding domestic partners that would have
restricted funds available to the City of San Francisco has been dropped).

1 employees, and reported on the cities, states, counties, and other entities offering domestic
2 partner benefits.²⁴

3 Moreover, section 7702B(f) was reenacted in 2004, and again excluded gay and lesbian
4 domestic partners by adopting subparagraphs (A) through (G) of section 152(d)(2), as amended,
5 but excluding subparagraph (H). By 2004, the existence of legal relationship recognition for gay
6 and lesbian couples in many jurisdictions including at the state level was well established. For
7 example, California, New Jersey, Washington, and Maine had enacted domestic partnership
8 legislation, Vermont created civil unions, Hawaii established reciprocal benefits for gay and
9 lesbian couples, and in Massachusetts gay and lesbian couples were legally permitted to marry.
10 Additionally, municipalities across the country in states without state-wide relationship
11 recognition for gay and lesbian couples continued to adopt their own ordinances. However,
12 Congress, in again excluding legally recognized gay and lesbian couples from this benefit, failed
13 to offer any legitimate government rationale for doing so. *See Lorillard v. Pons*, 434 U.S. 575,
14 580-81 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation
15 of a statute and to adopt that interpretation when it re-enacts a statute without change[.]”). And,
16 since 2004, additional states have provided legal recognition of same-sex relationships. Today,
17 six states recognize marriage (Connecticut, District of Columbia, Iowa, Massachusetts, New
18 Hampshire, and Vermont), three states recognize out-of-state same-sex marriages (Maryland,
19 New Mexico, and New York), and nine states that recognize domestic partners and/or civil
20 unions (California, District of Columbia, Delaware (starting 1/1/12), Illinois, Hawaii (starting
21 1/1/12), Nevada, New Jersey, Oregon, and Washington), and additional states that have some
22 level of statewide protection (Colorado, Hawaii, Maine, Maryland, and Wisconsin).²⁵ *See*

23 _____
24 ²⁴ 144 Cong. Rec. 1959-02 (1998), 1998 WL 109601 (introduction by Wellstone of S. 1636, a bill to
25 provide benefits to domestic partners of Federal employees); 144 Cong. Rec. 731-02, at 733, 1998
26 WL 55803, at *S733 (testimony of Wellstone in support of The Domestic Partnership Benefits and
27 Obligations Act of 1998, and reviewing numbers of cities, states and counties, and other entities
28 offering domestic partner benefits).

²⁵ National Center for Lesbian Rights, Summary of State Laws Regarding Same-Sex Couples,
available at
http://www.nclrights.org/site/DocServer/Relationship_Recognition_State_Laws_Summary.pdf?docID=6841.

1 *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982) (sustaining district court’s finding that at-large
2 electoral system, though “neutral in origin,” was being maintained for invidious purpose).

3 **C. Even if Viewed as “Neutral,” the Challenged Classification Reflects Invidious**
4 **Discrimination.**

5 “If the classification itself, covert [or] overt, is not based upon [sexual orientation or]
6 gender, the second question is whether the adverse effect reflects invidious [sexual orientation-
7 or] gender-based discrimination.” *Feeney*, 442 U.S. at 274 (citing *Arlington Heights v.*
8 *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977)). In this second inquiry, impact provides
9 an “important starting point.” *Id.*; *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“Necessarily,
10 an invidious discriminatory purpose may often be inferred from the totality of the relevant facts,
11 including the fact, if it is true, that the law bears more heavily on one race than another.”). Here,
12 the discriminatory effects of the exclusion are plain. Gay and lesbian couples, whether married
13 during the marriage equality “window” or registered as domestic partners, cannot participate
14 equally in the CalPERS program. All other couples can participate through marriage under
15 California law.

16 The challenged provision’s historical background is also relevant, “particularly if it
17 reveals a series of official actions taken for invidious purposes.” *Arlington Heights*, 429 U.S. at
18 267. Here, before, during, and after the 1996 congressional session, the federal government has
19 repeatedly expressed its antipathy towards gays and lesbians and their relationships through
20 official actions. These include, *inter alia*: the DOMA, discussed herein and in Plaintiffs’ prior
21 opposition; a ban on gays in federal employment from the 1940s through the 1970s;²⁶ a ban on
22 gays in the military which was only repealed last year; the discriminatory provisions of the tax
23 code; the 1993 exclusion of same-sex spouses and domestic partners from the protections of the
24 FMLA; and the refusal to fund the D.C. domestic partnership law.

25 ²⁶ In 1953, the Eisenhower administration issued Executive Order 10,450, which urged the dismissal
26 of all government employees who were “sex perverts,” including homosexuals, from both the
27 civilian and military branches of the federal government and federal contractors. Executive Order
28 10,450, 18 Fed. Reg. 2489 (Apr. 29, 1953); *see also* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551, 1566 (1993) (“Shortly after his inauguration in 1953, President Eisenhower issued Executive Order 10,450 calling for the dismissal of all government employees who were ‘sex perverts.’”). This ban remained in effect until 1975.

1 The legislative history of the challenged provision is also relevant. *Arlington Heights*,
2 429 U.S. at 268. As has been reviewed in this matter previously, the 1996 legislative session
3 enacted the DOMA in response to *Baehr*, 852 P.2d 44, a Hawaii Supreme Court decision
4 indicating that lesbian and gay couples might be entitled to marriage equality under the Hawaii
5 state constitution. Members of Congress repeatedly voiced their disapproval of homosexuality,
6 calling it “immoral,” “depraved,” “unnatural,” “based on perversion” and “an attack upon God's
7 principles.” *Gill*, 699 F. Supp. 2d at 378. Legislators argued that marriage by gays and lesbians
8 would “demean” and “trivialize” heterosexual marriage and might indeed be “the final blow to
9 the American family.” *Id* at 378-79.²⁷ The official House report describes the purpose of the
10 DOMA to enshrine Congress’s “moral disapproval of homosexuality, and a moral conviction that
11 heterosexuality better comports with traditional (especially Judeo-Christian) morality.” H.R.
12 Rep. No. 104-664, at 16 (1996), *reprinted in* 996 U.S.C.C.A.N. 2905, 2906-07. It is the DOMA
13 that prevents Plaintiff Garnett from seeking to enroll in the CalPERS plan as a “spouse.”

14 **D. Although Heightened Scrutiny Applies Here, The Challenged Law Fails Even**
15 **Rational Basis Review.**

16 Plaintiffs contend that heightened scrutiny applies to the challenged classification.
17 However, the law fails even a rational basis review. Under rational basis review, any
18 government action resting upon a distinction between discrete classes “must be rationally related
19 to a legitimate governmental purpose.” *Cleburne*, 473 U.S. at 433. “By requiring that the
20 classification bear a rational relationship to an independent and legitimate legislative end, we

21 ²⁷ The district court’s opinion in *Gill* compiles remarks made by members of Congress. *See*,
22 *e.g.*, 142 Cong. Rec. 7270-04, at 7275, 1996 WL 388595, at *H7275 (statement of Rep. Bob
23 Barr: “[marriage is] under direct assault by the homosexual extremists all across this
24 country”); 142 Cong. Rec. 7480-05, at 7501 (1996), 1996 WL 388595 (statement of Rep.
25 Henry Hyde: “Most people do not approve of homosexual conduct. . . . and they express
26 their disapprobation through the law.”); *id.* at 7495, *H7495 (statement of Rep. Bill
27 Lipinski: “Allowing for gay marriages would be the final straw, it would devalue the love
28 between a man and a woman and weaken us as a Nation.”); 142 Cong. Rec. 10,067-01, at
10,068 (1996), 1996 WL 508329, at *S10068 (statement of Sen. Jesse Helms: “[Those
opposed to DOMA] are demanding that homosexuality be considered as just another
lifestyle-these are the people who seek to force their agenda upon the vast majority of
Americans who reject the homosexual lifestyle. . . . Homosexuals and lesbians boast that
they are close to realizing their goal-legitimizing their behavior. . . . At the heart of this
debate is the moral and spiritual survival of this Nation.”).

1 ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by
2 the law.” *Romer*, 517 U.S. at 633. “[E]ven in the ordinary equal protection case calling for the
3 most deferential of standards, we insist on knowing the relation between the classification
4 adopted and the object to be attained. The search for the link between classification and
5 objective gives substance to the Equal Protection Clause.” *Id.* at 632; *Perry v. Schwarzenegger*,
6 704 F. Supp. 2d 921, 995 (N.D. Cal. 2010) (quoting *Romer*); *Gill*, 699 F. Supp. 2d at 386 (same).
7 Further, “[t]he State may not rely on a classification whose relationship to an asserted goal is so
8 attenuated as to render the distinction arbitrary or irrational.” *Cleburne*, 473 U.S. at 446; *Gill*,
9 699 F. Supp. 2d at 388 (quoting *Cleburne*). In other words, “a challenged law can only survive
10 this constitutional inquiry if it is narrow enough in scope and grounded in a sufficient factual
11 context for [the court] to ascertain some relation between the classification and the purpose it
12 serves[.]” *Gill*, 699 F. Supp. 2d at 387. Here, as in *Gill*, “there exists no fairly conceivable set of
13 facts that could ground a rational relationship” between a legitimate government interest and the
14 exclusion of legally recognized same-sex partners from state-provided long-term care plans.

15 **E. The Challenged Law Impermissibly Excludes Legally Recognized Same-Sex**
16 **Partners Based Upon Animus Against Lesbians and Gay Men and their**
17 **Relationships.**

18 In enacting and amending section 7702B in 1996, Congress set forth no particular interest
19 in excluding legally recognized same-sex partners from state-provided long-term care plans,
20 while including every other conceivable family member. But in enacting the DOMA which
21 amended section 7702B (along with hundreds of other laws) to exclude same-sex spouses,
22 Congressional leaders expressed deep hostility toward gay people, their relationships, and their
23 families. The exclusion of same-sex domestic partners and spouses from state-provided long-
24 term care plans “cannot be justified as an expression of the government’s disapproval of
25 homosexuality, preference for heterosexuality, or desire to discourage gay marriage.” *In re*
26 *Levenson*, 560 F.3d at 1150; *accord Perry*, 704 F. Supp. 2d, at 930-931 (“The state does not have
27 an interest in enforcing private moral or religious beliefs without an accompanying secular
28 purpose.”) (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)); *id.* at 1003 (“Moral disapproval

1 alone is an improper basis on which to deny rights to gay men and lesbians.”); *Gill*, 699 F. Supp.
2 2d at 396 (“animus alone cannot constitute a legitimate government interest”); *Lawrence*, 539
3 U.S. at 580 (O’Connor, J., concurring) (“When a law exhibits such a desire to harm a politically
4 unpopular group, we have applied a more searching form of rational basis review to strike down
5 such laws under the equal protection clause. . . . Moral disapproval of this group, like a bare
6 desire to harm the group, is an interest that is insufficient to satisfy rational basis review under
7 the Equal Protection Clause.”) (citing *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528
8 (1973) and *Romer*); *Romer*, 517 U.S. at 633 (legal classifications must not be “drawn for the
9 purpose of disadvantaging the group burdened by the law.”).²⁸

10 As *Romer* makes clear, “the differential treatment of gay people is not, in and of itself, a
11 proper justification for government actions.” *In re Levenson*, 560 F.3d at 1150 (citing *Romer*);
12 *cf. Perry*, 704 F. Supp. 2d, at 997 (“No evidence at trial illuminated distinctions among lesbians,
13 gay men and heterosexuals amounting to “real and undeniable differences” that the government
14 might need to take into account in legislating.”). Here, as in *Romer*, the circumstances
15 underlying the enactment of the exclusion challenged raise “the inevitable inference that the
16 disadvantage imposed [was] born of animosity toward the class of persons affected.” *See Romer*,
17 517 U.S. at 634-36; *see also Lawrence*, 539 U.S. at 571 (the existence of “powerful voices”
18 condemning homosexuality as immoral does not determine the definition of liberty for all).

20 ²⁸ *Accord Cleburne*, 473 U.S. at 446-47 (“[S]ome objectives – such as a bare desire to harm a
21 politically unpopular group – are not legitimate state interests.”); *id.* at 450 (“The short of it is that
22 requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally
23 retarded[.]”); *id.* at 452 & n.4 (Stevens, J., concurring) (“The term ‘rational,’ of course, includes a
24 requirement that an impartial lawmaker could logically believe that the classification would serve a
25 legitimate public purpose that transcends the harm to the members of the disadvantaged class. . . . If
26 the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would
27 be suspect.”); *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (“[I]f the
28 constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least
mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate
governmental interest.”); *Tucson Woman’s Clinic v. Eden*, 371 F.3d 1173, 1185-86 (9th Cir. 2004)
 (“[S]ome laws are so irrational or absurd on their face it is clear they can be motivated by nothing
other than animus or prejudice against a group,” citing *Romer* and *Cleburne*); *Pruitt v. Cheney*, 963
F.2d 1160, 1165 (9th Cir.1992) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“The
Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be
outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”)).

1 **II. PLAINTIFFS HAVE STATED A DUE PROCESS CLAIM AGAINST THE**
2 **FEDERAL DEFENDANTS FOR SELECTIVELY BURDENING THEIR**
3 **EXERCISE OF THEIR FUNDAMENTAL RIGHTS TO FAMILY**
4 **AUTONOMY AND DECISIONMAKING.**

5 The Supreme Court has long recognized that the due process clause embodies substantive
6 rights and liberties. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“Without a doubt, it
7 denotes ... the right of the individual to contract, to engage in any of the common occupations of
8 life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship
9 God according to the dictates of his own conscience, and generally to enjoy those privileges long
10 recognized at common law as essential to the orderly pursuit of happiness by free men.”). These
11 rights and liberties include a fundamental interest in independence from undue government
12 influence when making certain highly personal decisions in “matters relating to marriage,
13 procreation, contraception, family relationships, and child rearing and education.” *Whalen v.*
14 *Roe*, 429 U.S. 589, 599-600 & n. 24, n. 26 (1977); *accord Prince v. Massachusetts*, 321 U.S.
15 158, 166 (1944) (The Constitution protects “the private realm of family life which the state
16 cannot enter.”).

17 Numerous government intrusions affecting family life, including the right to live together
18 as a family unit, *see Moore v. East Cleveland*, 431 U.S. 494, 505 (1977) (striking down
19 occupancy restrictions and recognizing “larger conception of the family”), and the right to work
20 during pregnancy, *see Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640 (1974) (striking
21 down forced maternity leave), have been held to violate the substantive due process rights
22 enjoyed by all persons.²⁹ Here, Congress has chosen to list an array of “acceptable” family
23 members for participation in state-provided long-term care plans – from different-sex spouses, to
24 parents and grandparents, to children and step-children, to aunts and uncles, to in-laws (father-in-
25 law, mother-in-law, sister-in-law, brother-in-law, son-in-law, daughter-in-law), to aunts and
26 uncles, to siblings (including half- and step-siblings) – but has intentionally excluded legally

27

28 ²⁹ *See Loving*, 388 U.S. 1 (striking down marriage restrictions); *Griswold v. Connecticut*, 381 U.S.
29 479 (1965) (striking down restrictions on contraceptives); *Carey v. Population Services, Intern.*, 431
30 U.S. 678 (1977) (same); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down prohibition
31 on private school attendance); *see also Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)
32 (collecting cases).

1 recognized same-sex partners. With no permissible basis, this exclusion selectively burdens and
2 penalizes the Plaintiffs' exercise of their right to family autonomy and decision-making, on the
3 basis of sexual orientation, and in so doing demeans their lives and intimate decisions. *See*
4 *LaFleur*, 414 U.S. at 640 (finding that restrictive maternity leave regulations unconstitutionally
5 "penalize the pregnant teacher for deciding to bear a child," constituting "a heavy burden on the
6 exercise of these protected freedoms"); *Lawrence*, 539 U.S. at 574 (precedent permitting the
7 criminalization of same-sex sexual activity "demeans the lives of homosexual persons"). By
8 preventing same-sex partners and spouses from participating in a critical government-sponsored
9 tool for family planning, Congress places a selective, and unconstitutional, burden on these
10 families.

11 Despite the Congressional history underscoring the importance of long-term care to
12 families and family stability, the federal defendants attempt to recast the Plaintiffs' allegations as
13 describing nothing more than a mere "incidental economic burden." (Federal Defendants'
14 Motion at 16.) Citing *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549
15 (1983), the federal defendants contend that a legislature need not "subsidize" the exercise of a
16 fundamental right, and that therefore there can be no infringement of the Plaintiffs' constitutional
17 rights here. Federal Defendants' Motion at 16. The *Regan* case reviewed the lawfulness under
18 the First Amendment of the lobbying restrictions imposed by 26 U.S.C. § 501(c)(3), a provision
19 which regulates equally all organizations (save veterans' organizations) receiving tax-deductible
20 donations. It did not consider tax burdens and exclusions selectively placed upon individuals and
21 groups of individuals subjected to discrimination on the basis of status and family formation.
22 Thus, *Regan's* deference to congressional decision-making cannot be imported and applied to the
23 facts of this case. Indeed, *Regan* distinguished and reaffirmed the Court's opinion in *Perry v.*
24 *Sindermann*, 408 U.S. 593 (1972), which holds that the government may not deny a benefit to an
25 individual because he exercises a constitutional right.³⁰

26 ³⁰ *See Regan*, 461 U.S. at 546; *Perry v. Sindermann*, 408 U.S. at 597 ("For if the government could
27 deny a benefit to a person because of his constitutionally protected speech or associations, his
28 exercise of those freedoms would in effect be penalized and inhibited. This would allow the
government to 'produce a result which (it) could not command directly.'") (citing and quoting from

1 Far more persuasive than *Regan* here are cases regarding federal tax and benefits rules
2 discriminating against, and penalizing the protected family choices of, men and women. *See,*
3 *e.g., Califano v. Goldfarb*, 430 U.S. 199, 203 (1977) (striking down social security provision
4 requiring widowers but not widows to demonstrate economic dependence upon their spouse);
5 *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (striking down social security provision
6 denying survivor’s benefit to widower raising infant son) (“[While] the notion that men are more
7 likely than women to be the primary supporters of their spouses and children is not entirely
8 without empirical support, . . . such a gender-based generalization cannot suffice to justify the
9 denigration of the efforts of women who do work and whose earnings contribute significantly to
10 their families' support”); *Moritz v. C. I. R.*, 469 F.2d 466, 469-70 (10th Cir. 1972), *cert. denied*,
11 *C.I.R. v. Moritz*, 412 U.S. 906 (1973) (striking down tax law granting dependent care deduction
12 to women, widowers, divorced and separated men, and men with wives who are incapacitated,
13 but denying deduction to single man who cared for his disabled mother) (“[I]f the Congress
14 determines to grant deductions of a general type, a denial of them to a particular class may not be
15 based on an invidious discrimination”).

16 Moreover, the *Regan* case also holds that “government may not place obstacles in the
17 path of a [person’s] exercise” of those rights. *Reagan*, 461 U.S. at 549. Plaintiffs allege that
18 their ability and autonomy to engage in financial and long-term care planning with their lawful
19 spouses and domestic partners is unfairly and selectively constrained by operation of section
20 7702B(f). *See* Complaint ¶ 70. They experience this discriminatory government barrier solely
21 on the basis of their status as lesbians and gay men who have entered into legally recognized
22 same-sex partnerships. This kind of sexual orientation-based burdening of fundamental rights
23 and liberties is recognized as impermissible. *Lawrence*, 539 U.S. at 578 (holding that same-sex
24 couples have the constitutional right to engage in intimate relationships “without intervention of

25 *Speiser v. Randall*, 357 U.S. 513 (1958)); *Speiser*, 357 U.S. at 518 (“To deny [a tax] exemption to
26 claimants who engage in certain forms of speech is in effect to penalize them for such speech.”);
27 *accord Schwane v. Board of Bar Exam. of State of N.M.*, 353 U.S. 232, 243-47 (1957) (finding that
28 past membership in Communist Party could not bar licensure of attorney applicant); *see also Bob Jones University v. U.S.*, 461 U.S. 574, 595-96 (1983) (upholding IRS policy denying charitable tax exemption to racially discriminatory university as contrary to public policy).

1 the government.”); *Witt*, 527 F.3d at 816 (“We cannot reconcile what the Supreme Court did in
2 *Lawrence* with the minimal protections afforded by traditional rational basis review.”); *id.* at 812
3 (concluding that suspension from work resulting in loss of pay and points toward promotion and
4 retirement is sufficient to state due process claim under *Lawrence*).

5 While such intrusions have often been reviewed under heightened scrutiny, the
6 unnecessary intrusion by the government here into the private family lives of each of the
7 Plaintiffs violates the Constitution under any standard. *See Glucksberg*, 521 U.S. at 728 (“The
8 Constitution also requires, however, that [the challenged law] be rationally related to legitimate
9 government interests.”). Here, with no legitimate or rational basis, *see* pages 12 to 19, *supra*,
10 Section 7702B places an impermissible obstacle to the Plaintiffs’ ability to access long-term care
11 insurance and thereby ensure family stability throughout the life cycle.

12 **CONCLUSION**

13 For all of the reasons stated, Section 7702B violates the equal protection and substantive
14 due process guarantees of the Fifth Amendment to the Constitution. The plaintiffs have stated
15 claims for relief, and the federal defendants’ motion to dismiss should be rejected.

16 Dated: May 26, 2011

Respectfully submitted,

17 THE LEGAL AID SOCIETY
18 EMPLOYMENT LAW CENTER

19 By: /s/ Claudia Center
20 Claudia Center

21 Attorneys for Plaintiffs
22
23
24
25
26
27
28