

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL DRAGOVICH; MICHAEL  
GAITLEY; ELIZABETH LITTERAL;  
PATRICIA FITZSIMMONS; CAROLYN  
LIGHT; CHERYL LIGHT; DAVID BEERS;  
CHARLES COLE; RAFAEL V.  
DOMINGUEZ; and JOSE G.  
HERMOSILLO, 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 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.

No. C 10-01564 CW

ORDER GRANTING  
PLAINTIFFS' MOTION  
FOR SUMMARY  
JUDGMENT AND  
DENYING THE BLAG'S  
AND FEDERAL  
DEFENDANTS' CROSS-  
MOTIONS FOR  
SUMMARY JUDGMENT  
(Docket Nos. 111,  
116 and 117)

United States District Court  
For the Northern District of California

Plaintiffs challenge the constitutionality of § 3 of the  
Defense of Marriage Act (DOMA), 1 U.S.C. § 7, and § 7702B(f) of  
the Internal Revenue Code, 26 U.S.C. § 7702B(f), to the extent  
that these statutes limit Plaintiffs' participation in a long-term  
care insurance program maintained by the California Public  
Employees' Retirement System (CalPERS). Plaintiffs contend that  
these federal provisions violate the Constitution's guarantees of

1 equal protection and substantive due process by barring the same-  
2 sex legal spouses and registered domestic partners of California  
3 public employees from enrollment in the CalPERS long-term care  
4 plan, even though opposite-sex legal spouses are permitted to  
5 enroll.

6 Plaintiffs move for summary judgment on their claims against  
7 all Defendants. Federal Defendants have submitted a brief  
8 partially supporting Plaintiffs' motion for summary judgment.  
9 Federal Defendants argue that gay men and lesbians should be found  
10 to be a suspect class and that § 3 of the DOMA infringes their  
11 equal protection rights. However, Federal Defendants oppose  
12 Plaintiffs' motion and cross-move for summary judgment as to  
13 Plaintiffs' equal protection claim challenging § 3 of the DOMA on  
14 behalf of same-sex couples who are registered domestic partners  
15 under California law, and as to Plaintiffs' substantive due  
16 process challenge to § 3 of the DOMA. Federal Defendants also  
17 cross-move for judgment that Title 26 U.S.C. § 7702B(f) is  
18 constitutionally valid.

19 Because Federal Defendants would not defend the validity of  
20 § 3 of the DOMA against the equal protection challenge by same-sex  
21 spouses, the Court granted the Bipartisan Legal Advisory Group of  
22 the United States House of Representatives (BLAG) leave to  
23 intervene to defend the law. Accordingly, the BLAG has opposed  
24 Plaintiffs' motion for summary judgment that § 3 of the DOMA is  
25 unconstitutional as it affects same-sex spouses here, and has  
26 cross-moved for summary adjudication that the provision is  
27 constitutional.

28

1 State Defendants have filed a response to Plaintiffs' motion,  
2 seeking guidance from the Court and a stay of any federal action  
3 disqualifying the CalPERS program, in the event that the Court  
4 grants Plaintiffs' motion for summary judgment.<sup>1</sup>

5 Having considered all of the parties' submissions and oral  
6 argument, the Court grants Plaintiffs' motion for summary judgment  
7 and denies Federal Defendants' and the BLAG's cross-motions.

#### 8 BACKGROUND

##### 9 I. Long-term Care Insurance and the Challenged Provisions

10 Plaintiffs are California public employees and their same-sex  
11 spouses and registered domestic partners, who are in long-term  
12 committed relationships recognized and protected under California  
13 law. As explained in this Court's previous orders, CalPERS  
14 provides retirement and health benefits, including long-term care  
15 insurance, to many of the state's public employees and retirees  
16 and their families. Long-term care insurance provides coverage  
17 when a person needs assistance with basic activities of living due  
18 to injury, old age, or severe impairments related to chronic  
19 illnesses, such as Alzheimer's disease.

20 In 1996, Congress passed the DOMA, which, among other things,  
21 defined the terms "spouse" and "marriage" for federal law purposes  
22 in a manner limiting them to heterosexual couples. As amended by  
23 § 3 of the DOMA, the United States Code provides,

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24  
25 <sup>1</sup> State Defendants assert that Federal Defendants could  
26 eliminate the need for a stay by agreeing that they will not seek  
27 to disqualify the CalPERS long-term care plan, in the event that  
28 the Court's order were later overturned. However, Federal  
Defendants apparently have not agreed.

1 In determining the meaning of any Act of Congress, or  
2 of any ruling, regulation, or interpretation of the  
3 various administrative bureaus and agencies of the  
4 United States, the word "marriage" means only a legal  
5 union between one man and one woman as husband and  
6 wife, and the word "spouse" refers only to a person of  
7 the opposite sex who is a husband or a wife.

8 1 U.S.C. § 7.

9 Title 26 U.S.C. § 7702B(f) was also enacted in 1996, as part  
10 of the Health Insurance Portability and Accountability Act  
11 (HIPAA), providing favorable federal tax treatment to participants  
12 in qualified state-maintained long-term care insurance plans for  
13 state employees. 26 U.S.C. § 7702B(f). Currently, the CalPERS  
14 long-term care insurance program is a qualified state-maintained  
15 plan pursuant to § 7702B(f).

16 Section 7702B(f) (2) disqualifies a state-maintained plan from  
17 favorable tax treatment if it provides coverage to individuals  
18 other than those specified under its subparagraph (C). The list  
19 of eligible individuals in § 7702B(f) (2) (C) includes state  
20 employees and former employees, their spouses, and individuals  
21 bearing a relationship to the employees or spouses which is  
22 described in subparagraphs (A) through (G) of 26 U.S.C.  
23 § 152(d) (2). Id.

24 Section 152(d) (2), the part of the tax code from which  
25 subparagraph (C) draws its list of eligible relatives, defines the  
26 relatives for whom a taxpayer may claim a dependent exemption.  
27 See 26 U.S.C. §§ 151-52. Section 152(d) (2), subparagraphs (A)  
28 through (H), identifies the following individuals as "qualifying  
relatives" for the dependent exemption:

(A) A child or a descendant of a child.

- 1 (B) A brother, sister, stepbrother, or stepsister.
- 2 (C) The father or mother, or an ancestor of either.
- 3 (D) A stepfather or stepmother.
- 4 (E) A son or daughter of a brother or sister of the
- 5 taxpayer.
- 6 (F) A brother or sister of the father or mother of
- 7 the taxpayer.
- 8 (G) A son-in-law, daughter-in-law, father-in-law,
- 9 mother-in-law, brother-in-law, or sister-in-law.
- 10 (H) An individual . . . who, for the taxable year of
- 11 the taxpayer, has the same principal place of
- 12 abode as the taxpayer and is a member of the
- 13 taxpayer's household.

12 26 U.S.C. § 152(d)(2).

13 When it chose to incorporate subparagraphs (A) through (G),  
14 Congress specifically chose not to carry over subparagraph (H) to  
15 subparagraph (C) of § 7702B(f)(2). Had Congress not chosen to  
16 exclude subparagraph (H) from subparagraph (C) of § 7702B(f)(2),  
17 registered domestic partners of California public employees would  
18 have qualified as individuals eligible to enroll in the CalPERS  
19 long-term care plan.

20 In addition to providing favorable tax treatment to state-  
21 maintained long-term care plans, Congress approved such treatment  
22 for long-term care coverage purchased through the private market.

23 26 U.S.C. § 7702B(a)-(b).

24 Congress enacted these provisions because of the critical  
25 role of long term care insurance in protecting families. "The  
26 legislation . . . provides tax deductibility for long term care  
27 insurance, making it possible for more Americans to avoid  
28 financial difficulty as the result of chronic illness." 142 Cong.

1 Rec. S3578-01 at \*3608 (Statement of Sen. McCain) (Apr. 18, 1996);  
 2 see also Joint Committee on Taxation, "Description of Federal Tax  
 3 Rules and Legislative Background Relating to Long-Term Care  
 4 Scheduled for a Public Hearing Before the Senate Committee on  
 5 Finance on March 27, 2001," at 2001 WL 36044116 (provisions  
 6 granting tax advantages for long-term care plans were adopted "to  
 7 provide an incentive for individuals to take financial  
 8 responsibility for their long-term care needs.").

9 II. Congressional Denial of Federal Legal Recognition for Same-  
 10 Sex Couples

11 For more than two decades, jurisdictions other than the  
 12 federal government have extended to same-sex couples legal  
 13 recognition in various forms, such as registered domestic  
 14 partnerships, civil unions, reciprocal beneficiary relationships  
 15 and, more recently, civil marriage.<sup>2</sup> Over time, the number of

16 <sup>2</sup> As of 1992, registered domestic partnership benefits were  
 17 made available in Travis County, Texas; Dane County, Wisconsin;  
 18 the California counties of Alameda, San Mateo and Santa Cruz; and  
 19 the cities of Berkeley, Los Angeles, Oakland, Santa Cruz, San  
 20 Francisco, West Hollywood, New York, Ithaca, Cambridge, West Palm  
 21 Beach, Ann Arbor, East Lansing, Madison, Minneapolis, Seattle and  
 22 Tahoma Park. 138 Cong. Rec. S10876-01, 1992 WL 180795, at  
 \*S10904. In April 1992, the District of Columbia approved the  
 Health Care Benefits Expansion Act, D.C. Law 9-114, establishing a  
 local domestic partnership registry. See also D.C. Code § 36-1401  
 (legislative history of Law 9-114). As discussed later in this  
 order, Congress delayed implementation of the registry.

23 Since 1997, nineteen states have extended legal recognition  
 24 to same-sex couples for purposes of state law. M.V. Lee Badgett,  
 25 Jody L. Herman, Patterns of Relationship Recognition by Same-Sex  
 26 Couples in the United States, the Williams Institute, University  
 27 of California, Los Angeles, School of Law, 1, n.1, Appendix 1,  
 (November 2011) (providing a detailed survey of the various  
 28 statuses, their effective dates and relevant statutory citations),  
available at  
<http://williamsinstitute.law.ucla.edu/research/marriage-and-couples-rights/patterns-of-relationship-recognition-by-same-sex-couples-in-the-united-states/>.

1 jurisdictions granting these forms of legal recognition has  
2 increased.

3 Congress discussed registered domestic partnership laws prior  
4 to and during 1996, when the statutes challenged here were passed.  
5 These discussions occurred after the District of Columbia passed,  
6 in April 1992, the Health Care Benefits Expansion Act, which  
7 established a domestic partnership registry in that jurisdiction.  
8 Congress reacted to the new law by barring any local or federal  
9 funding to implement, enforce or administer the registry.

10 District of Columbia Appropriations Act, 1993, Pub. L. No. 102-  
11 382, 106 Stat. 1422 (1992). Representative Clyde Holloway argued,  
12 "If there ever was an attack on the family in this country, it is  
13 [the District of Columbia's] Domestic Partnership Act . . . To me,  
14 this bill totally destroys the families of this country." 138  
15 Cong. Rec. H2950-04, 1992 WL 96521, at \*H2950. In arguing against  
16 the appropriations ban before the Senate, Senator Brock Adams  
17 entered into the Congressional record information detailing  
18 domestic partnership recognition in numerous jurisdictions, apart  
19 from the District of Columbia. 138 Cong. Rec. S10876-01, 1992 WL  
20 180795, at \*S10904.

21 In 1993, as part of a successful drive to renew the funding  
22 ban, Representative Ernst Istook argued, "Now, obviously this was  
23 passed by the District of Columbia to enable people, more than  
24 anything else, who are in a homosexual relationship to register an  
25

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26 Currently, nine states and the District of Columbia offer  
27 registered domestic partnerships or civil unions with legal rights  
28 comparable to marriage, and six states and the District of  
Columbia permit same-sex couples to marry. Id. at 3, Table 1.

1 equivalent of a gay marriage. That is one of the reasons that  
2 this particular proposal is abhorrent, in my view." 139 Cong.  
3 Rec. H4353-01, 1993 WL 236117, at \*H4355, \*H4358; District of  
4 Columbia Appropriations Act, 1994, Pub. L. No. 103-127, 107 Stat.  
5 1336 (1993).

6 Other representatives echoed these arguments in favor of  
7 renewing the appropriations ban and the ban was renewed every year  
8 from 1993 through 2001.<sup>3</sup> See e.g., 140 Cong. Rec. H5589-02, 1994  
9 WL 363727, at \*H5601 (Representative Robert Dornan proclaiming,  
10 "From my historical knowledge, this business of domestic partner  
11 benefits started in Seattle where they were trying to give  
12 privileged treatment to lesbian and homosexual partners . . . Let  
13 us get rid of this domestic partnership nonsense."); 141 Cong.  
14 Rec. H11627-02, 1995 WL 639923, at \*H11659 (Representative Cliff  
15 Stearns asserting that domestic partnership registration laws  
16 "undermine the traditional moral values that are the bedrock of  
17 this Nation.").<sup>4</sup>

18  
19  
20 \_\_\_\_\_  
21 <sup>3</sup> In 2001, Congress authorized a more limited appropriations  
22 ban, permitting the use of non-federal funds to institute and  
23 administer the District of Columbia domestic partnership registry.  
24 District of Columbia Appropriations Act, 2002, Pub. L. No. 107-96,  
115 Stat. 923 (2001). Accordingly, in 2002, the District of  
Columbia finally implemented its domestic partnership registry.  
See 49 D.C. Reg. 5419 (June 14, 2002).

25 <sup>4</sup> A more detailed explanation of Congress's actions to block  
26 implementation of the District of Columbia's domestic partnership  
27 registry is provided in this Court's January 26, 2012 order  
28 denying Federal Defendants' motion to dismiss Plaintiffs'  
constitutional challenge to § 7702B(f) on behalf of California  
registered domestic partners.

1 In 1996, as well as renewing the ban on funding for the  
2 District of Columbia domestic partnership registry, Congress  
3 enacted the DOMA and the HIPAA, containing the provisions  
4 challenged here.

5 It is undisputed that one significant consideration in  
6 enacting § 3 of the DOMA was Congress's desire to foreclose  
7 federal recognition of same-sex marriage. Hawaii was on the verge  
8 of becoming the first state in the nation to grant marriage  
9 licenses to same-sex couples.<sup>5</sup> The House Report on the pending  
10 bill to enact the DOMA stated, "Civil laws that permit only  
11 heterosexual marriage reflect and honor a collective moral  
12 judgment about human sexuality. This judgment entails both moral  
13 disapproval of homosexuality, and a moral conviction that  
14 heterosexuality better comports with traditional (especially  
15 Judeo-Christian) morality." H.R. Rep. 104-664, at 15-16. The  
16 report adopted the view that "[S]ame-sex marriage, if sanctified  
17 by the law, if approved by the law, legitimates a public union, a  
18 legal status that most people . . . feel ought to be  
19 illegitimate.'" Id. at 16 (alteration and omission in original)  
20 (quoting Representative Henry Hyde, Chairman of the Judiciary  
21 Committee).

22 Moreover, the limiting definition of marriage proposed in § 3  
23 of the DOMA was viewed as necessary to exclude registered domestic  
24 partners from federal recognition and benefits. When Senator Don  
25

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26  
27 <sup>5</sup> The BLAG acknowledges that, when Congress enacted the DOMA,  
28 it recognized that Hawaii was on the verge of legalizing same-sex  
marriage. BLAG Cross Mot. Summ. J. 4.

1 Nickles introduced the bill that became the DOMA, he explained  
2 this, stating,

3 Another example of why we need a Federal definition of  
4 the terms "marriage" and "spouse" stems from  
5 experience during debate on the Family and Medical  
6 Leave Act of 1993. Shortly before passage of this act,  
7 I attached an amendment that defined "spouse" as "a  
8 husband or wife, as the case may be." When the  
9 Secretary of Labor published his proposed regulations,  
10 a considerable number of comments were received urging  
11 that the definition of "spouse" be "broadened to  
12 include domestic partners in committed relationships,  
13 including same-sex relationships." When the Secretary  
14 issued the final rules he stated that the definition  
15 of "spouse" and the legislative history precluded such  
16 a broadening of the definition.

17 142 Cong. Rec. 4851-02, 1996 WL 233584, at \*S4869-70.

18 A proposed amendment to the Defense of Marriage bill would  
19 have required the General Accounting Office to "undertake a study  
20 of the differences in the benefits, rights and privileges  
21 available to persons in a marriage and the benefits, rights and  
22 privileges available to persons in a domestic partnership  
23 resulting from the non-recognition of domestic partnerships as  
24 legal unions by State and Federal laws." 142 Cong. Rec. 7480-05,  
25 1996 WL 392787, at \*H7503. In opposition to the amendment,  
26 Representative Charles Canady stated, "This motion represents a  
27 transparent attempt to give some statutory recognition to domestic  
28 partnerships." 142 Cong. Rec. 7480-05, 1996 WL 392787, at \*H7504.  
The amendment was defeated. 142 Cong. Rec. 7480-05, 1996 WL  
392787, at \*H7505.

Thus, legislative history that is relevant to both § 3 of the  
DOMA and § 7702B(f) of Title 26 contains evidence of moral  
condemnation and social disapprobation of same-sex couples.

## 1 PROCEDURAL BACKGROUND

2 In their first motion to dismiss, Federal Defendants  
3 addressed Plaintiffs' equal protection and substantive due process  
4 challenge to § 3 of the DOMA. The Court denied the motion,  
5 finding that, under the rational basis standard of review,  
6 Plaintiffs had stated a cognizable constitutional claim.

7 At the time the Court considered the first motion to dismiss,  
8 Plaintiffs were all couples legally married under California law.  
9 Subsequently, however, Plaintiffs filed a Second Amended Complaint  
10 adding as Plaintiffs Rafael V. Dominguez and Jose G. Hermosillo,  
11 who are not legally married, but are registered as domestic  
12 partners in California. Federal Defendants moved to dismiss this  
13 complaint, arguing that Dominguez and Hermosillo had not alleged a  
14 cognizable equal protection or substantive due process claim based  
15 on § 7702B(f)'s failure to include registered domestic partners.  
16 The Court denied the motion, holding that Ninth Circuit precedent  
17 precluded it from applying strict scrutiny, but finding that  
18 Plaintiffs had stated a claim that the exclusion violated the  
19 rational basis test.

20 In addition to denying Federal Defendants' motions to dismiss  
21 the Court granted Plaintiffs' unopposed motion to certify a class  
22 pursuant to Federal Rule of Civil Procedure 23(b)(2). The  
23 certified class was defined as, "Present and future CalPERS  
24 members who are in legally recognized same-sex marriages and  
25 registered domestic partnerships together with their spouses and  
26 partners, who as couples and families are denied access to the  
27 CalPERS Long-Term Care Program on the same basis as similarly  
28

1 situated present and future CalPERS members who are in opposite-  
2 sex marriages, and their spouses." Docket No. 92.

3 The Court now considers the parties' cross-motions for  
4 summary judgment.

#### 5 LEGAL STANDARD

6 Summary judgment is properly granted when no genuine and  
7 disputed issues of material fact remain, and when, viewing the  
8 evidence most favorably to the non-moving party, the movant is  
9 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.  
10 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);  
11 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.  
12 1987).

13 The moving party bears the burden of showing that there is no  
14 material factual dispute. Therefore, the court must regard as  
15 true the opposing party's evidence, if supported by affidavits or  
16 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,  
17 815 F.2d at 1289. The court must draw all reasonable inferences  
18 in favor of the party against whom summary judgment is sought.  
19 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
20 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952  
21 F.2d 1551, 1558 (9th Cir. 1991).

22 Material facts which would preclude entry of summary judgment  
23 are those which, under applicable substantive law, may affect the  
24 outcome of the case. The substantive law will identify which  
25 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.  
26 242, 248 (1986).

## DISCUSSION

## I. Equal Protection

Plaintiff same-sex spouses claim that their rights to equal protection are violated by § 3 of the DOMA. In addition, Plaintiff registered domestic partners assert that their equal protection rights are infringed by § 3 of the DOMA and § 7702B(f) of Title 26. The doctrine of equal protection exists to ensure the Constitution's promise of equal treatment under the law. Romer v. Evans, 517 U.S. 620, 631 (1996).

The BLAG relies heavily on two cases, Baker v. Nelson, 409 U.S. 810 (1972), and Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982), to argue that Plaintiffs' equal protection challenge to § 3 of the DOMA is foreclosed. In Baker, the Supreme Court summarily dismissed an appeal from the Minnesota Supreme Court's decision to uphold, against a federal equal protection challenge, a state law prohibiting same-sex civil marriage. The Court resolved the appeal in a single sentence, stating that it was "dismissed for want of a substantial federal question." 409 U.S. at 810.

Mandel v. Bradley, 432 U.S. 173, 176 (1977), explains the precedential weight of a summary action by the Supreme Court. Mandel involved an independent candidate's claim that procedures under the Maryland Election Code violated his First and Fourteenth Amendment rights to access to the ballot by imposing an early deadline for filing nominating petitions. Id. at 174. Prior to Mandel, the Supreme Court had summarily affirmed a lower court's decision invalidating Pennsylvania's procedures for independent candidates to access the ballot. In Mandel, the Court held that the summary affirmance in its prior case did not mandate the

1 result reached by the district court because, unlike the Maryland  
2 procedure, the Pennsylvania requirements entailed both an early  
3 filing date and a twenty-one day limitation on signature  
4 gathering. Id. at 177. The Court stated that "a summary  
5 affirmance is an affirmance of the judgment only." Id. at 176.  
6 The Court further explained, "Summary affirmances and dismissals  
7 for want of a substantial federal question . . . prevent lower  
8 courts from coming to opposite conclusions on the precise issues  
9 presented and necessarily decided by those actions." Id.; cf.  
10 Hicks v. Miranda, 422 U.S. 332, 344-45 (1975) (holding that the  
11 Supreme Court's prior summary affirmance of a California appellate  
12 decision upholding the constitutionality of an obscenity statute  
13 precluded a three-judge federal court from finding that the same  
14 statute was unconstitutional.)

15 The Ninth Circuit recently addressed the precedential value  
16 of Baker, in the context of a constitutional challenge to  
17 Proposition 8, a ballot measure that eliminated the right to marry  
18 for same-sex couples in California. There, the court considered  
19 Mandel and Hicks, and determined that Baker was "not pertinent,"  
20 because "we do not address the question of the constitutionality  
21 of a state's ban on same-sex marriage." Perry v. Brown, 671 F.3d  
22 1052, 1082 n.14 (9th Cir. 2012). The Ninth Circuit reasoned that  
23 the case before it presented "a wholly different question: whether  
24 the people of a state may by plebiscite strip a group of a right  
25 or benefit, constitutional or otherwise, that they had previously  
26 enjoyed on terms of equality with all others in the state." Id.

27 Likewise, this case is distinguishable from Baker. Whereas  
28 the action in Baker addressed whether Minnesota violated the equal

1 protection clause by excluding same-sex couples from civil  
2 marriage, the married Plaintiffs here have already gained legal  
3 recognition under California law. The issue is instead whether a  
4 federal provision, § 3 of the DOMA, infringes Plaintiffs' rights  
5 under equal protection principles by denying them a benefit  
6 available to legally married heterosexual couples. Another judge  
7 in this district has distinguished Baker in the context of an  
8 action challenging § 3 of the DOMA. Golinski v. U.S. Office of  
9 Pers. Mgmt., 2012 WL 569685, \*8 n.5 (N.D. Cal.) (granting summary  
10 judgment in favor of plaintiff). Baker does not foreclose  
11 Plaintiffs' equal protection claim.

12 In Adams, a United States citizen and an Australian national  
13 in a same-sex relationship secured a marriage license from a  
14 county clerk in Colorado. The citizen petitioned the Immigration  
15 and Naturalization Service to permit his spouse to remain in the  
16 country as an "immediate relative," pursuant to § 201(b) of the  
17 Immigration and Nationality Act of 1952 (INA), 8 U.S.C. § 1151(b).  
18 Following the agency's denial of his petition and a final  
19 administrative decision denying his appeal, the couple filed an  
20 action challenging the exclusion on constitutional grounds. The  
21 Ninth Circuit stated that, even if Colorado recognized the  
22 marriage, Congress did not intend to confer spousal status based  
23 on same-sex marriages under § 201(b). 673 F.2d at 1040-41. The  
24 court arrived at its statutory interpretation based on its view of  
25 the ordinary meaning of marriage, and a 1965 amendment to the INA  
26 establishing a mandatory exclusion of homosexuals as inadmissible  
27 aliens. The mandatory exclusion evidenced Congress's "clearly  
28 express[ed] [] intent to exclude homosexuals." Id. at 1040. The

1 court also determined that the legislative exclusion withstood  
2 constitutional scrutiny. Id. at 1041-43. The court found that  
3 the denial of legal recognition to same-sex spouses satisfied the  
4 rational basis test in that Congress manifested a concern for  
5 family integrity in passing laws facilitating the immigration of  
6 spouses in valid heterosexual marriages. The court also  
7 determined, with little discussion, that Congress could have  
8 determined that legal recognition of same-sex marriages was not  
9 necessary in that such couples were not recognized in most, if  
10 any, states because they violate traditional and often prevailing  
11 social mores, or because they "never produce offspring." Id. at  
12 1042-43.

13 Adams does not control this case in light of Supreme Court  
14 and Ninth Circuit rulings and legislative developments since the  
15 decision. In Miller v. Gammie, 335 F.3d 889, 899-900 (9th Cir.  
16 2003) (en banc), the Ninth Circuit explained that a district court  
17 or a three-judge panel is free to re-examine the holding of a  
18 prior panel when the United States Supreme Court, or a controlling  
19 state Supreme Court ruling, has "undercut the theory or reasoning  
20 underlying the prior circuit precedent in such a way that the  
21 cases are clearly irreconcilable." Id. at 900. "[T]he issues  
22 decided by the higher court need not be identical in order to be  
23 controlling." Id.

24 Similarly, under Ninth Circuit precedent, a prior  
25 determination by the court is not controlling if subsequent  
26 legislation has undermined the decision. For example, in Zazueta-  
27 Carillo v. Ashcroft, 322 F.3d 1166, 1170-72 (9th Cir. 2003), the  
28 Ninth Circuit panel found that it was required to revisit an

1 existing rule "on a clean slate," because subsequent legislation  
2 by Congress changed the landscape of immigration law and  
3 alleviated the concerns that motivated the rule established in a  
4 prior Ninth Circuit decision.

5 Several developments since Adams demonstrate that the bases  
6 for its reasoning no longer apply, so that the case is not  
7 controlling. First, the Supreme Court in Lawrence v. Texas struck  
8 down laws criminalizing homosexuality, holding that social  
9 disapproval of homosexuality on the basis of asserted tradition  
10 and mores is no longer accepted as sufficient justification for  
11 laws burdening gay men and lesbians. 539 U.S. 558, 577 (2003)  
12 (adopting Justice Stevens' dissenting opinion in Bowers v.  
13 Hardwick, 478 U.S. 186, 216 (1986)). The Ninth Circuit recently  
14 held that "tradition alone is not a justification for taking away  
15 a right that had already been granted, even though that grant was  
16 in derogation of tradition." Perry, 671 F.3d at 1092.

17 Further, in 1990, Congress removed the mandatory provision in  
18 the INA, upon which Adams relied, that barred gay and lesbian  
19 individuals from receiving visas and gaining admission into the  
20 United States. Sec. 601, Immigration Act of 1990, Pub. L. No.  
21 101-649, 104 Stat. 4978 (amending 8 U.S.C. § 1182 to eliminate  
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1 subsection (a)(4), which had excluded those "afflicted with a  
2 psychopathic personality, sexual deviation, or a mental  
3 defect.").<sup>6</sup>

4 Moreover, in contrast to the state of the law in 1982, as  
5 Adams recited it, now several states, as well as the District of  
6 Columbia, offer legal recognition to same-sex couples in the form  
7 of registered domestic partnership, civil marriage or a similar  
8 designation.

9 Finally, Adams' rationale that same-sex couples never produce  
10 children has been proven false: same-sex couples use various  
11 methods to conceive and adopt children. The ability of same-sex  
12 couples to have children is recognized in the Ninth Circuit. See  
13 Perry, 671 F.3d at 1086-87 (noting a long line of California cases  
14 granting parental rights to gay and lesbian parents and that the  
15 state's "current policies and conduct recognize that gay  
16 individuals are fully capable of responsibly caring for and  
17 raising children.") (alterations omitted). Adams is not fatal to  
18 Plaintiffs' equal protection claims.

19  
20  
21 <sup>6</sup> Section 212(a)(4) of the INA of 1952 had excluded "[a]liens  
22 afflicted with a psychopathic personality, epilepsy, or a mental  
23 defect." In 1965, Congress eliminated epilepsy and added "sexual  
24 deviation." Pub. L. No. 414, 66 Stat. 163, 182, amended by Act of  
25 Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919  
26 (codified as amended at 8 U.S.C. § 1182(a)(4) (1988)). The entire  
27 provision was eliminated by the Immigration Act of 1990, Pub. L.  
28 No. 101-649, 104 Stat. 4978 (1990). See Shannon Minter, Sodomy  
and Public Morality Offenses Under U.S. Immigration Law:  
Penalizing Lesbian and Gay Identity, 26 Cornell Int'l L.J. 771,  
775-83 (1993) (explaining the history of statutory provisions  
barring gay men and lesbians from immigrating to the United  
States).

1 Under the doctrine of equal protection, certain  
2 classifications by statute or other government activity, such as  
3 classifications based on race, have been found to be suspect.  
4 Harris v. McRae, 448 U.S. 297, 322 (1980) (noting race as “the  
5 principal example” of a “suspect” classification). Where a  
6 challenged law burdens a suspect class, courts apply strict  
7 scrutiny to determine the constitutional validity of the  
8 provision. See Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312  
9 (1976). Such laws are “presumptively invalid and can be upheld  
10 only upon an extraordinary justification.” Pers. Adm’r of Mass.  
11 v. Feeney, 442 U.S. 256, 272 (1979). Courts apply an intermediate  
12 level of scrutiny to certain quasi-suspect classifications, such  
13 as those based upon sex, which “have traditionally been the  
14 touchstone for pervasive and often subtle discrimination.” Id. at  
15 273. A law that does not burden a protected class is subject to a  
16 lower standard of review and need only “bear[] a rational  
17 relationship to some legitimate end.” Romer, 517 U.S. at 631.

18 The Ninth Circuit has held that gay men and lesbians do not  
19 constitute a suspect or quasi-suspect class. High Tech Gays v.  
20 Def. Indus. Sec. Clearance Office, 895 F.2d 563, 574 (9th Cir.  
21 1990). Ninth Circuit panels have continued to utilize the  
22 rational basis standard applied in High Tech Gays, even after the  
23 Supreme Court’s decisions in Romer, 517 U.S. at 620, and Lawrence,  
24 539 U.S. at 577, which invalidated certain legislative enactments  
25 burdening gay men and lesbians. See e.g., Philips v. Perry, 106  
26 F.3d 1420, 1425 (9th Cir. 1997) (holding that High Tech Gays was  
27 controlling and rejecting request by amici curiae to apply strict  
28 scrutiny); Witt v. Dep’t of Air Force, 527 F.3d 806, 821 (9th Cir.

1 2008) (holding that because Lawrence declined to address equal  
2 protection, it did not disturb Philips' equal protection ruling  
3 under the rational basis standard of review). More recently, in  
4 Perry, 671 F.3d at 1080 ns.13, 19, the Ninth Circuit stated that  
5 it need not consider whether any form of heightened scrutiny was  
6 necessary or appropriate with respect to the plaintiff same-sex  
7 couples. Perry applied rational basis review based on Romer and  
8 noted that High Tech Gays had held that heightened scrutiny did  
9 not apply. Although the Ninth Circuit may revisit its ruling that  
10 gay men and lesbians do not constitute a suspect or quasi-suspect  
11 class, the Court tests the constitutionality of § 3 of the DOMA  
12 and § 7702B(f) of Title 26, pursuant to current Ninth Circuit law,  
13 by applying rational basis review.

14 Under this standard of review, a law that imposes a  
15 classification must be rationally related to the furtherance of a  
16 legitimate state interest. Romer, 517 U.S. at 631. This standard  
17 of review accords a strong presumption of validity to legislative  
18 enactments. Heller v. Doe, 509 U.S. 312, 319 (1993). "[I]t is  
19 entirely irrelevant for constitutional purposes whether the  
20 conceived reason for the challenged distinction actually motivated  
21 the legislature." FCC v. Beach Comm., 508 U.S. 307, 313 (1993).  
22 Nevertheless, rational basis review is not "toothless." Mathews  
23 v. De Castro, 429 U.S. 181, 185 (1976). "[E]ven in the ordinary  
24 equal protection case calling for the most deferential of  
25 standards, [courts] insist on knowing the relation between the  
26 classification adopted and the object to be attained." Gill v.  
27 United States Office of Pers. Mgmt., 699 F. Supp. 2d 374, 387 (D.  
28 Mass. 2010) (quoting Romer, 517 U.S. at 633).

1 In Romer, the Supreme Court held that gay men and lesbians,  
2 as a class, are at least protected from burdensome legislation  
3 that is the product of sheer anti-gay animus and devoid of any  
4 legitimate government purpose. 517 U.S. at 632-35 (holding that  
5 Colorado's anti-gay ballot measure "fails, indeed defies, even  
6 this conventional inquiry" applied under the rational basis test).  
7 In Perry, the Ninth Circuit applied Romer and found that  
8 Proposition 8 was an enactment devoid of any rational relationship  
9 to a legitimate state interest and was unconstitutionally tainted  
10 by anti-gay animus. 671 F.3d at 1086-95. Accordingly, in  
11 applying the rational basis test, this Court considers the  
12 evidence of anti-gay animus in the record of Congress's  
13 consideration of § 3 of the DOMA and § 7702B(f) of Title 26, along  
14 with possible justifications for the provisions.

15 A. Application of Rational Basis Test to Same-Sex Spouses'  
16 Challenge to § 3 of the DOMA

17 Plaintiffs contend that § 3 of the DOMA impermissibly  
18 excludes same-sex spouses from the federal definition of marriage  
19 based on animus towards gay men and lesbians and their  
20 relationships. The legislative history described above  
21 demonstrates that animus toward, and moral rejection of,  
22 homosexuality and same-sex relationships are apparent in the  
23 Congressional record. The BLAG does not argue that the  
24 legislative record is free of moral condemnation of gay men and  
25 lesbians. Rather, it asserts several rationales in defense of § 3  
26 of the DOMA.  
27  
28

## 1           1.     An Act of Caution to Preserve the Status Quo

2           The BLAG asserts that § 3 of the DOMA is a legitimate act of  
3 caution to protect the institution of traditional marriage. This  
4 argument is faulty for two reasons.

5           First, the preservation of marriage as an institution that  
6 excludes gay men and lesbians for the sake of tradition is not a  
7 legitimate governmental interest. As discussed above, the Ninth  
8 Circuit has disapproved "tradition" as a permissible policy goal  
9 in eliminating rights previously extended to same-sex couples.  
10 Perry, 671 F.3d at 1092-93. Section 3 of the DOMA eliminated  
11 numerous established federal rights generally available to married  
12 couples by precluding federal recognition of same-sex couples  
13 legally married under state law. Under equal protection  
14 jurisprudence, tradition is not a legally acceptable reason to  
15 prohibit a practice that historically has been the subject of  
16 social disapprobation.

17           In Palmore v. Sidoti, 466 U.S. 429, 433 (1984), the Supreme  
18 Court recognized that, while a child living with a stepparent of a  
19 different race may experience "pressures and stresses" that would  
20 not be present if the child were living with parents of the same  
21 racial origin, under the doctrine of equal protection, "the  
22 reality of private biases" is not a permissible consideration for  
23 the removal of a child from the custody of his or her natural  
24 parent. The Court stated, "Private biases may be outside the  
25 reach of the law, but the law cannot, directly or indirectly, give  
26 them effect." Id.

27           Likewise, in the context of same-sex intimacy and  
28 relationships, the Supreme Court has held that "the fact that the

1 governing majority in a State has traditionally viewed a  
2 particular practice as immoral is not a sufficient reason for  
3 upholding a law prohibiting the practice." Lawrence, 539 U.S. at  
4 577 (adopting Justice Stevens' dissent in Bowers, 478 U.S. at  
5 216).<sup>7</sup> The Court observed that "neither history nor tradition  
6 could save a law prohibiting miscegenation from constitutional  
7 attack." Id.

8 Furthermore, there is no principled distinction between anti-  
9 gay animus and a conception of civil marriage as an institution  
10 that cannot tolerate equally committed same-sex couples. In  
11 Perry, the Ninth Circuit rejected the contention that Proposition  
12 8, eliminating the designation of civil marriage for same-sex  
13 couples, but not the substantive rights associated with marriage,  
14 was intended only to disapprove of same-sex marriage. 671 F.3d at  
15 1093. Rather, the elimination of the right sent "a message that  
16 gays and lesbians are of lesser worth as a class--that they enjoy  
17 a lesser societal status." Id. Similarly, the Supreme Court in  
18 Lawrence discussed the "stigma" generated by laws criminalizing

19  
20  
21 <sup>7</sup> Although the majority in Lawrence invalidated state laws  
22 criminalizing sodomy on substantive due process grounds, and did  
23 not rely on equal protection arguments pertaining to gays and  
24 lesbians as a class, the Ninth Circuit in Perry cited the decision  
25 in its equal protection ruling. 671 F.3d at 1092-93. Perry  
26 reasoned that "laws affecting gays and lesbians' rights often  
27 regulate individual conduct--what sexual activity people may  
28 undertake in the privacy of their own homes, or who is permitted  
to marry whom" and, thus, such laws regulate status as much as  
they regulate conduct. Id. at 1093 (citing Christian Legal Soc'y  
v. Martinez, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2971, 2990 (2010) (declining  
"to distinguish between status and conduct" in the context of  
sexual orientation)). Accordingly, Perry found Lawrence relevant  
to its equal protection analysis.

1 homosexual conduct and stated that such laws are "an invitation to  
2 subject homosexual persons to discrimination both in the public  
3 and in the private spheres." 539 U.S. at 575. The notion that  
4 civil marriage may only sanction a union between a man and a woman  
5 posits that there is something inherently objectionable about  
6 homosexuality or that same-sex intimate relationships are  
7 irreconcilable with the core characteristics of marriage.  
8 Singling out same-sex spouses for exclusion from the federal  
9 definition of marriage amounts to a bare expression of animus on  
10 the basis of sexual orientation and, under Romer, this rationale  
11 does not satisfy rational basis review.

12 Nor was § 3 of the DOMA a cautious legislative step. The  
13 measure established an across-the-board federal definition of  
14 marriage limiting it to heterosexual couples, and preempting any  
15 opportunity to test the impact of state laws evolving to recognize  
16 same-sex marriage. The General Accounting Office has identified  
17 1,138 federal statutory provisions in which marital status is a  
18 factor in determining "benefits, rights, and privileges." General  
19 Accounting Office, Defense of Marriage Act: Update to Prior  
20 Report, GAO-04-353R, at 1 (January 23, 2004),  
21 [www.gao.gov/new.items/d04353r.pdf](http://www.gao.gov/new.items/d04353r.pdf). Through a single federal law,  
22 enacted before any state granted marriage licenses to same-sex  
23 couples, Congress foreclosed the recognition of same-sex spouses  
24 for any purpose under a sweeping range of federal provisions.

25 In Perry, the Ninth Circuit found that Proposition 8 was not  
26 plausibly a measure of caution for it erected a barrier to  
27 incremental policy-making and did not include a means of careful  
28 consideration, such as a time-specific moratorium on same-sex

1 marriage. Given the federal government's long-standing deference  
2 to state law in the area of domestic relations, the BLAG's  
3 rationale that the provision was a cautionary measure is not  
4 plausible. 671 F.3d at 1090; see Golinski, 2012 WL 569685 at \*24  
5 ("The passage of DOMA marks a stark departure from tradition and a  
6 blatant disregard of the well-accepted concept of federalism in  
7 the area of domestic relations."), appeals docketed, Nos. 12-15388  
8 and 12-15409 (9th Cir.); Gill, 699 F. Supp. 2d at 392 (finding  
9 that DOMA "mark[ed] the first time the federal government has ever  
10 attempted to legislatively mandate a uniform federal definition of  
11 marriage--or any other core concept of domestic relations, for  
12 that matter"). Section 3 of the DOMA did not prevent the states  
13 from allowing non-traditional, same-sex marriages and, thus, it  
14 created a new schism between state and federal domestic relations  
15 law.

16 In sum, Congress's hypothesized desire to exercise caution by  
17 preserving the traditional definition of marriage is not a  
18 legitimate justification; § 3 of the DOMA marked a significant  
19 departure from federal deference to the states' authority in  
20 defining marriage.

## 21 2. Protecting the Public Fisc

22 The BLAG further argues that § 3 of the DOMA is justified as  
23 an enactment designed to conserve scarce government resources.  
24 The effectiveness of § 3 of the DOMA as a cost-saving measure is a  
25 subject of debate. For example, as the BLAG has recognized, the  
26 Congressional Budget Office has opined that federal recognition of  
27 same-sex marriage would result in a net benefit to the federal  
28 treasury. BLAG's Cross Mot. Summ. J. at 21 n.6 (citing Douglas

1 Holtz-Eakin, The Potential Budgetary Impact of Recognizing Same-  
2 Sex Marriage, at 1, June 21, 2004).<sup>8</sup> However, even crediting  
3 cost-savings as a conceivable policy goal, groups selected to bear  
4 the burden of legislative enactments to save money must be  
5 rationally, not arbitrarily, chosen. Golinksi, 2012 WL 569685 at  
6 \*22 n.8 (citing Plyler v. Doe, 457 U.S. 202, 227, 229 (1982)).

7 Diaz v. Brewer, 656 F.3d 1008, 1015 (9th Cir. 2011), reh'g en  
8 banc denied, is also instructive. There, the Ninth Circuit  
9 affirmed a district court's preliminary injunction barring  
10 enforcement of a state provision eliminating health insurance  
11 benefits for registered domestic partners of Arizona state  
12 employees. In Arizona, couples were permitted to register as  
13 domestic partners, whether they were same-sex or heterosexual. In  
14 rejecting the state's rationales of cost-savings and reducing  
15 administrative burdens, the court observed that the savings  
16 depended upon a distinction between same-sex and similarly  
17 situated heterosexual couples, because the heterosexual couples  
18 could preserve their benefits by marrying, whereas same-sex  
19 couples were barred from marriage by Arizona constitutional law.  
20 Citing Eisenstadt v. Baird, 405 U.S. 438 (1972), the court held  
21 that a provision to save funds based on such a distinction could  
22 not survive rational basis review because it amounted to the  
23 "selective application of legislation to a small group." Id. at  
24 1014.

25  
26 \_\_\_\_\_  
27 <sup>8</sup> This report is available at  
28 <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5559/06-21-samesexmarriage.pdf>.

1 The desire to save money is not sufficient to justify § 3 of  
2 the DOMA.

3 3. Establishing Uniformity

4 According to the BLAG, § 3 of the DOMA promotes uniformity in  
5 eligibility for federal benefits. However, the federal government  
6 has accepted variations and inconsistencies in state marriage laws  
7 by recognizing for federal purposes any heterosexual marriage that  
8 is valid under state law. Gill, 699 F. Supp. at 391 (citing Dunn  
9 v. Comm'r of Internal Revenue, 70 T.C. 361, 366 (1978)

10 ("recognizing that whether an individual is 'married' is, for  
11 purposes of the tax laws, to be determined by the law of the State  
12 of the marital domicile"); 5 C.F.R. § 843.102 (defining "spouse"  
13 for purposes of federal employee benefits by reference to state  
14 law); 42 U.S.C. § 416(h)(1)(A)(i) (defining an "applicant" for  
15 purposes of Social Security survivor and death benefits as "the  
16 wife, husband, widow or widower" of an insured person "if the  
17 courts of the State" of the deceased's domicile "would find such  
18 an applicant and such insured individual were validly married");  
19 20 C.F.R. § 404.345 ("If you and the insured were validly married  
20 under State law at the time you apply for . . . [social security]  
21 benefits, the relationship requirement will be met."); 38 U.S.C.  
22 § 103(c) (veterans' benefits); 20 C.F.R. § 10.415 (workers'  
23 compensation); 45 C.F.R. § 237.50(b)(3) (public assistance); 29  
24 C.F.R. §§ 825.122 and 825.800 (Family Medical Leave Act); 20  
25 C.F.R. §§ 219.30 and 222.11 (benefits under the Railroad  
26 Retirement Act)). An enactment that precludes federal recognition  
27 of certain marriages because they involve same-sex couples cannot  
28 be justified as promoting uniformity where federal law otherwise

1 accepts wide variation in state marriage law. In considering the  
2 DOMA, Congress acknowledged the long-standing disposition of the  
3 federal government to accept state definitions of civil marriage.  
4 HR. Rep. 104-664 at 2 ("The determination of who may marry in the  
5 United States is uniquely a function of state law."). Instead,  
6 § 3 of the DOMA undermines uniform recognition of marriage, by  
7 requiring federal agencies to discern which state law marriages  
8 are acceptable for federal recognition and which are not.<sup>9</sup>

9 4. Encouraging Responsible Procreation and Preserving  
10 the Social Link Between Marriage and Children

11 The BLAG asserts that Congress could rationally have enacted  
12 § 3 of the DOMA to encourage marriage for heterosexual couples  
13 who, unlike same-sex couples, are generally at risk of  
14 accidentally conceiving children outside of marriage. The BLAG  
15 contends that the provision serves to incentivize the creation,  
16 stability, and closeness of heterosexual marriage, or the raising  
17 of children in that marital context, while declining to extend  
18 similar incentives to other relationships.

19 Here, the relationship between § 3 of the DOMA and the policy  
20 goal of steering child-bearing into the context of heterosexual  
21 marriage is too attenuated to be credited as a plausible rationale

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22 <sup>9</sup> The BLAG argues that Congress has approved numerous  
23 provisions in the areas of taxation, Social Security, immigration  
24 and federal benefits that define marriage for purposes of federal  
25 law. However, these provisions do not purport to establish a  
26 federal definition of marriage, but instead impose additional  
27 requirements to further the legislative goals of the provisions,  
28 while accepting the state definitions of marriage. Golinski, 2012  
WL 569685 at \*25 n.10 (citing 42 U.S.C. § 416 (requiring marriage  
of at least one year to obtain certain Social Security benefits);  
8 U.S.C. § 1186a(b)(1) (discrediting sham marriages for purposes  
of immigration)).

1 for the law. The law carries no incentivizing effect for  
2 heterosexual couples. The BLAG acknowledges that marriage has  
3 long been understood as a relationship between a man and a woman.  
4 Section 3 of the DOMA enacted an express exclusion, barring  
5 federal recognition of same-sex marriages under state law. There  
6 is no reasonable basis to believe that heterosexual couples are  
7 more inclined to marry and have children or to enter into a  
8 marriage after accidentally conceiving a child, due to this  
9 limiting federal definition enacted in 1996.<sup>10</sup> Golinski, 2012 WL  
10 569685 \*23 ("Denying federal benefits to same-sex married couples  
11 has no rational effect on the procreation practices of opposite-  
12 sex married (or unmarried) couples."). See also Lawrence, 539  
13 U.S. at 605 (Scalia, J., dissenting) (observing, "what  
14 justification could there possibly be for denying the benefits of

15 \_\_\_\_\_  
16 <sup>10</sup> The BLAG's reliance on Johnson v. Robison, 415 U.S. 361  
17 (1974), is not persuasive. There the Supreme Court upheld,  
18 against an equal protection challenge, a provision that granted  
19 educational benefits to drafted individuals who performed military  
20 service, but withheld such benefits from drafted religious,  
21 conscientious objectors who performed mandatory civilian service  
22 as an alternative to military service. Id. at 382-83. The Court  
23 determined that the educational benefits made military service  
24 more "palatable" and deterred drafted servicemen from skirting  
25 their duties, whereas individuals with deeply held religious  
26 convictions against military service would not be drawn to serve  
27 through the availability of educational benefits. Here, § 3 of  
28 the DOMA impacts an expansive body of laws that touch upon marital  
status. These laws concern diverse benefits, privileges,  
responsibilities and obligations which, collectively, are not  
readily analogous to the simple educational benefit present in  
Johnson. Thus, the incentivizing effect in Johnson does not apply  
here. Nor are same-sex couples like the conscientious objectors,  
because they are seeking to join the institution of marriage or  
have their existing marriages or legal relationships recognized by  
the federal government and they desire to assume the attending  
benefits and responsibilities. Johnson is inapposite.

1 marriage to homosexual couples . . . [s]urely not the  
2 encouragement of procreation, since the sterile and the elderly  
3 are allowed to marry”) and Perry, 671 F.3d at 1088 (“There is no  
4 rational reason to think that taking away the designation of  
5 ‘marriage’ from same-sex couples would advance the goal of  
6 encouraging California’s opposite-sex couples to procreate more  
7 responsibly.”).

8       The BLAG also argues that § 3 of the DOMA could have been  
9 passed to preserve the social link between marriage and child-  
10 rearing. The BLAG contends that Congress could have reasonably  
11 concluded that expanding the definition of marriage could weaken  
12 society’s view that the central purpose of marriage is to raise  
13 children and could contribute to the number of children born  
14 outside of marriage. This rationale is not plausible because, as  
15 noted earlier, child-rearing is not the core attribute of  
16 marriage, and there is no reasonable connection between the  
17 exclusion of same-sex spouses from the federal definition of  
18 marriage and minimizing the number of children born outside of  
19 wedlock.

20       The provision did not extend new marital rights and  
21 privileges to heterosexual couples. Rather, it blocked the  
22 application of existing federal rights to married same-sex couples  
23 to whom such privileges could have otherwise been accorded. Thus,  
24 the law did not establish an incentive for heterosexual couples to  
25 marry; they were able to do so and enjoy federal recognition,  
26 prior to the enactment of the DOMA.

27       There is no reasonable relationship between § 3 of the DOMA  
28 and the policy goal of encouraging heterosexual couples to

1 procreate while married or enter into marriage if they  
2 accidentally conceive a child. Because there is no rational  
3 relationship to this policy goal, the Court need not resolve  
4 whether fostering child-rearing by heterosexual, rather than same-  
5 sex couples, serves a legitimate governmental interest.

6 5. Summary

7 In sum, the legislative record contains evidence of anti-gay  
8 animus and the BLAG has failed to establish that § 3 of the DOMA  
9 is rationally related to a legitimate government interest.  
10 Accordingly, Plaintiff same-sex spouses are entitled to summary  
11 judgment that § 3 of the DOMA is invalid under the Constitution's  
12 equal protection principles to the extent that the law blocks  
13 their access to the CalPERS long-term care plan.

14 B. Registered Domestic Partners' Challenge to § 3 of the  
15 DOMA

16 Plaintiffs assert that the restrictive definition of "spouse"  
17 in § 3 of the DOMA precludes registered domestic partners from  
18 enrollment in the CalPERS long-term care plan, contravening their  
19 rights to equal protection under federal law and their entitlement  
20 to all of the rights, privileges, and obligations of marriage  
21 under California law. Plaintiffs contend that, if not for § 3 of  
22 the DOMA, Plaintiffs Dominguez and Hermosillo, who are registered  
23 domestic partners, but not married under California law, would be  
24 deemed "spouses" under state law for purposes of Hermosillo's  
25 enrollment in CalPERS' long-term care program.

26 State Defendants do not say that § 3 of the DOMA, in  
27 particular, precludes California registered domestic partners from  
28 enrolling in the CalPERS long-term care plan. Rather, they

1 represent that they would "admit same-sex spouses and domestic  
2 partners to [the CalPERS long-term care plan] but for federal  
3 law." State Defendants contend that enrollment of Plaintiff  
4 domestic partners in the plan would jeopardize the plan's status  
5 as a qualified state long-term care plan under § 7702B(f) (2).

6 Federal Defendants dispute Plaintiffs' contention that, but  
7 for § 3 of the DOMA, California registered domestic partners would  
8 necessarily be treated as spouses under the federal tax code.  
9 Fed. Defs.' Cross Mot. Summ. J. 2, 20-21 and Reply 1. The Court  
10 notes that § 3 of the DOMA does not expressly address registered  
11 domestic partners and it is clear that § 7702B(f) omits domestic  
12 partners.

13 Plaintiffs have not demonstrated that § 3 of the DOMA blocks  
14 CalPERS from enrolling California domestic partners in its long-  
15 term care plan. Plaintiffs contend hypothetically that if § 3 of  
16 the DOMA were invalidated, but § 7702B(f) were upheld, California  
17 registered domestic partners, who are legally entitled to be  
18 treated as spouses under California law, would be permitted to  
19 enroll in the CalPERS long-term care plan, without triggering  
20 disqualification of the plan for favorable tax treatment under  
21 § 7702B(f). In effect, Plaintiffs ask the Court to issue an  
22 advisory opinion, which would be improper. See Coal. for a  
23 Healthy Cal. v. F.C.C., 87 F.3d 383, 386 (9th Cir. 1996) (citing  
24 Flast v. Cohen, 392 U.S. 83, 96 (1968), for the proposition that  
25 federal courts are not authorized to issue advisory opinions).  
26 Accordingly, the Court finds moot Plaintiffs' claim that the equal  
27 protection rights of California registered domestic partners have  
28 been infringed by § 3 of the DOMA.

1 C. Application of Rational Basis Test to Registered  
Domestic Partners' Challenge to § 7702B(f)

2 In addition to challenging § 3 of the DOMA, Plaintiffs claim  
3 that § 7702B(f) infringes the equal protection rights of  
4 California same-sex registered domestic partners by excluding them  
5 from enrollment in qualified state-maintained long-term care  
6 plans. As explained above, subparagraph (C) of § 7702B(f)(2) does  
7 not include registered domestic partners in the list of relatives  
8 eligible to enroll in state-maintained long-term care plans. The  
9 list of eligible participants incorporates all relatives  
10 qualifying for a dependency exemption under 26 U.S.C. § 152(d)(2)  
11 except for those individuals who are eligible because they are  
12 members of the same household as the taxpayer. Had Congress  
13 incorporated subparagraph (H) of § 152(d)(2), in the list of  
14 individuals eligible under § 7702B(f), CalPERS would have been  
15 authorized to enroll the registered domestic partners of  
16 California public employees in its long-term care plan.

17 Federal Defendants oppose Plaintiffs' challenge to  
18 § 7702B(f), arguing, first, that registered domestic partners do  
19 not constitute a quasi-suspect or suspect class. For the reasons  
20 discussed above in connection with the non-suspect class status of  
21 gay men and lesbians, the Court cannot conclude that domestic  
22 partners constitute such a class. Although, as explained below,  
23 laws excluding registered domestic partners use that status as a  
24 proxy for homosexuality, gay men and lesbians still do not  
25 constitute a suspect or quasi-suspect class under current Ninth  
26 Circuit precedent.

27 Federal Defendants contend that the exclusion of registered  
28 domestic partners from § 7702B(f) does not amount to a

1 classification based on sexual orientation because many states  
2 permit heterosexual couples to register as domestic partners. The  
3 Court previously rejected this argument, reasoning that same-sex  
4 couples are relegated to domestic partnership because they are  
5 barred from civil marriage by California law.<sup>11</sup> January 26, 2012  
6 Order at 16. Laws limiting same-sex couples to registered  
7 domestic partnerships, while precluding them from marriage, turn  
8 on sexual orientation, and the availability of registered domestic  
9 partnership to different-sex couples does not negate the burdens  
10 faced by same-sex registered domestic partners.

11 The Court's prior ruling relied on the Ninth Circuit's  
12 decision in Diaz. There, as noted above, the Ninth Circuit  
13 considered a challenge to a state law provision that eliminated  
14 health care insurance benefits for the registered domestic  
15 partners of Arizona public employees. Arizona law allows  
16 heterosexual couples, as well as same-sex couples, to register as  
17 domestic partners. Although heterosexual registered domestic  
18 partners were also affected by the restriction, the court found  
19 that the law was tainted by a bare desire to harm same-sex couples  
20 because, unlike heterosexual couples, they could not marry under  
21 Arizona law. 656 F.3d at 1014-1015.

22 Federal Defendants argue that Diaz is inapposite because the  
23 case concerned the withdrawal of an existing benefit that an  
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25 <sup>11</sup> Only five to six percent of registered domestic partners in  
26 California are different-sex partners. At least one partner must  
27 be sixty-two years old or older to register, limiting the eligible  
28 pool. Declaration of Claudia Center, Ex. M, Gary J. Gates, M.V.  
Lee Badgett, Deborah Ho, Marriage, Registration and Dissolution by  
Same-Sex Couples in the United States, at 14 (July 1, 2009).

1 unpopular group had previously enjoyed. This, however, was not  
2 the crux of the Ninth Circuit's reasoning. The court explained  
3 that "when a state chooses to provide such benefits, it may not do  
4 so in an arbitrary or discriminatory manner that adversely affects  
5 particular groups that may be unpopular." Id. at 1013 (citing  
6 U.S. Dep't. of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973)).

7 Federal Defendants also argue that § 7702B(f) is neutral as  
8 to sexual orientation because other relatives, such as cousins,  
9 and individuals who share a close, family-like relationship are  
10 omitted from the list of eligible relatives. However, the  
11 relevant comparison is between § 7702B(f)'s treatment of domestic  
12 partners and its treatment of spouses because domestic partners  
13 are more comparable to spouses than to distant relatives, such as  
14 cousins. Congress viewed registered domestic partnership as a  
15 quasi-marital status, such as when Representative Istook referred  
16 to domestic partnership as the "equivalent to gay marriage," 1993  
17 WL 236117, at \*H4355, and Representative Stearns asserted that the  
18 District of Columbia domestic partnership registry was intended to  
19 give same-sex couples the legal and social benefits associated  
20 with marriage, 1995 WL 639923, at \*H11659. The fact that cousins  
21 are also affected does not undercut the Court's finding that  
22 § 7702B(f)'s exclusion of registered domestic partners is a  
23 classification based on sexual orientation. See Feeney, 442 U.S.  
24 at 275 ("If the impact of this statute could not be plausibly  
25 explained on a neutral ground, impact itself would signal that the  
26 real classification made by the law was in fact not neutral.").

27 Therefore, in applying rational basis review to Plaintiffs'  
28 equal protection challenge to § 7702B(f), as with § 3 of the DOMA,

1 the Court considers evidence of anti-gay animus and the existence  
2 of any other rational basis for § 7702B(f)'s exclusion of  
3 registered domestic partners. Neither party points to legislative  
4 history illuminating the reasons that Congress limited the  
5 eligible relatives contained in subparagraph (C). Thus, there is  
6 no direct evidence of either animus or a benign purpose in the  
7 record pertaining to § 7702B(f). However, information about  
8 Congress's views regarding legal recognition of registered  
9 domestic partnerships, recorded at the same time as it considered  
10 and approved § 7702B(f), is relevant to the Court's determination.  
11 In Arlington Heights v. Metropolitan Housing Development  
12 Corporation, 429 U.S. 252, 267 (1977), the Supreme Court  
13 explained, "The historical background of the decision is one  
14 evidentiary source, particularly if it reveals a series of  
15 official actions taken for invidious purposes . . . The specific  
16 sequence of events leading up to the challenged decision may also  
17 shed some light on the decisionmaker's purposes." Thus, facts  
18 beyond the legislative record directly pertaining to § 7702B(f)  
19 are relevant to discern Congress's intent. The legislative  
20 history of provisions that Congress considered contemporaneously  
21 with the passage of § 7702B(f) is relevant.

22 Plaintiffs point to Congress's contemporaneous consideration  
23 of § 3 of the DOMA and its obvious animosity towards same-sex  
24 couples in those proceedings, as well as its ban on funding of the  
25 District of Columbia's domestic partnership registry, as indirect  
26 evidence that this animus was the reason for its exclusion of a  
27 provision applicable to registered domestic partners from the list  
28 of eligible relatives under subparagraph (C) of § 7702B(f). The

1 DOMA and § 7702B(f) were enacted in the same legislative session,  
2 within a month of each other. Congress had been banning the  
3 funding of the District of Columbia's domestic partnership  
4 registry for years. In 1996, Congress not only knew that a number  
5 of localities and entities across the country had recognized and  
6 protected same-sex couples by offering registered domestic  
7 partnerships, it limited the federal definition of marriage to  
8 heterosexual married couples. Thwarting federal recognition of  
9 registered domestic partnerships was a consideration in approving  
10 § 3 of the DOMA's limiting definition of marriage. The statements  
11 reflecting animus towards gay men and lesbians in these contexts  
12 are relevant to show anti-gay animus in connection with  
13 § 7702B(f)'s exclusion of registered domestic partners. The Court  
14 infers that Congress acted on anti-gay animus in refusing to  
15 include registered domestic partners in the list of relatives  
16 eligible to enroll in state-maintained long term care plans.

17 In addition to pointing out evidence of anti-gay animus in  
18 the legislative record, Plaintiffs have refuted the existence of  
19 any rational basis for § 7702B(f)'s exclusion of registered  
20 domestic partners.

21 Federal Defendants argue that the exclusion of registered  
22 domestic partners from § 7702B(f) was rational because, in 1996,  
23 no state recognized such relationships. As noted earlier,  
24 Congress was actually aware of, and thwarted, the District of  
25 Columbia's domestic partnership registry. Congress was informed  
26 of domestic partnership registries established in various other  
27 jurisdictions. Accordingly, Federal Defendants' asserted  
28

1 rationale that the exclusion was reasonable because registered  
2 domestic partnership was a novel legal status cannot be credited.

3       Next, Federal Defendants contend that it was not irrational  
4 to exclude registered domestic partners from qualified state long-  
5 term care plans because, in 1996, no state treated registered  
6 domestic partners as spouses for state law purposes. Federal  
7 Defendants point out that California extended to registered  
8 domestic partners the full range of spousal rights and  
9 responsibilities available under state law only after a 2003  
10 legislative enactment. This argument, however, is not persuasive  
11 because treating registered domestic partners as eligible for  
12 enrollment in a state-maintained, long-term care plan does not  
13 entail extending to registered domestic partners all rights and  
14 responsibilities attached to marriage under a given state's law.

15       Federal Defendants also argue that Congress reasonably  
16 decided that the category of household members described in  
17 § 152(d)(2)(H) was not a suitable basis to determine eligibility  
18 for inclusion in a state long-term care plan because such  
19 relationships may change from year to year. This justification,  
20 however, cannot be credited because the eligibility of spouses,  
21 step-relatives and relatives-in-law, which depends on the  
22 existence of a marital relationship, may likewise change between  
23 one year and the next.

24       Federal Defendants further contend that the exclusion of  
25 registered domestic partners simplifies for state officials  
26 administering long-term care plans the task of verifying  
27 eligibility. This rationale is not plausible because the  
28 relationships of distant relatives who are eligible for long-term

1 care coverage through state-maintained plans are likely at least  
2 as difficult to verify as the residence of individuals who live in  
3 the same household as the taxpayer for the taxable year. Thus,  
4 the exclusion of subparagraph (H) does not rationally relate to  
5 efforts to ease administration of state-maintained long-term care  
6 plans. In Moreno, 413 U.S. at 537-38, the Court held that a  
7 provision that limited eligibility for food stamps to households  
8 comprising "related" rather than "non-related" individuals was not  
9 rationally connected to efforts to curb abuse of the program. In  
10 addition, the Ninth Circuit in Diaz recently rejected the argument  
11 that a state law eliminating health care benefits for domestic  
12 partners served the interest of easing administrative burdens  
13 where the challenged law amounted to a "selective" burden on a  
14 small group of individuals. 656 F.3d at 1014.

15 Finally, Federal Defendants assert that Congress reasonably  
16 could have assumed that there would not be any significant  
17 disparity between qualified state long-term care plans and private  
18 § 7702B plans, so that domestic partners of state employees would  
19 not be discouraged from purchasing long-term care coverage simply  
20 because they are ineligible for state-maintained long-term care  
21 coverage. This does not amount to a rationale for excluding  
22 household members under subparagraph (H) from the list of  
23 relatives eligible for state-maintained plans. The availability  
24 of long-term care coverage, with tax benefits, for purchase on the  
25 private market does not explain this federally mandated exclusion  
26 from state plans.

27 Section 7702B(f) is actually inconsistent with Congress's  
28 expressed policy goal of encouraging the purchase of long-term

1 care coverage generally. Congress's broad extension of favorable  
2 tax treatment to private plans was consistent with its policy  
3 goal. However, Congress imposed, pursuant to § 7702B(f), a  
4 penalty, namely disqualification of state-maintained plans from  
5 favorable federal tax treatment, if they extended long-term care  
6 coverage to household members and relatives beyond the list of  
7 individuals sanctioned by Congress.

8 Thus, none of the explanations put forth by Federal  
9 Defendants satisfies the rational basis test.

10 Because Congress's restriction on state-maintained long-term  
11 care plans lacks any rational relationship to a legitimate  
12 government interest, but rather appears to be motivated by anti-  
13 gay animus, the exclusion of registered domestic partners of  
14 public employees from § 7702B(f)'s list of individuals eligible to  
15 enroll in state-maintained long-term care plans violates the  
16 Constitution's equal protection guarantee.

#### 17 V. Substantive Due Process

18 The Court need not address Plaintiffs' substantive due  
19 process challenge to the disputed provisions because Plaintiffs  
20 prevail on their motion for summary judgment with respect to their  
21 equal protection challenge. Plaintiffs' meritorious equal  
22 protection challenge redresses their injuries by invalidating  
23 federal law thwarting their enrollment in the CalPERS long-term  
24 care plan and, thus, their substantive due process attack is moot.

#### 25 CONCLUSION

26 The Court finds that § 3 of the DOMA violates the equal  
27 protection rights of Plaintiff same-sex spouses, and  
28 subparagraph (C) of § 7702B(f) violates the equal protection

1 rights of Plaintiff registered domestic partners. Therefore, both  
2 provisions are constitutionally invalid to the extent that they  
3 exclude Plaintiff same-sex spouses and registered domestic  
4 partners from enrollment in the CalPERS long-term care plan.  
5 Thus, Plaintiffs' motion for summary judgment is granted with  
6 respect to their equal protection claims and the BLAG's and  
7 Federal Defendants' cross-motions for summary judgment that § 3 of  
8 the DOMA and § 7702B(f) of Title 26 are constitutional are denied.

9 Accordingly, the Court permanently enjoins State Defendants,  
10 and those acting at their direction or on their behalf, from  
11 denying Plaintiff class members enrollment in the CalPERS long-  
12 term care plan on the basis of § 3 of the DOMA or § 7702B(f)'s  
13 exclusion of same-sex spouses and registered domestic partners,  
14 respectively. Federal Defendants are enjoined from disqualifying  
15 the CalPERS long-term care plan under § 7702B(f) based on State  
16 Defendants' compliance with the terms of this injunction. A stay  
17 on State Defendants' compliance with this order will be granted,  
18 if a timely appeal is filed.

19 The Clerk is directed to enter judgment in favor of the  
20 Plaintiff class and against Defendants and Intervenors.

21 In their Prayer for Relief, Plaintiffs indicated their intent  
22 to seek attorneys' fees and costs. They may submit a motion  
23 making such a request.

24 IT IS SO ORDERED.

25  
26 Dated: 5/24/2012

27   
28 CLAUDIA WILKEN  
United States District Judge