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

MICHAEL DRAGOVICH; MICHAEL GAITLEY;  
ELIZABETH LITTERAL; PATRICIA  
FITZSIMMONS; CAROLYN LIGHT; and  
CHERYL LIGHT; 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.

No. 10-01564 CW

ORDER DENYING  
FEDERAL  
DEFENDANTS'  
MOTION TO DISMISS  
(Docket No. 25)

Plaintiffs bring a constitutional challenge to section three  
of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, and section  
7702B(f) of the Internal Revenue Code (I.R.C.), 26 U.S.C.  
§ 7702B(f), which interfere with their ability to participate in a  
state-maintained plan providing long-term care insurance. Long-  
term care insurance provides coverage when a person needs  
assistance with basic activities of living due to injury, old age,  
or severe impairments related to chronic illnesses, such as  
Alzheimer's disease. Enacted on August 21, 1996, as part of the  
Health Insurance Portability and Accountability Act (HIPAA),

1 section 7702B(f) provides favorable federal tax treatment to  
2 qualified state-maintained long-term care insurance plans for state  
3 employees. 26 U.S.C. § 7702B(f). Section 7702B(f) disqualifies a  
4 state-maintained plan from this favorable tax treatment if it  
5 provides coverage to individuals other than certain specified  
6 relatives of state employees and former employees. § 7702B(f)(2).  
7 The provision's list of eligible relatives does not include  
8 registered domestic partners, but does include spouses. 26 U.S.C.  
9 § 7702B(f)(2)(C); 26 U.S.C. § 152(d)(2)(A)-(G)). One month later,  
10 section three of the DOMA amended the United States Code to define,  
11 for federal law purposes, the term "spouse" to mean solely "a  
12 person of the opposite sex who is a husband or wife," and  
13 "marriage" to mean only "a legal union between one man and one  
14 woman as husband and wife." 1 U.S.C § 7.

15 Plaintiffs are three California public employees and their  
16 same-sex spouses, who are in long-term committed relationships  
17 legally recognized in California as both marriages and registered  
18 domestic partnerships. California Public Employees' Retirement  
19 System (CalPERS) provides retirement and health benefits, including  
20 long-term care insurance, to many of the state's public employees,  
21 retirees, and their families. CalPERS has refused to make  
22 available its Long-Term Care (LTC) Program to the same-sex spouses  
23 of the public employee Plaintiffs.

24 Plaintiffs contend that section three of the DOMA and  
25 I.R.C. § 7702B(f) violate the Fifth and Fourteenth Amendment  
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1 guarantees of equal protection and substantive due process.<sup>1</sup>  
2 Plaintiffs have named both Federal and State Defendants. Federal  
3 Defendants move to dismiss under Federal Rule of Civil Procedure  
4 12(b)(1), on grounds that this Court lacks subject matter  
5 jurisdiction because Plaintiffs do not have standing. In addition,  
6 Federal Defendants move to dismiss Plaintiffs' action under Federal  
7 Rule of Civil Procedure 12(b)(6) for failure to state claims for  
8 violations of equal protection and substantive due process. State  
9 Defendants have answered the complaint and do not join the motion  
10 to dismiss.

11 BACKGROUND

12 I. Facts Alleged in the Complaint

13 On a motion to dismiss under Rule 12(b)(6), the Court must  
14 take as true the facts alleged in Plaintiffs' complaint. The  
15 following summarizes the facts alleged.

16 A. Long-term care insurance and the CalPERS LTC Program

17 Pursuant to California law, Defendant CalPERS Board of  
18 Administration offers public employees and their families the  
19 opportunity to purchase long-term care insurance during periodic  
20 open enrollment periods. Cal. Gov't. Code § 2166(a).

21 Long-term care insurance has advantages which health and  
22 disability insurance, Medicare and MediCal generally do not offer.  
23 The official guide explaining the CalPERS LTC Program states that

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24  
25 <sup>1</sup> While the Fourteenth Amendment equal protection guarantee  
26 does not directly apply to the United States, courts have  
27 interpreted the Fifth Amendment's Due Process Clause as imposing on  
28 the United States the same principles of equal protection  
established in the Fourteenth Amendment. Adarand Constructors,  
Inc. v. Pena, 515 U.S. 200, 213-18 (1995).

1 "Medicare, Medigap and health insurance may cover very limited  
2 long-term care," and such plans "were designed to pay for hospital  
3 and doctor care--not extended, personal care." Pls.' Compl. at  
4 ¶ 38. The CalPERS guide further warns, "Medi-Cal only pays for  
5 long-term care after [an individual has] exhausted most of [his or  
6 her] own assets and income." Id. at ¶ 38. Furthermore, long and  
7 short term disability insurance policies generally only "replace  
8 lost income due to disability" and "most long-term care is paid  
9 directly by individuals and their families." Id. Accordingly, the  
10 insurance offered by the CalPERS LTC Program provides control over  
11 where and how an individual receives care, allows an individual to  
12 preserve assets for other uses, and helps reduce the high financial  
13 and emotional cost of long-term care. Id. at ¶ 5. The CalPERS LTC  
14 Program, and long-term care insurance in general, are an important  
15 option for individuals and families to safeguard their financial  
16 and emotional well-being.

17 B. I.R.C. § 7702B

18 As noted above, the United States has provided important tax  
19 benefits for long-term care insurance policies. 26 U.S.C. § 7702B.  
20 Premiums for qualified long-term care contracts are treated as  
21 medical expenses and may be claimed as itemized deductions. 26  
22 U.S.C. § 7702B(a)(4); 26 U.S.C. § 213(a), (d)(1)(D), (d)(10).  
23 Benefits received under a qualified long-term care insurance  
24 contract are excludable from gross income. 26  
25 U.S.C. § 7702B(a)(2), (d); 26 U.S.C. § 104(a)(2).

26 Congress enacted these provisions because of the critical role  
27 of long term care insurance in protecting families. "The  
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1 legislation . . . provides tax deductibility for long term care  
2 insurance, making it possible for more Americans to avoid financial  
3 difficulty as the result of chronic illness." 142 Cong. Rec.  
4 S3578-01 at \*3608 (Statement of Sen. McCain) (Apr. 18, 1996); see  
5 also, Joint Committee on Taxation, "Description of Federal Tax  
6 Rules and Legislative Background Relating to Long-Term Care  
7 Scheduled for a Public Hearing Before the Senate Committee on  
8 Finance on March 27, 2001," at 2001 WL 36044116 (provisions to  
9 grant tax advantages for long-term care plans were adopted "to  
10 provide an incentive for individuals to take financial  
11 responsibility for their long-term care needs.").

12 A state-maintained long-term care insurance program provides  
13 its beneficiaries the same favorable federal tax treatment if the  
14 program meets the requirements of I.R.C. § 7702B(b) and is offered  
15 only to the state's current and former employees, their spouses,  
16 and certain relatives. Id. § 7702B(f). Eligible relatives include  
17 children, grandchildren, brothers, sisters, stepbrothers,  
18 stepsisters, fathers, mothers, stepfathers, stepmothers,  
19 grandparents, nephews, nieces, aunts, uncles, sons-in-law,  
20 daughters-in-law, fathers-in-law, mothers-in-law, brothers-in-law,  
21 and sisters-in-law. See I.R.C. §§ 7702B(f)(2)(C)(iii);  
22 152(d)(2)(A)-(G).

23 Registered domestic partners are not included on the list of  
24 eligible relatives, 26 U.S.C. §§ 7702(B)(f)(1)-(2), 152(d)(2)(A)-  
25 (G), and because the DOMA's federal definition of spouse does not  
26 include same-sex spouses, 1 U.S.C. § 7, a state cannot allow same-  
27 sex couples to participate in its long-term care plan if it wishes  
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1 the plan to qualify for favorable tax treatment. The CalPERS LTC  
2 Program is a qualified plan under § 7702B and, as such, does not  
3 permit same-sex spouses or registered domestic partners of state  
4 employees to enroll.

5 In their answer to Plaintiffs' complaint, California  
6 Defendants CalPERS and CalPERS Chief Executive Officer Stausboll  
7 state that "they have no choice but to follow federal tax law."  
8 CalPERS Ans. at ¶¶ 10-11.

9 C. Plaintiff Couples and their California Status

10 As noted earlier, Plaintiffs are current California public  
11 employees--Michael Dragovich, Elizabeth Litteral, and Carolyn  
12 Light--and their same-sex spouses. Plaintiffs legally married  
13 during the window of time that California allowed civil marriage  
14 for same-sex couples, following the state supreme court's decision  
15 in In re Marriage Cases, 43 Cal. 4th 757 (2008) (holding that the  
16 denial of the right to marry to same-sex couples violated the state  
17 constitution, and that strict scrutiny review applies to laws  
18 burdening persons based on sexual orientation). Although  
19 Proposition 8 subsequently amended the California Constitution to  
20 prohibit civil marriage for same-sex couples, Plaintiffs' marriages  
21 remain valid under California law. Strauss v. Horton, 46 Cal. 4th  
22 364, 474 (2009) ("[W]e conclude that Proposition 8 cannot be  
23 interpreted to apply retroactively so as to invalidate the  
24 marriages of same-sex couples that occurred prior to the adoption  
25 of Proposition 8. Those marriages remain valid in all respects.").

26 In addition to being legally married, Plaintiff couples are  
27 registered domestic partners, pursuant to California Family Code  
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1 § 297. Since January 1, 2005, California law has provided,

2 Registered domestic partners shall have the same rights,  
3 protections, and benefits, and shall be subject to the  
4 same responsibilities, obligations, and duties under  
5 law, whether they derive from statutes, administrative  
6 regulations, court rules, government policies, common  
7 law, or any other provisions or sources of law, as are  
8 granted to and imposed upon spouses.

9 Cal. Fam. Code § 297.5(a). However, section (g) of the same  
10 statute specifically exempts CalPERS' federally qualified LTC  
11 Program from the general requirement that public agencies treat  
12 registered domestic partners as spouses. Cal. Fam. Code  
13 § 297.5(g).

14 Plaintiff couples wish to enroll in the CalPERS LTC Program.  
15 Plaintiff Michael Dragovich has purchased long-term care coverage  
16 for himself through the CalPERS LTC Program since 1997. In  
17 December, 2008, after marrying his long-time partner Michael  
18 Gaitley, Dragovich called the program's toll-free number to request  
19 enrollment materials for his spouse. The program representative  
20 informed Dragovich that same-sex spouses were ineligible to enroll  
21 in the program, and the restriction was based on federal law.  
22 Following this telephone call, Dragovich's attorney wrote a letter  
23 to CalPERS on his behalf, objecting to the exclusion by CalPERS  
24 based on sexual orientation. The Assistant Chief Counsel for  
25 CalPERS responded with a letter explaining that the program "is a  
26 tax-qualified plan for IRS purposes" and

27 must meet certain IRS provisions, including providing  
28 enrollment to certain persons such as employees, former  
employees, their spouses, and others within a specified  
relationship. Within this context, the federal Defense  
of Marriage Act (DOMA) currently recognizes a spouse to  
mean only a "person of the opposite sex." The  
enrollment of a same-sex spouse into the [LTC Program]

1 would therefore make the plan non-compliant with IRC  
2 provisions based on DOMA and jeopardize the plan's tax-  
qualified status.

3 At the time the lawsuit was filed, Plaintiffs Elizabeth  
4 Litteral and Patricia Fitzsimmons had been in a committed  
5 relationship for over seventeen years, and were raising a fourteen  
6 year old daughter. They registered as domestic partners in 2006,  
7 and married legally in 2008. Litteral has been employed with the  
8 University of California San Francisco Medical Center since 1995.  
9 Plaintiff Litteral has not purchased long-term care coverage  
10 through CalPERS, nor has either of them purchased coverage through  
11 a private insurer. They seek to join the CalPERS Program, because  
12 the premiums are lower than those charged by private carriers of  
13 individual policies.

14 Plaintiff Carolyn Light became an public employee at the  
15 University of California San Francisco Medical Center in 2005. She  
16 and Cheryl Light registered as California domestic partners in  
17 October, 2006, and legally married in June, 2008. They are  
18 planning to have children. They consider long-term care coverage  
19 necessary for financial planning as a family though, like  
20 Plaintiffs Litteral and Fitzsimmons, they have not purchased any  
21 long-term care insurance privately or through CalPERS.

22 CalPERS suspended enrollment in the LTC Program in 2009.  
23 California Government Code § 21661(a) requires CalPERS to open  
24 enrollment periodically. Historically, CalPERS has opened  
25 enrollment annually, beginning each April. CalPERS has stated that  
26 it may hold open enrollment in 2011.

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1 II. Facts Submitted by Declaration

2 In addition to the facts plead in the complaint, Plaintiffs  
3 have submitted declarations providing details about the CalPERS LTC  
4 Program, and their intent and efforts to participate in it.  
5 Plaintiffs may furnish affidavits or other evidence necessary to  
6 satisfy their burden of establishing subject matter jurisdiction.  
7 Colwell v. Department of Health and Human Services, 558 F.3d 1112,  
8 1121 (9th Cir. 2009). Thus, in considering Federal Defendants'  
9 motion to dismiss under Rule 12(b)(1), the Court takes account of  
10 these additional facts.

11 The CalPERS LTC Program offers a number of advantages over  
12 private insurance. A market comparison chart produced by CalPERS  
13 indicates that CalPERS' Program is the lowest cost long-term care  
14 insurance plan compared to six other similar policies included in  
15 the comparison. Center Dec., Ex. D. The program guarantees that  
16 coverage is inflation protected and premiums cannot be increased  
17 due to changes in age or health. Id. at Ex. B. Furthermore, only  
18 the CalPERS Board of Administration can approve a premium increase.  
19 Id.

20 Plaintiffs affirmed their intent and financial ability to  
21 participate in the CalPERS LTC Program as soon as they are  
22 permitted. Michael Dragovich Dec. ¶¶ 27-28; Carolyn Light Dec.  
23 ¶¶ 13-14; Patricia Fitzsimmons Dec. ¶¶ 13-14. Dragovich attested  
24 that enrolling his spouse, Gaitley, in a long-term care policy is a  
25 necessary step in their financial planning. Dragovich Dec. at ¶ 7.  
26 He tried to enroll Gaitley in the CalPERS LTC Program in 2007,  
27 prior to their marriage, when he and Gaitley were solely recognized

1 as registered domestic partners. Dragovich Dec. at ¶ 9. A CalPERS  
2 representative informed him then that domestic partners were not  
3 eligible for enrollment in the plan. Id. at ¶ 10. As noted above,  
4 in 2008, after marrying Gaitley, Dragovich again contacted CalPERS  
5 to request an application for the LTC Program. Id. at ¶ 11. After  
6 a CalPERS representative informed Dragovich that same-sex spouses  
7 were also ineligible due to federal law, he asked the  
8 representative to provide him with an application anyway. Id. at  
9 ¶ 12-14. Dragovich was told, however, that CalPERS would not  
10 furnish a program application for a same-sex spouse. Id. at ¶ 15.  
11 On March 14, 2009, Dragovich made an additional attempt to secure  
12 an application for the LTC Program online through the CalPERS  
13 website. Id. at Ex. A. CalPERS responded that applications were  
14 not available, but his name would be added to a mailing list for  
15 such materials. Though there was no open enrollment period for the  
16 LTC Program in 2009, during that year CalPERS made available a  
17 special, alternate application process for enrollment. Center  
18 Dec., Ex. E. Nonetheless, Dragovich never received an application  
19 to enroll his spouse. Dragovich Dec. ¶ 18.

20 By correspondence, and at a public meeting of the CalPERS  
21 Board, Plaintiffs' counsel inquired about the exclusion and  
22 prospects for its elimination prior to initiating the lawsuit.  
23 Dragovich Dec., Ex. C; Center Dec., Ex. C. CalPERS declined to  
24 commit to changing the policy. Dragovich Dec., Ex. D; Center Dec.,  
25 Ex. C.

26 As a component of her family's financial planning, Fitzsimmons  
27 has researched the cost and benefits of long-term care plans

1 offered by several private insurers, and the CalPERS LTC Program,  
2 and believes that the CalPERS Program offers a greater value to  
3 herself and her spouse, Litteral. Fitzsimmons Dec. at ¶¶ 5-8.

4 Fitzsimmons and Carolyn Light state that they have not applied  
5 for long-term care insurance for their spouses through the CalPERS  
6 LTC Program, because they understand that same-sex spouses and  
7 registered domestic partners are not eligible. Fitzsimmons Dec. at  
8 ¶ 9; Carolyn Light Dec. at ¶ 6. Carolyn Light specifically  
9 attributed her knowledge about the exclusion to Dragovich, and  
10 Dragovich confirmed that he spoke with her about his efforts to  
11 enroll his spouse in the LTC Program. Id. at ¶ 8; Dragovich Dec.  
12 at ¶ 21. Plaintiffs Carolyn Light and Litteral do not explain why  
13 they did not purchase long-term insurance for themselves through  
14 the CalPERS Program during prior open enrollment periods. Carolyn  
15 Light has stated that CalPERS' refusal to recognize her marriage or  
16 registered domestic partnership with Cheryl Light has evidenced  
17 disrespect towards her family, and caused her anxiety about her  
18 family status. Carolyn Light Dec. at ¶ 10.

19 LEGAL STANDARD

20 Dismissal is appropriate under Rule 12(b)(1) when the  
21 district court lacks subject matter jurisdiction over the claim.  
22 Fed. R. Civ. P. 12(b)(1). Subject matter jurisdiction is a  
23 threshold issue which goes to the power of the court to hear the  
24 case. Federal subject matter jurisdiction must exist at the time  
25 the action is commenced. Morongo Band of Mission Indians v. Cal.  
26 State Bd. of Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988). A  
27 federal court is presumed to lack subject matter jurisdiction until

1 the contrary affirmatively appears. Stock W., Inc. v. Confederated  
2 Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).

3 A Rule 12(b)(1) motion may either attack the sufficiency of  
4 the pleadings to establish federal jurisdiction, or allege an  
5 actual lack of jurisdiction which exists despite the formal  
6 sufficiency of the complaint. Thornhill Publ'g Co. v. Gen. Tel. &  
7 Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979); Roberts v.  
8 Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987). "In support of a  
9 motion to dismiss under Rule 12(b)(1), the moving party may submit  
10 affidavits or any other evidence properly before the court . . . It  
11 then becomes necessary for the party opposing the motion to present  
12 affidavits or any other evidence necessary to satisfy its burden of  
13 establishing that the court, in fact, possesses subject matter  
14 jurisdiction." Colwell, 558 F.3d at 1121 (internal citations  
15 omitted); Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039  
16 n.2 (9th Cir. 2003). The court enjoys broad authority to order  
17 discovery, consider extrinsic evidence, and hold evidentiary  
18 hearings in order to determine its own jurisdiction. Rosales v.  
19 United States, 824 F.2d 799, 803 (9th Cir. 1987).

20 Dismissal under Rule 12(b)(6) for failure to state a claim is  
21 appropriate only when the complaint does not give the defendant  
22 fair notice of a legally cognizable claim and the grounds on which  
23 it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A  
24 complaint must contain a "short and plain statement of the claim  
25 showing that the pleader is entitled to relief." Fed. R. Civ. P.  
26 8(a). In considering whether the complaint is sufficient to  
27 state a claim, the court will take all material allegations as true

1 and construe them in the light most favorable to the plaintiff. NL  
2 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).  
3 However, this principle is inapplicable to legal conclusions;  
4 "threadbare recitals of the elements of a cause of action,  
5 supported by mere conclusory statements," are not taken as true.  
6 Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949-50 (2009)  
7 (citing Twombly, 550 U.S. at 555).

8 I. Subject Matter Jurisdiction--Standing

9 Federal Defendants move to dismiss Plaintiffs' complaint for  
10 lack of subject matter jurisdiction, arguing that Plaintiffs do not  
11 have standing to pursue their claims.

12 In Lujan v. Defenders of Wildlife, the Supreme Court explained  
13 the irreducible constitutional minimum of standing  
14 contains three elements. First, the plaintiff must  
15 have suffered an injury in fact--an invasion of a  
16 legally protected interest which is (a) concrete and  
17 particularized, and (b) actual or imminent, not  
18 conjectural or hypothetical. Second, there must be a  
19 causal connection between the injury and the conduct  
20 complained of--the injury has to be fairly traceable  
21 to the challenged action of the defendant, and not the  
22 result of the independent action of some third party  
23 not before the court. Third, it must be likely, as  
24 opposed to merely speculative, that the injury will be  
25 redressed by a favorable decision.

26 504 U.S. 555, 560-61 (1992) (internal citations and quotation marks  
27 omitted).

28 "Because plaintiffs seek declaratory and injunctive relief  
only, there is a further requirement that they show a very  
significant possibility of future harm; it is insufficient for them  
to demonstrate only a past injury." Bras v. California Public  
Utilities Com'n, 59 F.3d 869, 833 (9th Cir. 1995), cert. denied,  
516 U.S. 1084 (1996).

1           A. Injury in Fact

2           Federal Defendants assert that Plaintiffs have not adequately  
3 demonstrated injury in fact, because they have failed to apply for  
4 the LTC Program. "Plaintiffs must demonstrate 'a personal stake in  
5 the outcome' in order to 'assure that concrete adverseness which  
6 sharpens the presentation of issues' necessary for the proper  
7 resolution of constitutional questions." City of Los Angeles v.  
8 Lyons, 461 U.S. 95, 101-02 (1983) (quoting Baker v. Carr, 369 U.S.  
9 186, 204 (1962)).

10           CalPERS refused to furnish an application to Dragovich for  
11 Gaitley. Carolyn Light learned about the exclusion of same-sex  
12 couples through Dragovich. Fitzsimmons also stated that she and  
13 her spouse were aware of the policy prohibiting same-sex spouses  
14 from enrollment in the LTC Program. CalPERS made the exclusion  
15 abundantly clear in its written and oral communications. Moreover,  
16 the DOMA and the I.R.C. plainly result in the exclusion of same-sex  
17 spouses and registered domestic partners. The Ninth Circuit has  
18 consistently held that standing does not require exercises in  
19 futility. See, e.g., Aleknagik Natives Ltd. v. Andrus, 648 F.2d  
20 496, 499 (9th Cir. 1981); Taniguchi v. Ashcroft, 303 F.3d 950, 957  
21 (9th Cir. 2002); see also Black Faculty Ass'n of Mesa College v.  
22 San Diego Community College Dist., 664 F.2d 1153, 1156 (9th Cir.  
23 1981) ("We recognize that an individual need not always file and  
24 perfect an application for a position to have standing . . .")  
25 (internal citation omitted).

26           In a number of cases, courts have found the plaintiffs to have  
27 standing in spite of the absence of any formal application under a  
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1 challenged program or law. In Taniguchi, the petitioner challenged  
2 the constitutionality of a provision that excluded her from a  
3 waiver of deportation, though she never actually applied for the  
4 waiver. 303 F.3d at 950. The Ninth Circuit held that “the  
5 [challenged] statute unambiguously precludes Taniguchi, as [a  
6 lawful permanent resident] convicted of an aggravated felony, from  
7 the discretionary waiver. To apply for the waiver would have been  
8 futile on Taniguchi’s part and, therefore, does not result in a  
9 lack of standing.” Id. at 957. Contrary to Federal Defendants’  
10 suggestion, the Ninth Circuit did not include in its reasoning that  
11 the petitioner had already suffered an injury due to her  
12 deportation.

13 In Desert Outdoor Advertising, Inc. v. City of Moreno Valley,  
14 the plaintiffs challenged a local ordinance that conditioned  
15 permits for signs and billboards on compliance with certain  
16 requirements. 103 F.3d 814 (9th Cir. 1996). The Ninth Circuit  
17 held that the plaintiffs established standing, though they had  
18 never applied for a permit for their signs. “Applying for a permit  
19 would have been futile because: (1) the City brought state court  
20 actions against [the plaintiffs] to compel them to remove their  
21 signs; and (2) the ordinance flatly prohibited [the plaintiffs’]  
22 off-site signs[.]” Id. at 818.

23 The Ninth Circuit has denied standing where the absence of an  
24 application rendered the policy and the legal dispute ambiguous.  
25 In Madden v. Boise State University, 976 F.2d 1219 (9th Cir.  
26 1992), the plaintiff brought a disability discrimination suit based  
27 on a dispute with the University over the availability of free  
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1 disabled parking. After the University told him that no free  
2 permits for disabled parking were available, the plaintiff filed a  
3 complaint with the U.S. Department of Education, Office of Civil  
4 Rights. In response to the OCR investigation finding the  
5 University's parking policy out of compliance with federal law, the  
6 University voluntarily took remedial measures, installing nine  
7 additional disabled parking spaces, three of which were designated  
8 free of charge to disabled persons who did not wish to pay the fee  
9 for a general disabled parking permit. The plaintiff,  
10 nevertheless, sued the University without submitting a formal  
11 application for a parking permit or otherwise requesting relief  
12 from the parking permit fee. As a result, the court was "left  
13 somewhat at sea" about the nature of the "real dispute." Id. at  
14 1221. There is no such ambiguity here.

15 Federal Defendants also argue that Plaintiffs lack injury  
16 because they failed to seek long-term care insurance elsewhere.  
17 The CalPERS LTC Program, however, offers a number of advantages  
18 over private policies, including lower rates, inflation protection,  
19 and restrictions on premium increases. Furthermore, Federal  
20 Defendants mischaracterize the injury as the inability to obtain  
21 insurance. The injury is the denial of equal access to the CalPERS  
22 LTC Program. "When the government erects a barrier that makes it  
23 more difficult for members of one group to obtain a benefit than it  
24 is for members of another group . . . [t]he 'injury in fact' in an  
25 equal protection case of this variety is the denial of equal  
26 treatment resulting from the imposition of the barrier, not the  
27 ultimate inability to obtain the benefit." Ne. Fla. Chapter of

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1 Assoc'd Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666  
2 (1993); see also Gratz v. Bollinger, 539 U.S. 244, 261-62 (2003).

3 In an equal protection challenge to a purportedly  
4 discriminatory program, the Ninth Circuit has applied an "able and  
5 ready" standard to determine whether a plaintiff is in a position  
6 to compete on an equal basis for a program benefit. Carroll v.  
7 Nicotiana, 342 F.3d 934, 941-42 (9th Cir. 2003) (citing Bras v.  
8 California Pub. Util. Comm'n., 59 F.3d 869, 873 (9th Cir. 1995)).  
9 A plaintiff sufficiently alleges injury when a discriminatory  
10 policy has interfered with the plaintiff's otherwise equal ability  
11 to compete for the program benefit. In Carroll, a case upon which  
12 Federal Defendants rely, the court found that the plaintiff, who  
13 alleged discrimination in a state-run business loan program, had  
14 done "essentially nothing to demonstrate that he is in a position  
15 to compete equally" with other loan applicants. Id. at 942. The  
16 plaintiff presented no work history or experience in  
17 entrepreneurial endeavors to bolster the bona fides of his business  
18 loan application, and failed to respond to the defendant's request  
19 for more information to complete his application. Id. at 942-43.<sup>2</sup>

20 Unlike Carroll, there is no evidence here that Plaintiffs  
21 would be unable to compete on an equal basis for the LTC Program  
22 once CalPERS agrees to furnish applications. Dragovich, Carolyn

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23  
24 <sup>2</sup> Carroll also considered an equal protection challenge to a  
25 second program, which leased homesteads. Id. at 943. However,  
26 contrary to Federal Defendants' suggestion, the court did not hold  
27 that the plaintiff was injured only because he had properly  
28 submitted an application. No party disputed the existence of an  
injury with respect to the homestead program, and the court simply  
reiterated the district court's finding.

1 Light and Fitzsimmons are current public employees. Plaintiffs  
2 have attested to their willingness and financial ability to pay the  
3 premiums associated with coverage through the CalPERS Program. Id.  
4 at 942 (“[T]he intent of the applicant may be relevant to standing  
5 in an equal protection challenge.”) (citing Gratz, 539 U.S. at  
6 261).

7 Nor is it dispositive that state employee Plaintiffs Carolyn  
8 Light and Litteral could have enrolled themselves in the CalPERS  
9 LTC Program in earlier years. They have not alleged that the  
10 CalPERS has barred them from individual enrollment in the LTC  
11 Program. Rather, through their spouses’ participation in the LTC  
12 Program, they seek equal treatment and greater financial security  
13 for themselves and their families.

14 B. Causation

15 Next, Federal Defendants contest the causal connection between  
16 Plaintiffs’ injury and the DOMA and I.R.C. § 7702B. Standing  
17 requires that the alleged injury “fairly can be traced to the  
18 challenged action” and is not the result of an independent action  
19 by some third party. Allen v. Wright, 468 U.S. 737, 759 (1984).  
20 Federal Defendants contend that Plaintiffs’ harm from lacking long-  
21 term care insurance is attributable to Plaintiffs’ failure to  
22 purchase the coverage from private insurers. However, again, this  
23 argument misunderstands the nature of the injury alleged, namely  
24 Plaintiffs’ inability to be considered on an equal basis as other  
25 California public employees and their spouses who apply for the  
26 CalPERS LTC Program. See Ne. Fla. Chapter of Assoc’d Gen.  
27 Contractors, 508 U.S. at 666.

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1 C. Redressability

2 Finally, Federal Defendants argue that Plaintiffs' alleged  
3 injury is not redressable by the relief they have requested. The  
4 redressability element of standing is satisfied only where the  
5 plaintiff shows "a likelihood that the requested relief will  
6 redress the alleged injury." Steel Co. v. Citizens for a Better  
7 Environment, 523 U.S. 83, 103 (1998).

8 Federal Defendants contend that it is not clear that the  
9 CalPERS plan would be available to Plaintiffs, even if they  
10 prevailed, because enrollment is currently closed. This  
11 contention, like Federal Defendants' other arguments, misconstrues  
12 the injury Plaintiffs have alleged. Furthermore, CalPERS has  
13 opened an alternate, special application process even after  
14 suspending open enrollment in the LTC Program. Thus, CalPERS  
15 apparently can accept and enroll program participants though open  
16 enrollment periods have been suspended. Furthermore, CalPERS must,  
17 by law, periodically allow enrollment into its LTC Program. Cal.  
18 Govt. Code § 21661(a) ("The long-term care insurance plans shall be  
19 made available periodically during open enrollment periods  
20 determined by the [CalPERS] board."). Unless the contested  
21 policies are changed, Plaintiffs will not be able to participate in  
22 the next open enrollment period.

23 With respect to Plaintiffs' registered domestic partner  
24 status, Federal Defendants make an additional redressability  
25 argument that California law independently precludes registered  
26 domestic partners from participating in the CalPERS LTC Program.  
27 As noted earlier, California Family Code § 297.5(g) exempts the

1 CalPERS LTC Program from the statute's prohibition of  
2 discriminating against couples and individuals based on their  
3 status as registered domestic partners, as opposed to spouses. The  
4 statute does not require CalPERS to exclude same-sex spouses or  
5 registered domestic partners from its LTC Program; it merely  
6 exempts the agency if it does. The provision's legislative history  
7 makes clear that the exception was created to protect the LTC  
8 Program's tax-qualified status under federal law. See Senate  
9 Appropriations Committee, Bill Summary, AB 205 (August 21, 2003).

10 Because Plaintiffs have satisfied Article III standing  
11 requirements, Federal Defendants' challenge to the Court's subject  
12 matter jurisdiction fails.

### 13 II. Failure to State a Claim

14 In addition to challenging the Court's subject matter  
15 jurisdiction, Federal Defendants move to dismiss Plaintiffs' action  
16 for failure to state a claim for equal protection and substantive  
17 due process.

#### 18 A. Equal Protection

19 Equal protection is "essentially a direction that all persons  
20 similarly situated should be treated alike." City of Cleburne v.  
21 Cleburne Living Ctr., 473 U.S. 432, 439 (1985). "[T]he  
22 Constitution 'neither knows nor tolerates classes among citizens.'" Romer v. Evans, 517 U.S. 620, 623 (1996) (quoting Plessy v.  
23 Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). The  
24 principle embodies a commitment to neutrality where the rights of  
25 persons are at stake. Id.

26 Yet courts must balance this mandate with the "practical  
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1 necessity that most legislation classifies for one purpose or  
2 another, with resulting disadvantage to various groups or persons.”  
3 Romer, 517 U.S. at 631. The equal protection guarantee preserves a  
4 measure of power for states and the federal government to create  
5 laws that classify certain groups. Personnel Administrator of  
6 Mass. v. Feeney, 442 U.S. 256, 271-72 (1979). Certain  
7 classifications, such as those based on race, are presumptively  
8 invalid. Id. at 272. Courts apply heightened scrutiny to laws  
9 burdening protected classes, while laws that do not burden a  
10 protected class are subject to rational basis review. Romer, 517  
11 U.S. at 631; Massachusetts Bd. Of Retirement v. Murgia, 427 U.S.  
12 307, 312-314 (1976). Under the rational basis test, a law must be  
13 rationally related to the furtherance of a legitimate state  
14 interest. Romer, 517 U.S. at 631.

15 Because the Court finds that Plaintiffs state a claim under  
16 the rational basis standard, the question of whether Plaintiffs are  
17 members of a protected class need not be resolved here. Under the  
18 rational basis test legislative enactments are accorded a strong  
19 presumption of validity. Id. A court may “hypothesize the  
20 motivations of the . . . legislature to find a legitimate objective  
21 promoted by the provision under attack.” Shaw v. Or. Pub.  
22 Employees’ Ret. Bd., 887 F.2d 947, 948-49 (9th Cir. 1989) (internal  
23 quotation omitted). “[I]t is entirely irrelevant for  
24 constitutional purposes whether the conceived reason for the  
25 challenged distinction actually motivated the legislature.” FCC v.  
26 Beach Comm., 508 U.S. 307, 313 (1993). On the other hand, the  
27 rational basis test is not a “toothless” test. Mathews v. De

1 Castro, 429 U.S. 181, 185 (1976). “[E]ven in the ordinary equal  
2 protection case calling for the most deferential of standards,  
3 [courts] insist on knowing the relation between the classification  
4 adopted and the object to be attained.” Gill v. Office of  
5 Personnel Management, 699 F. Supp. 2d 374, 387 (D. Mass. 2010)  
6 (quoting Romer, 517 U.S. at 633).

7 Federal Defendants disavow the governmental interests  
8 identified by Congress in passing the DOMA, and instead assert a  
9 post-hoc argument that the DOMA advances a legitimate governmental  
10 interest in preserving the status quo of the states’ definitions of  
11 marriage at the time the law was passed in 1996. At that time, no  
12 state extended the right to marry to same-sex couples. According  
13 to Federal Defendants, preserving the status quo allows states to  
14 resolve the issue of same-sex marriage for themselves, and provides  
15 uniformity in the federal allocation of marriage-related rights and  
16 benefits.

17 Section three of the DOMA, however, alters the status quo  
18 because it impairs the states’ authority to define marriage, by  
19 robbing states of the power to allow same-sex civil marriages that  
20 will be recognized under federal law. Federal Defendants concede  
21 that section three of the DOMA effected a departure from the  
22 federal government’s prior practice of generally accepting  
23 marriages recognized by state law. Federal Defendants’ Mot. to  
24 Dismiss at 21. In considering the legislation, Congress recognized  
25 the longstanding disposition of the federal government to accept  
26 state definitions of civil marriage, noting, “The determination of  
27 who may marry in the United States is uniquely a function of state

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1 law." HR. Rep. 104-664 (House Report) at 2. Thus, section three  
2 of the DOMA was a preemptive strike to bar federal legal  
3 recognition of same-sex marriages should certain states decide to  
4 allow them, rather than a law that furthered the status quo, which  
5 gave the states authority to define marriage for themselves. See  
6 Commonwealth of Massachusetts v. U.S. Dept. of Health and Human  
7 Services, 698 F. Supp. 2d 234, 249 (D. Mass. 2010) (holding that  
8 the "DOMA plainly intrudes on a core area of state sovereignty--the  
9 ability to define the marital status of its citizens" and violates  
10 the Tenth Amendment.)

11 Indeed, CalPERS' exclusion of same-sex spouses from its LTC  
12 Program is an example of the restraint on states' authority to  
13 extend legal recognition to same-sex marriages. CalPERS has made  
14 clear that its exclusion is an effort to comply with federal  
15 requirements for tax benefits. Plaintiffs have adequately stated a  
16 claim that there is no relationship between section three of the  
17 DOMA and its purported government interest--to maintain the status  
18 quo while allowing states to decide the definition of marriage.

19 As noted above, Federal Defendants disavow the actual reasons  
20 expressed by Congress for the DOMA. Nonetheless, those reasons--  
21 promoting procreation, encouraging heterosexual marriage,  
22 preserving governmental resources, and expressing moral  
23 disapproval--likewise would not justify granting Federal  
24 Defendants' motion to dismiss.

25 The DOMA's definition of marriage does not bear a relationship  
26 to encouraging procreation, because marriage has never been  
27 contingent on having children. See Lawrence, 539 U.S. at 605

1 (Scalia, J., dissenting) (observing, "what justification could  
2 there possibly be for denying the benefits of marriage to  
3 homosexual couples . . . [s]urely not the encouragement of  
4 procreation, since the sterile and the elderly are allowed to  
5 marry."); Goodridge v. Dept. of Public Health, 440 Mass. 309, 332  
6 (2003) ("While it is certainly true that many, perhaps most,  
7 married couples have children together (assisted or unassisted), it  
8 is the exclusive and permanent commitment of the marriage partners  
9 to one another, not the begetting of children, that is the sine qua  
10 non of civil marriage."). The exclusion of same-sex couples from  
11 the federal definition of marriage does not encourage heterosexual  
12 marriages. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 972 (N.D.  
13 Cal. 2010) ("Permitting same-sex couples to marry will not affect  
14 the number of opposite-sex couples who marry, divorce, cohabit,  
15 have children outside of marriage or otherwise affect the stability  
16 of opposite-sex marriages."). Furthermore, the preservation of  
17 resources does not justify barring some arbitrarily chosen group of  
18 individuals from a government program. Plyler v. Doe, 457 U.S.  
19 202, 229 (1982).

20 Nor does moral condemnation of homosexuality provide the  
21 requisite justification for the DOMA's section three. The "bare  
22 desire to harm a politically unpopular group" is not a legitimate  
23 state interest. Romer, 517 U.S. at 634-35; City of Cleburne, 473  
24 U.S. at 446-47; Dept. of Agriculture v. Moreno, 413 U.S. 528, 534  
25 (1973). In Romer the Supreme Court struck down a Colorado law,  
26 which it found "made a general announcement that gays and lesbians  
27 shall not have any particular protections from the law." The Court  
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1 reasoned that the law "impos[ed] a broad and undifferentiated  
2 disability on a single named group," 517 U.S. at 632, yet was  
3 "inexplicable by anything but animus[.]" Id. at 635.

4 The animus toward, and moral rejection of, homosexuality and  
5 same-sex relationships are apparent in the Congressional record.  
6 The House Report on the pending DOMA bill stated, "Civil laws that  
7 permit only heterosexual marriage reflect and honor a collective  
8 moral judgment about human sexuality. This judgment entails [a]  
9 moral disapproval of homosexuality . . ." H.R. Rep. 104-664, at  
10 15-16. The report further adopted the view that "[S]ame-sex  
11 marriage, if sanctified by the law, if approved by the law,  
12 legitimates a public union, a legal status that most people . . .  
13 feel ought to be illegitimate.'" Id. at 16 (alteration and  
14 omission in original).

15 In sum, Plaintiffs have sufficiently stated a claim that  
16 section three of the DOMA bears no rational relationship to a  
17 legitimate governmental interest. The section does not preserve  
18 the status quo of the states' authority to define marriage because  
19 it instead impairs their customary and historic authority in the  
20 realm of domestic relations. The Act's contemporaneous  
21 justifications have been found not to constitute legitimate  
22 government interests. Because neither Federal Defendants' current  
23 justification, nor the actual contemporaneous reasons, for the  
24 exclusion of same-sex couples from the federal definition of  
25 marriage can be found as a matter of law to be rationally based on  
26 a legitimate government interest, Plaintiffs have asserted a  
27 cognizable claim for an equal protection violation.

1 B. Substantive Due Process

2 In addition to their equal protection claim, Plaintiffs assert  
3 that section three of the DOMA and § 7702B of the I.R.C. infringe  
4 "their fundamental liberty and privacy interests in marital and  
5 familial relationships" in violation of their substantive due  
6 process rights. Compl. at ¶ 59.

7 The substantive due process right "provides heightened  
8 protection against interference with certain fundamental rights and  
9 liberty interests . . ." William v. Glucksberg, 521 U.S. 702, 720  
10 (1997) (recognizing "a long line of cases" holding that the Bill of  
11 Rights protects "the rights to marry, to have children, to direct  
12 the education and upbringing of one's children, to marital privacy,  
13 to use contraception, to bodily integrity, and to abortion.")  
14 (internal citations omitted).

15 When the government infringes a "fundamental liberty  
16 interest," the strict scrutiny test applies, and the law will not  
17 survive constitutional muster "unless the infringement is narrowly  
18 tailored to serve a compelling state interest." Id. at 721. Where  
19 no fundamental right is burdened by a challenged law, the law is  
20 scrutinized under the rational basis standard; it must be  
21 rationally related to a legitimate government interest. Id. at  
22 728; Heller v. Doe, 509 U.S. 312, 319-320 (1993).

23 Courts have invoked substantive due process in striking down  
24 laws burdening family life, including household occupancy  
25 restrictions, see Moore v. East Cleveland, 431 U.S. 494 (1977), and  
26 mandatory maternity leave, Cleveland Bd. of Educ. v. LaFleur, 414  
27 U.S. 632, 640 (1974). More recently, decisions by the Supreme  
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1 Court and the Ninth Circuit have made clear that government  
2 intrusion into a same-sex relationship may violate substantive due  
3 process rights, though the precise nature of the liberty interest  
4 has not been decided. See Lawrence, 539 U.S. at 578 (holding that  
5 same-sex couples have the constitutional right to engage in  
6 intimate relationships “without the intervention of the  
7 government”); Witt, 527 F.3d at 812 (“We cannot reconcile what the  
8 Supreme Court did in Lawrence with the minimal protections afforded  
9 by traditional rational basis review.”). Lawrence invalidated laws  
10 criminalizing same-sex intimacy, which amounted to a substantial  
11 government intrusion into same-sex relationships through the threat  
12 of criminal prosecution and related stigma. In Witt, the Ninth  
13 vacated the district court’s dismissal of the plaintiff’s  
14 substantive due process challenge of her discharge under the  
15 military’s “Don’t Ask Don’t Tell” policy. The court held that  
16 “[w]hen the government attempts to intrude upon the personal and  
17 private lives of homosexuals, in a manner that implicates the  
18 rights identified in Lawrence,” the law is reviewed with heightened  
19 scrutiny. 527 F.3d at 819 (citing Sell v. United States, 539 U.S.  
20 166 (2003)). The court remanded the case to the district court for  
21 further development of the factual record and application of the  
22 heightened scrutiny test it articulated in its decision.

23 Plaintiffs contend that by “burdening [their] ability and  
24 autonomy to engage in financial and long-term care planning with  
25 [their] lawful spouses and domestic partners, Defendants are  
26 violating the fundamental liberty and privacy interests in marital  
27 and familial relationships . . .” Compl. at ¶ 70. Federal

1 Defendants, however, characterize the laws as imposing an  
2 incidental economic burden which does not amount to an infringement  
3 on any fundamental right. Federal Defendants cite Regan v.  
4 Taxation with Representation of Wash., 461 U.S. 540, 549 (1983),  
5 where the plaintiffs challenged under the First Amendment the  
6 denial of tax exemption to organizations engaged in lobbying. The  
7 Court reasoned that "a legislature's decision not to subsidize the  
8 exercise of a fundamental right does not infringe the right, and  
9 thus is not subject to strict scrutiny." Id. at 549. Similarly,  
10 the Supreme Court has ruled that the denial of food stamps to  
11 households with striking workers did not infringe the strikers'  
12 right of association, even though denying such benefits made it  
13 harder for strikers to maintain themselves and their families.  
14 Lyng v. International Union, United Auto, Aerospace and Agr.  
15 Implement Workers of America, 485 U.S. 360, 368 (1998).

16 As discussed above in connection with their equal protection  
17 claims, Plaintiffs have sufficiently stated a claim that the laws  
18 at issue here do not bear a rational relationship to a legitimate  
19 governmental interest. Thus, the Court need not address whether a  
20 fundamental right or protected liberty interest is burdened.  
21 Plaintiffs have stated a cognizable claim for violation of their  
22 rights to substantive due process.

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CONCLUSION

Federal Defendants' motion to dismiss Plaintiffs' claims for lack of subject matter jurisdiction and for failure to state a claim is denied.

Plaintiffs' class certification motion shall be filed on January 20, 2010, and heard on February 24, 2010.

IT IS SO ORDERED.

Dated: 1/18/2011



CLAUDIA WILKEN  
United States District Judge