

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

3
4 MICHAEL DRAGOVICH; MICHAEL
5 GAITLEY; ELIZABETH LITTERAL;
6 PATRICIA FITZSIMMONS; CAROLYN
7 LIGHT; CHERYL LIGHT; DAVID BEERS;
8 CHARLES COLE; RAFAEL V.
9 DOMINGUEZ; and JOSE G.
10 HERMOSILLO, on behalf of
11 themselves and all others
12 similarly situated,

13 Plaintiffs,

14 v.

15 UNITED STATES DEPARTMENT OF THE
16 TREASURY, et al.,

17 Defendants.
18 _____/

No. C 10-01564 CW

ORDER DENYING
FEDERAL
DEFENDANTS' MOTION
TO DISMISS CERTAIN
CLAIMS (Docket
No. 97)

19 Plaintiffs challenge the constitutionality of section three
20 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, and
21 § 7702B(f) of the Internal Revenue Code, 26 U.S.C. § 7702B(f),
22 which limit their participation in a Long-Term Care (LTC)
23 insurance program maintained by the California Public Employees'
24 Retirement System (CalPERS). Plaintiffs contend that these
25 federal provisions violate the Constitution's guarantees of equal
26 protection and substantive due process because they exclude
27 legally married same-sex couples and registered domestic partners.

28 Federal Defendants earlier moved unsuccessfully to dismiss
Plaintiffs' equal protection and substantive due process challenge
to section three of the DOMA, which establishes a federal

1 definition of marriage that excludes legally married same-sex
2 spouses. At that time, Plaintiff couples were all legally married
3 under California law, so the Court did not find it necessary to
4 resolve whether a cognizable constitutional claim had been stated
5 with respect to § 7702B(f)'s exclusion of registered domestic
6 partners as family members eligible to enroll in federally
7 qualified, state-maintained long-term care plans. Nor did the
8 Court specifically address the constitutionality of section three
9 of the DOMA with respect to registered domestic partners.
10

11 Subsequently, however, Plaintiffs filed a Second Amended
12 Complaint adding as Plaintiffs Rafael V. Dominguez and Jose G.
13 Hermosillo, who are not legally married, but are registered as
14 domestic partners in California. In response, Federal Defendants
15 moved to dismiss, pursuant to Federal Rule of Civil Procedure
16 12(b)(6), the claims that § 7702B(f)'s exclusion of California
17 registered domestic partners violates equal protection and
18 substantive due process. Federal Defendants state that nothing in
19 their brief should be construed as support for the
20 constitutionality of section three of the DOMA. Thus, Federal
21 Defendants do not appear to move to dismiss the domestic partners'
22 challenge to that law. Having considered all of the parties'
23 submissions and oral argument, the Court denies Federal
24 Defendants' motion to dismiss.
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BACKGROUND

1
2 Plaintiffs are California public employees and their same-sex
3 spouses and registered domestic partners, who are in long-term
4 committed relationships recognized and protected under California
5 law. As explained in this Court's previous order, CalPERS
6 provides retirement and health benefits, including long-term care
7 insurance, to many of the state's public employees and retirees
8 and their families.

9
10 Long-term care insurance provides coverage when a person
11 needs assistance with basic activities of living due to injury,
12 old age, or severe impairments related to chronic illnesses, such
13 as Alzheimer's disease. Internal Revenue Code § 7702B(f), which
14 was enacted on August 21, 1996, as part of the Health Insurance
15 Portability and Accountability Act (HIPAA), provides favorable
16 federal tax treatment to participants in qualified state-
17 maintained long-term care insurance plans for state employees,
18 such as the CalPERS LTC insurance program. 26 U.S.C. § 7702B(f).
19 Section 7702B(f)(2) disqualifies a state-maintained plan from this
20 favorable tax treatment if it provides coverage to individuals
21 other than those specified under its subparagraph (C). 26 U.S.C.
22 § 7702B(f)(2)(C).
23

24 The list of eligible individuals in subparagraph (C) of
25 § 7702B(f)(2) includes state employees and former employees, their
26 spouses, and individuals bearing a relationship to the employees
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1 or spouses which is described in any of subparagraphs (A) through
2 (G) of section 152(d)(2). 26 U.S.C. § 7702B(f)(2)(C).

3 Section 152(d)(2), the part of the tax code from which
4 subparagraph (C)(iii) draws its list of eligible relatives,
5 defines the relatives for whom a taxpayer may claim a dependent
6 exemption. See 26 U.S.C. §§ 151-52. Section 152(d)(2) sets forth
7 subparagraphs (A) through (H) to identify the following
8 individuals as "qualifying relatives" for the exemption:
9

- 10 (A) A child or a descendant of a child.
- 11 (B) A brother, sister, stepbrother, or stepsister.
- 12 (C) The father or mother, or an ancestor of either.
- 13 (D) A stepfather or stepmother.
- 14 (E) A son or daughter of a brother or sister of the
15 taxpayer.
- 16 (F) A brother or sister of the father or mother of
17 the taxpayer.
- 18 (G) A son-in-law, daughter-in-law, father-in-law,
19 mother-in-law, brother-in-law, or sister-in-law.
- 20 (H) An individual . . . who, for the taxable year of
21 the taxpayer, has the same principal place of
22 abode as the taxpayer and is a member of the
23 taxpayer's household.

24 26 U.S.C. § 152(d)(2).

25 When it chose to incorporate subparagraphs (A) through (G),
26 Congress specifically chose not to carry over subparagraph (H) to
27 subparagraph (C)(iii) of § 7702B(f)(2). Had Congress not chosen
28 to exclude subparagraph (H) in subparagraph (C)(iii) of

1 § 7702B(f)(2), registered domestic partners would have been
2 eligible to enroll in the CalPERS LTC program.

3 Instead, CalPERS has refused to make its LTC insurance
4 program available to the registered domestic partners, as well as
5 the same-sex spouses, of the public employee Plaintiffs.
6 Plaintiffs' complaint asserts that Congress violated the
7 Constitution by excluding registered domestic partners as
8 relatives eligible for enrollment in qualified state-maintained
9 long-term care insurance plans.
10

11 In 1996, when Internal Revenue Code § 7702B(f) and the DOMA
12 were passed, registered domestic partnership laws had not been
13 widely adopted. Nonetheless, Congress had discussed registered
14 domestic partnerships prior to and during 1996. In April 1992,
15 the District of Columbia had passed the Health Care Benefits
16 Expansion Act, establishing a domestic partnership registry in
17 that jurisdiction. Congress reacted to the District of Columbia's
18 new law by barring any local or federal funding to implement,
19 enforce or administer the registry. District of Columbia
20 Appropriations Act, 1993, Pub. L. No. 102-382, 106 Stat. 1422
21 (1992).¹ Representative Clyde Holloway argued, "If there ever was
22 an attack on the family in this country, it is this Domestic
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24

25 ¹ The Health Care Benefits Expansion Act of 1992, D.C. Law 9-
26 114, which established the District of Columbia's domestic
27 partnership registry, was assigned Act No. 9-188 after its passage
28 by the Council and approval by the Mayor. See D.C. Code § 36-1401
(legislative history of law 9-114).

1 Partnership Act . . . To me, this bill totally destroys the
2 families of this country." 138 Cong. Rec. H2950-04, 1992 WL
3 96521, at *H2950. He stated, "I do not think anyone that is
4 homosexual can stand here on this floor and openly tell me that
5 homosexuality is good for the future of America." 138 Cong. Rec.
6 H6120-02, 1992 WL 156371, at *H6129.

7
8 In arguing against the appropriations ban before the Senate,
9 Senator Brock Adams entered into the Congressional record
10 information detailing domestic partnership recognition in numerous
11 jurisdictions, apart from the District of Columbia.² 138 Cong.
12 Rec. S10876-01, 1992 WL 180795, at *S10904.

13 On July 30, 1992, the appropriations bill was amended to
14 include the funding ban, and on October 5, 1992, the District of
15 Columbia Appropriations Act, 1993, became law. Pub L. No. 102-
16 382.

17
18 The ban on funds for the District of Columbia's domestic
19 partnership registry was renewed in subsequent years. In 1993, as
20 part of a successful drive to renew the ban, Representative Ernst
21 Istook argued, "Now, obviously this was passed by the District of
22 Columbia to enable people, more than anything else, who are in a
23

24 ² The record includes mention of Travis County in Texas, Dane
25 County in Wisconsin, the California counties of Alameda, San Mateo
26 and Santa Cruz, the cities of Berkeley, Los Angeles, Oakland,
27 Santa Cruz, San Francisco, West Hollywood, New York, Ithaca,
28 Cambridge, West Palm Beach, Ann Arbor, East Lansing, Madison,
Minneapolis, Seattle, and Tahoma Park, as well as others in which
domestic partner organizing efforts were underway.

1 homosexual relationship to register an equivalent of a gay
2 marriage. That is one of the reasons that this particular
3 proposal is abhorrent, in my view." 139 Cong. Rec. H4353-01, 1993
4 WL 236117, at *H4355, *H4358. The District of Columbia
5 Appropriations Act, 1994, included the ban. Pub. L. No. 103-127,
6 107 Stat. 1336 (1993).

7
8 In 1994, Representative Robert Dornan proclaimed, "From my
9 historical knowledge, this business of domestic partner benefits
10 started in Seattle where they were trying to give privileged
11 treatment to lesbian and homosexual partners . . . Let us get rid
12 of this domestic partnership nonsense." 140 Cong. Rec. H5589-02,
13 1994 WL 363727, at *H5601. Again, the funding ban was approved.
14 District of Columbia Appropriations Act, 1995, Pub. L. No. 103-
15 334, 108 Stat. 2576 (1994).

16
17 In 1995, opponents of registered domestic partnerships again
18 sought to include the ban in the District of Columbia
19 Appropriations Act, 1996. Representative Cliff Stearns asserted
20 that domestic partnership registration laws "undermine the
21 traditional moral values that are the bedrock of this Nation."
22 141 Cong. Rec. H11627-02, 1995 WL 639923, at *H11657.

23
24 Although the District of Columbia Appropriations Act was
25 never passed during the budget impasse of 1995, in 1996, during
26 the same legislative session in which § 7702B(f) and the DOMA were
27 passed, Congress passed continuing appropriations, which included
28 the ban on funding of the registry. Continuing Appropriations,

1 1996, Pub. L. No. 104-90, 110 Stat. 3 (1996). See also, Pub. L.
2 No. 104-92, 110 Stat. 16 (1996). Later that year, Congress passed
3 two appropriations bills that also contained the ban on funding
4 for the registry. Omnibus Consolidated Rescissions and
5 Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321
6 (1996); District of Columbia Appropriations Act, 1997, Pub. L. No.
7 104-194, 110 Stat. 2356 (1996) (captioned "Prohibition on Domestic
8 Partners Act").
9

10 The record of Congress' consideration of the DOMA, which also
11 occurred in 1996, likewise evidences animosity and moral
12 condemnation of same-sex relationships.³ Gill v. Office of
13 Personnel Mgmt., 699 F. Supp. 2d 374, 378-79 (D. Mass 2010).
14

15 Indeed, the issue of registered domestic partnerships arose within
16 the context of Congress' consideration of the DOMA. The day
17 Senator Nickles introduced the bill to enact the DOMA, he
18 explained that the law was needed to circumvent the recognition of
19 registered domestic partners under federal law. He stated,

20 Another example of why we need a Federal definition of
21 the terms "marriage" and "spouse" stems from
22 experience during debate on the Family and Medical
23 Leave Act of 1993. Shortly before passage of this act,
24 I attached an amendment that defined "spouse" as "a
25 husband or wife, as the case may be." When the
26 Secretary of Labor published his proposed regulations,
27 a considerable number of comments were received urging
28 that the definition of "spouse" be "broadened to
include domestic partners in committed relationships,

³ The record of animus is detailed in this Court's January 18, 2011 order denying Federal Defendants' motion to dismiss Plaintiffs' constitutional challenge to section three of the DOMA.

1 including same-sex relationships." When the Secretary
2 issued the final rules he stated that the definition
3 of "spouse" and the legislative history precluded such
4 a broadening of the definition.

5 142 Cong. Rec. 4851-02, 1996 WL 233584, at *S4869-70.

6 A proposed amendment to the bill that became the DOMA would
7 have required the General Accounting Office⁴ to "undertake a study
8 of the differences in the benefits, rights and privileges
9 available to persons in a marriage and the benefits, rights and
10 privileges available to persons in a domestic partnership
11 resulting from the non-recognition of domestic partnerships as
12 legal unions by State and Federal laws." 142 Cong. Rec. 7480-05,
13 1996 WL 392787, at *H7503. Representative Charles Canady stated,
14 in opposition to the amendment, "This motion represents a
15 transparent attempt to give some statutory recognition to domestic
16 partnerships." 142 Cong. Rec. 7480-05, 1996 WL 392787, at *H7504.
17 The amendment to require the study of domestic partnerships was
18 defeated. 142 Cong. Rec. 7480-05, 1996 WL 392787, at *H7505.

19 Congress continued until 2001 to approve annually the ban on
20 the use of local and federal funds to implement the District of
21 Columbia's domestic partnership registry. District of Columbia
22 Appropriations Act, 1998, Pub. L. No. 105-100, 111 Stat. 2160
23 (1997); Omnibus Consolidated and Emergency Supplemental
24 Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681
25 (1998); Consolidated Appropriations Act, 2000, Pub. L. No. 106-113
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28 ⁴ Now, the Government Accountability Office.

1 (1999), District of Columbia Appropriations Act, 2001, Pub. L.
2 No. 106-522, 114 Stat. 2464 (2000). In 1998, Representative Frank
3 Riggs stated, "[W]e as Federal lawmakers have a duty to oppose
4 policies and laws that confer partner benefits or marital status
5 on same-sex couples." 144 Cong. Rec. 7335-03, 1998 WL 454432, at
6 *H7343. Representative Riggs took the position that the registry,
7 if permitted to take effect, would "legitimize same-sex activity."
8 Id.

9
10 Also in 1998, Congress considered the Domestic Partnership
11 Benefits and Obligations Act of 1998, introduced by Senator Paul
12 Wellstone. This Act would have provided benefits to the domestic
13 partners of federal employees. 144 Cong. Rec. S1959-02, 1998 WL
14 109601. In his statement in support of the bill, Senator
15 Wellstone catalogued the number of cities, municipalities,
16 counties, businesses, non-profit organizations and unions that
17 offered domestic partnership benefits. 144 Cong. Rec. 731-02,
18 1998 WL 55803, at S733. Senator Wellstone further expressed his
19 disappointment that Congress had yet to offer domestic partnership
20 benefits when such benefits "have already been offered in some
21 cities and by some businesses since 1982 . . ." Id. The bill was
22 not passed.
23

24 In 2001, Congress authorized a more limited appropriations
25 ban, permitting the use of non-federal funds to institute and
26 administer the District of Columbia domestic partnership registry.
27 District of Columbia Appropriations Act, 2002, Pub. L. No. 107-96,
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1 115 Stat. 923 (2001). Accordingly, in 2002, the District of
2 Columbia finally implemented its domestic partnership registry.
3 See 49 D.C. Reg. 5419 (June 14, 2002).⁵

4 Internal Revenue Code § 7702B(f)(2)(C)(iii) was amended in
5 2004 in the Working Families Tax Relief Act, Public Law No. 108-
6 311, 118 Stat. 1166 (2004). Congress did not take that
7 opportunity to change the provision to include registered domestic
8 partners. By then, California, New Jersey, Washington and Maine
9 had enacted domestic partnership legislation.

11 LEGAL STANDARD

12 Dismissal under Rule 12(b)(6) for failure to state a claim is
13 appropriate only when the complaint does not give the defendant
14 fair notice of a legally cognizable claim and the grounds on which
15 it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).
16 A complaint must contain a "short and plain statement of the claim
17 showing that the pleader is entitled to relief." Fed. R. Civ. P.
18 8(a). In considering whether the complaint is sufficient to
19 state a claim, the court will take all material allegations as
20 true and construe them in the light most favorable to the
21 plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir.
22 1986). However, this principle is inapplicable to legal
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25 _____
26 ⁵ In 2010, Congress lifted the ban on federal funding for the
27 District of Columbia's domestic partnership registry. See
28 Consolidated Appropriations Act, 2010, Public Law 111-117
(Division C--Financial Services and General Government
Appropriations Act, 2010); H.R. Rep. 111-202, at 7.

1 conclusions; "threadbare recitals of the elements of a cause of
2 action, supported by mere conclusory statements," are not taken as
3 true. Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949-50
4 (2009) (citing Twombly, 550 U.S. at 555).

5 DISCUSSION

6 I. Equal Protection

7 The doctrine of equal protection exists to ensure the
8 Constitution's promise of equal treatment under the law. Romer v.
9 Evans, 517 U.S. 620, 631 (1996). Certain classifications by
10 statute or other government activity, such as classifications
11 based on race, have been found to be suspect. Harris v. McRae,
12 448 U.S. 297, 322 (1980) (noting race as "the principal example"
13 of a "suspect" classification). Where a challenged law burdens a
14 suspect class, courts apply strict scrutiny to determine the
15 constitutional validity of the provision. See Massachusetts Bd.
16 of Retirement v. Murgia, 427 U.S. 307, 312 (1976). Such laws are
17 "presumptively invalid and can be upheld only upon an
18 extraordinary justification." Personnel Administrator of Mass. v.
19 Feeney, 442 U.S. 256, 272 (1979). Courts apply an intermediate
20 level of scrutiny to certain other classifications, such as those
21 based upon sex, which "have traditionally been the touchstone for
22 pervasive and often subtle discrimination." Id. at 273. A law
23 that does not burden a protected class is subject to a lower
24 standard of review and need only "bear[] a rational relationship
25 to some legitimate end." Romer, 517 U.S. at 631.

1 Plaintiffs claim that § 7702B(f) violates registered domestic
2 partners' constitutional right to equal protection on the basis of
3 sexual orientation and gender.

4 Plaintiffs assert, but point to no controlling authority for
5 the proposition, that classifications on the basis of sexual
6 orientation are suspect, akin to racial classifications,
7 triggering judicial scrutiny of the highest order. Federal
8 Defendants agree that the Court should hold that sexual
9 orientation is a suspect classification. Letter from Attorney
10 General, Docket No. 64-2. However, in the Ninth Circuit, gays and
11 lesbians have been held not to constitute a suspect or quasi-
12 suspect class. Philips v. Perry, 106 F.3d 1420, 1425 (9th Cir.
13 1997) (citing High Tech Gays v. Defense Indus. Sec. Clearance
14 Office, 895 F.2d 563, 574 (9th Cir. 1990)). In Witt v. Dept. of
15 the Airforce, 527 F.3d 806, 821 (9th Cir. 2008), a Ninth Circuit
16 panel held that Lawrence v. Texas, 539 U.S. 558 (2003), did not
17 disturb the application of rational basis review to an equal
18 protection challenge to a federal policy permitting the discharge
19 of service-members on account of homosexual activity. Cf., Witt,
20 527 F.3d at 824-25 (J. Canby's opinion concurring and dissenting
21 in part, arguing that because "Lawrence unequivocally overruled
22 Bowers[v. Hardwick], 478 U.S. 186 (1986)], it 'undercut the theory
23 [and] reasoning underlying' High Tech Gays and Philips 'in such a
24 way that the cases are clearly irreconcilable,' under Miller v.
25 Gammie, 335 F.3d 889, 900 (9th Cir. 2003)") (alteration in
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1 original). The Ninth Circuit may, in light of developments in the
2 law, decide to change its ruling on the degree of protection to be
3 provided to gays and lesbians as a class, but unless and until it
4 does, this Court must follow its current holdings.

5 Although the Supreme Court has not established that sexual
6 orientation is a suspect or quasi-suspect class for purposes of
7 the equal protection doctrine, it did hold in Romer that gays and
8 lesbians, as a class, are at least protected from burdensome
9 legislation that is the product of sheer anti-gay animus and
10 devoid of any legitimate government purpose. 517 U.S. at 632-35
11 (holding that Colorado's anti-gay ballot measure "defies even
12 [the] conventional inquiry" applied under the rational basis
13 test). In striking down the ballot measure, the Supreme Court
14 reiterated, "If the constitutional conception of equal protection
15 of the laws means anything, it must at the very least mean that a
16 bare desire to harm a politically unpopular group cannot
17 constitute a legitimate governmental interest." Id. at 634-35
18 (quoting Department of Agriculture v. Moreno, 413 U.S. 528, 534
19 (1973)) (internal quotation marks and alterations omitted). See
20 also, Lawrence, 539 U.S. at 577 ("the fact that the governing
21 majority in a State has viewed a particular practice as immoral is
22 not a sufficient reason for upholding a law prohibiting the
23 practice . . .") (quoting Bowers, 478 U.S. at 216 (Stevens, J.,
24 dissenting)). Thus, the Supreme Court has held that anti-gay
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1 animus is not a legitimate governmental interest that may serve to
2 justify legislative enactments burdening gays and lesbians.

3 The Court considers next whether the classification in
4 § 7702B(f) is justified, so as to withstand Plaintiffs' equal
5 protection challenge. As noted earlier, the rational basis
6 standard applies where a challenged enactment does not burden a
7 protected class. Romer, 517 U.S. at 631.

8 Under the rational basis test, a law that imposes a
9 classification must be rationally related to the furtherance of a
10 legitimate state interest. Id. This standard of review accords a
11 strong presumption of validity to legislative enactments. Heller
12 v. Doe, 509 U.S. 312, 319 (1993). "[I]t is entirely irrelevant
13 for constitutional purposes whether the conceived reason for the
14 challenged distinction actually motivated the legislature." FCC
15 v. Beach Comm., 508 U.S. 307, 313 (1993). On the other hand, the
16 rational basis test is not "toothless." Mathews v. De Castro, 429
17 U.S. 181, 185 (1976). "[E]ven in the ordinary equal protection
18 case calling for the most deferential of standards, [courts]
19 insist on knowing the relation between the classification adopted
20 and the object to be attained." Gill, 699 F. Supp. 2d at 387
21 (quoting Romer, 517 U.S. at 633).

22 Plaintiffs contend that there is no fairly conceivable
23 rational relationship between a legitimate government interest and
24 the exclusion of registered domestic partners from subparagraph
25 (C)(iii) of § 7702B(f). Instead, they posit that the enactment
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1 was based upon animus. As noted earlier, the Supreme Court has
2 held that anti-gay animus is not a legitimate governmental
3 interest that may serve to justify legislative enactments
4 burdening gays and lesbians. See Lawrence, 539 U.S. at 577;
5 Romer, 517 U.S. at 634-35.

6 Federal Defendants take the position that § 7702B(f)'s non-
7 inclusion of registered domestic partners is not based on sexual
8 orientation. First, Federal Defendants contend that excluding
9 registered domestic partnerships is not a proxy for sexual-
10 orientation-based discrimination because many states permit
11 heterosexual couples to register as domestic partners. This
12 argument is not persuasive. In this state and many others,
13 registered domestic partnership is currently the only available
14 legal status that provides a complement of established rights and
15 obligations for same-sex couples seeking legal recognition of
16 their relationships. That California permits different-sex
17 couples, in which one or both persons are age sixty-two or older,
18 to choose registered domestic partnership over marriage does not
19 diminish the plain reality that same-sex couples are relegated to
20 registered domestic partnerships because legal marriage is
21 prohibited for them. The availability of registered domestic
22 partnership to different-sex couples does not negate the burdens
23 faced by same-sex registered domestic partners. The laws limiting
24 same-sex couples to registered domestic partnerships, while
25 precluding them from marriage, turn on sexual orientation.
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1 Federal Defendants also argue that the varying scope of
2 privileges afforded by different state registered domestic
3 partnership laws means that the legal relationship is not a proxy
4 for classification based on sexual orientation. This argument is
5 also unavailing. The number or type of privileges is irrelevant
6 when registered domestic partnerships provide the only
7 relationship rights available to same-sex couples.

8
9 Federal Defendants also assert that Plaintiffs cannot show
10 animus because the legislative history of § 7702B(f) is devoid of
11 any statement suggesting a purpose to discriminate against same-
12 sex domestic partners. Neither party points to legislative
13 history for § 7702B(f) illuminating the reasons why Congress chose
14 the eligible relatives contained in subparagraph (C)(iii).
15 Federal Defendants posit that an impermissible purpose for the
16 exclusion of registered domestic partners is not reasonably
17 inferred because no state recognized such relationships in 1996.

18
19 However, the history delineated above demonstrates that when
20 § 7702B(f) was adopted in 1996, Congress was aware that a number
21 of localities and entities across the country had recognized and
22 protected same-sex couples by offering registered domestic
23 partnerships. Indeed, in 1996, the District of Columbia would
24 have had a domestic partnership registry, but for Congress'
25 decision to ban all appropriations to implement, enforce or
26 administer the registry. Antipathy towards same-sex relationships
27 infused successful efforts to block implementation of the
28

1 registered domestic partnership law in the District from 1992 to
2 2001, which included the year that § 7702B(f) was enacted. The
3 statements reflecting moral condemnation of gays and lesbians in
4 the course of these deliberations support an inference that the
5 exclusion of domestic partners from the list of family members
6 eligible to enroll in federally qualified, state-maintained long-
7 term care plans was motivated by animus.

8
9 Facts beyond the legislative record pertaining directly to
10 § 7702B(f) are relevant. This includes the legislative history of
11 provisions that Congress considered contemporaneously with the
12 passage of § 7702B(f). Congress' decision to omit a provision
13 specifically reaching registered domestic partners, concurrently
14 with its denial of funding for the District of Columbia's domestic
15 partnership registry and its enactment of a federal definition of
16 marriage limited to heterosexual married couples, along with its
17 record of animosity towards gays and lesbians, may serve as
18 evidence of animus. See Arlington Heights, 429 U.S. at 267
19 (stating, in the context of a race-based, disparate impact claim,
20 that the "historical background of the decision" and the "specific
21 sequence of events leading up to the challenged decision" may shed
22 light on the decisionmaker's purposes).

23
24 Even after the District of Columbia implemented its domestic
25 partnership registry and other states adopted their own, Congress,
26 through the Working Families Tax Relief Act of 2004, enacted an
27 amended version of § 7702B(f) without adding registered domestic
28

1 partners or otherwise allowing states to enroll family members who
2 were not expressly identified in subparagraph (C)(iii). Federal
3 Defendants attempt to diminish the legislation as a "technical
4 amendment," but the Act established substantive law that, among
5 other things, provided relief from the "marriage penalty" in
6 certain tax brackets and repealed scheduled reductions in the
7 child tax credit. Pub. L. No. 108-311.

8
9 Next, Federal Defendants assert that § 7702B(f) does not
10 impermissibly discriminate against same-sex registered domestic
11 partners because other relatives, such as cousins, and individuals
12 who share a close, dependent, family-like relationship are omitted
13 for reasons unrelated to sexual orientation. However, the
14 relevant comparison is between § 7702B(f)'s treatment of
15 registered domestic partners and its treatment of spouses.
16 Congress' record indicates that it saw registered domestic
17 partnership as a marriage-like status. The omission of distant
18 relatives and other household members from the list of family
19 members eligible for enrollment does not preclude a finding that
20 § 7702B(f) imposes a discriminatory classification.

21
22 Federal Defendants contend that there is a rational basis for
23 § 7702B(f)'s exclusion of domestic partners because the limitation
24 allows for the evolution of state domestic partnership laws. This
25 argument is not persuasive. Section 7702B(f) provides favorable
26 federal tax treatment for long-term care plans maintained and
27 administered by states. The provision does not have any bearing
28

1 on how state domestic partnership laws evolve, one way or another.
2 By allowing federally qualified, state-maintained long-term care
3 plans to enroll only certain categories of family members,
4 § 7702B(f) simply withholds favorable tax treatment to domestic
5 partners that a state otherwise recognizes.

6 Federal Defendants contend that it was rational to decline to
7 carry over subparagraph (H) of § 152(d)(2) to subparagraph
8 (C)(iii) of § 7702B(f)(2), because (A) through (G) would reach an
9 adequate number of family members. Federal Defendants assert that
10 the list of relatives identified in section 152(d)(2)(A)-(G)
11 reasonably served the policy goal of encouraging individuals to
12 participate in a state long-term care insurance plan, and
13 ineligible family members, including registered domestic partners,
14 could secure long-term care insurance from other sources. The
15 fact that these private plans would enjoy the same tax benefits
16 under § 7702B(f) as state-maintained plans does not explain the
17 decision to exclude a particular group of family members from
18 state-maintained plans.
19
20

21 Federal Defendants assert that the eligibility limitation
22 could be justified as a rational effort to assure that the
23 eligibility of individuals seeking enrollment in a state-
24 maintained plan could be easily verified. According to Federal
25 Defendants, the catch-all provision of subparagraph (H), which
26 includes an individual living with the taxpayer as a member of the
27 household during a given tax year, describes a relationship that
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1 may change from year to year. This justification, however, cannot
2 be credited because the eligibility of spouses, step-relatives and
3 relatives-in-law, which depends on the existence of a marital
4 relationship, may likewise change from one year to the next.
5 Marital relationships lack any minimum time commitment. Thus, the
6 exclusion of subparagraph (H) does not rationally relate to
7 efforts to ease administration of state-maintained long-term care
8 plans. See Moreno, 413 U.S. at 537-38 (holding that a provision
9 that limited eligibility for food stamps to households with
10 "related" rather than "non-related" individuals was not rationally
11 connected to efforts to curb abuse of the program). The Ninth
12 Circuit recently declined to credit the argument that a state law
13 eliminating health care benefits for domestic partners served the
14 interest of easing administrative burdens where the challenged law
15 amounted to "the selective application of legislation to a small
16 group." Diaz v. Brewer, 656 F.3d 1008, 1014 (9th Cir. 2011)
17 (affirming, in the context of a motion for preliminary injunction,
18 the district court's finding that the plaintiff same-sex domestic
19 partners were likely to succeed on their equal protection claim
20 under the rational basis test).

21
22
23 Federal Defendants' argument that the list of eligible family
24 members was adequate to further the policy goals of § 7702B(f)
25 suggests that the enactment was a rational decision to limit the
26 subsidy provided by the law. It is conceivable that an
27 incremental amount of tax revenue might be gained by not including
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1 registered domestic partners in subparagraph (C)(iii) of
2 § 7702B(f)(2). However, in light of the reasoning in Plyler v.
3 Doe, 457 U.S. 202, 227 (1982), and Rinaldi v. Yeager, 384 U.S.
4 305, 308-09 (1966), a law cannot satisfy the rational basis
5 standard of review based on a mere cost-saving rationale.

6 In Plyler, the Supreme Court considered the constitutionality
7 of a state statute that withheld state funds for the education of
8 undocumented children and authorized local school districts to
9 deny enrollment in their public schools to children not "legally
10 admitted" to the country. The Court held that undocumented
11 persons did not constitute a suspect class and the right to
12 education did not comprise a fundamental liberty interest. Id. at
13 223. Accordingly, the Court declined to apply the strict scrutiny
14 standard of review to the statute, and instead considered whether
15 the statute rationally furthered some substantial state interest.
16 Id. at 224. To the state's assertion that the challenged law
17 furthered the "preservation of the state's limited resources for
18 the education of its lawful residents," the Court responded that
19 "a concern for the preservation of resources standing alone can
20 hardly justify the classification used in allocating those
21 resources . . . [The state] must do more than justify its
22 classification with a concise expression of an intention to
23 discriminate." Id. at 227 (internal citation omitted). The
24 exclusion of the particular group, even if the group does not
25 constitute a protected class, must be justified. Id. at 229

1 ("[T]he State must support its selection of this group as the
2 appropriate target for exclusion.") (emphasis in original).
3 Because the Court did not discern a conceivable, sufficient
4 justification for excluding undocumented children, it invalidated
5 the law.

6 Similarly, in Rinaldi, 384 U.S. at 308-09, the Court stated
7 that equal protection "imposes a requirement of some rationality
8 in the nature of the class singled out." There the Court struck
9 down, on equal protection grounds, a state statute that required
10 indigent prisoners to reimburse the cost of a transcript in the
11 event of an unsuccessful appeal, but did not impose the same
12 obligation on indigents who received a suspended sentence, were
13 placed on probation or were fined. The Court assumed that
14 replenishing a county treasury by seeking reimbursement from those
15 who had directly benefited from its expenditures could serve as a
16 legitimate basis for enacting the law. Id. at 309. However, in
17 applying the rational basis test, the Court noted that the law
18 "fasten[ed] a financial burden only upon those unsuccessful
19 appellants who are confined in state institutions," while those
20 appellants who had been given a lesser sanction had received the
21 same benefit from the county--a transcript used in an unsuccessful
22 appeal. Id. The factor distinguishing the groups was the nature
23 of the penalty attached to the offense committed. The Court found
24 the distinction arbitrary because it did not bear "some relevance
25 to the purpose for which the classification [was] made." Id.

1 Under the reasoning in Plyler and Rinaldi, Federal Defendants
2 must show that justifying the exclusion of registered domestic
3 partners for the purpose of meeting federal fiscal objectives did
4 not single out same-sex couples for arbitrary or impermissible
5 reasons. Here, as noted above, the distinction between spouses
6 and registered domestic partners turns on sexual orientation, a
7 factor that bears no relevance to the purpose for which § 7702B(f)
8 was enacted, that is, to incentivize the purchase of long-term
9 care insurance to improve the financial security of families
10 throughout the country. Moreover, the Ninth Circuit in Diaz
11 indicated that the cost-saving rationale may not succeed where the
12 amount of savings rendered by excluding same-sex domestic partners
13 is minimal. 656 F.3d at 1012-14 (noting evidence that the state
14 spent a minimal amount on domestic partners' benefits). It bears
15 repeating that Plaintiffs have provided legislative history
16 indicating that the distinction was actually motivated by anti-gay
17 animus.
18

19
20 In sum, Federal Defendants have failed to show a plausible,
21 legitimate rationale for excluding registered domestic partners
22 from § 7702B(f)(2)(C)(iii)'s list of eligible family members, and
23 the Court can think of none. Plaintiffs have pointed to a record
24 of animus that could explain the exclusion. None of the cases
25 upon which Federal Defendants rely establishes that the rational
26 basis test is satisfied where a challenged provision serves no
27 legitimate government interest and the enactment is tainted by
28

1 animus against a politically unpopular group. Therefore,
2 Plaintiffs' allegations on behalf of registered domestic partners
3 are sufficient to state an equal protection claim under the
4 rational basis test.

5 On the other hand, the sex discrimination basis of
6 Plaintiffs' equal protection claim fails because the allegations
7 do not evidence purposeful invidious discrimination on the basis
8 of sex. Feeney, 442 U.S. at 274. The Congressional record cited
9 by Plaintiffs demonstrates animus directed towards same-sex
10 couples, not men or women. Plaintiffs have not demonstrated how
11 their allegations, if proven, would establish an equal protection
12 violation based on sex discrimination.

14 II. Substantive Due Process

15 Arguing that family autonomy and decisionmaking are protected
16 liberty interests, Plaintiffs claim that § 7702B(f) violates their
17 substantive due process rights by penalizing their exercise of
18 such rights without a permissible basis. Under the doctrine of
19 substantive due process, when the government infringes a
20 "fundamental liberty interest," the strict scrutiny test applies,
21 and the law will not survive constitutional muster "unless the
22 infringement is narrowly tailored to serve a compelling state
23 interest." William v. Glucksberg, 521 U.S. 702, 721 (1997).
24 Assuming that family autonomy and decisionmaking do amount to a
25 constitutionally protected, fundamental right, § 7702B(f) creates
26 no more than an incidental economic burden on those interests.
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1 Accordingly, the law does not trigger strict judicial scrutiny.
2 See Lyng v. Auto Workers, 485 U.S. 360, 370 (1988) ("Because the
3 statute challenged here has no substantial impact on any
4 fundamental interest . . . we confine our consideration to whether
5 the statutory classification 'is rationally related to a
6 legitimate governmental interest.'").

7
8 In Lyng, the challenged provision prevented a family that was
9 already on food stamps from receiving an increased allotment if a
10 family member stopped working due to a strike. The provision also
11 barred families from becoming eligible for food stamps if their
12 eligibility arose because a household member stopped working as
13 part of a labor strike. The Court found that the law did not
14 interfere with familial living arrangements because it was
15 "exceedingly unlikely" that the restriction would prevent a family
16 from "dining together" or compel a striking member to leave the
17 household in order to increase the household allotment of food
18 stamps. Id. at 365. The Court reasoned that the law did not
19 "directly and substantially" interfere with family living
20 arrangements. Id. at 365-66.

21
22 In Regan v. Taxation with Representation of Washington, 461
23 U.S. 540, 549 (1983), the plaintiff challenged a tax provision
24 that contributions to lobbying efforts were not tax deductible,
25 while charitable contributions were. The Court held that the
26 legislature is not required to subsidize the exercise of a
27 fundamental right. The Court cited cases upholding the denial of
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1 subsidies for candidates in certain public elections, and the
2 denial of subsidies to pay for abortions. Id. Accordingly, the
3 Court declined to subject the provision to strict scrutiny review.

4 Plaintiffs rely on Cleveland Board of Education v. La Fleur,
5 414 U.S. 632, 639 (1974), which invalidated, on substantive due
6 process grounds, an employer's policy which set arbitrary cutoff
7 dates for when pregnant teachers were required to take leave and
8 could return to work. The Court found that the mandatory leave
9 policy penalized pregnant teachers for their decisions related to
10 family creation, namely the decision to bear a child. Id. at 648.
11 However, La Fleur is less analogous to the present claim than
12 Regan and Lyng because the law challenged in La Fleur was a more
13 significant intrusion, in that the pregnant teachers could not
14 work during the mandatory leave period.

15
16 Likewise, Speiser v. Randall, 357 U.S. 513 (1958), is
17 inapposite. There the Court struck down a law requiring persons
18 who sought to take advantage of a property tax exemption to sign a
19 declaration stating that they did not advocate the forcible
20 overthrow of the Government of the United States. The Speiser
21 Court stated, "To deny an exemption to claimants who engage in
22 speech is in effect to penalize them for the same speech." Id. at
23 518. The Court reasoned that the challenged law necessarily had
24 "the effect of coercing the claimants to refrain from the
25 proscribed speech." Id. at 519. Here, however, Plaintiffs cannot
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1 plausibly allege that § 7702B(f) has coerced same-sex couples to
2 forgo engaging in same-sex relationships.

3 Lyng and Regan preclude the application of strict scrutiny in
4 deciding the domestic partner Plaintiffs' substantive due process
5 claim. However, where strict scrutiny does not apply, courts
6 weigh a substantive due process challenge under the rational basis
7 standard. See Glucksberg, 521 U.S. at 728 (applying the rational
8 basis test to a law banning assisted-suicide because it was held
9 not to infringe on a fundamental liberty interest protected by the
10 Due Process Clause). For the reasons explained earlier in the
11 Court's equal protection analysis, Plaintiffs have alleged
12 sufficiently that the exclusion of registered domestic partners
13 from subparagraph (C)(iii) of § 7702B(f)(2) fails constitutional
14 standards, even under the rational basis test. Accordingly,
15 Federal Defendants' motion to dismiss Plaintiffs' substantive due
16 process claim on behalf of registered domestic partners is denied.
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CONCLUSION

1
2 Plaintiffs have stated a viable constitutional challenge to
3 § 7702B(f) under the doctrines of equal protection and substantive
4 due process. Thus, Federal Defendants' motion to dismiss the
5 first and second claim in Plaintiffs' Second Amended Complaint to
6 the extent they are brought by registered domestic partners is
7 DENIED.

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9 IT IS SO ORDERED.

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11 Dated: 1/26/2012

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13 CLAUDIA WILKEN
14 United States District Judge
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