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11 **UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 MICHAEL DRAGOVICH, MICHAEL  
14 GAITLEY, ELIZABETH LITTERAL,  
15 PATRICIA FITZSIMMONS, CAROLYN  
16 LIGHT, CHERYL LIGHT, DAVID BEERS,  
17 CHARLES COLE, RAFAEL V.  
18 DOMINGUEZ, and JOSE G. HERMOSILLO,  
19 on behalf of themselves and all others similarly  
20 situated,

21 Plaintiffs,

22 v.

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

Defendants.

Case No. CV 4:10-01564-CW

**SECOND AMENDED COMPLAINT  
FOR INJUNCTIVE AND  
DECLARATORY RELIEF**

**CLASS ACTION**

**INTRODUCTION**

1  
2 1. Plaintiffs are employees of the State of California and their spouses or partners who  
3 are in long-term committed relationships legally recognized under California law as marriages  
4 and domestic partnerships. But because Plaintiffs are same-sex couples, the federal and state  
5 Defendants are unconstitutionally denying them the opportunity to purchase coverage through  
6 the state’s long-term care insurance program, an essential tool for financial and family security  
7 that is offered to all other families of state workers.

8 2. As members of the California Public Employees’ Retirement System (~~–CalPERS~~”),  
9 Plaintiffs MICHAEL DRAGOVICH, ELIZABETH LITTERAL, CAROLYN LIGHT, DAVID  
10 BEERS, and RAFAEL V. DOMINGUEZ (~~–Plaintiff employees~~”) are eligible to apply to join  
11 the CalPERS Long Term Care (~~–LTC~~”) Program, and seek this opportunity for their same-sex  
12 partners, Plaintiffs MICHAEL GAITLEY, PATRICIA FITZSIMMONS, CHERYL LIGHT,  
13 CHARLES COLE, and JOSE G. HERMOSILLO (~~–Plaintiff spouses~~” or ~~–Plaintiff partners~~”).  
14 Through participation in the LTC Program, the Plaintiffs seek to ensure an adequate safety net  
15 for themselves and their loved ones in the event that future debilitating illness or injury requires  
16 long-term care services.

17 3. Long-term care insurance provides coverage when a person needs assistance with  
18 basic activities of living due to chronic illness, injury, the frailty of old age, or a severe  
19 cognitive impairment such as Alzheimer’s disease. In most instances, individuals and their  
20 families are not otherwise covered for this type of extended long-term care by health insurance,  
21 disability insurance, or Medicare. Long-term care insurance is thus an important benefit for  
22 individuals, couples, and families – regardless of sexual orientation – to enhance financial  
23 security, and to ensure access to appropriate care throughout the life cycle.

24 4. The U.S. Department of Health and Human Services reports that approximately  
25 seventy percent of Americans over the age of 65—approximately nine million people—will  
26 need long-term care services. By the year 2020, the number will increase to twelve million. At  
27 2009 rates, the average stay in a nursing home lasts 2.4 years and costs more than \$170,000.

1 The average cost in 2009 for care provided by a home health aide was \$21 per hour, or \$27,000  
2 annually.

3 5. Without long-term care insurance, the high costs of care can force families to make  
4 painful choices such as selling a family home to pay the bills, or having a working adult give up  
5 a job and income to work (unpaid) as a primary caretaker for a loved one who is no longer able  
6 to care for herself. The consequences of such steps can be financially and emotionally  
7 devastating, and in some cases may be insufficient, leaving individuals in poverty and  
8 dependent upon the limited services provided by MediCal. Long-term care insurance allows  
9 families to avoid such contingencies.

10 6. Long-term care coverage can allow families and individuals to achieve their  
11 preferences with respect to assets, aging, and living arrangements, including community-based  
12 care. According to the U.S. Department of Health and Human Services: —~~B~~ planning ahead,  
13 you may be able to save your assets and income for uses other than long-term care, including  
14 preserving the quality of life for your spouse or other loved ones. . . . Your choices for  
15 receiving care outside of a facility and being able to stay at home or receive services in the  
16 community for as long as possible are greater if you have planned ahead.” U.S. Department of  
17 Health and Human Services National Clearinghouse for Long-Term Care Information, available  
18 at [http://www.longtermcare.gov/LTC/Main\\_Site/Planning\\_LTC/Importance/index.aspx](http://www.longtermcare.gov/LTC/Main_Site/Planning_LTC/Importance/index.aspx).

19 7. Maximizing the number of families who purchase long-term health care insurance  
20 serves the public interest by spreading the risk of catastrophic expense, and helping individuals  
21 receive adequate assistance when they become unable to care for themselves, reducing the  
22 burden on publicly funded programs. Access to long-term care services can also prevent  
23 avoidable health problems, reducing the need for emergency care and other expensive medical  
24 services.

25 8. The federal government, recognizing the importance of long term care insurance in  
26 protecting families and the contributions to the public good made by public employees, enables  
27 states to offer tax-shielded (~~q~~qualified”) long term care insurance programs to public employees  
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1 and their families. These tax provisions were adopted ~~to~~ provide an incentive for individuals  
2 to take financial responsibility for their long-term care needs.” Joint Committee on Taxation,  
3 ~~Description of Federal Tax Rules and Legislative Background Relating to Long-Term Care~~  
4 Scheduled for a Public Hearing Before the Senate Committee on Finance on March 27, 2001,”  
5 available at 2001 WL 36044116 (I.R.S.). ~~The~~ legislation ... provides tax deductibility for long  
6 term care and insurance, making it possible for more Americans to avoid financial difficulty as  
7 the result of chronic illness.” 142 Cong. Rec. S3578-01 at \*3608 (Statement of Sen. McCain)  
8 (Apr. 18, 1996).

9 9. Under the Internal Revenue Code, a state may offer public employees a ~~qualified~~,”  
10 tax-shielded long term care insurance plan that allows an employee to enroll himself or herself,  
11 as well as any of the following family members:

- 12 • Opposite-sex spouse;
- 13 • Children;
- 14 • Grandchildren;
- 15 • Brothers;
- 16 • Sisters;
- 17 • Stepbrothers;
- 18 • Stepsisters;
- 19 • Father;
- 20 • Mother;
- 21 • Stepfather;
- 22 • Stepmother;
- 23 • Grandparents;
- 24 • Nephews;
- 25 • Nieces;
- 26 • Aunts;
- 27 • Uncles;

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- 1                   • Sons-in-law;
- 2                   • Daughters-in-law;
- 3                   • Father-in-law;
- 4                   • Mother-in-law
- 5                   • Brothers-in-law; and
- 6                   • Sisters-in-law.

7 26 U.S.C. §§ 7702B(f)(1)-(2); 152(d)(2)(A)-(G), 1 U.S.C. § 7. The rules do not limit the  
 8 number of family members who can enroll. **Only one conceivable family member category** –  
 9 same-sex spouses and other legally recognized same-sex partners such as registered domestic  
 10 partners – is excluded.

11       10. Consistent with federal statutory law, California statutory law mandates that  
 12 Defendant Board of Administration offer public employees and their families the opportunity to  
 13 purchase qualified long-term care insurance through the California Public Employees’  
 14 Retirement System (“CalPERS”) during periodic open enrollment. Cal. Gov’t Code  
 15 § 21661(a). A state employee may enroll himself or herself, and his or her spouse, brothers,  
 16 sisters, father, mother, father-in-law, and mother-in-law in the qualified long-term care  
 17 insurance program offered to California public employees. Cal. Gov’t Code § 21661(d). There  
 18 is no limit to the total number of family members who can enroll, so long as they fall into an  
 19 approved family member category. However, same-sex domestic partners are excluded under  
 20 the terms of state and federal statutory law. 26 U.S.C. §§ 7702B(f)(1)-(2); 152(d)(2)(A)-(G),  
 21 Cal. Fam. Code § 297.5(g). Same-sex spouses are excluded by virtue of federal statutory law, 1  
 22 U.S.C. § 7, which CalPERS has followed and has indicated that it will follow.

23       11. Thus, despite the important purposes underlying the establishment and development  
 24 of qualified long term care programs for public employees – to protect and provide for public  
 25 employees and their extended families – families headed by same-sex partners are singled out  
 26 for exclusion, and denied without basis an important tool of financial planning.

27       12. Defendants’ discrimination against the Plaintiffs with regard to long-term health care  
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1 insurance is particularly invidious given the historical exclusion of gay couples and families  
2 from social and financial institutions and programs, including insurance plans, that help couples  
3 and families protect their financial security and allow them the resources to make caretaking  
4 decisions as a family.

5 13. Moreover, the statutory exclusion of same-sex partners from qualified long-term care  
6 plans interferes with California's independent constitutional law. The California Supreme  
7 Court has affirmed that —a matter of constitutional right,” California law accords same-sex  
8 couples, whether in legally recognized marriages or domestic partnerships, the same respect and  
9 dignity and the same substantive legal rights and attributes as married opposite-sex couples.  
10 *Strauss v. Horton*, 36 Cal. 4th 364, 411 (2009).

11 14. As couples in legally recognized committed relationships, Plaintiffs are entitled to  
12 respect for their fundamental liberty and privacy interests in marital and familial relationships,  
13 and the full and equal protection of the law. The exclusion challenged herein disrespects  
14 Plaintiffs' marital and familial relationships, and constitutes irrational discrimination, all in  
15 violation of the constitutional guarantees of due process and equal protection.

16 15. Plaintiffs seek a determination that by excluding same-sex partners and spouses, the  
17 federal provisions at issue – 26 U.S.C.A. §§ 7702B(f)(1)-(2) and 152(d)(2)(A)-(G) – violate the  
18 due process and equal protection guarantees of the federal Constitution. Plaintiffs seek a further  
19 determination that the CalPERS LTC Plan violates the federal Constitution by conforming its  
20 requirements to the federal provisions, thereby denying Plaintiffs the same respect and benefits  
21 as it grants to similarly situated heterosexual public employees and their spouses.

#### 22 JURISDICTION

23 16. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 in that this  
24 case arises under the Constitution of the United States and presents a federal question under  
25 Article III of the United States Constitution; pursuant to 28 U.S.C. § 1343(a)(3), (4) and 42  
26 U.S.C. § 1983 in that this action is brought to redress deprivations, under color of state  
27 authority, of rights, privileges, and immunities secured by the Constitution of the United States;  
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1 and pursuant to 5 U.S.C. § 702 in that the action states a claim that an agency of the United  
2 States or an officer or employee thereof acted or failed to act in an official capacity or under  
3 color of legal authority. The Court has authority to grant declaratory and injunctive relief  
4 pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a) and § 2202. The Court has the  
5 authority to award costs and attorneys' fees under 28 U.S.C. § 2412 and 42 U.S.C. § 1988.

#### 6 **VENUE**

7 17. Venue is proper in the Northern District of California under 28 U.S.C. § 1391(e) in  
8 that this action does not involve real property, Plaintiffs reside in this District, and a substantial  
9 part of the acts and/or omissions giving rise to Plaintiffs' claims occurred in this District.

#### 10 **PARTIES**

11 18. Plaintiffs are public employees in the State of California who are eligible to purchase  
12 long-term care coverage offered through CalPERS (~~Plaintiff employees~~) and their legally  
13 recognized spouses and domestic partners (~~Plaintiff spouses~~ or ~~Plaintiff partners~~).

14 19. Plaintiff MICHAEL DRAGOVICH is a U.S. citizen residing in San Francisco,  
15 California, and is employed by the University of California, San Francisco (~~UCSF~~) Medical  
16 Center, where he has worked as a registered nurse and nurse coordinator in the area of liver  
17 transplants since 1992. He is 51 years old. As part of his employee benefits package, he is  
18 eligible for and participates in CalPERS, California's benefit program for public employees.  
19 Plaintiff DRAGOVICH purchased long-term care coverage through the CalPERS program in  
20 1997.

21 20. Plaintiff MICHAEL GAITLEY is also a U.S. citizen residing in San Francisco,  
22 California, and he is 51 years old. Plaintiff GAITLEY is an attorney who runs free legal clinics  
23 for low-wage workers throughout the Bay Area.

24 21. Plaintiff DRAGOVICH met Plaintiff GAITLEY in 1979. They have been a  
25 committed couple for more than 30 years. Plaintiffs DRAGOVICH and GAITLEY were  
26 married on June 28, 2008 pursuant to a duly issued marriage license; they are legally married  
27 under California law.

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1 22. Plaintiff ELIZABETH LITTERAL is a U.S. citizen residing in San Francisco,  
2 California, and is employed by the UCSF Medical Center, where she has worked as a nurse in  
3 the areas of oncology and hematology since approximately 1995. She is 50 years old. As part  
4 of her employee benefits package, she is eligible for and participates in CalPERS.

5 23. Plaintiff PATRICIA FITZSIMMONS is a U.S. citizen residing in San Francisco,  
6 California, and she is 59 years old. Plaintiff FITZSIMMONS is an attorney who directs the  
7 Child Advocacy Clinic at the University of San Francisco School of Law.

8 24. Plaintiff LITTERAL met Plaintiff FITZSIMMONS in 1992. They have been a  
9 committed couple for more than 17 years. Plaintiffs LITERRAL and FITZSIMMONS  
10 registered as domestic partners with the City and County of San Francisco on June 21, 1994. In  
11 1997, they adopted their daughter Molly, now 14. They also registered as domestic partners  
12 with the State of California when that registry became available through state law. Following  
13 the decision of Mayor Gavin Newsom to provide marriage licenses on a nondiscriminatory  
14 basis, Plaintiffs LITERRAL and FITZSIMMONS were married in San Francisco on February  
15 13, 2004; this marriage was subsequently invalidated by the California Supreme Court.  
16 Plaintiffs LITERRAL and FITZSIMMONS were then married on October 8, 2008 pursuant to a  
17 duly issued marriage license; they are legally married under California law.

18 25. Plaintiff CAROLYN LIGHT is a U.S. citizen residing in San Francisco, California,  
19 and is employed by the UCSF Medical Center, where she has worked as health care  
20 administrator since 2005. She is 32 years old. As part of her employee benefits package, she is  
21 eligible for and participates in CalPERS.

22 26. Plaintiff CHERYL LIGHT is a U.S. citizen residing in San Francisco, California, and  
23 a massage therapist.

24 27. Plaintiffs CAROLYN and CHERYL LIGHT met in college and have been a  
25 committed couple for seven years. They registered as domestic partners under California state  
26 law in October 2006. On June 24, 2008, Plaintiffs CAROLYN and CHERYL LIGHT were  
27 married pursuant to a duly issued marriage license; they are legally married under California  
28



1 law.

2 28. Plaintiff DAVID BEERS is a U.S. citizen residing in Oakland, California, and is  
3 employed as a fiscal analyst for the State of California, Department of Public Health,  
4 Tuberculosis Control Branch. He has held this position since 1999. Plaintiff BEERS is 57  
5 years old, and has been employed by the State of California in various positions for more than  
6 20 years. As part of his employee benefits package, he is eligible for and participates in  
7 CalPERS. Plaintiff BEERS purchased long-term care coverage through the CalPERS program  
8 in 1997.

9 29. Plaintiff CHARLES COLE is a U.S. citizen residing in Oakland, California. For  
10 many years, Plaintiff COLE has worked as a consultant assisting health care organizations,  
11 senior organizations, and communities of faith with fundraising, organizational development,  
12 governance, and marketing. Since 2004, Plaintiff COLE has served as the Chief Operating  
13 Officer of Chaparral House, a nonprofit skilled nursing facility for seniors. Plaintiff COLE is  
14 59 years old.

15 30. Plaintiff BEERS met Plaintiff COLE in 1995. Plaintiffs BEERS and COLE registered  
16 as domestic partners under California state law on July 24, 2000. They had a commitment  
17 ceremony on July 15, 2001. On July 13, 2008, Plaintiffs BEERS and COLE were married  
18 pursuant to a duly issued marriage license; they are legally married under California law.

19 31. Plaintiff RAFAEL V. DOMINGUEZ is a U.S. citizen residing in La Mesa, California.  
20 Plaintiff DOMINGUEZ is employed as an EEO officer/Title VI liaison with CalTRANS in San  
21 Diego, California. He has held this position since August 2010. Prior to working for  
22 CalTRANS, Plaintiff DOMINGUEZ worked for the California Department of Fair Employment  
23 and Housing and for the State Compensation Insurance Fund. He has been a state employee  
24 since June of 2004. As part of his employee benefits package, he is eligible for and participates  
25 in CalPERS.

26 32. Plaintiff JOSE G. HERMOSILLO is a U.S. citizen residing in La Mesa, California.  
27 For about ten years, he has worked as an independent contractor providing Spanish language  
28

1 interpreting services to federal contractors throughout California and outside California.

2 33. Plaintiff DOMINGUEZ and Plaintiff HERMOSILLO became a committed couple in  
3 2005, and registered as domestic partners under California state law on June 18, 2007. They are  
4 not married.

5 34. Defendant DEPARTMENT OF THE TREASURY is a federal government  
6 department established by Congress.

7 35. Defendant INTERNAL REVENUE SERVICE is a bureau of the DEPARTMENT OF  
8 THE TREASURY that is organized to carry out the responsibilities of the Secretary of the  
9 Treasury in executing and applying the internal revenue laws pursuant to 26 U.S.C. § 7801.

10 36. Defendant TIMOTHY GEITHNER is currently the Secretary of the Treasury and is  
11 sued in his official capacity. In his official capacity, Secretary GEITHNER is responsible for  
12 the administration of the DEPARTMENT OF THE TREASURY, including the administration  
13 and enforcement of the internal revenue laws. 26 U.S.C. § 7801.

14 37. Defendant DOUGLAS SHULMAN is currently the Commissioner of Internal  
15 Revenue and issued in his official capacity. In his official capacity, Commissioner SHULMAN  
16 is responsible for administering and supervising the execution and application of the internal  
17 revenue laws. 26 U.S.C. § 7803.

18 38. Defendant BOARD OF ADMINISTRATION of California Public Employees'  
19 Retirement System (~~BOARD~~) is the thirteen-member body vested with management and  
20 control of the Public Employees' Retirement System. Cal. Gov't Code § 20120.

21 39. Defendant ANNE STAUSBOLL is Chief Executive Officer of the California Public  
22 Employees' Retirement System and is sued in her official capacity.

23 **CLASS ACTION ALLEGATIONS**

24 40. Plaintiffs DRAGOVICH, GAITLEY, LITERRAL, FITZSIMMONS, CAROLYN  
25 LIGHT, CHERYL LIGHT, BEERS, COLE, DOMINGUEZ, and HERMOSILLO bring this  
26 action on behalf of themselves and all persons similarly situated. The class they seek to  
27 represent is composed of CalPERS members who are in same-sex marriages and registered  
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1 domestic partnerships legally recognized by the State of California, and their spouses and  
2 partners, who as couples and families are denied access to the CalPERS Long-Term Care  
3 Program that is equal to similarly situated CalPERS members who are in opposite-sex  
4 marriages, and their spouses.

5 41. The persons in the class are so numerous that joinder of all such persons is  
6 impracticable and the disposition of their claims in a class action is a benefit both to the parties  
7 and to this Court. The Williams Institute at the University of California, Los Angeles, has  
8 estimated that there are nearly 193,000 current state and local public employees who are  
9 lesbian, gay, bisexual, and transgender.

10 42. There is a well-defined community of interest in the questions of law and fact  
11 regarding the parties to be represented, and common questions of law and fact predominate.

12 43. The claims of Plaintiffs DRAGOVICH, GAITLEY, LITERRAL, FITZSIMMONS,  
13 CAROLYN LIGHT, CHERYL LIGHT, BEERS, COLE, DOMINGUEZ, and HERMOSILLO  
14 are typical of those of the class, and Plaintiffs DRAGOVICH, GAITLEY, LITERRAL,  
15 FITZSIMMONS, CAROLYN LIGHT, CHERYL LIGHT, BEERS, COLE, DOMINGUEZ, and  
16 HERMOSILLO will fairly and adequately represent the interests of the class.

#### 17 STATEMENT OF FACTS

18 44. As California public employees, the Plaintiff employees are eligible for and  
19 participate in California's public employee benefit program, administered through the  
20 California Public Employees' Retirement System ("CalPERS").

#### 21 **The CalPERS Long-Term Care Program.**

22 45. One benefit included in CalPERS is the opportunity to enroll in the CalPERS Long-  
23 Term Care Program. The Long-Term Care Program ("Program") provides benefit payouts in  
24 the event that the beneficiary requires long-term skilled nursing care (for example, due to  
25 illness, injury, or advanced age). The Long-Term Care Program allows California public  
26 employees and/or family members of employees, including spouses, adult siblings, parents and  
27 parents-in-law to enroll in the Program. These family members can apply for the Program even  
28

1 if the public employee chooses not to enroll.

2 46. The 2008 CalPERS Long-Term Care Program Information Guide (~~Information~~  
3 Guide”), made available to all members of CalPERS including the Plaintiff employees, defines  
4 ~~long-term care~~” as ~~the~~extended care you or a loved one may need when you need assistance  
5 with basic Activities of Daily Living (ADLs) like bathing, dressing, or eating.” This care can be  
6 necessary ~~because~~ of a chronic illness, injury, or due to the frailty of old age [or] a Severe  
7 Cognitive Impairment, such as Alzheimer’s Disease.” The Program offers coverage options for  
8 care provided at home, at an adult day care center, in an assisted living facility, or in a nursing  
9 home.

10 47. In most instances, individuals and their families are not covered for long-term care by  
11 other insurance or disability plans. Medicare and employer-sponsored or private health  
12 insurance do not pay for the majority of long-term care services. MediCal provides limited  
13 coverage for some long-term care only to individuals who meet a state-determined poverty level  
14 and certain health-related criteria.

15 48. In a section entitled ~~Do~~ Not Forget Your Loved Ones,” the Information Guide offers  
16 facts to ~~help~~ you better understand why you should tell your spouse, parents, parents-in-law  
17 and adult siblings about the CalPERS Long-Term Care Program.” The Information Guide  
18 repeatedly offers reminders that employees should enroll their ~~spouse,~~ ~~family,~~ and ~~loved~~  
19 ones.”

20 49. According to CalPERS, three out of five people over age 65 will need some type of  
21 long-term care over their lifetime. In 2007, the average cost of care in a nursing home in  
22 California was \$180 per day, or over \$65,000 annually, and the average nursing home stay is 2.6  
23 years, costing approximately \$170,000. Care received at home can cost more than \$20,000 a  
24 year. As with other health care costs, the costs of long-term care are rising annually.

25 **Defendants’ Exclusion of the Plaintiff Spouses.**

26 50. Plaintiff DRAGOVICH has been employed as a registered nurse and nurse  
27 coordinator at UCSF Medical Center for approximately eighteen years. Plaintiff DRAGOVICH  
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1 has been in a committed relationship with Plaintiff GAITLEY for more than 30 years, since  
2 1979. On June 28, 2008, following the decision of the California Supreme Court in *In re*  
3 *Marriage Cases*, 43 Cal. 4th 757 (2008) (holding that denial of the right to marry to same-sex  
4 couples violated the California Constitution), Plaintiff DRAGOVICH married Plaintiff  
5 GAITLEY, pursuant to a duly issued California marriage license. Plaintiffs DRAGOVICH and  
6 GAITLEY remain lawfully married spouses under the laws of the State of California. *Strauss v.*  
7 *Horton*, 46 Cal. 4th 364 (2009).

8 51. Plaintiffs DRAGOVICH and GAITLEY are each 51 years old. Like families across  
9 the country planning their future, Plaintiffs DRAGOVICH and GAITLEY seek the security that,  
10 should either of them experience a debilitating illness or injury or otherwise become unable to  
11 care for himself, there will be an adequate safety net in place to provide necessary long-term  
12 health care. Additionally, Plaintiffs DRAGOVICH and GAITLEY seek the administrative  
13 convenience of being insured by the same provider, particularly as they age. Plaintiff  
14 DRAGOVICH purchased long-term care coverage through the CalPERS program in 1997;  
15 Plaintiff GAITLEY seeks the same coverage.

16 52. Plaintiff LITTERAL has been employed as an oncology nurse at UCSF Medical  
17 Center for approximately 15 years. Plaintiffs LITTERAL and FITZSIMMONS have been in a  
18 committed relationship for more than 17 years. Plaintiffs LITTERAL and FITZSIMMONS  
19 registered as domestic partners with the City and County of San Francisco on June 21, 1994.  
20 They also registered as domestic partners with the State of California when that registry became  
21 available through state law. Following the decision of Mayor Gavin Newsom to provide  
22 marriage licenses on a nondiscriminatory basis, Plaintiffs LITTERAL and FITZSIMMONS  
23 were married in San Francisco on February 13, 2004; this marriage was subsequently  
24 invalidated by the California Supreme Court. Following the *In re Marriage* cases, Plaintiffs  
25 LITTERAL and FITZSIMMONS were married on October 8, 2008 pursuant to a duly issued  
26 marriage license; they are legally married under California law.

27 53. For some time, Plaintiffs LITTERAL and FITZSIMMONS have been reviewing their  
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1 options for obtaining long-term care coverage. They are interested in joining the CalPERS  
2 Long-Term Care Program because the benefits are tax-protected, and because, as a publicly  
3 operated group plan, the premiums are lower than those charged by private carriers of individual  
4 policies. If and when they are able to purchase the coverage, they intend to do so.

5 54. Plaintiff CAROLYN LIGHT has been employed as health care administrator at UCSF  
6 Medical Center since 2005. She and Plaintiff CHERYL LIGHT have been in a committed  
7 relationship for seven years. They registered as domestic partners in 2006, and married legally  
8 in 2008. They are planning to have children. Plaintiffs CAROLYN and CHERYL LIGHT are  
9 interested in coverage through the CalPERS Long-Term Care Program because they view this  
10 coverage as a component of their financial planning as a couple. If and when they are able to  
11 purchase the coverage, they intend to do so.

12 55. Plaintiff BEERS has been employed by the State of California for more than 20 years.  
13 He currently serves as a fiscal analyst for the Tuberculosis Control Branch of the Department of  
14 Public Health, Tuberculosis Control Branch. He has held this position since 1999. He and  
15 Plaintiff COLE have been in a committed relationship since 1999. They registered as domestic  
16 partners under California state law on July 24, 2000, and had a commitment ceremony on July  
17 15, 2001. On July 13, 2008, Plaintiffs BEERS and COLE were married pursuant to a duly  
18 issued marriage license; they are legally married under California law. Plaintiff BEERS has  
19 long been aware of the need for, and the benefits of, long-term care coverage. He purchased  
20 coverage through the CalPERS long-term care plan in 1997.

21 56. Like Plaintiff BEERS, Plaintiff COLE is intensely aware of the need for long-term  
22 care coverage. As Chief Operating Officer for Chaparral House, a skilled nursing facility, and  
23 as a consultant for health care organizations, Plaintiff COLE is intimately familiar with the daily  
24 costs of long-term care, and the lack of adequate coverage provided by government programs  
25 such as MediCal and Medicare. Moreover, during the AIDS epidemic beginning in the early  
26 1980s, Plaintiff COLE cared for dozens of individuals living and dying with AIDS who  
27 required assistance with basic activities of daily living such as bathing, dressing, and eating. A  
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1 former Baptist minister, Plaintiff COLE was an active lay leader in the Metropolitan  
2 Community Church of San Francisco; literally hundreds of MCCSF members died during the  
3 AIDS years. Plaintiffs BEERS and COLE seek long-term care coverage because they want the  
4 security and safety net it provides in the event that either of them experience a debilitating  
5 illness or injury and requires daily care.

6 57. Beginning in 2004, Plaintiffs BEERS and COLE began discussing the possibility of  
7 enrolling Plaintiff COLE in the CalPERS long-term care plan. In 2005, Plaintiff COLE began  
8 sending emails to membership services for the CalPERS long-term care plan, inquiring about  
9 whether he could become covered as a domestic partner. Eventually he was told via email by a  
10 representative of the CalPERS long-term care plan that coverage was not available to him.  
11 Plaintiff COLE continued to inquire, and finally spoke by telephone with a representative of the  
12 CalPERS long-term care plan; the representative told Plaintiff COLE that there was nothing  
13 CalPERS could do to include domestic partners because of the IRS rules. Plaintiff COLE  
14 suggested that CalPERS sue the IRS. Plaintiff COLE made one more effort in about 2007,  
15 emailing CalPERS about obtaining long-term care coverage; he was again told that he is not  
16 eligible. Plaintiff COLE has surveyed the private long-term care market; however, he has been  
17 unable to find a product comparable to the CalPERS program with respect to benefits,  
18 escalation (also known as inflation protection), and premiums. As well, Plaintiff COLE seeks  
19 the benefits and protections of being part of the CalPERS plan. Unlike private plans, the  
20 CalPERS plan is run as a nonprofit, and has access to favorable investment opportunities.  
21 Unlike private plans, increases in premiums are supervised by the Board of Administration, and  
22 are imposed uniformly across the population of insured participants.

23 58. Plaintiff DOMINGUEZ and Plaintiff HERMOSILLO are in their 40s, and purchased a  
24 home together in September 2007, shortly after they registered as domestic partners under state  
25 law. Plaintiff DOMINGUEZ has looked into purchasing long-term care coverage from  
26 CalPERS, and wishes to buy this coverage for himself and for Plaintiff HERMOSILLO. He is  
27 aware from his own research, and from his mother's experiences of aging while living in her  
28



1 own home, that long-term care insurance coverage – separate from Medicare – is an important  
2 option for protecting family assets while accessing services. He seeks CalPERS long-term care  
3 coverage for himself and for Plaintiff HERMOSILLO because he wishes to protect their home  
4 and the stability of their household and finances in the event that, as they get older, one or both  
5 of them require assistance in their activities of daily living. For the same reasons, Plaintiff  
6 HERMOSILLO seeks CalPERS long-term care coverage. If and when they are able to purchase  
7 the coverage, they intend to do so.

8 59. After Plaintiffs DRAGOVICH and GAITLEY married, Plaintiff DRAGOVICH  
9 sought to enroll Plaintiff GAITLEY in the CalPERS Long-Term Care Program. In December  
10 2008, Plaintiff DRAGOVICH called the Program’s toll-free number to request enrollment  
11 materials, but was told by the Program representative with whom he spoke that same-sex  
12 spouses are ineligible to enroll in the Program. When Plaintiff DRAGOVICH inquired further,  
13 the representative informed him that this restriction was based on federal law.

14 60. Following Plaintiff DRAGOVICH’s telephone conversation with the Long-Term Care  
15 Program representative, his attorney wrote a letter to CalPERS on his behalf, objecting to  
16 discrimination by CalPERS on the basis of sexual orientation. CalPERS Assistant Chief  
17 Counsel responded with a letter explaining that the Program “is a tax-qualified plan for IRS  
18 purposes,” under which members may make their contributions to the Program using pre-tax  
19 dollars, and benefit payouts are not subject to the federal income tax. Counsel stated that in  
20 order to maintain the tax-qualified status of the Program:

21 [The plan must meet certain IRS provisions, including providing enrollment to certain  
22 persons such as employees, former employees, their spouses, and others within a specified  
23 relationship. Within this context, the federal Defense of Marriage Act (DOMA) currently  
24 recognizes a spouse to mean only a ~~person~~ person of the opposite sex.” The enrollment of a  
25 same-sex spouse into the [Long-Term Care Program] would therefore make the plan non-  
compliant with IRC provisions based on DOMA and jeopardize the plan’s tax-qualified  
status.

26 61. The federal and state rules challenged herein burden the familial relationships of the  
27 Plaintiffs, including the ability of the Plaintiff employees to support their families by enrolling  
28



1 their partners in the long-term care program available to spouses of California public  
2 employees, and their rights to equal protection under the law.

3 62. Shortly after Plaintiff DRAGOVICH's attorney inquired on his behalf about  
4 enrollment of his spouse, CalPERS suspended enrollment for any new enrollees. According to  
5 the CalPERS website, enrollment remains closed, despite California law requiring that long-  
6 term care insurance plans shall be made available periodically during open enrollment periods  
7 determined by the board." Cal. Gov't Code § 21661(a). Historically, the board has offered  
8 open enrollment periods annually, beginning each April. At public meetings, CalPERS has  
9 stated that it may hold an open enrollment in 2011.

10 63. Plaintiffs (as well as all others now foreclosed from enrollment) are being adversely  
11 affected by the delay in enrollment for the CalPERS program. Applying for long-term health  
12 care at a younger age increases the likelihood of qualifying for the coverage and results in lower  
13 premiums because premiums are linked to age at enrollment. Already almost two years have  
14 passed since Plaintiff DRAGOVICH first tried to enroll his spouse. Moreover, it is important  
15 that individuals apply for long-term care insurance when they are in good health because long-  
16 term care insurance plans like CalPERS uses underwriting which can prevent people from being  
17 approved for coverage.

18 64. It is impossible to predict when Plaintiffs (and others now foreclosed from  
19 enrollment) will need long-term care. The U.S. Department of Health and Human Services  
20 advises about the importance of planning ahead for long-term care because if people first learn  
21 about long-term care when they or a loved one need care ... their options are often limited by  
22 lack of information, the immediate need for services, and insufficient resources to pay for  
23 preferred services." U.S. Department of Health and Human Services National Clearinghouse  
24 for Long-Term Care Information, available at  
25 [http://www.longtermcare.gov/LTC/Main\\_Site/Planning\\_LTC/Importance/index.aspx](http://www.longtermcare.gov/LTC/Main_Site/Planning_LTC/Importance/index.aspx).

26 **Marriage and Domestic Partnerships in California.**

27 65. As a sovereign State of the United States of America, the State of California has  
28

1 exclusively established and ordained the legal requirements for civil marriage and registered  
2 domestic partnerships within the State and the status of members of such marriages and  
3 partnerships.

4 66. Effective January 1, 2005, and presently, California law allows same-sex couples to  
5 enter into domestic partnerships, legally recognized committed relationships with all of the  
6 same substantive legal rights, responsibilities, benefits, and protections as civil marriage affords  
7 to opposite-sex couples who enter into civil marriages recognized by the State of California.  
8 The California statute governing legal recognition of domestic partnerships, California Family  
9 Code 297.5, states that —Registered domestic partners shall have the same rights, protections,  
10 and benefits, and shall be subject to the same responsibilities, obligations, and duties under law,  
11 whether they derive from statutes, administrative regulations, court rules, government policies,  
12 common law, or any other provisions or sources of law, as are granted to and imposed upon  
13 spouses.” Cal. Fam. Code § 297.5(a).

14 67. However, section (g) of the same statute specifically exempts the federally qualified  
15 long term care program from this equality guarantee, stating, —No public agency in this state  
16 may discriminate against any person or couple of the ground that the person is a registered  
17 domestic partner rather than a spouse or that the couple are registered domestic partners rather  
18 than spouses, except that nothing in this section applies to modify eligibility for long-term care  
19 plans pursuant to Chapter 15 (commencing with Section 21660) of Par 3 of Division 5 of Title 2  
20 of the Government Code [Public Employees’ Long-Term Care Act].”

21 68. Effective June 15, 2008, with the implementation of the California Supreme Court’s  
22 constitutional determination in *In re Marriage Cases*, 43 Cal. 4th 757 (2008), same-sex couples  
23 who otherwise complied with the requirements for obtaining a marriage license in the State of  
24 California were entitled to marry under California law.

25 69. Although the California Constitution was modified on November 4, 2008 by the  
26 passage of Proposition 8, eliminating the ability of same-sex couples to enter into a legally  
27 recognized relationship designated —marriage,” marriages of same-sex couples that occurred  
28

1 prior to the adoption of Proposition 8—including Plaintiffs’ marriages—remain valid in all  
2 respects.” *Strauss v. Horton*, 36 Cal. 4th 364, 473-74 (2009).

3 70. Moreover, same-sex couples in California, whether in legally recognized marriages or  
4 domestic partnerships, possess, under the state constitutional privacy and due process clauses,  
5 the core set of basic substantive legal rights and attributes traditionally associated with  
6 marriage, including, most fundamentally, the opportunity of an individual to establish—with  
7 the person with whom the individual has chosen to share his or her life—an officially  
8 recognized and protected family possessing mutual rights and responsibilities and entitled to the  
9 same respect and dignity accorded a union traditionally designated as marriage. Like opposite-  
10 sex couples, same-sex couples enjoy this protection not as a matter of legislative grace, but of  
11 constitutional right.” *Id.* at 411.

12 71. Under California constitutional law, the Plaintiff couples must be accorded the same  
13 status, responsibilities, and protections as married opposite-sex couples. By failing to offer  
14 enrollment equally to the Plaintiffs, the Board is discriminating in violation of California law.

15 **Violation of Federal Constitutional Protections.**

16 72. The Plaintiff couples are similarly situated to California public employees and their  
17 opposite-sex spouses. In excluding same-sex spouses and domestic partners from the vast array  
18 of family members permitted to enroll in a qualified long-term care plan, the federal Defendants  
19 are violating the Plaintiffs’ fundamental liberty and privacy interests in marital and familial  
20 relationships, and are discriminating against them in violation of the guarantee of equal  
21 protection.

22 73. By implementing and conforming to the federal rules, and by excluding same-sex  
23 spouses and domestic partners from the list of eligible participants in the Long-Term Care  
24 Program, without basis, Defendants Board of Administration and Stausboll are violating  
25 Plaintiffs’ constitutionally protected rights to due process and equal protection.

26 74. The state and federal statutes challenged herein are particularly noxious in that they  
27 interfere and conflict with the State of California’s ability to comply with its own state  
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1 constitutional mandates. Here, the California Supreme Court has articulated and affirmed the  
2 State's strong interest under the California Constitution in according couples in same-sex  
3 relationships and their families the same legal responsibilities, benefits, and protections as  
4 couples in opposite-sex relationships and their families. In considering the legitimacy of federal  
5 governmental interests, federal courts should endeavor to reconcile competing state interests.

6 **INJUNCTIVE AND DECLARATORY RELIEF ALLEGATIONS**

7 75. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 64 as  
8 though fully set forth herein.

9 76. A present and actual controversy exists regarding the respective rights and obligations  
10 of Plaintiffs and Defendants. Plaintiffs desire a judicial determination of their rights and  
11 Defendants' obligations in a declaration as to whether Defendants' conduct violates the United  
12 States Constitution.

13 77. Such a declaration is necessary and appropriate at this time in order that Plaintiffs may  
14 ascertain their rights. Such a declaration is also necessary and appropriate to prevent further  
15 harm or infringement of Plaintiffs' rights.

16 78. Plaintiffs have no adequate remedy at law and unless the relief requested herein is  
17 granted, Plaintiffs will suffer irreparable harm by the deprivation of enrollment in a qualified  
18 long-term care plan.

19 **FIRST CLAIM FOR RELIEF**

20 Violation of Fifth Amendment

21 Due Process

22 (against Federal Defendants)

23 79. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 78 as  
24 though fully set forth herein.

25 80. As United States citizens, Plaintiffs have fundamental liberty and privacy interests in  
26 marital and familial relationships protected by the Fifth Amendment to the U.S. Constitution.

27 81. Under federal statute, states are authorized to offer tax-shielded long-term care  
28 insurance programs to public employees and a vast array of their family members, including

1 their opposite-sex spouses. 26 U.S.C.A. §§ 7702B(f)(1)-(2); 152(d)(2)(A)-(G). Same-sex  
2 spouses and domestic partners are excluded. *Id.*; 1 U.S.C. § 7.

3 82. Plaintiffs' marriages and domestic partnerships are valid and legally recognized under  
4 California law, and are afforded identical rights, responsibilities, benefits, and protections under  
5 California law.

6 83. By burdening the Plaintiffs' ability and autonomy to engage in financial and long-term  
7 care planning with their lawful spouses and domestic partners, the Defendants are violating the  
8 fundamental liberty and privacy interests in marital and familial relationships protected by the  
9 due process clause of the Fifth Amendment of the U.S. Constitution.

10 84. As a proximate result of these unlawful acts, the Plaintiffs have suffered and continue  
11 to suffer irreparable injury.

12 85. The Plaintiffs are entitled to relief, including declaratory relief and injunctive relief,  
13 and attorneys' fees and costs.

14 **SECOND CLAIM FOR RELIEF**

15 Violation of Fifth Amendment

16 Equal Protection

17 (against Federal Defendants)

18 86. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 85 as if  
19 fully set forth herein.

20 87. As United States citizens, the Plaintiffs are entitled to equal consideration and  
21 treatment from the federal government, and with respect to each and every program operated by  
22 the federal government, including the treatment of qualified long-term care insurance.

23 88. Under federal statute, states are authorized to offer tax-shielded long-term care  
24 insurance programs to public employees and a vast array of their family members, including  
25 their opposite-sex spouses. 26 U.S.C.A. §§ 7702B(f)(1)-(2); 152(d)(2)(A)-(G). Same-sex  
26 spouses and domestic partners are excluded. *Id.*; 1 U.S.C. § 7.

27 89. Plaintiffs' marriages and domestic partnerships are valid and legally recognized under  
28 California law, and are afforded identical rights, responsibilities, benefits, and protections under  
California law.

1 90. By treating the Plaintiffs differently from similarly situated opposite-sex married  
2 couples without basis, the Defendants are violating their right to equal protection secured by the  
3 Fifth Amendment of the United States Constitution.

4 91. As a proximate result of these unlawful acts, the Plaintiffs have suffered and continue  
5 to suffer irreparable injury.

6 92. The Plaintiffs are entitled to relief, including declaratory relief, injunctive relief, and  
7 attorneys' fees and costs.

8 **THIRD CLAIM FOR RELIEF**

42 U.S.C. § 1983

9 For Violation of Due Process Clause of Fourteenth Amendment  
10 (against Defendants Board of Administration and Stausboll)

11 93. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 92 as  
12 though fully set forth herein.

13 94. Plaintiffs have fundamental liberty and privacy interests in marital and familial  
14 relationships protected against state interference by the due process clause of the Fourteenth  
15 Amendment of the U.S. Constitution. Plaintiffs' marriages and domestic partnerships are valid  
16 and legally recognized under California law.

17 95. By denying Plaintiffs the right to enroll in the CalPERS Long-Term Care Program,  
18 and by conforming the plan to the unconstitutional federal standards, Defendants Board of  
19 Administration and Stausboll, acting under color of state law, are unconstitutionally burdening  
20 Plaintiffs' ability and autonomy to engage in financial and health care planning with their  
21 legally recognized spouses and domestic partners, in violation of the due process clause of the  
22 Fourteenth Amendment.

23 96. As a proximate result of these unlawful acts, the Plaintiffs have suffered and continue  
24 to suffer irreparable injury.

25 97. The Plaintiffs are entitled to relief, including declaratory relief, injunctive relief, and  
26 attorneys' fees and costs.

27 / / /

**FOURTH CLAIM FOR RELIEF**

42 U.S.C. § 1983

For Violation of Equal Protection Clause of Fourteenth Amendment  
(against Defendants Board of Administration and Stausboll)

1  
2  
3 98. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 97 as  
4 though fully set forth herein.

5 99. Plaintiffs have a right of equal protection secured by the Fourteenth Amendment to  
6 the Constitution. Plaintiffs' marriages and domestic partnerships are valid and legally  
7 recognized under California law. The State of California has an interest in treating Plaintiffs in  
8 a manner equal to similarly situated state employees and their opposite-sex spouses.

9 100. By denying Plaintiffs the right to enroll in the CalPERS Long-Term Care Program,  
10 and by conforming the plan to the unconstitutional federal standards, Defendants Board of  
11 Administration and Stausboll, acting under color of state law, are unconstitutionally  
12 discriminating against Plaintiffs compared to similarly situated California public employees and  
13 their opposite-sex spouses in violation of the Fourteenth Amendment of the United States  
14 Constitution.

15 101. As a proximate result of these unlawful acts, the Plaintiffs have suffered and continue  
16 to suffer irreparable injury.

17 102. The Plaintiffs are entitled to relief, including declaratory relief, injunctive relief,  
18 attorneys' fees and costs.

**PRAYER FOR RELIEF**

19  
20 WHEREFORE, Plaintiffs pray that this Court:

21 1. Enter an order declaring that 26 U.S.C.A. §§ 7702B(f)(1)-(2) (cross-referencing  
22 152(d)(2)(A)-(G)) is unconstitutional to the extent it excludes same-sex spouses and registered  
23 domestic partners from enrollment in qualified long-term care plans;

24 2. Enter an order declaring that Cal. Fam. Code § 297.5(g) is unconstitutional to the  
25 extent it excludes same-sex spouses and registered domestic partners from enrollment in the  
26 CalPERS Long-Term Care Program;

27 3. Enter an order enjoining Defendant Board of Administration and Defendant Stausboll  
28

1 from complying with these unconstitutional federal and state laws;

2 4. Enter an order directing the Defendant Board of Administration and Defendant  
3 Stausboll to permit the enrollment of the same-sex spouses and registered domestic partners of  
4 state employees during future open enrollment periods for its Long-Term Care Plan;

5 5. Enter an order enjoining Defendant United States Department of the Treasury,  
6 Defendant Geithner, Defendant Internal Revenue Service, and Defendant Shulman from  
7 challenging the tax-shielded ~~“qualified”~~ status of the CalPERS LTC Program;

8 6. Award attorneys’ fees and costs; and

9 7. Grant any other relief that the Court deems just and proper.

10

Respectfully submitted,

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THE LEGAL AID SOCIETY  
EMPLOYMENT LAW CENTER

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Date: August 12, 2011

By: \_\_\_\_\_ /s/  
Claudia Center  
Attorneys for Plaintiffs

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