

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

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7 MICHAEL DRAGOVICH, et al., on
8 behalf of themselves and all
9 others similarly situated,

10 Plaintiffs,

11 v.

12 UNITED STATES DEPARTMENT OF THE
13 TREASURY, et al.,

14 Defendants.

No. C 10-01564 CW

ORDER DENYING
PLAINTIFFS'
MOTIONS (1) FOR
CLASS NOTICE;
(2) FOR ADDITIONAL
REMEDIES; (3) FOR
LEAVE TO
SUPPLEMENT THE
COMPLAINT; (4) FOR
SUMMARY
ADJUDICATION; AND
(5) TO COMPEL
DISCOVERY, AND
GRANTING FEDERAL
AND STATE
DEFENDANTS' CROSS-
MOTIONS FOR
SUMMARY JUDGMENT

(Docket No. 185)

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16 Currently before the Court are Plaintiffs' motions (1) for
17 class notice; (2) for additional remedies; (3) for leave to
18 supplement the complaint; (4) for summary adjudication; and (5) to
19 compel limited discovery from State Defendants. State Defendants
20 and Federal Defendants oppose the motions. In addition, State
21 Defendants cross-move for partial summary judgment as to the two
22 42 U.S.C. § 1983 claims against them and Federal Defendants cross-
23 move for summary judgment regarding Plaintiffs' substantive due
24 process and equal protection claims brought on behalf of the
25 domestic-partner class members. Having considered the parties'
26 papers and oral argument on the matter, the Court DENIES
27 Plaintiffs' motions and GRANTS Defendants' cross-motions. Docket
28 No. 185.

1 BACKGROUND

2 The Court's prior orders outline the relevant factual and
3 statutory background at length. This order provides only a brief
4 summary of the background relevant to the resolution of the
5 instant motions.

6 I. Long-term Care Insurance and the Challenged Provisions

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

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

22 In determining the meaning of any Act of Congress, or
23 of any ruling, regulation, or interpretation of the
24 various administrative bureaus and agencies of the
25 United States, the word "marriage" means only a legal
26 union between one man and one woman as husband and
27 wife, and the word "spouse" refers only to a person of
28 the opposite sex who is a husband or a wife.

1 U.S.C. § 7.

1 Title 26 U.S.C. § 7702B(f) was also enacted in 1996, as part
2 of the Health Insurance Portability and Accountability Act
3 (HIPAA), providing favorable federal tax treatment to participants
4 in qualified state-maintained long-term care insurance plans for
5 state employees. 26 U.S.C. § 7702B(f). Currently, the CalPERS
6 long-term care insurance program is a qualified state-maintained
7 plan pursuant to § 7702B(f).

8 Section 7702B(f) (2) disqualifies a state-maintained plan from
9 favorable tax treatment if it provides coverage to individuals
10 other than those specified under its subparagraph (C). The list
11 of eligible individuals in § 7702B(f) (2) (C) includes state
12 employees and former employees, their spouses, and individuals
13 bearing a relationship to the employees or spouses which is
14 described in subparagraphs (A) through (G) of 26 U.S.C.
15 § 152(d) (2). Id.

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

- 22 (A) A child or a descendant of a child.
- 23 (B) A brother, sister, stepbrother, or stepsister.
- 24 (C) The father or mother, or an ancestor of either.
- 25 (D) A stepfather or stepmother.
- 26 (E) A son or daughter of a brother or sister of the
27 taxpayer.

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1 (F) A brother or sister of the father or mother of
the taxpayer.

2 (G) A son-in-law, daughter-in-law, father-in-law,
3 mother-in-law, brother-in-law, or sister-in-law.

4 (H) An individual . . . who, for the taxable year of
5 the taxpayer, has the same principal place of
6 abode as the taxpayer and is a member of the
taxpayer's household.

7 26 U.S.C. § 152(d)(2).

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

15 In addition to providing favorable tax treatment to state-
16 maintained long-term care plans, Congress approved such treatment
17 for long-term care coverage purchased through the private market.
18 26 U.S.C. § 7702B(a)-(b).

19 II. Procedural History

20 In May 2012, this Court issued an order granting Plaintiffs'
21 motion for summary judgment on all claims, denying the Bipartisan
22 Legal Advisory Group's (BLAG) cross-motion for summary judgment on
23 all claims, and denying Federal Defendants cross-motion for
24 summary judgment on the domestic-partner Plaintiffs' claims.
25 Docket No. 124, May 24, 2012 Order. BLAG and Federal Defendants
26 each timely appealed that order and the Ninth Circuit consolidated
27 their appeals in September 2012.

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1 In July 2013, shortly after the Supreme Court issued its
2 decisions in United States v. Windsor, 133 S. Ct. 2675 (2013), and
3 Hollingsworth v. Perry, 133 S. Ct. 2652 (2013), the Ninth Circuit
4 dismissed BLAG's appeal. See Docket No. 146. Three months later,
5 in October 2013, the Ninth Circuit issued a separate decision in
6 Federal Defendants' appeal, USCA Case No. 12-16628, granting
7 appellants' unopposed motion to vacate the portion of this Court's
8 summary judgment order addressing the claims of domestic-partner
9 Plaintiffs and remanding for further proceedings in light of Perry
10 and Windsor. See Docket No. 147.

11 In 2013, the California Legislature enacted the Public
12 Employees' Long-Term Care Act, which amended California law to
13 permit the enrollment of members "and their spouses, domestic
14 partners, parents, siblings, adult children, and spouses'
15 parents," "[e]xcept as prohibited by the Internal Revenue Code,
16 including but not limited to, Section 7702B(f)(2) . . . , or any
17 other authority that governs eligibility for a federally qualified
18 state long-term care plan." Cal. Gov't Code § 21661(e).

19 DISCUSSION

20 I. Motion to Compel

21 Plaintiffs seek to compel production of documents that would
22 provide them with the names and contact information of registered
23 domestic partners who, if married, would be eligible for the
24 CalPERS Long-Term Care Program (LTCP). Plaintiffs assert that
25 they will use this information to contact domestic-partner class
26 members to seek additional information regarding barriers to
27 marriage they may be experiencing. For example, Plaintiffs
28 hypothesize that there may be retired class members who moved to

1 states that don't recognize same-sex marriages and who are now
2 unable to travel to get married or that there may be class members
3 who have become disabled or whose domestic partners have become
4 disabled so that they cannot legally consent to marriage.

5 State Defendants argue that such discovery is improper
6 because discovery is not currently open and the purpose of the
7 discovery is to locate new class representatives. The Court need
8 not reach State Defendants' arguments. Having considered
9 Plaintiffs' request, the Court finds that the unlikely potential
10 benefit of the proposed discovery does not outweigh the burden
11 associated with the discovery, particularly in light of the
12 CalPERS' members' privacy rights that would be implicated by a
13 mass mailing to all domestic-partner members.

14 II. Plaintiffs' Motion to Supplement the Complaint

15 Rule 15(d) of the Federal Rules of Civil Procedure provides,
16 "On motion and reasonable notice, the court may, on just terms,
17 permit a party to serve a supplemental pleading setting out any
18 transaction, occurrence, or event that happened after the date of
19 the pleading to be supplemented." "Under the Rule, allowance or
20 denial of leave to file a supplemental pleading is addressed to
21 the sound discretion of the District Court." United States v.
22 Reiten, 313 F.2d 673, 675 (9th Cir. 1963).

23 Plaintiffs seek leave pursuant to Rule 15(d) to file a
24 supplemental complaint to add claims for relief for violations of
25 Title VII against the State of California and the Regents of the
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1 University of California.¹ Plaintiffs' proposed supplemental
2 complaint indicates that they have filed a class charge with the
3 Equal Employment Opportunity Commission alleging a Title VII
4 violation. Docket No. 185, Kristen Dec., Ex. D ¶ 92. The Title
5 VII claim, filed by class representative Michael Dragovich, seeks,
6 "Placement of [Dragovich's] spouse in the Long Term Care Program
7 with recognition that there should be some accommodations for the
8 possible increased costs caused by the inability to enroll my
9 spouse immediately after our nuptials." Docket No. 188, Kristen
10 Dec., Ex. F. The claim further seeks, "Accommodation for the
11 delay in being able to have my spouse join the CalPERS Long Term
12 Care Program so that any new premium will be at a reasonable cost
13 based on the previous unlawful exclusion." Id. The claim is
14 filed "as a class based charge on behalf of [Dragovich] and other
15 state employees whose same-sex spouses and same-sex domestic
16 partners have been denied enrollment." Id.

17 However, judgment has already entered as to the same-sex
18 spouse class members. BLAG appealed that ruling, but the appeal
19 was dismissed following Windsor and Perry. Accordingly, that
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21 ¹ Plaintiffs state that this request is "[p]ursuant to their
22 understanding of the Court's July 29, 2014 Order," which directed
23 the parties to brief the issues in their case management
24 statement, including Plaintiffs' request for leave to file an
25 amended complaint. Docket No. 185 at 12. However, the Court's
26 reason for entertaining a motion for leave to amend the complaint
27 was to allow Plaintiffs to seek leave to amend to include
28 allegations regarding ongoing harm to impacted domestic-partner
class members and to add representative class members suffering
such harm. Plaintiffs did not include any such allegations or
class representatives in their proposed supplemental complaint
and, as discussed above, it does not appear likely that they will
find evidence of such harm through reasonable discovery.

1 judgment is now final. The Court expresses no opinion regarding
2 whether Plaintiffs' proposed Title VII claim could be filed as a
3 new complaint and whether it would be appropriate for class
4 treatment. To the extent that Plaintiffs seek to supplement the
5 complaint on behalf of same-sex domestic partners, the Court finds
6 that any entitlement to discounted premiums would require multiple
7 individualized inquiries, such as the age at which the class
8 members would have sought coverage, the level of coverage they
9 would have sought and whether they would have maintained the same
10 level of coverage over time, that are not appropriate in this
11 class action. Moreover, administration of discounted premiums
12 would require complicated individualized calculations of back
13 premiums owed and the oversight of the payment of such back
14 premiums.

15 Accordingly, the Court declines to exercise its discretion to
16 allow Plaintiffs to supplement their complaint.

17 III. Cross-Motions for Summary Judgment

18 Summary judgment is properly granted when no genuine and
19 disputed issues of material fact remain, and when, viewing the
20 evidence most favorably to the non-moving party, the movant is
21 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
22 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
23 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
24 1987).

25 The moving party bears the burden of showing that there is no
26 material factual dispute. The court must draw all reasonable
27 inferences in favor of the party against whom summary judgment is
28 sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475

1 U.S. 574, 587 (1986); Intel Corp. v. Hartford Accident & Indem.
2 Co., 952 F.2d 1551, 1558 (9th Cir. 1991). Material facts which
3 would preclude entry of summary judgment are those which, under
4 applicable substantive law, may affect the outcome of the case.
5 The substantive law will identify which facts are material.
6 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

7 A. Claims against Federal Defendants

8 1. Equal Protection Claim

9 In their cross-motion for summary judgment, Federal
10 Defendants argue that, following the Supreme Court's decisions in
11 Windsor and Perry, the Court should enter judgment in their favor
12 because § 7702B(f) "no longer discriminates on the basis of sexual
13 orientation." Docket No. 186 at 16. In other words, because
14 same-sex couples can now get married in California and the federal
15 government is no longer enforcing the DOMA, any couple may get
16 married and then apply for LTCP coverage. Federal Defendants
17 continue that § 7702B(f) no longer creates a discriminatory impact
18 because, now that same-sex couples can choose to marry in
19 California, the exclusion of registered domestic partners from
20 § 7702B(f) impacts same-sex and heterosexual couples equally. See
21 De La Cruz v. Tormey, 582 F.2d 45, 50 (9th Cir. 1978) (where there
22 is no facial discrimination in statute, plaintiffs "are required
23 to prove two essential elements . . . discriminatory effect and
24 invidious discriminatory intent or purpose.").

25 Plaintiffs argue that Defendants' position "ignores the legal
26 history of discrimination in relationship recognition and its
27 present effects, which have shaped the lives and choices of the
28 California gay and lesbian couples who comprise the certified

1 class.” Docket No. 185 at 15. Plaintiffs do not dispute that an
2 ongoing discriminatory impact is required, but argue that the
3 continued exclusion of registered domestic partners from
4 § 7702B(f) imposes unnecessary harms and continuing discriminatory
5 effects on the basis of sexual orientation. Plaintiffs argue that
6 potential barriers to marriage “result from the history of
7 unconstitutional discrimination.” Docket No. 185 at 18. In light
8 of these possible ongoing harms, Plaintiffs argue that the Court
9 should reaffirm its previous finding that the exclusion of
10 registered domestic partners from § 7702B(f) is an
11 unconstitutional classification based on sexual orientation.

12 Plaintiffs contend that § 7702B(f) has a disparate impact on
13 same-sex couples because a greater percentage of domestic partners
14 are same-sex couples. However, Plaintiffs do not provide any
15 evidence to support a finding that this continues to be true in
16 California following Perry and the fact remains that virtually all
17 of the domestic-partner class members could marry.

18 Plaintiffs further argue that “[b]ut for the history of
19 sexual orientation discrimination,” domestic-partner class members
20 “would not be uniquely required by Federal Defendants to perfect a
21 subsequent second form of legal relationship recommendation,”
22 incurring the cost of a marriage license and the burden of a
23 ceremony performed by a lawful officiant. Docket No. 188 at 11.
24 In other words, although heterosexual and same-sex registered
25 domestic partners may get married, only same-sex registered
26 domestic partners were previously forced to choose to become
27 domestic partners, without the option to marry in the first
28 instance. The Court notes that the Plaintiffs make no such

1 allegations in their complaint or their proposed supplemental
2 complaint. Further, it remains that same-sex registered domestic
3 partners now have the opportunity to marry on the same terms as
4 heterosexual registered domestic partners. Moreover, as Federal
5 Defendants note, the barriers applicable to all class members,
6 such as marriage license fees and participation in a marriage
7 ceremony, are minimal and apply equally to heterosexual registered
8 domestic partners who wish to get married.

9 Finally, Plaintiffs argue that there may be registered
10 domestic partners in the class who face barriers to marriage.
11 Among the barriers that Plaintiffs identify are that some couples
12 may have moved to states that do not allow same-sex marriage and
13 may not be able to travel to a state that does; some couples may
14 not be able to consent to marry due to failing capacity of one
15 partner; and some couples may have difficulty appearing in person
16 to obtain a marriage license as required by California law. Such
17 speculative individualized claims cannot be resolved in this class
18 action.² Further, Plaintiffs do not include any allegations
19 regarding these potential barriers to marriage in their proposed
20 amended complaint. See Docket No. 185, Kristen Decl., Ex. D.

23 ² Plaintiffs also argue that the State of California treats
24 registered domestic partners as though they are married for
25 various benefits and some states, but not California, have
26 automatically "converted" or "merged" domestic partnerships into
27 marriages. The federal government treats these converted or
28 merged relationships as marriages. Plaintiffs assert that these
distinctions impermissibly elevate form over substance. However,
no such harm is alleged in the complaint or in the proposed
supplemental complaint.

1 Accordingly, the Court finds that Plaintiffs have failed to
2 provide evidence of an ongoing discriminatory impact sufficient to
3 support an equal protection violation. The Court DENIES
4 Plaintiffs' motion for summary judgment on their equal protection
5 claim and GRANTS Federal Defendants' cross-motion for summary
6 judgment on that claim.

7 2. Substantive Due Process Claim

8 Plaintiffs also assert a substantive due process claim,
9 arguing that by excluding registered domestic partners from the
10 list of family members eligible to participate in tax-advantaged
11 state-provided long-term care plans, the government "selectively
12 burdens and penalizes the Plaintiffs' exercise of their right to
13 family autonomy and decision-making, on the basis of sexual
14 orientation, and in doing so demeans their lives and intimate
15 decisions." Docket No. 185 at 24. Plaintiffs argue that Federal
16 Defendants prevent same-sex registered domestic partners "from
17 participating in a critical government-sponsored tool for
18 decisions regarding life and family planning" and therefore
19 "impose[] a selective burden on the family relationships of same-
20 sex couples without an adequate justification." Id. at 25.
21 However, as discussed above with respect to Plaintiffs' equal
22 protection claim, the Court finds that Plaintiffs have not
23 presented any evidence of such a continuing "selective burden" on
24 same-sex registered domestic partners. Following Perry, same-sex
25 registered domestic partners can choose to marry, just as
26 heterosexual registered domestic partners can. Accordingly, the
27 Court denies Plaintiffs' motion for summary adjudication and
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1 grants Federal Defendants' cross-motion for summary judgment with
2 respect to Plaintiffs' substantive due process claim.

3 B. Claims against State Defendants

4 Plaintiffs assert two claims pursuant to 42 U.S.C. § 1983
5 against State Defendants, based on State Defendants "denying
6 Plaintiffs the right to enroll in the CalPERS Long-Term Care
7 Program, and [] conforming the plan to [] unconstitutional federal
8 standards." Docket No. 66 ¶¶ 95, 100. As discussed above, the
9 Court finds that, following Windsor and Perry, the federal
10 standards no longer violate the Constitution. Accordingly, the
11 Court denies Plaintiffs' motion for summary adjudication as to the
12 State Defendants and grants State Defendants' cross-motion for
13 summary judgment.

14 IV. Plaintiffs' Motion for Class Notice

15 Plaintiffs move for class notice, arguing that class members
16 should be advised that same-sex spouses of CalPERS members may
17 apply for LTCP, and same-sex registered domestic partners of
18 CalPERS members may not apply. Plaintiffs argue that such notice
19 "will permit class members the opportunity to, inter alia,
20 intervene in the action, submit comments, and contact class
21 counsel." Docket No. 185 at 6-7. Further, Plaintiffs argue that
22 CalPERS should bear the burden of providing the notice they
23 request.

24 "The trial court may in its discretion in a class action
25 certified under Rule 23(b)(2) direct that notice be given under
26 Rule 23(d)." EEOC v. General Tel. Co. of Northwest, 599 F.2d 322,
27 334 (9th Cir. 1979); see also Fed. R. Civ. P. 23(c)(2)(A) ("For
28 any class certified under Rule 23(b)(1) or (b)(2), the court may

1 direct notice to the class.”). Plaintiffs assert that the Court
2 should exercise its discretion to require notice to the class,
3 citing cases in which trial courts have required notice because
4 “the issues of potential relief involved are important to class
5 members and the Court desires to have the maximum input from the
6 class.” Am. Counsel of the Blind v. Astrue, 2008 WL 4279674, *7
7 (N.D. Cal.).

8 However, that case is distinguishable from the instant case.
9 In Counsel of the Blind, the parties sought “to compel the Social
10 Security Administration to provide alternative formats of
11 communication that would enable the putative class [of individuals
12 with vision impairment] to have equal access to participate in SSA
13 programs.” Id. at *1. The court specifically noted that “class
14 members could be given notice and a choice of what type of
15 accommodation they would prefer.” Id. at *3. There, it made
16 sense to seek input from class members regarding the types of
17 alternative formats that would best address their needs. In
18 contrast, Plaintiffs here do not need the input of class members
19 with respect to the remedy sought. There are no fact-based
20 remedies, such as disability accommodations, that require feedback
21 from class members.

22 State Defendants further argue that the type of “notice
23 relief” that Plaintiffs seek is barred by the Eleventh Amendment
24 because there is no ongoing violation of federal law. In Green v.
25 Mansour, the Supreme Court held that plaintiffs in a putative
26 class action seeking changes to public assistance calculations
27 were not entitled to “notice relief” or a declaration that the
28 state practice the plaintiffs sought to change violated federal

1 law when Congress changed the federal law to clarify federal
2 requirements and the state amended its practices in response. 474
3 U.S. 64, 65-66 (1985). Plaintiffs argue that Green is
4 distinguishable because "Defendants here have not established that
5 they are in compliance with the Constitution." Docket No. 188 at
6 1.

7 To the extent that Plaintiffs seek notice to CalPERS members
8 with same-sex spouses, the Court notes that this relief was not
9 sought prior to the entry of judgment. BLAG appealed that ruling,
10 but the appeal was dismissed following Windsor and Perry, and that
11 judgment is now final. There is no ongoing constitutional
12 violation and Green controls. The Court has now found that there
13 is no ongoing constitutional violation with respect to same-sex
14 registered domestic partners. Therefore, Green also precludes
15 notice to domestic-partner class members. Accordingly, the Court
16 denies Plaintiffs' motion for class notice.

17 V. Plaintiffs' Motion for Additional Remedies

18 Finally, Plaintiffs argue that the Court should exercise "its
19 equitable powers to provide full relief to class members by
20 placing them in the position they would have occupied absent the
21 discriminatory conduct." Docket No. 185 at 10. Specifically,
22 Plaintiffs argue that "class members should be permitted to
23 purchase CalPERS LTCP insurance for the premiums they would have
24 paid in the year they originally sought to enroll their same-sex
25 partner." Id.

26 A. Same-Sex Spouses

27 As previously noted, the Court already ruled in favor of
28 same-sex spouse class members and judgment entered. The remedy

1 Plaintiffs now seek was not sought at that time and the appeal of
2 the judgment as to same-sex spouses was dismissed. The Court
3 finds no basis on which it may revisit its earlier judgment, which
4 is now final.

5 B. Registered Domestic Partner Plaintiffs

6 State Defendants also argue that any claim for discounted
7 premiums is prohibited by the Eleventh Amendment because there is
8 no ongoing federal violation to justify prospective relief.
9 Plaintiffs do not dispute that an ongoing violation is required
10 for the Court to order prospective relief. See Ex parte Young,
11 209 U.S. 123, 156 (1908). The Court has now found that there is
12 no ongoing constitutional violation with respect to domestic-
13 partner class members and grants State and Federal Defendants'
14 cross-motions for summary judgment. As discussed above, providing
15 the requested discounts would require multiple individualized
16 inquiries including the age at which the class members would have
17 sought coverage, the level of coverage they would have sought and
18 whether they would have maintained the same level of coverage over
19 time. Moreover, the requested relief would require complicated
20 individualized calculations of back premiums owed and oversight of
21 the payment of those back premiums.

22 Because there is no ongoing constitutional violation to
23 justify the grant of injunctive relief and because the relief
24 sought would require individualized inquiries, the Court denies
25 Plaintiffs' motion for additional remedies as to same-sex domestic
26 partners.

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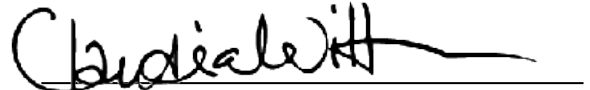
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CONCLUSION

For the reasons stated above, the Court DENIES Plaintiffs' motions (1) for class notice; (2) for additional remedies; (3) for leave to supplement the complaint; (4) for summary adjudication; and (5) to compel limited discovery from State Defendants. The Court GRANTS Defendants' cross-motions for summary judgment. An Amended Judgment will enter separately.

IT IS SO ORDERED.

Dated: December 4, 2014


CLAUDIA WILKEN
United States District Judge