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11 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

12 HUGH HELD and
13 KELLEY RICHARDSON-WRIGHT,
on behalf of themselves
14 and all other similarly situated,

15 Plaintiffs,

16 v.

17 CAROLYN W. COLVIN,
Acting Commissioner of Social
18 Security, in her official capacity,

19 Defendant.
24

Case No. 2:15-cv-1732 PA (JCx)

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

[Notice of Motion and Motion for
Preliminary Injunction; Supporting
Declarations; and [Proposed] Order
filed concurrently]

Date: Monday, July 20, 2015
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Courtroom: 15

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1 **I. INTRODUCTION**

2 This is a proposed class action about the effects of continued discrimination
3 by the Social Security Administration (“SSA”), against Supplemental Security
4 Income (“SSI”) recipients married to a person of the same sex, long after that
5 discrimination was held unlawful by the Supreme Court in *United States v.*
6 *Windsor*, 133 S. Ct. 2675 (2013). After *Windsor*, SSA should have recognized
7 these marriages immediately. Yet it failed to do so. Hugh Held and Kelley
8 Richardson-Wright bring this action on behalf of a class of similarly-situated
9 individuals (collectively, “Plaintiffs”) married to someone of the same sex and
10 who have been or will be targeted by SSA for recoupment of overpayments caused
11 by SSA’s failure to recognize their marriages.

12 Class members should not be liable for overpayments caused by SSA’s
13 unlawful conduct. SSA’s unreasonable and unjustified delay in recognizing
14 Plaintiffs’ marriages after *Windsor* was a violation of the Equal Protection
15 guarantee of the Fifth Amendment and the overpayments were a consequence of
16 that discrimination. In addition, under the Social Security Act, SSA may not
17 recoup overpayments if the recipient was without fault and if recoupment would be
18 against equity and good conscience. SSA can meet neither of these requirements
19 here. Lastly, SSA has violated Plaintiffs’ procedural due process rights by failing
24 to consider the evidence already in its possession showing that SSA, not Plaintiffs,

1 is at fault and that recoupment is against equity and good conscience.

2 Permitting SSA, during the pendency of this case, to seek recovery of
3 overpayments caused by its unlawful conduct will cause irreparable harm. To
4 avoid that harm, Plaintiffs seek a preliminary injunction (1) enjoining SSA from
5 making any effort to recoup overpayments caused by SSA's failure to recognize
6 Plaintiffs' marriages after the *Windsor* decision; and (2) requiring SSA to return
7 any such funds already withheld or otherwise received.

8 **II. BACKGROUND**

9 **A. Supplemental Security Income**

10 SSI is a federal assistance program designed to provide individuals in the
11 greatest need income for basic necessities. 20 C.F.R. § 416.110. SSA administers
12 the SSI program. *Id.*; 42 U.S.C. § 1381a. In order to be eligible, an individual
13 must be age 65 or older, blind, or disabled. 42 U.S.C. § 1382(a). In addition, SSI
14 recipients must be very poor—individuals must have less than \$2,000 in resources,
15 and married couples must collectively have less than \$3,000 in resources. 20
16 C.F.R. § 416.1205. The maximum federal benefit is \$733 per month for an
17 individual and \$1,100 a month for a married couple.¹ Bychowski Decl., Ex. A

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24 ¹ Some states provide a modest supplement to the federal benefit.

1 (POMS SI 02001.020).² Marriage always results in a lower amount of individual
2 monthly SSI benefits and may result in a complete loss of benefits.

3 **B. SSA Violated Plaintiffs' Constitutional Rights**

4 Plaintiffs' claims have their roots in the 1996 Defense of Marriage Act
5 ("DOMA"), which declared that marriages of same-sex couples would not have
6 status equal to marriages of different-sex couples. Section 3 of DOMA (codified
7 at 1 U.S.C. § 7) stated that, for the purpose of determining the meaning of any
8 federal law, "the word 'marriage' means only a legal union between one man and
9 one woman as husband and wife, and the word 'spouse' refers only to a person of
10 the opposite sex who is a husband or a wife."

11 Starting in 2004, a growing number of states began to allow same-sex
12 couples to marry. These included Massachusetts, where Plaintiff Kelley
13 Richardson-Wright and her wife Kena Richardson-Wright were married in 2007,
14 and California, home to Plaintiff Hugh Held and his husband Orion Masters, a
15 couple since 1993 who married in 2008. Nevertheless, because of DOMA, SSA
16 did not recognize the marriages of same-sex couples for purposes of SSI. Instead,
17 SSA treated applicants married to a person of the same sex as single.

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19 ² The declaration of Stephen T. Bychowski is filed concurrently with this memorandum.
24 The declarations of (1) Hugh Held and (2) Kelley and Kena Richardson-Wright cited in
this memorandum were filed with Plaintiffs' Motion for Class Certification, ECF Doc.
Nos. 26-2, 26-3.

1 The actions of SSA and other federal agencies in denying equal status to
2 Plaintiffs, and others, were declared illegal by the Supreme Court’s June 2013
3 decision in *United States v. Windsor*, striking down Section 3 of DOMA because it
4 violated the Fifth Amendment of the Constitution. 133 S. Ct. 2675, 2696 (2013).
5 The Court explained the government had used DOMA to “impose a disadvantage,
6 a separate status, and so a stigma upon all who enter into same-sex marriages.” *Id.*
7 at 2693. The Court elaborated that “DOMA instructs all federal officials, and
8 indeed all persons with whom same-sex couples interact, including their own
9 children, that their marriage is less worthy than the marriages of others.” *Id.* at
10 2696. Because “the principal purpose and the necessary effect of this law are to
11 demean those persons who are in a lawful same-sex marriage,” the Court held that
12 DOMA violated the Fifth Amendment. *Id.* at 2694.

13 **C. SSA Continues Discriminating Against Plaintiffs after *Windsor***

14 Nevertheless, SSA *continued* for over a year after *Windsor* to treat SSI
15 recipients who were married to a person of the same sex as if they were single.³

17 ³ After *Windsor*, individuals married to someone of the same sex who filed new SSI
18 applications had their applications placed on hold by SSA. In January 2014, six months
19 after *Windsor*, SSA finally began to process those applications and ceased its
20 discrimination against new SSI applicants. See Bychowski Decl., Ex. B (*Social Security*
21 *Publishes New Supplemental Security Income Rules Involving Same-Sex Married*
22 *Couples*, Social Security Admin. (Jan. 31, 2014), [http://www.ssa.gov/news/#!/post/1-](http://www.ssa.gov/news/#!/post/1-2014-7)
23 [2014-7](http://www.ssa.gov/news/#!/post/1-2014-7)). But SSA still continued to treat Plaintiffs, who were already receiving SSI, as if
24 they were single.

1 During this time, SSA provided little guidance to the employees in its field offices,
2 much less to SSI recipients, as to when or how it would adjust its practices to
3 recognize marriages of same-sex couples and cease its unlawful discrimination.

4 For example, Kelley Richardson-Wright had a routine financial redetermination in
5 October 2014, over a year after *Windsor*. Richardson-Wright Decl. at ¶ 9. Even
6 though SSA knew of her marital status, it said nothing at the time about any
7 changes to her SSI benefits. *Id.* Similarly, shortly after *Windsor*, Hugh Held went
8 to an SSA office and inquired as to the impact on his benefits. Held Decl. at ¶ 6.

9 The SSA representative told him that it might affect his benefits, but it was unclear
10 how. *Id.*

11 It was not until the summer of 2014, a year after *Windsor*, that SSA began
12 sending notices to some SSI recipients about how SSA would be calculating their
13 benefits as married individuals, for the first time recognizing these marriages. *See,*
14 *e.g.*, Held Decl. at ¶ 10, Ex. D; Richardson-Wright Decl. at ¶ 12, Ex. B. SSA also
15 began seeking to recoup overpayments caused by its delay by recalculating
16 Plaintiffs' past benefits as if SSA had complied with *Windsor* from the start. Held
17 Decl. at ¶ 10, Ex. D; Richardson-Wright Decl. at ¶ 14, Ex. E. In effect, SSA's
18 benefits calculation assumes a counterfactual and imaginary world where SSA had
19 immediately complied with *Windsor*. The couples subjected to the discrimination
24 have been left to bear the consequences of SSA's unlawful conduct.

1 For example, in June 2014, a year after *Windsor*, Mr. Held received, without
2 explanation or warning, an SSI benefit almost two-thirds lower than his prior
3 benefit (\$308 versus \$877) and then a statement telling him he had to pay back an
4 overpayment of over \$6,000. Held Decl. at ¶ 7. It took until September for SSA to
5 explain that SSA had overpaid him because SSA had not recognized his marriage.
6 *Id.* at ¶ 10.

7 SSA was similarly aware of Plaintiff Kelley Richardson-Wright's marriage.
8 Richardson-Wright Decl. at ¶ 6. In late November 2014, nearly *a year and a half*
9 after *Windsor*, SSA kicked off a confusing two-week-long flurry of a half dozen
10 inconsistent and conflicting notices. *Id.* at ¶ 10. These culminated in a December
11 2014 notice of overpayment stating that Ms. Richardson-Wright had been overpaid
12 by approximately \$4,100 because her "[s]pouse's wages are now taken into
13 account" – *i.e.* because SSA finally was recognizing her marriage. *Id.* at ¶ 16, Ex.
14 F. Bizarrely, SSA's notice also asked Ms. Richardson-Wright to explain why "[i]t
15 wasn't KELLEY S RICHARDSON-WRIGHT's fault that she got too much SSI
16 money," even though SSA is surely aware that the reason for the overpayment was
17 SSA's failure to comply with *Windsor*. *Id.*, Ex. F at 2. Even though Ms.
18 Richardson-Wright sought reconsideration from SSA, SSA began to withhold
19 funds from her benefits, and only after the Complaint in this action was filed
24 ceased doing so, and reimbursed the improperly withheld funds. *Id.* at ¶ 31.

1 These events caused Ms. Richardson-Wright and her wife, Kena, to forgo
2 basic necessities and put them at risk of eviction from their home. *Id.* at ¶ 22. The
3 SSI reduction occurred at a particularly difficult financial time for the couple. *Id.*
4 at ¶ 28. The stress from the extreme financial strain caused by the reduction in SSI
5 payments caused Kelley to be hospitalized. *Id.* at ¶ 23. While Kelley was in the
6 hospital, Kena’s car was repossessed. *Id.* at ¶ 24.

7 **D. After the Filing of this Action, SSA Temporarily Halts Initiation of**
8 **New Attempts to Recoup Overpayments**

9 In a tacit admission that its conduct in seeking recoupment of these
10 overpayments is unlawful, unfair, and causes irreparable harm, after the Complaint
11 in this action was filed, SSA issued an emergency directive to its field adjudicators
12 instructing them to put a halt to that practice, but only for a few months.

13 Specifically, on May 6, 2015, SSA issued an “Emergency Message” that
14 adjudicators should put “on hold, effective immediately, any ... SSI... post-
15 eligibility action that would result in an overpayment for past months due to
16 [recognition of a same-sex marriage].” Bychowski Decl., Ex. C (SSA EM-

17 15016).⁴ The emergency communication emphasized that “[r]egardless of when
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24 ⁴ SSA’s Emergency Message is also available at
<https://secure.ssa.gov/apps10/reference.nsf/links/05052015024754PM>.

1 the change occurred or when SSA first learned of the event, do not create an
2 overpayment on a recipient's SSI record due to recognition of a same-sex
3 marriage." *Id.* This directive, by its terms, expires on October 30, 2015, although
4 the expiration date can be extended or shortened at any time. It also excludes SSI
5 recipients already in overpayment status as of May 6, 2015. *Id.* It does not purport
6 to be a change in policy; it is simply a temporary hold on new collections. The
7 directive does not instruct SSA staff to cease recovery efforts of previously
8 determined overpayments or to refund previously withheld overpayments, nor does
9 it address whether collection of such overpayments would be against equity and
10 good conscience. *Id.*

11 As for the named plaintiffs, after the filing of the Complaint in this action,
12 SSA notified each of them that it was granting them waivers of overpayments,
13 even though SSA collected no further evidence from them and held no further
14 proceedings. Held Decl. at ¶ 12, Ex. F; Richardson-Wright Decl. at ¶ 33, Ex. K.

15 **III. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY**
16 **INJUNCTION**

17 Plaintiffs are entitled to a preliminary injunction to prevent SSA from
18 placing the burden of its continued post-*Windsor* discrimination on the class.
19 Specifically, SSA should be enjoined from withholding funds from Plaintiffs'
24 benefits in an effort to recoup any overpayments caused by SSA's failure to timely

1 recognize Plaintiffs' marriages and should be required to return any such funds
2 already withheld. SSA should also be enjoined from issuing notices of
3 overpayment or taking any other steps to recover such overpayments. Simply put,
4 allowing SSA to further add to Plaintiffs' injury will only exacerbate the already
5 irreparable harm caused by SSA's failure to promptly cease its discrimination
6 following *Windsor*.

7 SSA's recent temporary and partial emergency efforts – apparently spurred
8 by this lawsuit – to avoid some of the widespread and continuing harm from its
9 unlawful discrimination and subsequent collection practices are welcome, but
10 inadequate. Although SSA appears to recognize that its actions have been
11 sufficiently harmful to require emergency action to temporarily halt them, SSA
12 continues to hold the threat of a potential future overpayment notice over the heads
13 of the entire class. But, come October 2015 (or earlier, if SSA chooses to revoke
14 its directive), adjudicators are free to resume collection activities. In the
15 meantime, class members have been thrust even further into a months-long limbo,
16 with no power to prepare to pay if SSA decides to collect or to stop overpayments
17 if they are continuing. Indeed, SSA's emergency action does not halt SSA's
18 discriminatory conduct at all; it only delays the date of reckoning and, if anything,
19 permits the harm and uncertainty to the class to mount. As for unnamed class
24 members who *already* had received notices of overpayments prior to SSA's

1 emergency action, they have received no relief at all.

2 Plaintiffs, by this motion, in effect simply ask that SSA's existing hold
3 extend to *all* class members, even those already in overpayment status and for SSA
4 to be required to maintain its hold during the pendency of this case, rather than for
5 an arbitrary period of a few months. When the traditional factors for issuance of a
6 preliminary injunction are considered here – (1) whether the plaintiff is likely to
7 succeed on the merits; (2) whether the plaintiff is likely to suffer irreparable harm;
8 (3) whether the harm to the plaintiff outweighs the harm to the defendant; and (4)
9 whether an injunction is in the public interest – the factors individually and on
10 balance strongly weigh in favor of a preliminary injunction. *See Alliance for the*
11 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

12 **A. Plaintiffs Are Likely to Succeed on the Merits**

13 1. The Overpayments Were a Consequence of SSA's Continued
14 Unlawful Discrimination after *Windsor*

15 The Supreme Court in *Windsor* has *already* held that treating lawfully
16 married couples, such as Plaintiffs, as single because they are married to a person
17 of the same sex violates the Equal Protection guarantee of the Fifth Amendment.
18 Yet, despite *Windsor*, SSA treated SSI recipients married to persons of the same
19 sex as unmarried for over a year after *Windsor* was decided. Thus, for over a year,
24 SSA failed to recognize Plaintiffs' marriages and knowingly miscalculated their

1 SSI benefits.

2 SSA's continued treatment of Plaintiffs as single following *Windsor* could
3 not be a plainer violation of *Windsor* and the Constitution. The overpayments are
4 a consequence of that violation. Obviously, Plaintiffs would not be facing
5 substantial overpayment liabilities – indeed, the overpayments would not have
6 even occurred – if SSA had only followed *Windsor* and the Constitution. SSA's
7 attempt to end its discrimination by retroactively recognizing marriages and then
8 seeking to collect overpayments does not cure the Constitutional harm: it
9 compounds it.

10 This harm includes not only the stigma recognized by the Supreme Court
11 from SSA's failure to recognize Plaintiffs' marriages during that time, but also the
12 uncertainty the conduct caused, the deprivation of SSI recipients' ability to plan
13 financially for sudden overpayment liabilities, and the additional stigma of now
14 being blamed for an overpayment Plaintiffs did not cause and had no ability to
15 avoid. Moreover, had SSA paid the correct amount in the first place, many would
16 have been eligible for increased amounts of other need-based assistance, such as
17 Supplemental Nutrition Assistance Program (SNAP) benefits (also known as food
18 stamps), home energy assistance, or subsidized housing benefits. For example,
19 Kelley Richardson-Wright and her wife would have received a greater amount of
24 SNAP benefits and probably would have qualified for an increased amount of

1 energy assistance if they had been paid correctly. Richardson-Wright Decl. at
2 ¶ 29. None of these harms are corrected by SSI's belated and retroactive marriage
3 recognition and all are exacerbated by its overpayment collection activities.

4 By contrast, during the months following *Windsor*, SSA, of course,
5 recognized the marriages of couples of different sex and calculated their benefits
6 using their proper marital status. Those couples have not been put at risk of a
7 substantial overpayment liability, and the resultant financial uncertainty, caused by
8 a retroactive change in how SSA recognized their marriages.

9 This disparate treatment based on sexual orientation is subject to, at least,
10 heightened scrutiny. *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471,
11 484 (9th Cir. 2014). Accordingly, SSA's unequal treatment is impermissible
12 unless it serves an important governmental objective and is substantially related to
13 the achievement of that objective. *Latta v. Otter*, 2014 U.S. App. LEXIS 19620, at
14 *60 (9th Cir. Oct. 7, 2014). SSA's "burden of justification" is "demanding" and
15 must be "exceedingly persuasive." *Id.*

16 SSA cannot meet this stringent standard. SSA began processing some Old
17 Age, Survivor, and Disability Insurance ("OASDI") claims for spousal retirement
18 benefits based on marriages between individuals of the same sex in August, 2013,
19 a month and a half after *Windsor*. SSA began processing new SSI applications in
24 January 2014, seven months after *Windsor*. There was no reason to believe that

1 the legal standard for recognizing the marriages of existing SSI recipients could be
2 different from the standard applied to new SSI applicants. SSA also had years to
3 prepare for the possibility of the end of DOMA. Here, all that SSA had to do was
4 recognize the marriages of same-sex couples in the same way as SSA has been
5 recognizing the marriages of different-sex couples for over half a century. There is
6 no “important governmental objective” that could justify SSA’s failure for over a
7 year to correct a Constitutional violation found by the Supreme Court.

8 Indeed, where the government has violated the Equal Protection guarantee
9 of the Constitution, it normally must immediately correct the discrimination and
10 remove all vestiges of it. *E.g., Cooper v. Aaron*, 358 U.S. 1, 7 (1958) (obedience
11 to the Constitution generally required “immediate” desegregation because “delay
12 in any guise in order to deny... constitutional rights [can] not be countenanced”);
13 *cf. Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955) (“The burden rests upon the
14 [government] to establish that [additional] time is necessary in the public interest and
15 is consistent with good faith compliance at the earliest practicable date.”). As the
16 Supreme Court explained in *Green v. County School Board*, 391 U.S. 430, 437-38
17 (1968), when the government has unconstitutionally discriminated, it is “clearly
18 charged with the affirmative duty to take whatever steps might be necessary to
19 convert to a unitary system in which ... discrimination would be eliminated root
24 and branch.” Indeed, “[e]ach instance of a failure ... to fulfill this affirmative duty

1 continues the [Equal Protection] violation.” *Columbus Bd. of Educ. v. Penick*, 443
2 U.S. 449, 459 (1979).

3 SSA’s attempt to recoup overpayments caused by its conduct does not
4 eliminate the discrimination “root and branch,” but extends its tendrils and
5 magnifies its effects. All SSA needed to do here was treat married couples of the
6 same sex the same way SSA was *already* treating other married couples when it
7 came to calculating their SSI benefits and eligibility. SSA’s failure to do so for
8 over a year was wrong, it was unconstitutional, and it was inexcusable.

9 2. SSA’s Recoupment of Overpayments Violates the Social Security Act

10 The Social Security Act requires SSA to refrain from “penalizing” a
11 recipient who has been paid “more ... than the correct amount” where (1) the
12 overpayment was not the fault of the recipient and (2) recoupment would be
13 against equity and good conscience. Specifically, it states that:

14 The Commissioner of Social Security ... *shall* make such provision as
15 the Commissioner finds appropriate in the case of payment of more
16 than the correct amount of benefits with respect to an individual with
17 a view to *avoiding penalizing* such individual or his eligible spouse
18 *who was without fault* in connection with the overpayment, *if*
19 *adjustment or recovery* on account of such overpayment in such case
24

1 *would* defeat the purposes of this subchapter or *be against equity and*
2 *good conscience*.

3 42 U.S.C. § 1383(b)(1)(A) (emphases added). In these circumstances, any attempt
4 by SSA to recoup overpayments caused by SSA's continued post-*Windsor*
5 discrimination necessarily violates this statutory mandate.

6 This is not a case that involves close questions of fault, fairness, and equity,
7 where individualized differences may tilt the balance. These overpayments were
8 the result of an unlawful, discriminatory policy on the part of SSA that Plaintiffs
9 were powerless to affect. The fault here is exclusively SSA's, not Plaintiffs', and
10 the inequity and unfairness of SSA's demand to recoup overpayments caused by
11 its own discriminatory conduct is self-evident.

12 As a group, Plaintiffs are not at fault for SSA's overpayments. The
13 overpayments were the result of SSA's failure to recognize the marriages of same-
14 sex couples as required by *Windsor*. SSA was aware it was calculating Plaintiffs'
15 benefits incorrectly and in violation of the Constitution, and it failed to do anything
16 about it for over a year. "The fault in this case belongs at the agency's doorstep."
17 *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981) (quoting *Rini v. Harris*, 615
18 F.2d 625, 627 (5th Cir. 1980)) (holding that recoupment was improper).

19 Class members are not at fault regardless of whether they knew of SSA's
24 failure to implement *Windsor* and recognize their marriages. Those that did not

1 know were plainly not at fault. *See Quinlivan v. Sullivan*, 916 F.2d 524, 525-26
2 (9th Cir. 1990) (“It is undisputed that Quinlivan was without fault” because “[h]e
3 was unaware of the change in the law.”). If any did know, SSA’s conduct put
4 them in an impossible state of fiscal limbo. There was nothing they could have
5 done to cause SSA to recognize their marriage and calculate their benefits
6 correctly. For example, after *Windsor*, Plaintiff Hugh Held inquired with SSA
7 about the impact of the decision on his benefits, but SSA told him that *Windsor*’s
8 impact was unclear. Held Decl. at ¶ 6. Mr. Held and the other class members
9 were left in the uncertain hands of SSA, unsure when SSA would get around to
10 implementing *Windsor* and whether and how SSA would recalculate their previous
11 payments when it did. *See Lewin*, 654 F.2d at 636 (plaintiff not at fault in part
12 because “the benefit program itself was in a state of flux at [the] time”).

13 Moreover, even overpayments are easily consumed by necessary living
14 expenses. The maximum federal and state SSI monthly benefit in California is
15 \$889.40 for an individual and \$1,496.20 for a married couple if both spouses are
16 SSI eligible. Bychowski Decl., Ex. A (POMS SI 02001.020). This is well below,
17 for example, the approximately \$1,950 per month estimated for basic living
18 expenses for even an unmarried senior citizen in California.⁵ Moreover, given the

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24 ⁵ *See* Bychowski Decl., Ex. D (California Elder Economic Security Index, *available at*
<http://www.insightccd.org/communities/cfess/eesiDetail.html?ref=60>).

1 strict resource limits for SSI eligibility, Plaintiffs did not have the option of setting
2 aside overpayments based on the hypothetical possibility that SSA might someday
3 retroactively recognize their marriages. If Plaintiffs had saved the overpayments,
4 they quickly would have accumulated sufficient resources to become ineligible for
5 SSI or other needs based benefits.

6 Recouping the overpayments is also against equity and good conscience.
7 While SSA guidance improperly limits the meaning of “equity and good
8 conscience” to just three enumerated circumstances, the Ninth Circuit has rejected
9 that constrained view of equity and instead requires SSA to apply a “broad concept
10 of fairness.” *Quinlivan*, 916 F.2d at 527.⁶

11 The unfairness of requiring discriminated-against couples to bear the
12 burden, uncertainty, and consequences of an agency’s discriminatory conduct
13 needs no further elaboration. Fairness and equity demand that the consequences of
14 unlawful discrimination be borne by the perpetrator of discrimination, not its
15 targets. Moreover, SSA’s action placed Plaintiffs in an impossible Catch-22. As
16

17
18 ⁶ Because of *Quinlivan*, SSA revised its definition of “equity and good conscience” to
19 properly apply the statute’s mandate that SSA do equity by its actions—but only for
20 claimants who reside in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana,
21 Nevada, Northern Mariana Islands, Oregon, or Washington. Bychowski Decl., Ex. E
(Acquiescence Ruling 92-5(9)).

1 noted above, due to SSI's resource limits Plaintiffs could not retain the amount of
2 the overpayment even if they could speculatively predict when SSA might finally
3 recognize their marriage for purpose of ongoing benefits or how it would do so.
4 As the Ninth Circuit explained in *Quinlivan*, “[i]t is unfair to have expected
5 [plaintiff] to hold the funds for more than two years ... with eligibility for general
6 assistance dependent on his level of assets.” *Id.* On the other hand, if Plaintiffs
7 continued to use their SSI benefits to pay for their essential needs – just as they
8 had been doing before *Windsor* – they would risk being later hit with an
9 overpayment bill potentially in the thousands of dollars.

10 3. SSA Violated Plaintiffs’ Procedural Due Process Rights

11 A fundamental component of due process is the requirement that the
12 government *at least consider the relevant evidence already in its possession*
13 before seeking to deprive people of their life, liberty, or property. As far back as
14 1937, the Supreme Court held that a government body “must consider the evidence
15 and base its findings and decision upon it.” *Anniston Mfg. Co. v. Davis*, 301 U.S.
16 337, 357 (1937). More recently, the Ninth Circuit held that this requirement is so
17 basic that reviewing courts presume it occurs. *Larita-Martinez v. INS*, 220 F.3d
18 1092, 1095 (9th Cir. 2000) (“[I]t is so expected that a court would review all
19 relevant materials in the record that reviewing courts have presumed it.”)

24 SSA’s recoupment of overpayments is a deprivation of property entitling

1 Plaintiffs to due process of law under the Fifth Amendment. *See Elliott v.*
2 *Weinberger*, 1975 U.S. App. LEXIS 12532, at *32 (9th Cir. Oct. 1, 1975). There
3 can be no doubt SSA ignored the evidence in its possession that these
4 overpayments were SSA's fault, not Plaintiffs', and that recoupment is unfair. The
5 overpayments are the consequence of SSA's delay in implementing *Windsor*, not
6 anything that Plaintiffs have done, as SSA surely knows.

7 Yet, SSA's notices of overpayment have demanded proof that Plaintiffs,
8 such as Kelley Richardson-Wright, explain to SSA why "[i]t wasn't KELLEY S
9 RICHARDSON-WRIGHT's fault that she got too much SSI money." Richardson-
10 Wright Decl., Ex. F at 2. Given the circumstances, that demand is nonsensical,
11 and shows that SSA failed to even consider the relevant facts. Due process
12 required more before SSA launched its attempts to seek recoupment.

13 Indeed, after this action was filed, SSA granted Plaintiffs Hugh Held and
14 Kelley Richardson-Wright waivers without requesting *any* further information
15 from them or conducting *any* further proceedings. The only new information SSA
16 learned about their cases was that these two individuals had filed a class action
17 lawsuit. SSA knew then, and it plainly knows now, that it cannot collect
18 overpayments in these circumstances without violating both the Constitution and
19 the Social Security Act. It should be enjoined from taking actions that would
24 knowingly violate the law.

1 **B. Plaintiffs Will Suffer Irreparable Harm**

2 Because SSA's actions involve "the deprivation of constitutional rights" this
3 "unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d
4 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).
5 SSA's emergency directive, following the institution of this lawsuit, to put on hold
6 any action that would put additional individuals into overpayment status shows
7 that SSA recognizes the serious and irreparable harm its attempts to collect
8 overpayments have and will cause. SSA's action is laudable, but it is still partial
9 and temporary, and does not avoid all irreparable harm. It is expressly only a
10 temporary solution, is entirely voluntary, can be modified or revoked by SSA at
11 any time, gives class members within its scope little to no assurances or ability to
12 plan their finances in the event the hold is lifted, and provides no relief to those
13 already in overpayment status before the directive was put in place.

14 SSA irreparably harmed all class members by failing to recognize their
15 marriages for over a year in violation of the Supreme Court's clear mandate that
16 such conduct was unconstitutional. As the Supreme Court stated in *Windsor*,
17 SSA's unequal treatment "demean[s] those persons who are in a lawful same-sex
18 marriage" and indicates to them that "their marriage is less worthy than the
19 marriages of others." 133 S. Ct. 2675, 2694-96 (2013).

24 Recoupment efforts, indeed even the threat of them, impose a real and

1 irreparable fiscal, physical, and emotional harm on the class. As SSI recipients,
2 class members are the poorest subset of older people and those with disabilities in
3 the country. Yet, individual class members have accrued overpayments in the
4 thousands of dollars while SSA failed for months after *Windsor* to recognize
5 Plaintiffs' marriages, and any recoupment will reduce benefits recipients need for
6 basic living expenses. *See, e.g.*, Richardson-Wright Decl., Ex. E (demanding
7 payment of \$4,129.88); Held Decl., Ex. A (demanding payment of \$6,205). Such
8 sudden multi-thousand-dollar liabilities would cause financial distress in families
9 even of modest means, especially when it is uncertain when the hammer might fall.
10 To Plaintiffs, they are undeniably crippling.

11 For example, for the months of January to March 2015, SSA deducted from
12 Plaintiff Kelley Richardson-Wright's monthly SSI payment in order to recover the
13 overpayment caused by SSA's actions. Richardson-Wright Decl. at ¶¶ 22, 27.
14 This reduction caused Ms. Richardson-Wright to forgo basic necessities and put
15 her at risk of eviction from her home. *Id* at ¶ 22. The stress from the extreme
16 financial strain caused her to be hospitalized. *Id* at ¶ 23. While she was in the
17 hospital, her wife's car was repossessed. *Id* at ¶ 24.

18 While SSA has now ceased its unlawful withholding from Ms. Richardson-
19 Wright and granted both her and Mr. Held a waiver, an injunction is necessary to
24 protect other class members from the same needless suffering. As the Ninth

1 Circuit explained in *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983):

2 [B]ecause the members of plaintiffs' class are largely infirm and
3 disabled, their resources and life spans are by definition extremely
4 limited. Deprivation of benefits pending trial might cause economic
5 hardship, suffering or even death. Retroactive restoration of benefits
6 would be inadequate to remedy these hardships.

7 *see also Leschniok v. Heckler*, 713 F.2d 520, 524 (9th Cir. 1983) ("We fail to
8 comprehend the Secretary's argument that financial compensation at some future
9 date, should the claimants survive and prevail, mitigates the hardship which is
10 visited upon claimants and their families each and every day.").

11 **C. The Harm to Plaintiffs Outweighs the Harm to SSA**

12 In contrast to the serious financial harm, uncertainty, and emotional strain
13 that SSA's actions have already caused and will cause Plaintiffs, the only possible
14 harm to SSA from a preliminary injunction would be the cost of temporarily
15 halting its recoupment efforts for all class members. This purely administrative
16 concern pales in comparison to Plaintiffs' physical and emotional suffering.
17 Indeed, SSA's own failure to promptly implement *Windsor* is itself a tacit
18 admission that SSA did not deem avoidance of overpayments a meaningful
19 priority. SSA's recent emergency action to put new overpayment recoupment
24 actions temporarily on hold also demonstrates that halting those efforts is not only

1 warranted but fiscally and administratively feasible, if not even prudent. As the
2 Ninth Circuit has explained in similar circumstances:

3 [T]he physical and emotional suffering shown by plaintiffs ... is far
4 more compelling than the possibility of some administrative
5 inconvenience or monetary loss to the government.... Faced with
6 such a conflict between financial concerns and preventable human
7 suffering, we have little difficulty concluding that the balance of
8 hardships tips decidedly in plaintiffs' favor.

9 *Lopez*, 713 F.2d at 1437; *see also Beltran v. Meyers*, 677 F.2d 1317, 1322 (9th Cir.
10 1982) (“Balancing the medical or financial hardship to the plaintiffs-appellees
11 against the financial hardship to the state resulting from its inability to recover for
12 medical services should its rules ultimately be held valid, it was not an abuse of
13 discretion for the district judge to find that the balance of hardships tipped sharply
14 in favor of plaintiffs.”).

15 **D. The Public Interest Favors an Injunction**

16 Congress created SSI because it recognized that it is in the public interest to
17 ensure that the aged, blind, and disabled can afford basic necessities. It is also in
18 the public interest to ensure that the government does not unconstitutionally
19 discriminate against its citizens. Thus, public interest is served when those that
24 unlawfully discriminate, not the discriminated-against class, bear the burden,

1 uncertainty, and harm caused by their discrimination. Granting a preliminary
2 injunction in this case will protect and advance these public interests. The Ninth
3 Circuit has already eloquently stated all that needs to be said:

4 Our society as a whole suffers when we neglect the poor, the hungry,
5 the disabled, or when we deprive them of their rights or privileges....

6 It would be tragic, not only from the standpoint of the individuals
7 involved but also from the standpoint of society, were poor, elderly,
8 disabled people to be wrongfully deprived of essential benefits for any
9 period of time.

10 *Lopez*, 713 F.2d at 1437-38; *see also Latta v. Otter*, 771 F.3d 496, 500 (9th Cir.
11 2014) (dissolving stay of order striking down Idaho’s prohibition of marriage by
12 people of the same sex because of the “public’s interest in equality of treatment of
13 persons deprived of important constitutional rights”).

14 **IV. CONCLUSION**

15 For the reasons set forth above, Plaintiffs respectfully request that the Court
16 enter a preliminary injunction (1) enjoining SSA from making any effort to recoup
17 overpayments caused by SSA’s failure to recognize Plaintiffs’ marriages after the
18 *Windsor* decision; and (2) requiring SSA to return any such funds already withheld
19 or otherwise received.

24

1 Dated: June 17, 2015.

2 **HUGH HELD and**
3 **KELLEY RICHARDSON-WRIGHT**

4 By their attorneys,

5 /s/ Stephen T. Bychowski

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