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10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12

13 KRISTIN M. PERRY, SANDRA B. STIER,
 PAUL R. KATAMI, and JEFFREY J.
 14 ZARRILLO,
 Plaintiffs,

Case No.: CV 09 2292 VRW

**ANSWER OF DEFENDANT
 PATRICK O'CONNELL**

15 v.

Date:
 Time:
 Courtroom:
 Judge: Hon. Vaughn R. Walker
 Trial Date:
 Action Filed: May 22, 2009

16 ARNOLD SCHWARZENEGGER, in his
 17 official capacity as Governor of California;
 EDMUND G. BROWN, JR. in his official
 18 capacity as Attorney General of California;
 MARK B. HORTON, in his official capacity
 19 as Director of the California Department of
 Public Health and State Registrar of Vital
 20 Statistics; LINETTE SCOTT, in her official
 21 capacity as Deputy Director of Health
 Information and Strategic Planning for the
 22 California Department of Public Health;
 PATRICK O'CONNELL in his official
 23 capacity as Clerk-Recorder for the County
 of Alameda; and DEAN C. LOGAN, in his
 24 official capacity as Registrar-
 Recorder/County Clerk for the County of
 25 Los Angeles,
 26 Defendants.

1 DEFENDANT PATRICK O'CONNELL in his official capacity as Clerk-Recorder for
2 the County of Alameda ("Defendant"), as and for himself only, answers the Complaint
3 of KRISTIN M. PERRY, SANDRA B. STIER, PAUL R. KATAMI, and JEFFREY J.
4 ZARRILLO ("Plaintiffs") and alleges as follows:

5 1. Answering Paragraph 1 of the Complaint, Defendant admits the
6 allegations contained therein to the extent they reflect the current state of the law.
7 Except as so admitted, Defendant is without knowledge or information sufficient to form
8 a belief as to the truth of the allegations contained in paragraph 1, and on that basis
9 denies each and every remaining allegation contained therein.

10 2. Answering Paragraph 2, Defendant admits that Plaintiffs have asked for
11 the relief as alleged therein. Except as so admitted, Defendant denies each and every
12 allegation contained in paragraph 2.

13 3. Answering Paragraph 3, Defendant admits that Plaintiffs have brought this
14 suit under provisions of the United States Constitution and 42 U.S.C. § 1983. Defendant
15 further admits that subject matter jurisdiction exists for this Court pursuant to 28 U.S.C.
16 § 1331, though Defendant expressly reserves its right to challenge subject matter
17 jurisdiction in the event new information reveals such is warranted. Except as so
18 admitted, Defendant denies each and every allegation contained in paragraph 3.

19 4. Answering Paragraph 4, Defendant admits that venue is proper in this
20 Court pursuant to 28 U.S.C. § 1391(b) because this answering Defendant resides in this
21 District. Except as so admitted, Defendant is without knowledge or information sufficient
22 to form a belief as to the truth of the allegations contained in paragraph 4, and on that
23 basis denies each and every remaining allegation contained therein.

24 5. Answering Paragraph 5, Defendant admits that Plaintiffs have asked for
25 the relief as alleged therein. Except as so admitted, Defendant denies each and every
26 allegation contained in paragraph 5.

1 6. Answering Paragraph 6, Defendant admits that Plaintiffs have asked for
2 the relief as alleged therein. Except as so admitted, Defendant denies each and every
3 allegation contained in paragraph 6.

4 7. Answering Paragraph 7 of the Complaint, Defendant admits that the
5 California Constitution prohibits marriage between two members of the same sex.
6 Defendant admits the allegations contained therein to the extent they reflect the current
7 state of the law. Except as so admitted, Defendant is without knowledge or information
8 sufficient to form a belief as to the truth of the allegations contained in paragraph 7, and
9 on that basis denies each and every remaining allegation contained therein.

10 8. Answering Paragraph 8, Defendant admits that Plaintiffs have asked for
11 the relief as alleged therein. Except as so admitted, Defendant denies each and every
12 allegation contained in paragraph 8. Defendant expressly denies that Plaintiffs are, or
13 would be, entitled to an award of attorneys fees as against this answering Defendant.

14 9. Answering Paragraph 9 of the Complaint, Defendant is without knowledge
15 or information sufficient to form a belief as to the truth of the allegations contained in
16 paragraph 9, and on that basis denies each and every allegation contained therein.

17 10. Answering Paragraph 10 of the Complaint, Defendant is without
18 knowledge or information sufficient to form a belief as to the truth of the allegations
19 contained in paragraph 10, and on that basis denies each and every allegation
20 contained therein.

21 11. Answering Paragraph 11 of the Complaint, Defendant is without
22 knowledge or information sufficient to form a belief as to the truth of the allegations
23 contained in paragraph 11, and on that basis denies each and every allegation
24 contained therein.

25 12. Answering Paragraph 12 of the Complaint, Defendant is without
26 knowledge or information sufficient to form a belief as to the truth of the allegations
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1 contained in paragraph 12, and on that basis denies each and every allegation
2 contained therein.

3 13. Answering Paragraph 13 of the Complaint, Defendant admits the
4 allegations contained therein.

5 14. Answering Paragraph 14 of the Complaint, Defendant admits the
6 allegations contained therein.

7 15. Answering Paragraph 15 of the Complaint, Defendant admits the
8 allegations contained therein.

9 16. Answering Paragraph 16 of the Complaint, Defendant admits the
10 allegations contained therein.

11 17. Answering Paragraph 17, Defendant admits the allegations
12 contained therein.

13 18. Answering Paragraph 18 of the Complaint, Defendant admits that
14 Dean C. Logan is the is the Registrar-recorder/County Clerk for the County of Los
15 Angeles. Insofar as the remaining allegations contained in Paragraph 18 are expressly
16 directed to Defendant Logan, this answering Defendant is without knowledge or
17 information sufficient to form a belief as to the truth of the allegations contained in
18 paragraph, and on that basis denies each and every remaining allegation contained
19 therein.

20 19. Answering Paragraph 19 of the Complaint, Defendant admits that
21 he has a ministerial duty to carry out provisions of the California Constitution, including
22 Prop 8. Except as so admitted, Defendant is without knowledge or information sufficient
23 to form a belief as to the truth of the allegations contained in paragraph 19, and on that
24 basis denies each and every remaining allegation contained therein.

25 20. Answering Paragraph 20 of the Complaint, Defendant admits the
26 allegations contained therein to the extent they reflect the current state of the law.
27 Except as so admitted, Defendant is without knowledge or information sufficient to form

1 a belief as to the truth of the allegations contained in paragraph 20, and on that basis
2 denies each and every remaining allegation contained therein.

3 21. Answering Paragraph 21 of the Complaint, Defendant denies that
4 California Family Code section 300 was enacted in 1977. Defendant alleges that said
5 citation was to California Civil Code section 4100, which was repealed in 1993 and
6 replaced with Family Code section 300. Defendant admits the remaining allegations
7 contained therein to the extent they reflect the current state of the law. Except as so
8 admitted, Defendant is without knowledge or information sufficient to form a belief as to
9 the truth of the allegations contained in paragraph 21, and on that basis denies each
10 and every remaining allegation contained therein.

11 22. Answering Paragraph 22 of the Complaint, Defendant admits the
12 allegations contained therein to the extent they reflect the current state of the law.
13 Except as so admitted, Defendant is without knowledge or information sufficient to form
14 a belief as to the truth of the allegations contained in paragraph 22, and on that basis
15 denies each and every remaining allegation contained therein.

16 23. Answering Paragraph 23 of the Complaint, Defendant admits the
17 allegations contained therein to the extent they reflect the current state of the law.
18 Except as so admitted, Defendant is without knowledge or information sufficient to form
19 a belief as to the truth of the allegations contained in paragraph 23, and on that basis
20 denies each and every remaining allegation contained therein.

21 24. Answering Paragraph 24 of the Complaint, Defendant admits that
22 California voters approved Proposition 22 in the year 2000, which is codified at Cal.
23 Family Code section 308.5. Defendant further admits that the California Supreme Court
24 held in *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 95 P.3d 459
25 (2004) that Cal. Fam. Code sections 300 and 308.5 prohibited officials of the City and
26 County of San Francisco from issuing marriage licenses to same sex couples, but did
27 not make a determination of the constitutionality of those code sections. Except as so

1 admitted, Defendant is without knowledge or information sufficient to form a belief as to
2 the truth of the allegations contained in paragraph 24, and on that basis denies each
3 and every remaining allegation contained therein.

4 25. Answering Paragraph 25 of the Complaint, Defendant admits that
5 proponents of the ban on same-sex marriage submitted petitions with sufficient
6 signatures to place what would become Prop 8 on the November 4, 2008 ballot. Except
7 as so admitted, Defendant is without knowledge or information sufficient to form a belief
8 as to the truth of the allegations contained in paragraph 25, and on that basis denies
9 each and every remaining allegation contained therein.

10 26. Answering Paragraph 26 of the Complaint, Defendant admits the
11 allegations contained therein.

12 27. Answering Paragraph 27 of the Complaint, Defendant admits that
13 the Secretary of State declared that Prop 8 could be placed on the November 4, 2008
14 general election ballot. Defendant further admits that the Secretary of State Voter
15 Information Guide stated that Prop 8 would “[c]hange[] the California Constitution to
16 eliminate the right of same-sex couples to marry in California.” Except as so admitted,
17 Defendant is without knowledge or information sufficient to form a belief as to the truth
18 of the allegations contained in paragraph 27, and on that basis denies each and every
19 remaining allegation contained therein.

20 28. Answering Paragraph 28 of the Complaint, Defendant admits the
21 allegations contained therein.

22 29. Answering Paragraph 29 of the Complaint, Defendant admits the
23 allegations contained therein to the extent they reflect the current state of the law.
24 Except as so admitted, Defendant is without knowledge or information sufficient to form
25 a belief as to the truth of the allegations contained in paragraph 29, and on that basis
26 denies each and every remaining allegation contained therein.

1 30. Answering Paragraph 30 of the Complaint, Defendant admits the
2 allegations contained therein to the extent they reflect the current state of the law.
3 Except as so admitted, Defendant is without knowledge or information sufficient to form
4 a belief as to the truth of the allegations contained in paragraph 30, and on that basis
5 denies each and every remaining allegation contained therein.

6 31. Answering Paragraph 31 of the Complaint, Defendant admits that
7 insofar as Plaintiffs allege that they are in same-sex relationship, the California
8 Constitution prohibits them from entering into marriage in the State of California. Except
9 as so admitted, Defendant is without knowledge or information sufficient to form a belief
10 as to the truth of the allegations contained in paragraph 31, and on that basis denies
11 each and every remaining allegation contained therein.

12 32. Answering Paragraph 32 of the Complaint, Defendant admits that
13 the California Constitution prohibits marriage between two members of the same sex.
14 Defendant is without knowledge or information sufficient to form a belief as to the truth
15 of the remaining allegations contained in paragraph 32, and on that basis denies each
16 and every allegation contained therein.

17 33. Answering Paragraph 33 of the Complaint, Defendant admits that
18 the California Constitution prohibits marriage between two members of the same sex.
19 Defendant is without knowledge or information sufficient to form a belief as to the truth
20 of the remaining allegations contained in paragraph 33, and on that basis denies each
21 and every allegation contained therein.

22 34. Answering Paragraph 34 of the Complaint, Defendant admits that
23 the California Constitution prohibits marriage between two members of the same sex.
24 Except as so admitted, Defendant is without knowledge or information sufficient to form
25 a belief as to the truth of the allegations contained in paragraph 34, and on that basis
26 denies each and every remaining allegation contained therein.

1 35. Answering Paragraph 35 of the Complaint, Defendant admits that
2 the California Constitution prohibits marriage between two members of the same sex.
3 Defendant admits the allegations contained therein to the extent they reflect the current
4 state of the law. Except as so admitted, Defendant is without knowledge or information
5 sufficient to form a belief as to the truth of the allegations contained in paragraph 35,
6 and on that basis denies each and every remaining allegation contained therein.

7 36. Answering Paragraph 36 of the Complaint, Defendant admits that
8 he has a ministerial duty to abide by the provisions of Prop 8, and unless and until it is
9 amended, replaced or declared invalid, Defendant does not have the power to issue
10 marriage licenses to same-sex couples. Except as so admitted, Defendant is without
11 knowledge or information sufficient to form a belief as to the truth of the allegations
12 contained in paragraph 36, and on that basis denies each and every remaining
13 allegation contained therein.

14 **IN ANSWERING TO CLAIM ONE: DUE PROCESS**

15 37. Defendant realleges and reincorporates by reference its responses
16 to paragraphs 1 through 36, *supra*, as though fully set forth herein.

17 38. Answering Paragraph 38 of the Complaint, Defendant alleges that
18 no court has yet made such a determination. Except as so alleged, Defendant is without
19 knowledge or information sufficient to form a belief as to the truth of the allegations
20 contained in paragraph 38, and on that basis denies each and every remaining
21 allegation contained therein.

22 39. Answering Paragraph 39 of the Complaint, Defendant alleges that
23 no court has yet made such a determination. Except as so alleged, Defendant is without
24 knowledge or information sufficient to form a belief as to the truth of the allegations
25 contained in paragraph 39, and on that basis denies each and every remaining
26 allegation contained therein.

IN ANSWERING TO CLAIM TWO: EQUAL PROTECTION

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2 40. Defendant realleges and reincorporates by reference its responses
3 to paragraphs 1 through 39, *supra*, as though fully set forth herein.

4 41. Answering Paragraph 41 of the Complaint, Defendant alleges that
5 no court has yet made such a determination. Except as so alleged, Defendant is without
6 knowledge or information sufficient to form a belief as to the truth of the allegations
7 contained in paragraph 41, and on that basis denies each and every remaining
8 allegation contained therein.

9 42. Answering Paragraph 42 of the Complaint, Defendant admits the
10 allegations contained therein to the extent they reflect the current state of the law.
11 Defendant further alleges that no court has yet made a determination of the
12 constitutionality of the current state of the law. Except as so admitted, Defendant is
13 without knowledge or information sufficient to form a belief as to the truth of the
14 allegations contained in paragraph 42, and on that basis denies each and every
15 remaining allegation contained therein.

16 43. Answering Paragraph 43 of the Complaint, Defendant admits that
17 the effect of Prop 8 was to amend the California Constitution, and Prop 8 prohibits
18 Plaintiffs from marrying anyone of the same sex. Defendant further alleges that no court
19 has yet determined whether the U.S. Constitution invalidates Prop 8. Except as so
20 admitted, Defendant is without knowledge or information sufficient to form a belief as to
21 the truth of the allegations contained in paragraph 43, and on that basis denies each
22 and every remaining allegation contained therein.

23 44. Answering Paragraph 44 of the Complaint, Defendant admits that
24 the effect of Prop 8 is to provide that only a marriage between a man and a woman is
25 valid and recognized in the State of California. Defendant further alleges that no court
26 has yet determined whether the U.S. Constitution invalidates Prop 8. Except as so
27 admitted, Defendant is without knowledge or information sufficient to form a belief as to

1 the truth of the allegations contained in paragraph 44, and on that basis denies each
2 and every remaining allegation contained therein.

3 **IN ANSWERING TO CLAIM THREE: VIOLATION OF 42 U.S.C § 1983**

4 45. Defendant realleges and reincorporates by reference its responses
5 to paragraphs 1 through 44, *supra*, as though fully set forth herein.

6 46. Answering Paragraph 46 of the Complaint, Defendant admits that
7 insofar as Plaintiffs allege that they are in same-sex relationship, the California
8 Constitution prohibits them from entering into marriage in the State of California.
9 Defendant further alleges that no court has yet determined whether the U.S.
10 Constitution invalidates Prop 8. Except as so admitted, Defendant is without knowledge
11 or information sufficient to form a belief as to the truth of the allegations contained in
12 paragraph 46, and on that basis denies each and every remaining allegation contained
13 therein.

14 **IN ANSWERING TO ALLEGATION OF IRREPARABLE INJURY**

15 47. Defendant realleges and reincorporates by reference its responses
16 to paragraphs 1 through 46, *supra*, as though fully set forth herein.

17 48. Answering Paragraph 48 of the Complaint, Defendant alleges that
18 no court has yet determined whether the U.S. Constitution invalidates Prop 8. Except as
19 so alleged, Defendant is without knowledge or information sufficient to form a belief as
20 to the truth of the allegations contained in paragraph 48, and on that basis denies each
21 and every remaining allegation contained therein.

22 49. Answering Paragraph 49 of the Complaint, Defendant admits that a
23 controversy exists in that Defendant is required to perform its ministerial duties under
24 present State law, which includes the mandates of Prop 8, and that Plaintiffs allege they
25 have been harmed as a result. Except as so admitted, Defendant is without knowledge
26 or information sufficient to form a belief as to the truth of the allegations contained in
27

1 paragraph 49, and on that basis denies each and every remaining allegation contained
2 therein.

3 **AFFIRMATIVE DEFENSES**

4 Because the Complaint is couched in conclusionary terms, Defendant cannot
5 fully anticipate all affirmative defenses which may be applicable and, accordingly,
6 Defendant reserves the right to assert any and all such additional affirmative defenses
7 as are applicable in this action without waiver thereof:

8 AS A FIRST AFFIRMATIVE DEFENSE, this answering Defendant states that it
9 has no discretion in the performance of its ministerial duties complained of by Plaintiffs
10 in their Complaint.
11

12 AS A SECOND AFFIRMATIVE DEFENSE, this answering Defendant states that
13 the injuries and damages Plaintiffs complain of, if any, resulted from the acts and/or
14 omissions of others, and without any fault on the part of this answering Defendant.

15 AS A THIRD AFFIRMATIVE DEFENSE, this answering Defendant alleges that
16 all actions taken were undertaken in good faith and with reasonable belief that said
17 actions were valid, necessary and constitutionally proper, thus these Defendants are
18 entitled to qualified immunity.
19

20 AS A FOURTH AFFIRMATIVE DEFENSE, this answering Defendant asserts
21 that to the extent that Plaintiffs may attempt to allege state law claims, these are barred
22 pursuant to California Government Code §§ 911.2, 911.4, 954.4, 946.4, 950.2, and
23 950.6. Said sections are pleaded as though fully set forth herein.

24 AS A FIFTH AFFIRMATIVE DEFENSE, this answering Defendant alleges that
25 Plaintiff's complaint is barred by all applicable statutes of limitation.
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1 AS A SIXTH AFFIRMATIVE DEFENSE, this answering Defendant alleges that
2 any party or individual who was negligent and/or contributed to and/or caused the
3 alleged injuries and damages was not acting as Defendant's agent or agents or within
4 its knowledge or within the course and/or scope of employment with this answering
5 Defendant.

6
7 AS A SEVENTH AFFIRMATIVE DEFENSE, this answering Defendant states
8 that Plaintiffs fail to state a claim upon which relief can be granted as against this
9 Defendant.

10 AS AN EIGHTH AFFIRMATIVE DEFENSE, this answering Defendant alleges
11 that Plaintiff have failed to allege and/or have not stated facts sufficient to show an
12 affirmative link between this answering Defendant and the acts which allegedly violated
13 Plaintiffs' rights.

14
15 AS A NINTH AFFIRMATIVE DEFENSE, this answering Defendant alleges that
16 Defendant's acts were privileged under applicable statutes and case law, including
17 immunity under federal law for official acts because Defendant's conduct does not
18 violate clearly established statutory or constitutional rights of which a reasonable
19 person would have known.

20 AS A TENTH AFFIRMATIVE DEFENSE, this answering Defendant alleges that
21 Plaintiffs' claims are barred by all applicable Government Code immunities including,
22 but not limited to, §§ 815, 815.2, 815.6, 818, 818.2, 818.8, 820, 820.2, 820.4, 820.6,
23 820.8, 821.6 and 822.2. Said sections are pleaded as though set forth fully herein.

24
25 AS AN ELEVENTH AFFIRMATIVE DEFENSE, this answering Defendant states
26 that to the extent that plaintiff's damages, if any, are shown to have been caused by
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1 any other Defendant, as well as because of any non-liability on the part of this
2 answering Defendant, such liability for non-economic damages is several, and not joint,
3 pursuant to Civil Code 1431.2(a). Any recovery of non-economic damages from
4 Defendant must be limited to the actual percentage of fault allocated to Defendants.
5 This defense is interposed only in the alternative and does not admit any of the
6 allegations of the complaint.
7

8 AS A TWELFTH AFFIRMATIVE DEFENSE, this answering Defendant is
9 informed and believes and alleges that Plaintiffs' actions constituted a waiver of any
10 alleged acts or omissions, if any, of this answering Defendant.

11 AS A THIRTEENTH AFFIRMATIVE DEFENSE, this answering Defendant states
12 that to the extent Plaintiffs seek to recover attorneys' fees under 42 U.S.C. § 1988,
13 such should not be assessed against this answering Defendant because of special
14 circumstances mandating Defendant's ministerial duties.
15

16 AS A FOURTEENTH AFFIRMATIVE DEFENSE, this answering Defendant
17 alleges to the extent any person suffered any detriment, such was unavoidable.

18 AS A FIFTEENTH AFFIRMATIVE DEFENSE, this answering Defendant alleges
19 Plaintiffs have failed to join a party or parties necessary for a just resolution of this
20 matter and has further omitted to state any reasons for such failure.

21 AS A SIXTEENTH AFFIRMATIVE DEFENSE, this answering Defendant alleges
22 Plaintiffs are equitably estopped from asserting the claims set forth in the Complaint.
23

24 AS A SEVENTEENTH AFFIRMATIVE DEFENSE, this answering Defendant
25 alleges any acts or omissions of the Defendant were superseded by the act or
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1 omissions of others, including Plaintiff, and/or other named or unnamed entities that
2 were independent, intervening, and the proximate cause of the damages alleged.

3 AS AN EIGHTEENTH AFFIRMATIVE DEFENSE, this answering Defendant
4 states that plaintiff unreasonably delayed in bringing this action against Defendant and
5 that such delay substantially prejudiced this Defendant. Therefore this action is barred
6 by the doctrine of *laches*.

7
8 AS A NINETEENTH AFFIRMATIVE DEFENSE, this answering Defendant states
9 that if Plaintiff sustained the damages alleged in the Complaint, which Defendant
10 denies, Plaintiffs' damages were caused in whole or in part by the conduct of third
11 parties for whom Defendant is not responsible, by forces over which Defendant has no
12 control or through acts or omissions on the part of plaintiff, and therefore, an act or
13 omission on the part of Defendant was not the proximate cause and/or legal cause of
14 the Plaintiffs' alleged damages.

15
16 AS A TWENTIETH AFFIRMATIVE DEFENSE, this answering Defendant alleges
17 that this answering Defendant did not take affirmative acts to deprive Plaintiffs of any
18 right or privilege guaranteed by the constitution or laws of the United States.

19 AS A TWENTY-FIRST AFFIRMATIVE DEFENSE, this answering Defendant
20 alleges Plaintiffs failed to exhaust their administrative and other state remedies.

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1 **WHEREFORE**, Defendant prays for judgment as follows:

- 2 1. That judgment be rendered in favor of Defendant and against Plaintiffs;
3 2. That Plaintiff take nothing by the allegations of their complaint therein;
4 3. That Defendant be awarded its costs of suit incurred herein; and
5 4. For all such other and further relief as this Court deems just and proper.
6

7 DATED: *June 16, 2009*

RICHARD E. WINNIE, County Counsel
in and for the County of Alameda, State
of California

11
12 By: *Claude Kolm*
13 Claude Kolm
14 Deputy County Counsel

15 Attorneys for Defendant
16 Patrick O'Connell, Clerk-Recorder of the
17 County of Alameda
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