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9
10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

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

14 Plaintiffs,

15 v.

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

25 Defendants.

Case No.: 09-CV-2292 VRW

DEFENDANT PATRICK
O'CONNELL'S STATEMENT OF
NON-OPPOSITION TO
PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION

DATE: July 2, 2009

TIME: 10:00 a.m.

Dept.: Courtroom 6, 17th Fl.
Chief Judge Walker

1 DEFENDANT PATRICK O'CONNELL in his official capacity as Clerk-Recorder for the
2 County of Alameda does not oppose Plaintiffs' motion for preliminary injunction.

3 DISCUSSION

4 In connection with their complaint for declaratory, injunctive, and other relief,
5 Plaintiffs have brought a motion for preliminary injunction enjoining defendants from
6 enforcing Article I, § 7.5 of the California Constitution ("Prop 8") to the extent that it limits
7 civil marriage in California to the union of a man and a woman. (Plaintiffs' Motion for
8 Preliminary Injunction "Motion Prelim. Inj" 1:6-9) Plaintiffs name responding Defendant
9 O'Connell in his official capacity as Clerk-Recorder for the County of Alameda, as he
10 denied Plaintiffs Petty and Stier application for a marriage license on the basis that they
11 were a same-sex couple. (Mot. Prelim. Inj. 5:10-15)

12 Defendant O'Connell, as the Clerk-Registrar for the County of Alameda, is
13 responsible for maintaining vital records of marriages, issuing marriage licenses, and
14 performing civil marriage ceremonies. (Plaintiffs' Complaint, 3 ¶17) California Family
15 Code §§ 300 and 308.5, as interpreted by the California Supreme Court, restrict civil
16 marriage to opposite-sex couples. (*In re Marriage Cases* 43 Cal. 4th 757, 183 P.3d 384
17 (2008); *accord*, Plaintiffs' Complaint 2 ¶ 6.)

18 Defendant O'Connell is thus charged with the *ministerial* duty of enforcing the
19 California statute, with no authority to disregard its terms. (*Lockyer v. City and County of*
20 *San Francisco*, 33 Cal.4th 1055, 95 P.3d 459 (2004)) Much like the statutory provisions
21 limiting marriage to a union between a man and a woman, and thus controlling the
22 authority of a clerk and registrar, so too does Prop 8. Defendant O'Connell's duties are
23 characterized as ministerial, rather than discretionary. In other words, he may not
24 issue marriage licenses that do not satisfy the statutory requirements. At present, Prop
25 8, as well as the relevant Family Code sections, preclude issuance of same-sex
26 marriage licenses.

27 This case is now the inverse of *Lockyer*, in which the San Francisco County Clerk
28 was sued by the Attorney General for issuing same-sex marriage licenses. In *Lockyer*,

1 the California Supreme Court was asked to determine “whether a local executive
2 official, charged with the ministerial duty of enforcing a statute, has the authority to
3 disregard the terms of the statute in the absence of a judicial determination that it is
4 unconstitutional, based solely on the official’s opinion that the governing statute is
5 unconstitutional.” (*Id.*, at 463-464) Holding that the City officials had “no authority to
6 refuse to perform their ministerial duty in conformity with the current California marriage
7 statutes on the basis of their view that the statutory limitation of marriage to a couple
8 comprised of a man and a woman is unconstitutional”, the Court invalidated all of the
9 same-sex marriages that had been performed. (*Id.*, at 488, 499)

10 The California Supreme Court’s recent decision in *Strauss v. Horton*, S168047 (Cal.
11 5/26/09) upholding Prop 8 illustrates that its recent enactment does not alter Defendant
12 O’Connell’s ministerial duties. To the extent that Defendant O’Connell may have a
13 separate view as to the constitutionality of the statutory preclusion of issuance of same-
14 sex marriage licenses, he remains without authority to deviate from his ministerial
15 duties. Quite simply, absent a judicial determination that the statutory scheme is
16 unconstitutional, Defendant O’Connell may not issue marriage licenses to same-sex
17 applicants. To do otherwise would subject him to the exact same legal challenges
18 already adjudicated in *Lockyer*.

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CONCLUSION

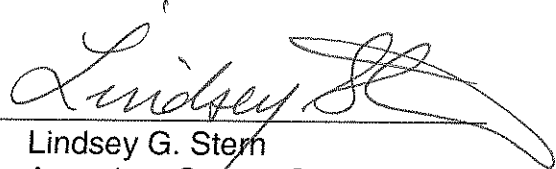
Defendant O'Connell has no authority to make an independent determination of the constitutionality of the Family Code in performing his ministerial duties. In submitting this Non-Opposition, Defendant O'Connell takes no position as to the constitutionality of Prop 8 or the relevant Family Code sections and leaves the determination of the propriety of issuance of the requested preliminary injunction to the Court's discretion.

Respectfully submitted,

DATED: June 11, 2009

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