

SUPREME COURT
FILED

JUN 10 2009

Frederick K. Ohirich Clerk

Case No. S168078

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Petitioners,

vs.

MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al.,

Respondents,

DENNIS HOLLINGSWORTH, et al.

Interveners.

PETITION FOR REHEARING

DENNIS J. HERRERA, State Bar #139669
City Attorney
THERESE M. STEWART, State Bar #1134930
DANNY CHOU, State Bar #180240
KATHLEEN S. MORRIS, State Bar #196672
SHERRI SOKELAND KAISER, State Bar #197986
VINCE CHHABRIA, State Bar #208757
ERIN BERNSTEIN, State Bar #231539
TARA M. STEELEY, State Bar #231775
MOLLIE LEE, State Bar #251404
Deputy City Attorneys
City Hall, Room 234
One Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682
Telephone: (415) 554-4708
Facsimile: (415) 554-4699

Attorneys for Plaintiff/Respondent
CITY AND COUNTY OF SAN FRANCISCO

Case No. S168078

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Petitioners,

vs.

MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al.,

Respondents,

DENNIS HOLLINGSWORTH, et al.

Intervenors.

PETITION FOR REHEARING

DENNIS J. HERRERA, State Bar #139669
City Attorney
THERESE M. STEWART, State Bar #104930
DANNY CHOU, State Bar #180240
KATHLEEN S. MORRIS, State Bar #196672
SHERRI SOKELAND KAISER, State Bar #197986
VINCE CHHABRIA, State Bar #208557
ERIN BERNSTEIN, State Bar #231539
TARA M. STEELEY, State Bar #231775
MOLLIE LEE, State Bar #251404
Deputy City Attorneys
City Hall, Room 234
One Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682
Telephone: (415) 554-4708
Facsimile: (415) 554-4699

Attorneys for Plaintiff/Respondent
CITY AND COUNTY OF SAN FRANCISCO

Pursuant to Rules 8.536, 8.532(c), and 8.264(c) of the California Rules of Court, Petitioner City and County of San Francisco (City) joins the Petition for Rehearing filed by the National Center for Lesbian Rights, et al. (NCLR Reh. Petition), and respectfully requests that this Court rehear and/or modify its opinion in *Strauss v. Horton* (May 26, 2009, S168047, S168066, S168078), __ Cal. 4th __ .¹

The Court's majority opinion states that in *Mulkey v. Reitman* (1966) 64 Cal.2d 529, aff'd. *sub nom. Reitman v. Mulkey* (1967) 387 U.S. 369, "the challengers [did not] *even argue* that the measure at issue should be characterized as a constitutional revision rather than as a constitutional amendment[, which] affords a realistic indication of the weakness and unprecedented nature of petitioners' present claim." (*Strauss v. Horton* (May 26, 2009, S168047, S168066, S168078) slip opn., at p. 96.) The City respectfully requests that this Court rehear and/or modify its opinion to delete this sentence, as it is somewhat inaccurate and appears to conflict with prior precedent of the Court.

The Court's opinion states, or at least implies, that no party challenging Proposition 14, the initiative challenged in *Mulkey v. Reitman*, argued that the initiative was an impermissible revision to the California Constitution. But in *Hill v. Miller* (S7657), one of several companion cases challenging Proposition 14 that were apparently consolidated before this Court (see NCLR Reh. Petition, Request for Judicial Notice), parties challenging Proposition 14 (1964) did argue that the initiative was an

¹ The decision in this case was filed on May 26, 2009. Thus, this request for rehearing and/or modification is timely because it is being submitted on or before June 10, 2009. (Cal. Rules of Court, Rule 8.536(b), Rule 8.268(b)(1).)

impermissible revision. (See NCLR Reh. Petition, Request for Judicial Notice, Exh. A, at pp. 66-76.) The Respondent in that case, Crawford Miller, responded to that argument in his first brief to this Court (see NCLR Reh. Petition, Request for Judicial Notice, Exh. B, at p. 11), and Hill again argued that the measure was a revision in his reply brief (see NCLR Reh. Petition, Request for Judicial Notice, Exh. C, at p. 2).

This Court, having held in *Mulkey* that Proposition 14 violated the Equal Protection Clause of the federal Constitution, declined "to discuss claims of the unconstitutionality of [Proposition 14] based on California constitutional provisions and law." (*Mulkey v. Reitman, supra*, 64 Cal.2d at p. 533.) These claims presumably included the claim made in *Hill* that the initiative was an impermissible revision. The City therefore respectfully requests that the Court rehear and/or modify its opinion to reflect that parties challenging Proposition 14 had raised the revision/amendment issue.

The City further respectfully requests that the Court reconsider or modify its assertion that a court may infer from a party's decision not to raise a particular legal argument that such argument is either "weak" or "unprecedented." The reasons for parties to make decisions as to what arguments to make or emphasize in briefing an issue are individualized and often involve matters of strategy that have little to do with the strength or weakness of an argument. Further, it is often difficult for courts to determine what arguments attorneys did or did not raise in historical cases, as is demonstrated in the instant matter. Most importantly, the Court's pronouncement that arguments not raised by counsel in prior cases implies that those arguments are weak is difficult to reconcile with the court's longstanding jurisprudence that cases are not authority for matters not addressed or decided in them. (See *e.g., Kinsman v. Unocal Corp.* (2005)

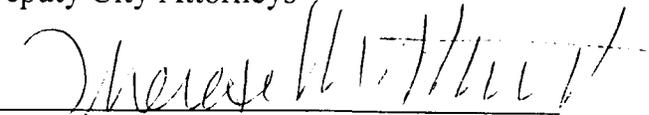
37 Cal.4th 659, 680; *Chevron USA, Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195 ["An opinion is not authority for propositions not considered."]; *People v. Banks* (1993) 6 Cal.4th 926, 945.)

For the above reasons, the City respectfully requests that the Court modify its opinion to delete the statement that in *Mulkey*, "the challengers [did not] *even argue* that the measure at issue should be characterized as a constitutional revision rather than as a constitutional amendment[, which] affords a realistic indication of the weakness and unprecedented nature of petitioners' present claim."

Dated: June 9, 2009

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
DANNY CHOU
Chief of Complex and Special Litigation
KATHLEEN S. MORRIS
SHERRI SOKELAND KAISER
VINCE CHHABRIA
ERIN BERNSTEIN
TARA M. STEELEY
MOLLIE LEE
Deputy City Attorneys

By: _____


THERESE M. STEWART

Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this petition contains 740 words up to and including the signature lines that follow the petition's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on June 9, 2009.

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
DANNY CHOU
Chief of Complex and Special Litigation
KATHLEEN S. MORRIS
SHERRI SOKELAND KAISER
VINCE CHHABRIA
ERIN BERNSTEIN
TARA M. STEELEY
MOLLIE LEE
Deputy City Attorneys

By: 
ERIN BERNSTEIN

Attorneys for Petitioners

PROOF OF SERVICE

I, MARTINA HASSETT, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Seventh Floor, San Francisco, CA 94102.

On June 10, 2009, I served the following document(s):

PETITION FOR REHEARING

on the following persons at the locations specified:

See Attached Service List

in the manner indicated below:

- BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.
- BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service. **A declaration from the messenger who made the delivery** **is attached** or **will be filed separately with the court.**
- BY OVERNIGHT DELIVERY:** I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the same day.
- BY FACSIMILE:** Based on a written agreement of the parties to accept service by fax, I transmitted true and correct copies of the above document(s) via a facsimile machine at telephone number Fax #' to the persons and the fax numbers listed above. The fax transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine, and **a copy of the transmission report** **is attached** or **will be filed separately with the court.**

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed June 10, 2009, at San Francisco, California.



MARTINA HASSETT

SERVICE LIST
 CALIFORNIA SUPREME COURT CASES S168047, S168066 and
 S168078

<p>Shannon P. Minter Christopher F. Stoll Melanie Rowen Catherine Sakimura Ilona M. Turner Shin-Ming Wong NATIONAL CENTER FOR LESBIAN RIGHTS 870 Market Street, Suite 370 San Francisco, CA 94102</p> <p>Gregory D. Phillips, Esq. Jay M. Fujitani, Esq. David C. Dinielli, Esq. Michelle Friedland, Esq. Lika C. Miyake, Esq. Mark R. Conrad, Esq. Munger, Tolles & Olson, LLP 355 S. Grand Avenue, 35th Floor Los Angeles, CA 90071-1560 Telephone: 213 693-9100 Facsimile: 213 687-3702</p>	<p>Attorneys for Petitioners Karen L. Strauss, Ruth Borenstein, Brad Jacklin, Dustin Hergert, Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter, Desmond Wu, James Tolen and Equality California</p>
<p>Andrew P. Pugno Law Offices of Andrew P. Pugno 101 Parkshore Drive, Suite 100 Folsom, CA 95630-4726 Telephone: 916 608-3065 Facsimile: 916 608-3066</p> <p>Kenneth W. Starr 24569 Via De Casa Malibu, CA 90265-3205</p>	<p>Attorneys for Interveners Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak- Shing William Tam, Mark A. Jansson, and Protectmarriage.com</p>
<p>Gloria Allred Michael Maroko John Steven West Allred, Maroko & Goldberg 6300 Wilshire Blvd., Suite 1500 Los Angeles, CA 90048-5217 Telephone: 323 653-6530 Facsimile: 323 653-1660</p> <p>CCSF PETITION FOR REHEARING</p>	<p>Attorneys for Petitioners Robin Tyler and Diane Olson et al. (S168066)</p> <p style="text-align: right;">n:\govli\li2008\090456\00561121.doc</p>

SERVICE LIST
CALIFORNIA SUPREME COURT CASES S168047, S168066 and
S168078

<p>Jerome B. Falk, Jr. Steven L. Mayer Amy E. Margolin Amy L. Bomse Adam Polakoff Howard Rice Nemerovski Canady Falk & Rabkin Three Embarcadero Center, 7th Floor San Francisco, CA 94111-4024 Telephone: 415 434-1600 Facsimile: 415 217-5910</p>	<p>Attorneys for Petitioners City and County of San Francisco, Helen Zia, Lia Shigemura, Edward Swanson, Paul Herman, Zoe Dunning, Pam Grey, Marian Martino, Joanna Cusenza, Bradley Akin, Paul Hill, Emily Griffen, Sage Andersen, Suwanna Kerdkaew and Tina M. Yun (S168078)</p>
<p>Ann Miller Ravel, County Counsel Tamara Lange Juniper Lesnik Office of the County Counsel 70 West Hedding Street East Wing, 9th Floor San Jose, CA 95110-1770 Telephone: 408 299-5900 Facsimile: 408 292-7240</p>	<p>Attorneys for Petitioner County of Santa Clara (S168078)</p>
<p>John G. Barisone Santa Cruz City Attorney Atchison, Barisone, Condotti & Kovacevich 333 Church Street Santa Cruz, CA 95060 Telephone: 831 423-8383 Facsimile: 831 423-9401</p>	<p>Attorneys for Petitioner City of Santa Cruz (S168068)</p>
<p>Rockard J. Delgadillo City Attorney Richard H. Llewellyn, Jr. David J. Michaelson Office of the Los Angeles City Attorney 200 N. Main Street City Hall East, Room 800 Los Angeles, CA 90112 Telephone: 213 978-8100 Facsimile: 213 978-8312</p>	<p>Attorneys for Petitioner City of Los Angeles</p>

SERVICE LIST
CALIFORNIA SUPREME COURT CASES S168047, S168066 and
S168078

<p>Raymond G. Fortner, Jr., County Counsel Leela A. Kapur Elizabeth M. Cortez Judy W. Whitehurst Office of Los Angeles, County Counsel 648 Kenneth Hahn Hall of Administration 500 West Temple Street Los Angeles, CA 90012-2713 Telephone: 213 974-1845 Facsimile: 213 617-7182</p>	<p>Attorneys for Petitioner County of Los Angeles (S168078)</p>
<p>Richard E. Winnie, County Counsel Brian E. Washington Claude Kolm Office of County Counsel County of Alameda 1221 Oak Street, Suite 450 Oakland, CA 94612 Telephone: 510 272-6700 Facsimile: 510 272-5020</p>	<p>Attorneys for Petitioner County of Alameda (S168078)</p>
<p>Patrick K. Faulkner, County Counsel Sheila Shah Lichtblau 3501 Civic Center Drive, Room 275 San Rafael, CA 94903 Telephone: 415 499-6117 Facsimile: 415 499-3796</p>	<p>Attorneys for Petitioner County of Alameda (S168078)</p>
<p>Michael P. Murphy, County Counsel Brenda B. Carlson Glenn M. Levy Hall of Justice & Records 400 County Center, 6th Floor Redwood City, CA 94063 Telephone: 650 363-1965 Facsimile: 650 363-4034</p>	<p>Attorneys for Petitioner County of San Mateo (S168078)</p>

SERVICE LIST
 CALIFORNIA SUPREME COURT CASES S168047, S 168066 and
 S168078

<p>Dana McRae County Counsel County of Santa Cruz 701 Ocean Street, Room 505 Santa Cruz, CA 95060 Telephone: 831 454-2040 Facsimile: 831 454-2115</p>	<p>Attorneys for Petitioner County of Santa Cruz (S168078)</p>
<p>Harvey E. Levine, City Attorney Nellie R. Ancel 3300 Capitol Avenue Fremont, CA 94538 Telephone: 510 284-4030 Facsimile: 510 284-4031</p>	<p>Attorneys for Petitioner City of Fremont (S168078)</p>
<p>Rutan & Tucker, LLP Philip D. Kohn City Attorney, City of Laguna Beach 611 Anton Blvd., 14th Floor Costa Mesa, CA 92626-1931 Telephone: 714 641-5100 Facsimile: 714 546-9035</p>	<p>Attorneys for Petitioner City of Laguna Beach (S168078)</p>
<p>John Russo, City Attorney Barbara Parker Oakland City Attorney City Hall, 6th Floor 1 Frank Ogawa Plaza Oakland, CA 94612 Telephone: 510 238-3601 Facsimile: 510 238-6500</p>	<p>Attorneys for Petitioner City of Oakland (S168078)</p>
<p>Jan I. Goldsmith, City Attorney George F. Shaefer, Deputy City Attorney Office of City Attorney 1200 Third Avenue, Suite 1100 San Diego, CA 92101-4106 Telephone: 619 533-5861 Facsimile: 619 533-5856</p>	<p>Attorneys for Petitioner City of San Diego (S168078)</p>

SERVICE LIST
CALIFORNIA SUPREME COURT CASES S168047, S168066 and
S168078

<p>Marsha Jones Moutrie, City Attorney Joseph Lawrence Santa Monica City Attorney's Office City Hall 1685 Main Street, 3rd Floor Santa Monica, CA 90401 Telephone: 310 458-8336 Facsimile: 310 395-6727</p>	<p>Attorneys for Petitioner City of Santa Monica (S168078)</p>
<p>Lawrence W. McLaughlin, City Attorney City of Sebastopol 7120 Bodega Avenue Sebastopol, CA 95472 Telephone: 707 579-4523 Facsimile: 707 577-0169</p>	<p>Attorneys for Petitioner City of Sebastopol (S168078)</p>
<p>Edmund G. Brown, Jr., Attorney General of the State of California James M. Humes Manuel M. Mederios David S. Chaney Christopher E. Krueger Mark R. Beckington Kimberly J. Graham Office of the Attorney General 1300 I Street, Suite 125 Sacramento, CA 95814-2951 Telephone: 916 322-6114 Facsimile: 916 324-8835</p> <p>Edmund G. Brown, Jr. Office of the Attorney General 1515 Clay Street, Room 206 Oakland, CA 94612 Telephone: 510 622-2100</p>	<p>Attorneys of Respondent State of California; Edmund G. Brown, Jr.</p>

SERVICE LIST
CALIFORNIA SUPREME COURT CASES S168047, S168066 and
S168078

<p>Kenneth C. Mennemeier Andrew W. Stroud Kelcie M. Gosling Mennemeier, Glassman & Stroud LLP 980 9th Street, Suite 1700 Sacramento, CA 95814-2736 Telephone: 916 553-4000 Facsimile: 916 553-4011</p>	<p>Attorneys for Respondents Mark B. Horton, State Registrar of Vital Statistics of the State of California, and Linette Scott, Deputy Directory of Health Information and Strategic Planning for CDPH</p>
<p>Raymond C. Marshall Bingham McCutchen LLP Three Embarcadero Center San Francisco, CA 94111-4067 Telephone: 415 393-2000 Facsimile: 415 393-2286</p>	<p>Attorneys for Amici Asian Pacific Legal Center et al.</p>