

re: December 1990
election

1 IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
2 FIRST APPELLATE DISTRICT, DIVISION ONE
3
4

5 EVELYN GIARDINA and FRED WEEKES,)
6 Petitioners and Appellants,) No. A052096
7 v.) Alameda County
8 MARIE MCKECHNIE, City Clerk of) Superior Court
9 the City of Berkeley,) No. 673368-7
10 Respondent) Honorable Howard L.
11 LONI HANCOCK, Mayor of the City) Schwartz, Presiding
12 of Berkeley,)
13 Real Party in Interest)
14 and Respondent.)
15

16 AMICUS CURIAE BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO
17 IN SUPPORT OF RESPONDENT MARIE MCKECHNIE
18

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20
21 LOUISE H. RENNE
22 City Attorney
23 BURK E. DELVENTHAL
24 G. SCOTT EMBLIDGE
25 Deputy City Attorneys
26 206 City Hall
San Francisco, CA 94102-4682
(415) 554-4264
Attorneys for Amicus Curiae
City and County of San Francisco

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INTRODUCTION

Perhaps no single enterprise administered by a municipal government is so fraught with the potential for error as an election. From the registering of voters and assigning of precincts, to the printing of ballots, to the ballots' distribution, marking and counting, tens of thousands of opportunities for mistakes arise, even in an election held in a small community. To ensure that California elections are carried out in as fair, consistent and impartial a manner as possible, California's Elections Code imposes a myriad of duties on those charged with administering elections. Nonetheless, it is simply inconceivable that this process could be error free.

In December 1990, the City of Berkeley held a runoff election. Berkeley's City Clerk, Marie McKechnie, oversaw the administration of the election. Appellants Evelyn Giardina and Fred Weekes (hereinafter collectively referred to as "Giardina") can point to no statutory duty McKechnie failed to fulfill. They only point to a few ways in which the election could have been more perfectly administered.

On this showing, Giardina asked the trial court to order McKechnie to perform an act specifically forbidden by California law. California's Elections Code codifies a fundamental principle of democratic elections law by forbidding the counting of ballots received after the close of the polls. But that is exactly what Giardina asked the court below to order McKechnie to do. The Superior Court correctly declined Giardina's invitation.

1 At most, the facts of this case demonstrate a possible need
2 for further clarity and fine tuning from the legislature
3 regarding election procedures. But it is the legislature, not
4 the judiciary, that has the institutional competence to evaluate
5 the need for clarity and to provide it if necessary.

6 This Court's role is limited to examining the record and
7 determining whether there is any substantial evidence to support
8 the Superior Court's conclusion that Berkeley's runoff election
9 was conducted in accordance with the Elections Code's
10 requirements. Because substantial evidence shows that those
11 requirements were met, the trial court was correct in denying the
12 extraordinary remedy Giardina requested.

13
14 ARGUMENT

15 I. THE TRIAL COURT PROPERLY DENIED RELIEF BECAUSE
16 APPELLANTS SOUGHT AN ORDER COMPELLING THE
PERFORMANCE OF AN ACT THE LEGISLATURE HAS
SPECIFICALLY FORBIDDEN.

17 In her 48-page brief, Giardina scrupulously avoids
18 reminding this Court of the relief she sought. The reason is
19 simple. The relief--an order requiring McKechnie to count late
20 ballots--is specifically forbidden by the Elections Code.
21 Section 1013 states that absentee ballots received after the
22 close of the polls on election day "cannot be counted." This law
23 upholds the integrity of the elections process by providing a
24 firm, absolute and objective time limit on voting. The Superior
25 Court properly refrained from ordering McKechnie to violate the
26 legislature's mandate.

1 The outcome of this case is of great importance to the
2 amici because Giardina would have this Court fashion an exception
3 to §1013's mandatory language. The exception would strike at the
4 heart of the legislature's intent in drafting and amending
5 §1013. Also, the exception would strip §1013 of its valuable
6 message that candidates and voters can count on elections being
7 over when the polls close. Finally, the exception would deprive
8 election officials and courts of the bright line afforded by
9 §1013's deadline.

10
11 A. Section 1013 Forbids The Remedy Giardina
 Requests That This Court Order.

12 The legislature could not have been more clear in mandating
13 that absentee ballots not be counted if received after the close
14 of the polls on election day. Before 1986, §1013 provided, in
15 relevant part, as follows:

16 After marking the ballot, the absent voter may
17 return it to the official from whom it came by
18 mail or in person, or may return it to any member
19 of a precinct board at any polling place within
 the jurisdiction. The ballot must, however, be
 received by either the official or precinct board
 before the close of the polls on election day.

20 Thus, §1013 stated that all absentee ballots must "be
21 received . . . before the close of the polls on election day."
22 If that were not clear enough, in 1986 the legislature amended
23 the first sentence of §1013, changing the word "may" to "shall,"
24 and then, in 1987, added the following sentence to the end of the
25 statute: "The provisions of this section are mandatory, not
26 / / /

1 directory, and no ballot shall be counted if it not delivered in
2 compliance with this section."^{1/}

3 The legislature's 1987 amendment of §1013 was meant to
4 "clarify the potential ambiguity contained in" the Supreme
5 Court's decision in Wilks v. Mouton (1986) 42 Cal.3d 400.
6 (Stats.1987, c. 22; see West's Ann.Cal.Elec.Code (1991 Cumulative
7 Pocket Part), §1013, "Historical and Statutory Notes".) The
8 legislature reaffirmed that its intent "is and always has been
9 that the provisions of Section 1013 are mandatory and not
10 directory in effect," and cited Fair v. Hernandez (1982) 138
11 Cal.App.3d 578, as a correct statement of the legislature's
12 intent. (Id.) Finally, the legislature stated that its intent
13 "is and always has been that any ballot cast in violation of
14 Section 1013 cannot be counted, particularly when such a ballot
15 would affect the result of the election." (Id.; see Escalante v.
16 City of Hermosa Beach (1987) 195 Cal.App.3d 1009, 1019-20.)

17 There is no room for disagreement on this point.^{2/} The
18 legislature has directed that any ballot received after the polls
19 close "cannot be counted."

21 ^{1/} Remarkably, Giardina fails to mention this important
22 language in §1013 when she quotes what she describes as the
"pertinent" passages of §1013. (Appellants' Brief at 7, n. 5.)

23 ^{2/} Giardina devoted a section of her brief to an argument
24 entitled "The Statutes Creating the Deadline in Question Did Not
25 Preclude the Remedy Sought by Petitioners." However, she failed
26 to mention in her discussion that the legislature amended §1013
four years ago to compel the opposite conclusion. Giardina also
fails to cite Wilks or the 1982 Fair decision.

1 B. Strict Compliance With §1013's Deadline Is
2 Necessary To Preserve The Integrity Of The
3 Elections Process.

4 In the case the legislature cited with approval, Fair v.
5 Hernandez, supra, the court addressed the question of whether 11
6 absentee ballots delivered to the city clerk by a candidate's
7 campaign worker violated §1013 and therefore could not be
8 counted. The court held that §1013 mandated that the votes not
9 be counted because the absentee ballots were delivered by someone
10 other than the voter.

11 The Fair court recognized that "[P]reservation of the
12 integrity of the election process is far more important in the
13 long run than the resolution of any one particular election."
14 (138 Cal.App.3d 578, quoting its earlier opinion, Fair v.
15 Hernandez (1981) 116 Cal.App.3d 868, 881.) The same principle
16 applies here. Even if the record supported a finding that a
17 failure to count the contested absentee ballots would cause some
18 unfairness to some potential voters, that unfairness is greatly
19 outweighed by the necessity to preserve the integrity of the
20 election process and count only those ballots received by the
21 statutory deadline.

22 Firm and consistent application of the law is perhaps
23 nowhere as important as in the area of election law. Unless all
24 candidates and voters are treated the same, a perception of
25 manipulation of the democratic process is inevitable. Voters
26 will lose confidence in the electoral process if a court or an
election official excuses one candidate or one group of voters

1 from compliance with a well established deadline or other
2 requirement. It is certain that if McKechnie had taken it upon
3 herself to count the late ballots in this case, the supporters of
4 whichever candidate came up short would have cried "foul!"

5 In addition to ensuring evenhanded treatment, a firm
6 election deadline enables citizens to know with certainty an
7 election's outcome shortly after the election. Only a "no
8 exceptions" deadline, as mandated by §1013, can accomplish this
9 purpose. For example, in this case if McKechnie were ordered to
10 count all ballots postmarked by election day, when would the
11 results be final? How long should McKechnie assume it takes for
12 "properly postmarked" ballots to arrive? Should McKechnie wait
13 one day, three days, one week or two weeks from the election to
14 announce the results? As the Superior Court stated below:

15 Sections 1013 and 1016, regarding receipt of
16 the absentee ballot by the close of the polls,
17 indicate a clear legislative intent to conclude
18 and determine elections in a timely manner and
19 avoid prolonging the determination of the results
due to the uncertainty of mail delivery. It most
likely was also its intention to limit legal
challenges to elections. . . .

20 Giardina claims that the late voters were "disenfranchised"
21 by McKechnie's decision to honor §1013's deadline. But voters
22 are presumed to know statutory deadlines. (Veteran's Finance
23 Committee of 1943 v. Betts (1961) 55 Cal.2d 397, 402.) A voter
24 who fails to vote before the time state law sets for the last
25 ballot to be cast may have caused himself or herself to be
26 / / /

1 "disenfranchised," but that voter was not "disenfranchised" by
2 the person who enforced the law's deadline.^{3/}

3 Individuals who fail to deliver their ballots before the
4 close of the polls are no more disenfranchised than individuals
5 who are not permitted to vote because they did not comply with
6 other procedures required of all voters, for example, (1) failing
7 to register no later than "28 days immediately preceding an
8 election" (§305), or (2) failing to include on an affidavit of
9 registration "all the facts required to be stated" (§§500 and
10 503; see Escalante v. City of Hermosa Beach (1987) 195 Cal.App.3d
11 1009, 1023.)

12 In short, in faithfully executing the election laws, an
13 elections officer is obligated to enforce the rules evenhandedly
14 on all who fail to satisfy the procedural steps necessary to vote
15 in our democratic system. The assertion that those failing to
16 follow mandated voting procedures have been "disenfranchised"
17 ignores the fact that the franchise is extended only to those who
18 opt to vote at the times and in the manner specified by law.

19 The "disenfranchised" voters in this case did not comply
20 with the voting deadline the legislature has mandated. Their
21 votes therefore should not--the legislature has said "cannot"--be

22

23 ^{3/} In fact, if the late ballots in this case were
24 counted, that decision would arguably "disenfranchise"
25 individuals who did not vote because they knew they would be
26 unable to reach the polls on time on election day and because
they knew that the law provided that their absentee ballots would
not be counted if simply mailed on election day.

1 counted. Counting late ballots would not only conflict with
2 state law; it would undermine the fairness and impartiality of
3 the elections system.

4 II. EVEN IF THE LAW DID NOT PROHIBIT THE REMEDY
5 GIARDINA REQUESTS IT IS IMPOSSIBLE TO FASHION
6 SUCH A REMEDY IN THIS CASE.

7 Even if §1013 did not specifically forbid the counting of
8 late ballots, the remedy Giardina requests is impossible to
9 provide. As discussed in more detail below, Giardina claims that
10 McKechnie violated her alleged duty promptly to mail absentee
11 ballots to applicants. Giardina argues that this conduct
12 "disenfranchised" certain potential voters, and she wants their
13 franchise returned by counting ballots postmarked by election day.

14 However, the order Giardina desires would not accomplish
15 her stated purpose. On the record below, there was simply no way
16 for the trial court to find which of the ballots postmarked, but
17 not received, on election day came from individuals who received
18 their absentee ballots so close to election day that they did not
19 have a reasonable amount of time to exercise their right to
20 vote. Many of the contested ballots may have come from people
21 who applied for and received their ballots weeks before the
22 election, but procrastinated in depositing their completed
23 ballots in the mail. In addition, counting the contested ballots
24 would not return the franchise to all the individuals who
25 received their absentee ballots "late," because some did not
26 receive the ballots until after election day, and others

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