
IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

GERTRUDE WILKS, L.A. BRECKENRIDGE,
ARN CENEDELLA, EULESLEY REECE,
EDWARD JOHNSON, LEON ABERNATHY,
JOE SANDERS, ROY LEE ASHFORD,
MARY L. OWENS WHITE and GRANT WHITE,

Petitioners,

vs.

BARBARA A. MOUTON, RUBEN ABRICA,
FRANK OMOWALE SATTERWHITE,
JAMES A. BLAKEY, JR., CITY OF EAST
PALO ALTO and COUNTY OF SAN MATEO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

To the Honorable, the Chief Justice and
Associate Justices of the Supreme Court of the
United States

Petitioners Gertrude Wilks, et al. respectfully pray
that a Writ of Certiorari issue to review the judgment and
opinion of the California Supreme Court entered in the above-
entitled proceeding on August 21, 1986.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

GERTRUDE WILKS, ET AL., PETITIONERS,

vs.

BARBARA A. MOUTON, ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

PAUL N. McCLOSKEY, JR.
BROBECK, PHLEGER & HARRISON
TWO EMBARCADERO PLACE
2200 GENG ROAD
PALO ALTO CALIFORNIA 94303
TELEPHONE: (415) 424-0160
COUNSEL OF RECORD AND FOR
PETITIONERS

November 18, 1986

QUESTIONS PRESENTED

1. In a local election decided by 15 votes, were voters' constitutional protections against dilution and debasement of their votes violated by State approval of a procedure allowing opposing campaign workers, including a candidate, to obtain absentee ballots for elderly, physically-disabled and illiterate voters in a predominantly-minority, low income area and then go unsolicited to their homes, including a federally-assisted home for the elderly, and there make out the absentee ballots of 17 voters and "assist" 28 others to make out their ballots?

2. Does such procedure involve an unconstitutional invasion of a voter's right to vote his or her ballot in secrecy?

LIST OF PARTIES

In addition to the parties hereto as listed in the caption, the following have made appearances as amicus curiae:

Mexican American Legal Defense and Educational Fund.

By:

John E. Huerta
Mexican American Legal Defense and
Educational Fund
634 South Spring Street, Suite 1100
Los Angeles, CA 90014
(213) 629-2512

Lani Soules

By:

Sidney M. Walinsky, Esq.
Robert L. Gnaizda, Esq.
Anita P. Arriola, Esq.
Public Advocates, Inc.
1535 Mission Street
San Francisco, CA 94103
(415) 431-7430

Stanford Mid-Peninsula Urban Coalition

By:

James Ware, Esq.
Blase, Valentine & Klein
A Professional Corporation
1717 Embarcadero Road
P.O. Box 51050
Palo Alto, CA 94303
(415) 857-1717

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	i
OPINIONS BELOW.....	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED.....	2
STATEMENT OF CASE.....	2
REASONS FOR GRANTING THE WRIT.....	7
CONCLUSION	10
 Appendix:	
	<u>Tab</u>
SUPREME COURT DECISION.....	1
COURT OF APPEALS DECISION.....	2
ORDER MODIFYING OPINION AND DENYING REHEARING.....	3
TRAIL COURTS JUDGMENTS; FINDINGS OF FACT AND CONCLUSIONS OF LAW.....	4
CONTESTANTS PRELIMINARY PRE-TRIAL MEMORANDUM.....	5
APPELLANTS' REPLY BRIEF AND BRIEF IN RESPONSE TO CROSS-APPEAL.....	6
ANSWER TO PETITION FOR HEARING BY RESPONDENTS AND APPELLANTS GERTRUDE WILKS, ET AL.....	7

TABLE OF AUTHORITIES

	<u>Pages</u>
<u>Cases:</u>	
<u>Anderson v. United States,</u> 417 U.S. 211 (1974).....	8
<u>Carrington v. Rash,</u> 380 U.S. 89 (1985).....	4
<u>Duncan v. Poythress,</u> 657 F.2d 691 (5th Cir. 1981).....	9
<u>Dunn v. Blumstein,</u> 405 U.S. 330 (1972).....	4
<u>Fair v. Hernandez,</u> 116 Cal.App.3d 868 (1981).....	6
<u>Fair v. Hernandez</u> 138 Cal.App.3d 578 (1982).....	6
<u>Hadley v. Junior College Dist.,</u> 397 U.S. 50 (1970).....	7,8, 9,10
<u>Harman v. Forssenius,</u> 380 U.S. 528 (1965).....	4
<u>Peterson v. City of San Diego,</u> 34 Cal.3d 225.....	4
<u>Reynolds v. Sims,</u> 377 U.S. 533 (1964).....	4,8
<u>Schneider v. State of New Jersey,</u> 308 U.S. 147 (1939).....	4
<u>United States v. Morado,</u> 454 F.2d 167 (5th Cir. 1972).....	9,10
<u>Yick Wo v. Hopkins,</u> 118 U.S. 356 (1886).....	4
<u>Constitutional Provisions:</u>	
U.S. CONST. amend XIV, §1.....	2

Federal Statutes:

28 U.S.C. §1257(3).....	2
18 U.S.C. §241.....	9

California Statute

Elections Code §26945.....	6
----------------------------	---

OPINIONS BELOW

The opinion of the Supreme Court of California is reported at 42 Cal.3d 400, and is reprinted in the appendix hereto, tab 1, infra.

The opinion and modification thereof of the Court of Appeal filed August 29, 1984, was not reported, but copies thereof are reprinted in the appendix hereto, as tabs 2 and 3, infra.

The Judgment, Findings of Fact and Conclusions of Law of the trial court were not reported, but copies thereof are reprinted in the appendix hereto, tab 4, infra.

JURISDICTION

The judgment and opinion of the Supreme Court of California, California's highest court, was entered on August 21, 1986. No rehearing was sought.

Jurisdiction is believed conferred by 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the 14th Amendment to the Constitution of the United States provides: "nor shall any State deprive any person of life, liberty or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On June 7, 1983, an election was held in the

unincorporated community of East Palo Alto to determine whether it should become a city.

Approximately 18,000 people resided in this low-income, predominantly-minority community; many voters were elderly, physically-disabled and/or illiterate.

Petitioners Gertrude Wilks et al. opposed incorporation; a citizens group, "East Palo Alto Citizens Committee for Incorporation" (EPACCI) worked actively for incorporation.

The ballots cast in precinct polling places on election day opposed incorporation by a 79 vote margin, 1,678 opposed and 1,599 in favor. Of the 272 absentee ballots, however, 183 were cast for incorporation and only 89 against, the 2-to-1, 94 vote difference turning defeat into victory for the EPACCI forces by a 15 vote margin.

Thus, on June 14, 1983, the County of San Mateo certified the incorporation measure as having been passed 1,782 to 1,767, a margin of 15 votes.

Petitioners duly filed an election contest under California law, challenging primarily some 94 absentee ballots garnered by EPACCI workers in the weeks preceding the election.

The trial court upheld the election against petitioners' contest, but the California Court of Appeals reversed, on U.S. and California constitutional grounds, remanding the case to the trial court for determination as to how 94 absentee ballots had been cast.

The grounds for petitioners' protest and for the Court of Appeals ruling is perhaps best described in the words of the Court of Appeal itself:

unincorporated community of East Palo Alto to determine whether it should become a city.

Approximately 18,000 people resided in this low-income, predominantly-minority community; many voters were elderly, physically-disabled and/or illiterate.

Petitioners Gertrude Wilks et al. opposed incorporation; a citizens group, "East Palo Alto Citizens Committee for Incorporation" (EPACCI) worked actively for incorporation.

The ballots cast in precinct polling places on election day opposed incorporation by a 79 vote margin, 1,678 opposed and 1,599 in favor. Of the 272 absentee ballots, however, 183 were cast for incorporation and only 89 against, the 2-to-1, 94 vote difference turning defeat into victory for the EPACCI forces by a 15 vote margin.

Thus, on June 14, 1983, the County of San Mateo certified the incorporation measure as having been passed 1,782 to 1,767, a margin of 15 votes.

Petitioners duly filed an election contest under California law, challenging primarily some 94 absentee ballots garnered by EPACCI workers in the weeks preceding the election.

The trial court upheld the election against petitioners' contest, but the California Court of Appeals reversed, on U.S. and California constitutional grounds, remanding the case to the trial court for determination as to how 94 absentee ballots had been cast.

The grounds for petitioners' protest and for the Court of Appeals ruling is perhaps best described in the words of the Court of Appeal itself:

". . . the undisputed evidence reveals that an aggressive campaign was waged by EPACCI in support of the incorporation measure."

"EPACCI leaders not only provided voters with absentee ballot application forms, but also actively assisted many voters--some of whom were admittedly elderly, physically disabled, illiterate or unfamiliar with ballot forms and accompanying instructions--during the actual voting process."

"In light of the serious challenge to a cherished interest in our national political heritage, we must carefully scrutinize the claimed improprieties, as our high court recently noted in Peterson v. City of San Diego, supra, 34 Cal.3d 225, 229-230: (citing, inter alia, six U.S. Supreme Court decisions, Dunn v. Blumstein, 405 U.S. 330, Reynolds v. Sims, 377 U.S. 533, Yick Wo v. Hopkins, 118 U.S. 356, Harman v. Forssenius, 380 U.S. 528, Carrington v. Rash, 385 U.S. 89, and Schneider v. State of New Jersey, 308 U.S. 147)." (See Appendix, tab 2, pages 14 and 18.)

"Having these precepts in mind, we are unable to escape the conclusion that, on the facts of the present record, indisputably the secrecy of some ballots was compromised. Thus, campaign workers systematically visited the residences of voters, often after having supplied them with absentee ballots, and either personally instructed the voter in the use of the computer ballot during the voting process or actually punched the ballot card for the voter. Seventeen ballots were punched by campaign workers for EPACCI rather than the voter; indeed some of these voters never actually perused or even received their ballot cards, although they did sign a ballot envelope for an EPACCI representative. Twenty-eight ballots were cast with the assistance of and in the presence of EPACCI representatives."

"Unlike the trial court, we can find no justification in the fact that some of such voters may have requested the assistance of campaign workers: many others did not, but were nevertheless in effect forced to a decision under intimidating circumstances, in the presence of campaign officials."

"In the case at bench, however, while it appears that some 'assisted' voters were disabled, many others were not, but nevertheless received heavy-handed and we think improperly-suggested if not outrightly coercive assistance, all in derogation of constitutional guarantees of secrecy and privacy in voting."

"Since we have concluded that the 'assistance' provided by EPACCI campaign workers, which in some cases virtually--and in rarer instances actually--resulted in voting by proxy, in its totality constituted a serious breach of the constitutional right to secrecy of voting, we reluctantly decide that all ballots in which EPACCI campaign workers participated in the voting process either by actually punching the ballot form or, in the voter's presence, assisting a voter in doing so, must be voided."

The California Court of Appeal also voided, on California statutory grounds, 15 absentee ballots mailed to the address of EPACCI workers, and 46 other absentee ballots hand-carried by EPACCI workers to the County Clerk, thus essentially upholding petitioners' challenge to almost the exact number of absentee ballots (94) which had changed the defeat of the incorporation measure into a victory.

The Court of Appeals' decision not only relied on the six U.S. Supreme Court cases cited above, but also relied on California statutory provisions against mail delivery of absentee ballots to other than the voter and hand delivery of completed ballots by 3rd parties, provisions which the Court found to be intended to protect the secrecy of the ballot and integrity of the voting process. The Court further relied on a series of prior California decisions, particularly citing an appellate decision on which the U.S. Supreme Court had denied certiorari

where a concurring justice had said:

". . . Preservation of the integrity of the election process is far more important in the long run than the resolution of any one particular election."

Fair v. Hernandez, 116 Cal.App.3d 868 (1981) cert. den. 454 U.S. 941.

A second Fair v. Hernandez, 138 Cal.App.3d 578 (1982) had invalidated eleven critical absentee ballots on the basis that the statute's purpose in prohibiting 3rd party delivery of absentee ballots was to preserve "the secrecy, uniformity and integrity of the voting process," Fair, supra, page 582.

The Court of Appeals also cited another provision in California's statutory scheme for protecting the secrecy of the ballot, Elections Code §26945, making it a felony to interfere with the secrecy of voting. (See Appendix, tab 2, page 10.)

All of these authorities, both state and federal, were deemed inapplicable by the California Supreme Court which relied instead on the trial court's findings that no fraud had occurred in the absentee voting process and that the voters involved had consented to the conceded intrusion on the secrecy of their votes.

In short, the California Supreme Court validated the same procedure which the Court of Appeals had found to violate both U.S. Constitutional protections and state law; in so doing the Court made no reference whatsoever to the federal constitutional issues involved.

The federal constitutional issue had been presented at each stage of proceedings at trial and on appeal.

Petitioner's initial Preliminary Pretrial Memorandum to the trial court, reprinted in the appendix at tab 5, infra, stated (at page 2):

"The issue is one of a voter's constitutional right to vote in elections without having his vote wrongfully denied, debased or diluted, Hadley v. Junior College Dist., 397 U.S. 50, 52 (1970)."

The trial court's Findings and Conclusions, reprinted in the appendix at tab 4, infra, ruled specifically against petitioners on the constitutional equal protection, due process, secret ballot and privacy issues. (See page 20, tab 4.)

Petitioners' Reply Brief in the Court of Appeals, reprinted in the appendix, tab 6, infra twice cited Hadley. (Appendix, tab 6, pages 14 and 18.)

In petitioners' brief to the California Supreme Court, reprinted in the appendix at tab 7, infra, the final conclusion again cites Hadley:

"In making their arguments, Petitioners devote a great deal of their arguments to the point that it is in the best interests of the people of East Palo Alto that the incorporation vote be upheld; they likewise totally ignore the constitutional right of dissenting voters, likewise upheld by the U.S. Supreme Court, not to have their votes wrongfully denied, debased or polluted by the illegally-cast vote of another. Hadley v. Junior College Dist., 397 U.S. 50 (1970)." (See pages 32 and 33, tab 7.)

REASONS FOR GRANTING THE WRIT

The California Supreme Court's decision squarely challenges the principle of the cases culminating in Hadley et al. v. Junior College District of Metropolitan Kansas City, 397 U.S. 50, 25 L.Ed.2d 45, 90 S.Ct. 791 (1969).

"This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that the right to vote is protected by the United States Constitution against dilution or debasement." [Hadley, supra, at page 54].

The Court concluded:

"We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election." [Hadley, supra, at page 56].

Any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Reynolds v. Sims, 377 U.S. at 555-562.

The foregoing fundamental principle justifies insertion after the words "to vote" the words "in secret."

If false ballots diluting the influence and value of honest ballots are voidable (see Anderson v. United States, 417 U.S. 211, 216), ballots where the secrecy and privacy of the voter is infringed are equally pernicious.

The procedures followed in East Palo Alto, given the stamp of approval of the California Supreme Court, represent an open invitation for future invasions of privacy and the secrecy of the voting process, not to mention its integrity.

As stated in the concurring opinion of Justice Grodin:

"It is inevitable that political and special interest groups will be tempted to 'assist' voters in casting their ballots, perhaps at

organizational parties at which the marking and mailing of ballots constitutes a group activity." (See Appendix, tab 1, Concurring Opinion of Grodin, J.)

Lower courts have extended the Hadley principle to protection of voters against unfairness in state election procedures.

In Duncan v. Poythress, 657 F.2d 691, (5th Cir. 1981) the court said:

"Although we recently decided that the fourteenth amendment provides no guarantee against innocent irregularities in the 'administration of state elections', . . . the guidance offered by cases such as Griffen and Briscoe, point the way to our holding today that the due process clause of the fourteenth amendment prohibits action by state officials which seriously undermine the fundamental fairness of the election process." [Duncan, supra, at pages 699-700.]

In United States v. Morado, 454 F.2d 167 (5th Cir. 1972), eight individuals were convicted under the federal conspiracy statute, 18 U.S.C. 241, for "joining together for the purpose of causing a number of improperly delivered, improperly returned, and improperly marked absentee ballots, and applications therefor, to be processed in that election." (Morado, supra, p. 169)

In Morado, campaign partisans undertook much the same activity as did the pro-incorporation partisans in East Palo Alto, improperly playing upon the elderly, illiterate and infirm through a process of improper delivery and improper return of ballots and ballot application materials involving acquisition of the ballots during unsolicited visits by the partisans, often "during which a reluctant voter would be influenced to sign an

application for absentee ballot, and be told how to mark his ballot, or would have his ballot marked for him." [Morado, supra, at p. 171).

CONCLUSION

The procedures in East Palo Alto which the California Supreme Court has validated seriously undermine the fairness of the election process and violate the due process and equal protection clauses of the 14th Amendment.

The Hadley rule should be broadened to specifically protect voters from the dilution and debasement of their votes by any coercive intrusion on the privacy and secrecy of their fellow voters. Every voter should be free from having to deal with an eager campaign worker or candidate on his or her doorstep, anxious to "assist" with the casting of the voter's absentee ballot.

Dated: November 18, 1986

Respectfully submitted,



PAUL N. MCCLOSKEY, JR.
BROBECK, PHLEGER & HARRISON
TWO EMBARCADERO PLACE
2200 GENG ROAD
PALO ALTO, CALIFORNIA 94303
TELEPHONE; (415) 424-0160
COUNSEL OF RECORD AND FOR
PETITIONERS

APPENDIX

	<u>Tab</u>
SUPREME COURT DECISION	1
COURT OF APPEALS DECISION.	2
ORDER MODIFYING OPINION AND DENYING REHEARING	3
TRIAL COURTS JUDGMENT; FINDINGS OF FACT AND CONCLUSIONS OF LAW	4
CONTESTANTS PRELIMINARY PRE-TRIAL MEMORANDUM	5
APPELLANTS' REPLY BRIEF AND BRIEF IN RESPONSE TO CROSS-APPEAL	6
ANSWER TO PETITION FOR HEARING BY RESPONDENTS AND APPELLANTS GERTRUDE WILKS, ET AL.	7