

## Excluding an Office from Absentee Ballots

*Price v. Albany County Board of Elections*  
(Gary L. Sharpe, N.D.N.Y. 1:06-cv-1083)

The complaint alleged that New York's excluding county party-committee positions from absentee ballots in a primary election, to be held in four days, violated the First Amendment. The judge issued as limited a temporary restraining order as possible: he ordered absentee ballots prepared for the party positions, but he ordered them segregated so that a determination of whether to count them could be made after the election. The court of appeals ruled that excluding county-committee positions from absentee ballots was unconstitutional.

*Subject:* Absentee and early voting. *Topics:* Absentee ballots; party procedures; ballot segregation; primary election; attorney fees.

Four days before New York's September 12, 2006, primary election, the Albany County Republican Committee, a committee candidate, and two voters filed a federal complaint in the Northern District of New York's Albany courthouse alleging that New York's excluding county party-committee positions from absentee ballots violated the First Amendment.<sup>1</sup> With their complaint, the plaintiffs filed a motion for a temporary restraining order.<sup>2</sup>

In New York, each political party had a county committee in each county.<sup>3</sup> An important committee function was the selection of party nominees when vacancies arose between early July and early November in an election year for that office.<sup>4</sup> Committee members were elected at the time of primaries in even years, the years of election for federal and state offices, rather than odd years, the years of election for local offices.<sup>5</sup> Terms expired immediately upon the holding of elections for committee positions; candidates usually run unopposed.<sup>6</sup> New York argued that allowing absentee votes for committee positions could result in a prolonged vacancy if the absentee votes decided an election.<sup>7</sup>

The lead plaintiff was one of three candidates for two positions in an election with approximately twenty-seven eligible voters.<sup>8</sup>

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1. Complaint, *Price v. Albany Cty. Bd. of Elections*, No. 1:06-cv-1083 (N.D.N.Y. Sept. 8, 2006), D.E. 1; *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 104–05 (2d Cir. 2008); see Amended Complaint, *Price*, No. 1:06-cv-1083 (N.D.N.Y. Sept. 28, 2006), D.E. 9.

2. Temporary-Restraining-Order Motion, *Price*, No. 1:06-cv-1083 (N.D.N.Y. Sept. 8, 2006), D.E. 3; *Price*, 540 F.3d at 105.

3. *Price*, 540 F.3d at 104.

4. *Id.* at 104.

5. *Id.* at 104, 111.

6. *Id.* at 105 & n.2, 111.

7. *Id.* at 110.

8. Opinion, *Price v. Albany Cty. Bd. of Elections*, No. 1:06-cv-1083 (N.D.N.Y. Oct. 22, 2007), D.E. 32 [hereinafter Oct. 22, 2007, Opinion], 2007 WL 3104327.

On September 11, Judge Gary L. Sharpe held a hearing and decided to “grant a temporary restraining order as limited as is possible.”<sup>9</sup> He ordered absentee ballots prepared for Albany County party committees, but ordered that the ballots be segregated so that it could be determined after the election whether they would be counted.<sup>10</sup>

Not counting the votes of the two plaintiffs who voted absentee, the lead plaintiff received ten votes and each of the other two candidates received seven votes.<sup>11</sup>

On October 22, 2007, after full briefing and argument, Judge Sharpe determined that exclusion of county-committee positions from absentee ballots passed constitutional muster.<sup>12</sup> The parties and the judge agreed that the two absentee votes would not be counted and the committee-position election would remain uncertified.<sup>13</sup>

On August 22, 2008, the court of appeals determined that excluding county-committee positions from absentee ballots did not pass constitutional muster.<sup>14</sup> The appellate court found justifications for excluding the offices contrived and unpersuasive.<sup>15</sup> On December 4, 2009, Judge Sharpe awarded the plaintiffs \$105,695.74 in attorney fees and costs.<sup>16</sup>

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9. Transcript at 41, *id.* (Sept. 11, 2006, filed Jan. 24, 2007), D.E. 19; *see Minutes, id.* (Sept. 11, 2006), D.E. 4.

10. Order, *id.* (Sept. 11, 2006), D.E. 6.

11. Oct. 22, 2007, Opinion, *supra* note 8, at 9; *see* Brian Nearing, *Legal Threat Called Tool for Ending County GOP Dispute*, Albany Times Union, Sept. 19, 2006, at B7 (reporting that the lead plaintiff won a seat on the committee).

12. Oct. 22, 2007, Opinion, *supra* note 8.

13. Order, *Price*, No. 1:06-cv-1083 (N.D.N.Y. Nov. 21, 2007), D.E. 36.

14. *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101 (2d Cir. 2008).

15. *Id.* at 110–12.

16. Order, *Price*, No. 1:06-cv-1083 (N.D.N.Y. Dec. 4, 2009), D.E. 63, 2009 WL 4730698.