

IN THE
Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, et al.,

Petitioners

v.

MARGARITA LÓPEZ TORRES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**REPLY BRIEF FOR RESPONDENT
MARGARITA LÓPEZ TORRES**

Counsel of Record

Date: September 27, 2007

Questions Presented

1. Was the convention system used by New York State to nominate Supreme Court justices, in fact, unconstitutional?
2. Did the Second U.S. District Court of Appeals overstep its bounds in mandating primary elections for state Supreme Court justices?
3. Should the Supreme Court hear and revalidate this case?

Table of Authorities

Bullen, George. "New York State Board of Elections v. Lopez Torres et al., Petition for Writ of Certiorari." 25 September 2007.

Nguyen, Giang. "New York Board of Elections, et al. v. Torres, Margarita, et al." On The Docket. Medill Journalism, Northwestern University. 21 February 2007. Accessed 26 September 2007.
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Office of the Attorney General. "White Opinion No. MW-181." State of Texas. 23 May 1980. Accessed 26 September 2007.
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1. Constitutionality of the Convention System

The case of New York State Board of Elections v. Margarita Lopez Torres was brought to the attention of the U.S. Court of Appeals, Second Circuit because the respondent was unfairly and unjustly denied a position on the New York State Supreme Court. The method of choosing justices in New York State was a convention system within political parties. Delegates in the ruling party chose potential candidates and placed them on the court. Candidates with a strong party backing had a solid advantage over any candidate not so fortunate.

This method of choosing justices is, first and foremost, undemocratic. Petitioner argues the opposite, claiming that elected officials will reinforce the will of the people, and that this faith in elected officials is inherent in democracy (Petition for Writ of Certiorari, p.4). By removing the rank-and-file voters from the process, the voice of the people is effectively detached from said appointments. Such removal does not necessarily construe the popular opinion in said matter in a representative democracy.

Also, such reliance on party nominations introduces a dependence of the state judicial branch on the political bodies in the legislature and the executive. As was argued by Alexander Hamilton in Federalist #78 (p.3), it is crucial to democracy that the judiciary remain independent from the representative bodies. This *includes* political parties. Reliance on party nominations and appointments make the justices no more than elected party officials themselves. It is imperative that non-party affiliated candidates are able to make their voices heard in order to fill state Supreme Court positions.

In relation to the First Amendment, the right to assemble and align with any candidate they choose is, as the petitioner points out, a universal right to all citizens. Petitioner

suggests that, in removing the option for conventions, limits are put on that right for political parties (Petition for Writ of Certiorari, p.4). This is not the case. Parties may still organize and support candidates they find qualified. By requiring primaries that liberty is not compromised. It is only that independent citizens have this right strengthened to the point that they may challenge the parties. There is nothing unconstitutional in challenging the power of political parties.

Petitioner argues that a previous ruling in the case “American Party of Texas v. White” legally condones conventions to resolve intra-party competition, and that this ruling unjustly overturns that case’s decision (p.5). This cannot be held true if the convention system is, in fact, unconstitutional. American Party of Texas v. White clearly allows two options for the choosing of state justices: convention or primary. Examine the fact that party conventions dismiss eligible and qualified candidates from the running without any chance for success. Examine the fact that party conventions force the judiciary branch under the will of the representative bodies. Also consider that conventions limit the rights of non-party affiliated citizens to organize and select their justices. Primaries, on the other hand, strengthen that right without taking away the right of political parties to do the same. The convention system, in limiting the chances of non-party aligned candidates to succeed, in limiting the powers of the court, and denying independent citizens First Amendment rights, is unconstitutional. Under American Party of Texas v. White, if party conventions are against the law, primaries are the only legal method remaining of choosing judicial candidates. Therefore, it should now be *mandatory* in New York State for Supreme Court justices to be chosen through primary.

2. The Rights of the Court of Appeals

As argued above, the use of political conventions to choose judicial candidates is expressly unconstitutional. Because this is the case, the Court of Appeals is completely justified in banning the use of this practice to select Supreme Court justices. The court did not attempt to create legislation or enact law. Rather it altered precedent in the previous case of *American Party of Texas v. White*. The use of political conventions was archaic at best, and no longer prominent in any state save New York. In order to adapt to the modern political climate, it was imperative that New York State ban this dated practice and adopt a method that is more commonly accepted in the U.S. legal system today.

Petitioner accuses the Court of Appeals of exercising “judicial activism” in the decision on this case (Petition for Writ of Certiorari, p.5). Though this term is impressive and controversial, as far as counsel is aware such behavior in a court is not expressly illegal. As already argued, no legislation or executive action is required by the court’s decision. Only an alteration of precedent was required. No policy was enacted, as said precedent allowed for the use of primaries already, and the decision only deemed the unconstitutionality of a practice in use at the state level. The Court of Appeals is fully justified in determining the constitutionality of practices at the state level.

3. Need for This Case to Go to the U.S. Supreme Court

There is no need for the U.S. Supreme Court to hear this case, for several reasons. Firstly, the use of party conventions to nominate state justices is undemocratic and unconstitutional. They limit citizens' voting rights, judicial independence and First Amendment rights. The Court of Appeals ruled this case correctly and there is no need for it to be heard again. Ruling was made based on precedent and only altered said precedent when it was found to be unconstitutional.

Secondly, the Court of Appeals did not overstep its bounds. It was perfectly justified both in deeming the unconstitutionality of party conventions as well as banning them from use in New York. Alteration of precedent is a right the court reserves under the power of judicial review, established in *Marbury v. Madison*. Nothing done by the Court of Appeals can be considered to be outside this power of judicial review, nor are any claims of judicial activism grounds for further appeal. This ruling is well within judicial jurisdiction.

Thirdly, even if an argument may be made for the use of political conventions to nominate justices, this is a *state* issue. As no other state in the union uses this practice, this situation is unique to New York. Therefore, power to determine the constitutionality of said practice should be left at the state level. To bring this to the nation's attention on a federal level is overkill and is unnecessary.

Conclusion

1. Is the political convention system unconstitutional?

Yes, it is. It limits non-party affiliated citizens' rights, judicial independence and First Amendment rights. It should no longer be allowed to be practiced in the state of New York.

2. Did the Court of Appeals overstep its bounds?

No, it did not. Under judicial review, the Court of Appeals is allowed to determine flaws in political policy and adjust these flaws. By altering precedent in the case of American Party of Texas v. White, the court did just that, while upholding the constitutionality of the primary system of election.

3. Should the Supreme Court hear and revalidate this case?

No, it should not. This case was decided correctly at the state level, was decided fairly by a capable circuit court, and applies to a situation at the state level. Movement of this case to the federal level is not practical or necessary.