

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 04-023

Constitutionality of notice requirement for write-in candidates

QUESTION

Whether subsection (i) of Tenn. Code Ann. § 2-7-133, which requires a person attempting to be elected by write-in ballots to complete a notice requesting such person's ballots be counted in each county of the district no later than twenty days before the general election, is constitutional?

OPINION

It is the opinion of this Office that Tenn. Code Ann. § 2-7-133(i) is constitutionally defensible.

ANALYSIS

In 2003, the Legislature amended Tenn. Code Ann. § 2-7-133 to add subsection (i), which provides as follows:

Any person attempting to be elected by write-in ballots shall complete a notice requesting such person's ballots be counted in each county of the district no later than twenty (20) days before the general election. Such person shall only have votes counted in counties where such notice was completed and timely filed. The notice shall be on a form prescribed by the coordinator of elections and shall not require signatures of any person other than the write-in candidate requesting ballots be counted. The coordinator of elections shall distribute such form to the county election commission.

You have asked whether this provision is constitutional, particularly in light of the fact that voters who write in the name of a candidate will not have their votes counted unless that individual has complied with the requirements of this provision.

In 2002, this Office opined that similar legislation requiring any person trying to receive a party nomination by write-in ballots to complete a notice requesting such person's ballots be counted in each county of the district no later than thirty days before a primary election was constitutionally

defensible. Op. Tenn. Atty. Gen. 02-076 (June 27, 2002).¹ In that opinion, we noted that the United States Supreme Court has held that a state may constitutionally ban write-in voting provided that its electoral scheme provides sufficient ballot access. See *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). In *Burdick*, the Supreme Court established a balancing test for determining whether a state election law passes constitutional muster under the First and Fourteenth Amendments:

[u]nder this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” But when a state election law provision imposes only “reasonable nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restrictions.

Id. at 434, 112 S.Ct. at 2059 (citations omitted). The Supreme Court then found that Hawaii’s overall general election ballot access scheme provided for easy access to the ballot, even though to obtain a position on the general election ballot, a candidate was required to participate in Hawaii’s open primary through one of three different mechanisms. *Id.* at 435-436, 112 S.Ct. at 2064-65.

Thus, under this standard set forth in *Burdick*, courts will first review a state’s overall ballot access scheme to see if it passes constitutional muster. Courts then look to whether the resulting presumption that the ballot access restriction is valid should be overcome. We think that a court applying this test to the notice requirements of Tenn. Code Ann. § 2-7-133(i) will find such provision to be constitutionally valid. Tennessee’s ballot access laws provide three alternatives for a person to gain access to a general election ballot: as the certified nominee of a recognized political party (Tenn. Code Ann. §§ 2-8-115 and 2-5-101); as an independent candidate (Tenn. Code Ann. § 2-5-101(a)); and, as a write-in candidate (Tenn. Code Ann. §§ 2-5-207(d)(1), 2-5-209(d) and 2-7-117). In order to qualify as an independent candidate in a general election, all that is required is the filing of a nominating petition signed by the candidate and twenty-five or more registered voters who are eligible to vote by the appropriate qualifying deadline. See Tenn. Code Ann. § 2-5-101(a) and (b).

Tennessee’s overall ballot access scheme actually provides greater access to a general election ballot than the scheme upheld by the Supreme Court in *Burdick*. Furthermore, there are a

¹ The Legislature subsequently amended Tenn. Code Ann. § 2-8-113 in 2003 to add such a requirement with respect to write-in candidates, except that it shortened the time period for filing from thirty (30) days before the election to twenty (20) days before the election, making it virtually identical to the requirements of Tenn. Code Ann. § 2-7-113(i). See Tenn. Code Ann. § 2-8-113(c).

number of state interests that would be furthered by the notice filing requirement in both Tenn. Code Ann. §§ 2-7-133 and 2-8-113 with respect to write-in candidates. Those interests include limiting the general election to recognized parties and to those parties and candidates that are well supported as evidenced by their ability to meet the signature requirements, focusing the voters on major issues and candidates, and conserving state resources by reducing the risk that resources will be used to count votes for fictitious candidates or those unwilling or unqualified to serve in public office. The State's interest in voter education would also be served by encouraging candidates and parties to publicize their candidacies early enough to allow for extended public debate. These interests have been recognized by the Supreme Court and other federal courts as legitimate state interests that outweigh the limited burden an outright ban on write-in voting places upon voters. *See Burdick*, 504 U.S. at 439-440, 112 S.Ct. at 2066-67, and *Coalition for Free and Open Elections Prohibition Party v. McElderry*, 48 F.3d 493, 499 (10th Cir. 1995).

Thus, under the standards set forth in *Burdick*, we think that a court would find that Tennessee's ballot access laws are constitutional and that the State's interests outweigh the limited burden that the notice filing requirements of Tenn. Code Ann. §§ 2-7-133 and 2-8-113 place on voters and write-in candidates. Finally, we would note that similar notice requirements for write-in candidates have been upheld as constitutional in other states. *See Chavez v. Hannah*, 827 S.W.2d 100, 102-103 (Tx.Ct.App. 1992) (noting that the "state has an interest, if not a duty to protect the integrity of its political processes from frivolous or fraudulent candidacies for election to public office" and that such a statute prevents "a secret blitzkrieg campaign from being waged at the expense of the unknowing voters and honest candidates") and *Cross v. Fong Eu*, 430 F.Supp. 1036 (N.D.Ca. 1977) (finding that California had a legitimate governmental interest in conserving its vote-counting resources sufficient to require a bare minimum showing of candidate interest before votes are counted).

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

JANET M. KLEINFELTER
Senior Counsel

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Requested by:

The Honorable James F. Kyle
State Senator
10 Legislative Plaza
Nashville, TN 37243-0028