S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

May 21, 2012

Opinion No. 12-56

Recall Petitions in Multi-District Cities or Counties

QUESTION

When a recall petition is sought against an officeholder in one of several districts embedded in a county or municipality, Tenn. Code Ann. § 2-5-151(d) provides that all registered voters of the county are eligible to be signatories on the petition to recall, even though such signatories may not reside within the officeholder's district, and that all registered voters of the county should be included in the total population used to establish the minimum threshold of petition signatures required to initiate a recall. Does the application of Tenn. Code Ann. § 2-5-151(d) to such recall petitions violate any provision of the Tennessee or United States Constitutions, including the concept of "one person, one vote" under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution or the "void for vagueness" principle?

OPINION

No, Tenn. Code Ann. § 2-5-151(d) as applied to such recall petitions is constitutionally defensible.

ANALYSIS

Tenn. Code Ann. § 2-5-151, with certain exceptions, establishes the process that must be followed when any governmental entity by its charter allows a petition to be filed for recall, referendum or initiative. This statute provides in pertinent part as follows:

> (a) Any governmental entity having a charter provision for a petition for recall, referendum or initiative or any person acting pursuant to such charter provision shall meet the requirements of this section.
>
> (b) Before a petition may be circulated, at least one (1) registered voter of the city or county shall file with the election commission:
>
> (1) The proper form of the petition; and
>
> (2) The text of the question posed in the petition.
>
> . . . .

> (d) Petitions shall be signed by at least fifteen percent (15%) of those registered to vote in the municipality or county. The disqualification of one (1) or more signatures shall not render a petition invalid, but shall disqualify such signatures from being counted towards the statutory minimum of signatures required in this section.
>
> (e) Upon filing each completed petition shall contain the following:
> (1) The full text of the question attached to each petition;
> (2) The genuine signature and address of registered voters only, pursuant to the requirements of § 2-1-107;
> (3) The printed name of each signatory; and
> (4) The date of signature.

Tenn. Code Ann. § 2-5-151.

This statute was originally enacted in 1997. 1997 Tenn. Pub. Acts, ch. 558. The statute was amended in 2005 to exclude from its provisions "any county having a metropolitan form of government and a population greater than one hundred thousand (100,000) according to the 2000 federal census or any subsequent federal census." 2005 Tenn. Pub. Acts, ch. 428; Tenn. Code Ann. § 2-5-201(1).

This opinion request concerns the situation in which a petition for recall is sought for a local official elected from one district within a multi-district municipality or county. In such a case, the question arises whether Tenn. Code Ann. § 2-5-151(d) allows persons who are not registered voters within the district but are registered voters of the municipality or county to sign a petition to recall the elected official of the district. A second question is whether the minimum threshold of at least fifteen percent of registered voters required to initiate a petition for recall under Tenn. Code Ann. § 2-5-151(d) is based upon the number of registered voters in the district or the larger number of registered voters in the municipality or county.

This Office has addressed these issues on two occasions. In Opinion No. 97-149, issued on October 23, 1997, the Office interpreted the pertinent provisions of Tenn. Code Ann. § 2-5-201(d) as allowing registered voters outside of a district, but within the municipality or county, to be counted as signatories on a petition to recall an elected official from that district. These registered voters from the municipality or county were also included in the total population used to derive the minimum threshold of 15% established by the statute. Thus, to initiate a petition for recall of an elected official of a district within the municipality or county, the petition for recall would have to be signed by 15% of the total registered voters in the municipality or county, not just 15% of the registered voters in the particular district for which the recall petition was sought.

This Office in reaching this conclusion relied upon the established rule of statutory construction that a statute should be interpreted according to its plain meaning, particularly when the statute was unambiguous. As this Office explained:

> It is a fundamental rule of statutory construction that "[l]egislative intent and purpose is to be ascertained primarily from the natural and ordinary meaning of the language used, without a forced or subtle construction that would limit or extend the meaning of the language." *Tuggle v. Allright Parking Systems, Inc*., 922 S.W.2d 105, 107 (Tenn. 1996). Moreover, "where the language contained within the four corners of a statute is plain, clear, and unambiguous and the enactment is within legislative competency the duty of the courts is simple and obvious…obey it." *Id.*
>
> Section 33 of Chapter 558 [now codified as Tenn. Code Ann. § 2-5-201(d)], which by its terms is a general law applicable to all governmental entities having charter provisions for petitions for recall, referendum, and initiative, requires that all such petitions must be signed by at least 15% of the registered voters of the "municipality or county." Section 33 makes no distinction between citywide recall, referendum or initiative elections and recall elections from city council districts within a municipality. The plain language of Section 33 requires that all petitions for recall election pursuant to municipal charters must be signed by 15% of the voters of the municipality.

Op. Tenn. Att'y Gen. 97-149, at 1-2 (October 23, 1997).[1] This office reiterated this conclusion in a subsequent opinion. Op. Tenn. Att'y Gen. 01-100 (June 18, 2001).

These opinions were issued over ten years ago, and the General Assembly has taken no action to amend the recall petition statute other than to exempt certain counties from its scope. *See* 2005 Tenn. Pub. Acts, ch. 558; Tenn. Code Ann. § 2-15-151*(l*). This inaction by the General Assembly in light of this Office's opinions suggests that the General Assembly concurs with this Office's interpretation of this statute, especially given the fact that in the interim the General Assembly took action to exempt some but not all counties from the provisions of Tenn. Code Ann. § 2-5-151. *Freeman Industries , LLC v. Eastman Chemical Co.* 172 S.W.3d 512, 519 (Tenn. 2005); *Jones v. D. Canale Co*. 652 S.W.2d 336, 337-338 (Tenn. 1983). Thus the plain meaning of the statute, coupled with the General Assembly's inaction, indicates there is no need to reconsider this Office's prior opinions.

This Office would note that one state jurisdiction has interpreted a similar statute differently. In the case of *Roman v. Sharper*, 53 N.J. 338, 250 A.2d 745 (1969), a lawsuit was commenced to restrain a recall election initiated by a petition for recall of a councilman elected from the South Ward of the City of Newark. The New Jersey recall statute provided that a recall petition "shall be signed by qualified voters equal in number to at least twenty-five per centum (25%) of the registered voters of the municipality." *Id*. at 746 (quoting N.J.S.A. 40:69A-169). The issue confronting the New Jersey Supreme Court was whether the 25% threshold requirement included all registered voters of the municipality or just the registered voters of the ward embedded within the municipality.

---

[1] This Office also observed in Opinion 97-149 that the legislative debates regarding the enactment of the recall statute shed no light on how the statute should be interpreted in the context of a district that was embedded in a municipality or county. Op. Tenn. Att'y Gen. No. 97-149, at 2.

The New Jersey Supreme Court rejected the argument that the threshold should include 25% of the registered voters of the entire municipality, instead of just 25% of the registered voters in the ward embedded within the municipality. The Court reasoned as follows:

> [A] recall could be initiated by voters who reside outside the ward and who therefore could not vote for the recall or for a successor if the incumbent is recalled. Possible constitutional questions aside, there is no reason to suppose the Legislature intended anything so unique … It would be strange to deny the power to initiate a recall to the voters who alone can vote upon the recall question.
>
> There of course is no constitutional right to recall officeholders, and the Legislature, if it wishes to provide that mechanism, can specify rational restraints upon it. We should assume the Legislature intended a reasonable approach, and we should construe the statute to provide one if we can. It being clear that the Legislature intended to invest the power of initiation in 25% Of [sic] a group of voters, the problem is to identify that group. Sensibly the group should be the group that can vote to recall and elect a successor. In the case of a ward election, that group is of course the electorate of that ward and not the electorate of the entire City.
>
> …..
>
> [T]he fact remains that we must choose between two imperfect expressions. This being the case, we should select that view which accords with probable legislative intent, and the probable intention is to commit the subject of recall to the voters qualified to vote at the ensuing election and to them alone.

Id. at 746-747.

In so holding the Court also observed that the term "qualified voters" as used in New Jersey's statute would be limited to those voters who are qualified to vote at the recall election. *Id.* at 746. Thus, in this respect, the New Jersey statute is different from and more ambiguous than the language in Tennessee's statute. For this reason as well as the reasons discussed above, this Office remains persuaded that its prior opinions properly interpret the operation of Tennessee's recall statute.

Tenn. Code Ann. § 2-5-151(d) as applied to the factual situation set forth by this opinion request would be constitutionally defensible. Initially, a strong presumption exists that acts of the General Assembly are constitutional, and any party attacking the constitutionality of a statute bears a heavy burden of proof. *Gallaher v. Elam*, 104 S.W.3d 455, 459-60 (Tenn. 2003); *Esquinance v. Polk County Educ. Ass'n*, 195 S.W.3d 35, 46-47 (Tenn. Ct. App. 2005).

Turning to the equal protection question posed by this request, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits a state from denying "any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV. The Tennessee Constitution provides similar guarantees to its citizens, stating that

the Legislature may only enact general laws (Tenn. Const., art. XI, § 8) and that no person may be disturbed except by the law (Tenn. Const., art. I, § 8).

Under either the United States or Tennessee Constitutions, an equal protection analysis requires strict scrutiny if a legislative classification operates to the disadvantage of a suspect class or if a classification interferes with a fundamental right, with heightened scrutiny being required if quasi-suspect classifications are at issue. Any other classifications are subject to the lowest level of scrutiny, applying the rational basis test. Under the rational basis standard for an equal protection analysis, a classification will pass constitutional muster if any rational basis supports the statutory distinction. *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir. 2005); *Gallaher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003). Tenn. Code Ann. § 2-5-201, which sets forth the process for recall petitions, does not impact either a fundamental right or a suspect classification, thus any challenge to such a statute under equal protection grounds must show that the statute lacks a rational basis. *See Smith v. Abercrombie*, 235 Ga. 741, 744, 221 S.E.2d 802, 805-806 (1975).

Although recall petitions are not themselves elections, in conducting an equal protection analysis of Tennessee's recall process it is instructive to examine equal protection challenges to statutes that allowed non-residents to vote under various circumstances. In the case of *Duncan v. Coffee County*, 69 F.3d 88 (6th Cir. 1995), Coffee County enacted an election process for the Coffee County School Board. At this time, for educational purposes Coffee County had three distinct residential groupings, those being the city of Tullahoma, the city of Manchester and the remaining unincorporated parts of Coffee County referred to as "Rural Coffee County." *Id.* at 90-91. Under the election process established for the School Board by Coffee County, seven board seats were created. Four of the seven seats were elected by voters within each of the three educational residential groupings (two by the city of Tullahoma, one each by the city of Manchester and Rural Coffee County). *Id*. at 91. The remaining three seats were elected by residents of two of the three educational groupings (two by Tullahoma and Rural Coffee County, and one by Manchester and Rural Coffee County). *Id*. The Plaintiffs, who were residents of Rural Coffee County but not Tullahoma, claimed this arrangement was unconstitutional on equal protection grounds because their votes were unfairly "diluted" by the residents of Tullahoma. *Id*.

The Sixth Circuit Court of Appeals rejected the Plaintiff's equal protection challenge, finding the inclusion of "out-of-district" voters from the City of Tullahoma in the Rural Coffee County school district's election was appropriate given those voters had a "substantial interest" in the rural county school district. *Id*. at 94-98. In so holding, the Court found that "the benchmark for determining whether the inclusion of 'out-of-district' voters in another district's elections unconstitutionally dilutes those votes is whether the decision is irrational." *Id.* at 94. Such inclusion is rational if the out-of-district voters have a "substantial interest" in the election. *Id.* Relevant factors in determining whether a substantial interest exists include the degree to which one district is financing the other, the voting strength of the non-resident voters (*i.e.*, the greater the strength, the more likely that their inclusion lacks a rational basis), and the existence of any joint programs. *Id*.

The *Duncan* decision is relevant to the question posed, given the General Assembly in enacting the recall provisions could have intended to give out-of-district voters a voice in the

attempted recall of a district representative embedded in a county given the common interests in county government shared by all county voters. This arguably represents a "rational basis" to sustain Tenn. Code Ann. § 2-5-151(d) against an equal protection challenge, especially given the general rule that an act will be sustained if it can be justified on any rational ground even where the reasonableness of the act is fairly debatable. *See State Personnel Recruiting Services Bd. v. Horne*, 732 S.W.2d 289, 291 (Tenn. Ct. App. 1987) (citing *McConnell v. City of Lebanon*, 203 Tenn. 498, 314 S.W.2d 12 (1958); *Phillips v. State*, 202 Tenn. 402, 304 S.W.2d 614 (1957)).

Nor does Tenn. Code Ann. § 2-5-151(a) violate federal or Tennessee due process standards by being "void for vagueness." An act is only considered "void for vagueness" if it fails to clearly define to a person of ordinary intelligence the applicable requirements of the act. *Miller v. City of Cincinnati*, 622 F.3d 524, 539 (6th Cir. 2010); *Super Flea Market of Chattanooga, Inc. v. Olsen*, 677 S.W.2d 449, 452 (Tenn. 1984). The "void for vagueness" doctrine is intended to give fair warning of proscribed conduct and protect against the "impermissible delegation of basic policy matters" that can then be decided on an *ad hoc* subjective basis. *Miller*, 622 F.3d at 539. Tenn. Code Ann. § 2-5-151(a) does not run afoul of this constitutional principle, given it clearly articulates in an understandable manner the process whereby a recall petition is developed and what is required for the petition to be successful. The formulation of the actual question is left to the voter(s) preparing the petition, with the county election commission charged with certifying if the petition is in proper form. Tenn. Code Ann. § 2-5-151(b) & (c). These provisions provide sufficient direction for the appropriate parties to evaluate whether a recall petition meets the statutory requirements. *See Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 445 (Tenn. 1984) (stating that a statute does not need "to expressly state what is necessarily implied in order to render it effectual").

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

Requested by:

The Honorable Mae Beavers
State Senator
7 Legislative Plaza
Nashville, Tennessee 37243