STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 19-11

Constitutionality of Laws Governing State Primary Boards

Question

Do Tenn. Code Ann. §§ 2-13-102, 2-13-103, and 2-17-104, which require the establishment of a state primary board for each political party in Tennessee and give that board certain authorities, infringe on the political parties' First Amendment right to freedom of association?

Opinion

No.

ANALYSIS

Tennessee law requires each political party in the State to have "a state executive committee which shall be the state primary board for the party." Tenn. Code Ann. § 2-13-102(a). This primary board "shall perform the duties and exercise the powers" of the party under state law. *Id.* § 2-13-102(b). The members of the primary board must be "elected at the regular August primary election immediately before the election of the governor." *Id.* § 2-13-103(a). And in each primary, the party's "voters in each senatorial district shall elect one (1) man and one (1) woman as members" of the state primary board for a term of four years. *Id.* § 2-13-103(b). The primary board has the authority to, among other things, "hear and determine" a primary election contest and "make the disposition of the contest which justice and fairness require, including setting aside the election if necessary." *Id.* § 2-17-104(c).

It is "well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments [to the United States Constitution]." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982) (noting the "importance of the freedom of association"). A political party's freedom of association includes the right "to identify the people who constitute the association," to "select a standard bearer who best represents the party's ideologies and preferences," and to make decisions about the "process for electing[] its leaders." *Eu*, 489 U.S. at 224, 229 (internal quotation marks omitted). This First Amendment right to freedom of association is incorporated against the States through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

When challenged as unconstitutional, laws that "impos[e] severe burdens" on a political party's associational rights are subject to strict scrutiny and thus "must be narrowly tailored and advance a compelling state interest." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358

(1997). But challenges to laws that impose "[l]esser burdens . . . trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* (internal quotation marks omitted).

Under these legal principles and the existing precedent discussed below it appears that Tenn. Code Ann. §§ 2-13-102, 2-13-103, and 2-17-104(c) do not impose a severe burden on Tennessee political parties' First Amendment right to association; any potential burden would merely be an "indirect consequence of laws necessary to the successful completion of a party's external responsibilities in ensuring the order and fairness of elections." *Eu*, 489 U.S. at 232. Because the laws impose only, at most, a "modest burden," *Wash. St. Grange v. Wash. St. Republican Party*, 552 U.S. 442, 452 (2008), they are subject to "less exacting review," *Timmons*, 520 U.S. at 358. And the State's "broad power" to regulate the election process is sufficient to satisfy that review. *Wash. St. Grange*, 552 U.S. at 451-52. "[T]he state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *see also Clingman v. Beaver*, 544 U.S. 581, 593 (2005) (noting the State's important regulatory interests are usually sufficient when "a state electoral provision places no heavy burden on associational rights").

The Supreme Court has upheld a Washington statutory scheme similar to Tennessee's. In *Marchioro v. Chaney*, 442 U.S. 191, 195-96 (1979), the Court recognized that "[t]he requirement that political parties form central or county committees composed of specified representatives from each district is common in the laws of the States," and that "[t]hese laws are part of broader election regulations that recognize the critical role played by political parties in the process of selecting and electing candidates for state and national office." In fact, in a footnote collecting representative state laws, the Court specifically cited the 1978 version of Tenn. Code Ann. § 2-13-103, which has not been amended since that time. *Id.* at 195 fn. 11 (citing Tenn. Code Ann. § 2-1304 (Supp. 1978)). Even though the committee required to be established in *Marchioro* did, in practice, "play a significant role in internal party affairs," the Court nevertheless upheld the law, finding that those activities were not "required by statute to be performed by the Committee." *Id.* at 198. "[A]ll of the 'internal party decisions,'" that the challengers claimed "should not be made by a statutorily composed Committee" were made "not because of anything in the statute, but because of delegations of authority" from the party itself. *Id.* at 198-99. "Nothing in the statute required the party to authorize such decisionmaking by the Committee." *Id.* at 199.

Ten years later in *Eu*, the Supreme Court struck down California laws that created and regulated the state central committees of political parties. *Eu*, 419 U.S. at 216-19. But, as *Eu* itself pointed out, the California statutory scheme was materially different from the Washington scheme upheld in *Marchioro*. *Eu*, 489 U.S. at 232 n.22. The statute at issue in *Marchioro* had "only required that the state central committee perform certain limited functions such as filling vacancies on the party ticket, nominating Presidential electors and delegates to national conventions, and calling state-wide conventions." *Id.* In *Marchioro*, then, "the Democratic Party, not the State, had assigned" to the party committee "significant responsibilities in administering the party, raising and distributing funds to candidates, conducting campaigns, and setting party policy." *Id.* By contrast, in *Eu*, the California law itself "place[d] the state central committees at a party's helm" and required that committee to perform certain core party functions, such as "conducting the party's campaigns." *Id.*

The laws at issue in *Eu* "dictate[d] the size and composition of the state central committees; set forth rules governing the selection and removal of committee members; fix[ed] the maximum term of office for the chair of the state central committee"; contained geographical requirements for the chair of the committee; "specif[ied] the time and place of committee meetings; and limit[ed] the dues parties may impose on members." *Id.* at 218-19. Because these restrictions each "limit[ed] a political party's discretion in how to organize itself, conduct its affairs, and select its leaders," *Eu* held the laws were presumptively unconstitutional and put the burden on California to show they were narrowly tailored to a compelling governmental interest, a burden California could not satisfy. *Id.* at 230-33.

The Tennessee laws governing the establishment of primary boards are more similar to the laws at issue in *Marchioro* than to the laws at issue in *Eu*, and, accordingly, do not infringe on the First Amendment right of association of political parties. Section 2-13-103 does dictate, to a limited extent, the "composition" of a party's state primary board, the terms of service, and "geographical requirements." *See Eu*, 419 U.S. at 218. It requires voters in each senatorial district to elect one man and one woman to serve four-year terms. Tenn. Code Ann. § 2-13-103(b). But these requirements—much less extensive than those at issue in *Eu*—are imposed on a state primary board that, like the committee at issue in *Marchioro*, is required by state law to perform only limited functions. Indeed, the law that the Court upheld in *Marchioro* imposed similar requirements. *See Marchioro*, 442 U.S. at 192 n.1 (noting the Washington law required the state committee to consist of one man and one woman from each county).

If a political party decides to grant its state primary board *additional* authority to govern core party functions, that choice does not render the State's regulation of the primary board unduly burdensome under the First Amendment. *See Marchioro*, 442 U.S. at 199 ("There can be no complaint that the party's right to govern itself has been substantially burdened by statute when the source of the complaint is the party's own decision to confer critical authority on the State Committee."). As *Eu* explained, the California laws regulating the party committees at issue there were subject to strict scrutiny only because state law "place[d]" the committee at the "party's helm" and assigned it responsibility for core party functions such as "conducting the party's campaigns." 489 U.S. at 232 n.22. By contrast, Tennessee law, like the law at issue in *Marchioro*, assigns state primary boards limited responsibilities related to ensuring fair, timely, and honest elections, such as hearing and resolving primary election contests. *See* Tenn. Code Ann. § 2-17-104(c). Accordingly, unlike the provisions at issue in *Eu*, the requirements imposed on state primary boards by Tenn. Code Ann. § 2-12-103 do not constitute "direct regulation of a party's leaders" or "regulation of internal party governance," *Eu*, 489 U.S. at 231-32, nor does Tennessee law require that the state primary board be the party's "leaders" or that it "govern" the party's protected activities, *id.* at 230. Each party makes that choice.

In sum, in light of applicable legal principles and guidance provided by the United States Supreme Court in *Marchioro* and *Eu*, Tennessee's election laws governing state primary boards do not infringe on political parties' First Amendment rights to association.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

JONATHAN DAVID SHAUB
Assistant Solicitor General

Requested by:

The Honorable Jason L. Powell
State Representative
418 Cordell Hull Bldg.
Nashville, TN 37243