STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 22-03

Laws Governing Voting Procedures in Tennessee

Question 1

Are voting procedures in Tennessee governed by state or federal law?

Opinion 1

While the State is primarily responsible for regulating federal, state, and local elections, Congress has the authority, pursuant to the Elections Clause of the federal Constitution, to override state regulations with respect to *federal* elections. Additionally, pursuant to the Supremacy Clause of the federal Constitution, Congress may enact federal legislation that pre-empts state laws, including state laws governing voting procedures. States must also adhere to the federal constitutional requirements of the Fourteenth and Fifteenth Amendments with respect to voting.

Question 2

If a county uses hand-marked ballots, may it meet its obligation to accommodate disabled voters by offering assistance with the hand-marked ballots?

Question 3

If an electronic machine is required to accommodate disabled voters and assuming such machines are portable, could the requirement be met by making the machine be available upon demand or by having at least three machines equidistant to any precinct so that they would be available if needed?

Question 4

Is a county permitted to ensure accommodation for disabled voters without purchasing for every precinct an electronic machine that may not be needed?

Opinions 2-4

The answers to Questions 2-4 would depend upon the particular facts and circumstances in any given situation.

ANALYSIS

1. Laws Governing Voting Procedures in Tennessee

The State has long been primarily responsible for regulating federal, state, and local elections. *See Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[T]he States have evolved comprehensive, and in many respects, complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualification of voters, and the selection and qualification of candidates."). Tennessee's Election Code is set forth in title 2, and Tenn. Code Ann. § 2-1-102 states that the purpose of title 2 is to regulate the conduct of all elections.

The authority of the State to regulate elections, however, is not without limit. "It is well settled that the Elections Clause [of the federal Constitution][1] grants Congress the power to override state regulations by establishing uniform rules for *federal elections*, binding on the States." *Foster v. Love*, 522 U.S. 67, 69 (1997) (emphasis added). Thus, while the state legislatures may prescribe the time, place, and manner of holding *federal elections*, the United States Congress is authorized to alter those state laws through federal legislation.

Pursuant to this constitutional authority, Congress has enacted 2 U.S.C. § 7 which requires that federal congressional elections occur on the "Tuesday next after the 1st Monday in November, in every even numbered year . . .." Congress has also enacted the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.* ("NVRA") and the Help America Vote Act, Pub.L. 107–252. Title III, § 302, 116 Stat. 1706 (codified at 42 U.S.C. § 15301 *et seq.*) ("HAVA"), both of which impose upon the States certain statutory requirements for the administration of federal elections.

States must also adhere to certain other federal constitutional and statutory requirements. States may not in *any* election—state or federal—deny or abridge the right to vote on the basis of race. *See* U.S. Const. amend. XV, § 1. States also must adhere to the principle of one person, one vote. *See Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964). Furthermore, the federal Constitution's Supremacy Clause establishes that valid federal legislation can pre-empt state laws. *Oneok, Inc. v. Learjet, Inc.*, 573 U.S. 377 (2015) (citing U.S. Const. Art. VI, cl.2). For example, Title II of the Americans with Disabilities Act ("ADA"), provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, program, or activities of a public entity." 42 U.S.C. § 12132 (2018), And that provision of the ADA applies to state voting procedures as "[v]oting is a quintessential public activity." *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 507 (4th Cir. 2016) ("*NFB I*").

2.-4. Accommodations for Disabled Voters

Whether a county could satisfy its ADA obligation to accommodate disabled voters by the means or in the ways proposed in Questions 2-4 would depend upon the particular facts and circumstances in any given situation.

[1] The Elections Clause, U.S. Const. Art. I, § 4, cl. 1, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of [choosing] Senators."

The regulations implementing the ADA require public entities to "furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity" it offers. 28 C.F.R. § 35.160(b)(1). For such auxiliary aids to be effective, they must be (1) "provided in accessible formats," (2) "in a timely manner," and (3) "in such a way as to protect the privacy and independence of the individual with a disability." *Id.* § 35.160(b)(2). Determining whether "appropriate auxiliary aids and services" would be necessary, and if so, whether any particular aid or services would be effective for purposes of the ADA are highly fact-specific inquiries, as is the availability to a county of the "fundamental alteration" affirmative defense to a claim of violation of the ADA. The "fundamental alteration" defense rests on the premise that governmental entities need not accommodate disabled individuals if doing so "would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164. Determining whether a proposed modification is a "reasonable modification" which should be implemented under the ADA, or a "fundamental alteration," which need not be implemented under the ADA, can only be done on a case-by-case basis and requires an analysis of all the particular facts and circumstances in any given situation. *See Hindel v. Husted*, 875 F.3d 344, 347 (6th Cir. 2017) (citations omitted).

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