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Opinion No. 02-069

Senate Bill 1201/House Bill 1767 - Primary Elections - Write-In Candidates

QUESTIONS

1. Amendment 2 to Senate Bill 1201/House Bill 1767 proposes to change the requirement that write-in candidates in primary elections must receive at least 5% of the "total number of votes cast in the election" in order to win to 5% of the "registered voters in the district." What effect would such a proposed change have on independent candidates for the same office?

2. Does the 30 day notice requirement contained in Section 4 of Amendment 2 to Senate Bill 1201/House Bill 1767 refer to 30 days prior to the start of early voting or 30 days prior to election day?

OPINIONS

1. Independent candidates would be indirectly affected by this proposed legislative change, because Amendment 2 would make it more difficult for write-in candidates for primary elections to meet the 5% requirement, *i.e.*, a write-in candidate would have to obtain 5% of the total number of registered voters in the district instead of 5% of the voters who voted in that primary election.

2. The 30 day notice requirement refers to 30 days prior to primary election day.

ANALYSIS

Tenn. Code Ann. § 2-8-113 (a) presently provides the following:

> On the third Thursday after a primary election the state coordinator of elections shall publicly calculate and compare the votes received by each person and declare who has been nominated for office in the primary or elected to the state executive committee. The candidates who receive the highest number of votes shall be declared elected or nominated; provided, that in order for any person to receive a party nomination by write-in ballots, such person must receive a number of write-in votes equal to or

> greater than five percent (5%) of the total number of votes cast in the primary on the day of the election. However, this section shall not apply where there are candidates for the office involved listed on the official ballot.

Section 3 of Amendment 2 to Senate Bill 1201/House Bill 1767 would change the 5% requirement from 5% of the "total number of votes cast in the primary on the day of the election" to "equal to or greater than 5% of the registered voters in the district." This provision would have no direct effect on independent candidates for such offices as they are not candidates in the primary elections. However, independent candidates would be indirectly affected, because the proposed amendment would make it more difficult for write-in candidates in primary elections to meet the 5% requirement. At present Tenn. Code Ann. § 2-8-113(a) provides that for a write-in candidate to prevail in a primary election, he or she must not only obtain a majority of the votes cast in that election, but the write-in candidate must also obtain at least 5% of the "votes cast in the primary on the day of the election." The proposed amendment would change that requirement to 5% of the registered voters in the district. Historically, less than 100% of the registered voters in a district cast votes in primary elections; therefore, the proposed amendment would make it more difficult for write-in candidates to prevail in primary elections. Thus, independent candidates will indirectly benefit from the proposed amendment which would make it more difficult for write-in candidates in primary elections to win and qualify to run in the general election against the independent candidates.

The second question concerns whether the 30 day notice requirement contained in Section 4 of Amendment 2 to Senate Bill 1201/House Bill 1767 refers to 30 days prior to the start of early voting or 30 days prior to election day. Tenn. Code Ann. § 2-1-104(a)(19) defines "primary election" as "an election held for a political party for the purpose of allowing members of that party to select a nominee or nominees to appear on the general election ballot." Furthermore, Tenn. Code Ann. § 2-13-203 provides that "[p]olitical parties shall nominate their candidates for [certain state] offices by vote of the members of the party in primary elections at the regular August election." Tenn. Code Ann. § 2-1-104(a)(25) defines "Regular August Election" as "the election held on the first Thursday in August in every even-numbered year." Thus, the phrase "30 days before the primary election" in Section 4 of Amendment 2 to Senate Bill 1201/House Bill 1767 refers to the first Thursday in August in every even-numbered year in primary elections for the state offices referred to in Tenn. Code Ann. § 2-13-203.

The fact that some voters vote early either absentee-by-mail or in-person does not change the 30 day notice requirement to when the first vote is cast. In *Millsaps v. Thompson*, 259 F.3d 535 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit held that Tennessee's Early Voting Statute did not conflict with federal election day statutes that require federal elections to be held in even-numbered years on the first Tuesday after the first Monday in November. The Court found that since all of the administrative acts necessary to conduct an election including the tabulation of the ballots are not concluded until election day, the Tennessee Early Voting Statute did not conflict with federal law. Primary election day in Tennessee for certain state offices is the first Thursday in August, not the day the first ballot is cast in early voting in that election. Therefore, under the proposed amendment, a write-in candidate would have

to notify the proper election officials 30 days before that date.

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