S T A T E O F T E N N E S S E E
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Opinion No. 06-047

Constitutionality of Provision in Chapter 1 of the Public Acts of 2006, Reserving Seats on the Ethics Commission For African-American and Female Members

QUESTION

Section 26 of 2006 Public Acts Chapter 1, amends, *inter alia*, Tenn. Code Ann. § 3-6-103 to create an Ethics Commission, and provides that seats on the commission shall be reserved for at least one African-American and one female. Is this portion of the statute constitutional?

OPINION

These provisions are constitutionally suspect.

ANALYSIS

The pertinent portion of § 26 of 2006 Public Acts, Ch. 1, provides that Tenn. Code Ann. § 3-6-103 shall be amended to include the following language:

> (a) There is created as an independent entity of state government a Tennessee Ethics Commission. The commission shall be composed of six (6) members appointed as provided in this section. Appointments shall be made to reflect the broadest possible representation of Tennessee citizens. Of the six (6) members appointed at least one (1) shall be a female member and one (1) shall be an African-American member. However, an African-American female member shall not satisfy the requirement of one (1) female member and one (1) African-American member.

The Office has considered this issue on at least three previous occasions, as reflected in Op. Tenn. Att'y Gen. 93-09 (January 28, 1993), Op. Tenn. Att'y Gen. 89-140 (December 8, 1989), and Op. Tenn. Att'y Gen. 79-98 (March 7, 1979)(copies attached). All of the prior opinions rendered by this Office have reached the same conclusion: that provisions such as the above-quoted portion of Section 26 of 2006 Public Acts Ch. 1, setting aside seats on boards or commission on the basis of race or gender, are constitutionally suspect and thus vulnerable to challenge.[1] We continue to abide by our previous opinions.

[1]While all three attached opinions have examined the issue of race-based membership on boards or commissions, only Op. Tenn. Atty. Gen. 93-09 included an analysis of gender-based membership as well.

Race-based classifications are subject to "strict scrutiny," the highest level of scrutiny applied by the courts, and thus the most difficult level of constitutional analysis for challenged legislation to survive. To defeat such a challenge the State would likely be required to demonstrate to a court that the racial classification was (1) necessary to achieve a compelling governmental interest, and that it was (2) narrowly tailored in order to limit the extent of the racial classification as much as possible. *Grutter v. Bollinger*, 539 U.S. 306, 326-327, 123 S.Ct. 2325, 2337-2338, 156 L.Ed. 2d 304 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270, 123 S.Ct. 2411, 2427, 156 L.Ed.2d 257 (2003).

Gender-based classifications are subject to a somewhat less exacting standard, "heightened scrutiny." Nevertheless, surviving this level of scrutiny would require the State to demonstrate that the gender-based classification was substantially related to the achievement of an important governmental interest. *Wengler v. Druggists Mutual Insurance Co*., 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed. 2d 107 (1980). Both levels of scrutiny present difficult tests for challenged legislation.

The legislation does not identify any "compelling state interest" or "important governmental interest" that would support discriminating on the basis of race or gender in the selection of members of the newly created Ethics Commission, and none readily suggests itself to this Office. We note that the legislation already provides that the membership of the Commission should "reflect the broadest possible representation of Tennessee citizens," and, in light of this statement of Legislative intent, there is no reason to assume at this juncture that the appointing authorities will disregard considerations of ethnic and gender diversity in making their appointments to the Commission.

Consequently, we are of the opinion that the portion of 2006 Public Acts, Ch. 1 that reserves seats on the newly-created Ethics Commission specifically for African-American and female members is vulnerable to constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Finally, we note that § 52 of 2006 Public Acts, Ch. 1 provides for the severability of the various portions of that act.[2] Thus, in the event a court were to find the reservation of seats on the Ethics Commission on the basis of race and/or gender to be invalid, the remaining portions of the act would remain valid.

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[2]"SECTION 52. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable."

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