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Opinion No. 13-106

Right of Non-Resident Property Owners to Vote in Annexation Referendum

QUESTIONS

1. If the General Assembly enacted legislation requiring a referendum to validate a city ordinance annexing property, could this legislation constitutionally restrict participation in the referendum to the property owners in the territory to be annexed, excluding from participation people who reside in the territory but do not own property in it?
2. Could this legislation constitutionally allow both residents and nonresident property owners within the territory to be annexed to vote in the referendum?
3. Assuming this legislation could constitutionally allow nonresident property owners to vote in the referendum, could the General Assembly, as a condition of voting, constitutionally require such nonresident property owners to either be qualified voters for members of the General Assembly or citizens of the United States?

OPINIONS

1. Any such limit must be necessary to further a compelling state interest, and this Office is unaware of any compelling state interest to justify limiting the right to vote in an annexation referendum to property owners in the area to be annexed. The fact that property owners will be subject to property tax while nonproperty owning residents will not is not a constitutionally sufficient basis for excluding nonproperty owning residents from voting on an annexation referendum.
2. Such legislation may be constitutionally defensible if appropriately drafted. A provision extending the right to vote in annexation elections to nonresident property owners in the territory to be annexed should contain some minimum limits on property ownership to ensure that these owners have a substantial interest in the election. Extending the franchise to nonresident property owners is also subject to a challenge that, under particular facts and circumstances, the system unconstitutionally dilutes the votes of residents.
3. Under Tennessee law, in order to vote for a member of the General Assembly, a voter must be a citizen of the United States, eighteen years or older, reside in the legislative district, and not be otherwise disqualified, for example, by a felony conviction. These are all valid

requirements for allowing residents in a territory to be annexed to vote. The General Assembly may constitutionally set these same qualifications on voting on an annexation referendum for nonresident property owners who own property in a territory to be annexed. Since property owners do not have a fundamental right to vote in an annexation referendum, further qualifications need only be supported by a rational basis. Each of these restrictions is rationally related to the State's legitimate interest of ensuring that voters in the referendum have a certain level of maturity, can be readily ascertained, and have a reasonable opportunity to inform themselves about the subject of the election. The General Assembly may also constitutionally extend the right to vote in an annexation referendum to persons who own property in an area to be annexed so long as they are United States citizens, subject to the qualifications noted in response to Question 2.

ANALYSIS

1. Allowing only Property Owners to Vote in Annexation Referendum

This opinion addresses who may constitutionally be allowed to vote, or be excluded from voting, on a referendum to approve a city's decision to annex unincorporated territory by ordinance. The first question is whether the right to vote on annexation could be limited to persons, whether resident or not, who own property in the territory to be annexed.

The power of a municipality to annex property and the right to challenge the exercise of this power are strictly statutory. *State ex rel. Hornkohl v. City of Tullahoma*, 746 S.W.2d 199, 201 (Tenn. Ct. App. 1987). As this Office recently observed, the General Assembly is not constitutionally required to allow any citizens to vote on whether territory where they reside or own property will be annexed to a municipality. Tenn. Att'y Gen. Op. 13-58, at 2 (July 25, 2013). Similarly, citizens have no constitutionally protected right to have their residential property annexed into a city. Tenn. Att'y Gen. Op. 13-45, at 3-4 (June 11, 2013). A Tennessee citizen's right to vote in federal, state, and local elections is set forth by the Tennessee Constitution:

Every person, being eighteen years of age, being a citizen of the United States, being a resident of the State for a period of time as prescribed by the General Assembly, and being duly registered in the county of residence for a period of time prior to the day of any election as prescribed by the General Assembly, shall be entitled to vote in all federal, state, and local elections held in the county or district in which such person resides. All such requirements shall be equal and uniform across the state, and *there shall be no other qualification attached to the right of suffrage.*

Tenn. Const. Art. IV, § 1 (emphasis added). But this provision does not apply to municipal corporations. *Ledgerwood v. Pitts*, 122 Tenn. 570, 125 S.W. 1036, 1042 (1910); Tenn. Att'y Gen. Op. 08-122 (July 10, 2008) (nonresident property owners may constitutionally be authorized to vote in municipal elections).

Under the United States Constitution, any limitations on the right to vote beyond reasonable citizenship, age, and residency requirements are subject to strict scrutiny to determine whether they violate the “equal right to vote” under the Fourteenth Amendment to the United States Constitution. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (durational residency requirements). Where a state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, courts must determine whether the exclusions are necessary to promote a compelling state interest. *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 627 (1969)(citing *Carrington v. Rash*, 380 U. S. 89, 96 (1965)). In *Kramer*, the United States Supreme Court found unconstitutional a statute that limited the right to vote in school district elections to property owners, lessees of taxable realty, and parents or guardians of children in public schools. The Court found that these restrictions were not narrowly tailored to promote the state’s declared interest in limiting the franchise to those “primarily interested” in school affairs. The court noted that the classifications “permit inclusion of many persons who have, at best, a remote and indirect interest, in school affairs, and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions.” *Id.* at 632.

For similar reasons, the United States Supreme Court has invalidated state laws limiting the right to vote on the issuance of local government general obligation bonds to property owners. *City of Phoenix v. Kolodziejcki*, 399 U.S. 204, 213 (1970); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969); *Hill v. Stone*, 421 U.S. 289, 297 (1975). In *City of Phoenix*, the Court rejected the city’s argument that the statute recognized the “unique interest” of real property owners in the issuance of general obligation debt. The Court noted that all residents—both property owners and non-property owners—would be substantially affected by the outcome of the bond election. 399 U.S. at 209. The Court, therefore, found no basis for concluding that nonproperty owners were substantially less interested in the issuance of the bonds than property owners. *Id.* at 212. Thus, the restriction was not narrowly tailored to promote a compelling state interest.

The Court has recognized that, in narrow circumstances, the legislature may constitutionally limit the right to vote to landowners in a district so long as the limit is relevant to achievement of the regulation’s objective. *Salyer Land Company v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 730 (1973). In that case, the Court upheld a state law limiting the right to vote for directors of a water storage district to landowners in the district, whether resident or not. The Court distinguished water districts from other units of local governments exercising general governmental power. *Id.* at 727-28. The Court traced the history of irrigation issues in the western states and noted that the district in question did not have general governmental authority. Instead, its powers were limited to projects regarding water acquisition and distribution. Costs of its projects were assessed against district land in accordance with benefits accruing to each tract held in separate ownership. The Court found, therefore, that the statute would not be subject to “close scrutiny” under the tests articulated in *Kramer*, *Phoenix*, and *Houma*. *Id.* at 730. Instead, the Court applied a less exacting rational basis test and found a rational basis to support the limit.

The United States Supreme Court has not directly addressed whether a limit on the right to vote in an annexation referendum is subject to the higher standard of scrutiny outlined in

Kramer and the other cases discussed above. The United States Court of Appeals for the Fourth Circuit addressed this issue in *Hayward v. Clay*, 573 F.2d 187 (4th Cir. 1978), *cert. denied*, 439 U.S. 959 (1978). There, a city and its registered voters challenged a state law that required a majority of property owners in an area proposed to be annexed to consent to the annexation before a general annexation referendum could be held. If the property owners consented, then voters in the territory to be annexed and the annexing municipality would have to approve the annexation. The court found that this provision in effect permitted property holders to prevent residents in the affected areas from exercising their right to vote. The court acknowledged that, under the United States Constitution, there is no fundamental right to vote on annexation. But the court noted that, “once the right to vote is established, the equal protection clause requires that, in matters of general interest to the community, restriction of the franchise on grounds other than age, citizenship, and residence can be tolerated only upon proof that it furthers a compelling state interest.” 573 F.2d at 190 (citing *Hill v. Stone*, 421 U.S. at 297). The court found that the statute was subject to strict scrutiny under the reasoning in *Cipriano*, *Phoenix*, and similar cases. 573 F.2d at 190. The court stated:

A change in the entire structure of local government is a matter of general interest. Annexation will affect municipal services that every citizen receives whether or not he is a freeholder. The district court found that this annexation “not only involves changes in taxation, police, and fire protection, sanitation, water, sewer and other public services, but brings about a complete change in the form of municipal government itself.” Therefore, a property-based classification of voters is of no less constitutional significance in an annexation referendum than when the question is the issuance of municipal bonds or the details of operating a school system.

Id. The court found that proponents of the statute failed to show differences in the impact of annexation on property owners and nonproperty owners amounting to a compelling state interest. Relying on *Phoenix*, the court stated that the fact that property owners would immediately be subject to higher property taxes upon annexation was an insufficient basis for restricting the franchise. *Id.*

Under the reasoning articulated in *Hayward*, the right to vote in an annexation referendum cannot be restricted on grounds other than age, citizenship, and residence unless the restriction furthers a compelling state interest. The fact that property owners, unlike people who reside in the area, will be immediately subject to city property taxes does not by itself justify such restriction. This Office is unable to articulate any other compelling state interest to justify limiting the right to vote in an annexation referendum to property owners in the area to be annexed.

2. Allowing Nonresident Property Owners as well as Residents to vote in Annexation Referendum

The next question is whether the right to vote in an annexation referendum may constitutionally be extended to allow nonresident property owners, as well as residents in a territory to be annexed, to vote in an annexation referendum. The Tennessee Supreme Court has stated that the right of nonresident property owners to vote in municipal elections is dependent altogether upon the determination of the General Assembly. *Clay v. Buchanan*, 162 Tenn. 204, 36 S.W.2d 91, 93 (1931). Extending the right to vote in this way would also be subject to analysis under Section 2 of the Voting Rights Act and the Fourteenth Amendment to the United States Constitution. Section 2 of the Voting Rights Act prohibits an electoral practice that was adopted for a discriminatory purpose or that results in minorities being denied equal access to the political process. *See, e.g., Brown v. Board of Commissioners of the City of Chattanooga*, 722 F.Supp. 380, 389 (E.D. Tenn. 1989). Under the Fourteenth Amendment, an electoral classification that affects some citizens differently from others, “will not be set aside if any state of facts reasonably may be conceived to justify it.” *Glisson v. Mayor and Councilmen of the Town of Savannah Beach*, 346 F.2d 135, 137 (5th Cir. 1965) (upholding statute allowing nonresidents who owned property in town and who resided in the county where the town was located to vote in town elections) (citing *McGowan v. State of Maryland*, 366 U.S. 420, 426-27 (1961)).

In *Brown*, the District Court for the Eastern District of Tennessee found invalid a city ordinance allowing nonresidents who owned even a trivial amount of property in the City of Chattanooga to vote in city elections. 722 F.Supp at 399. The court acknowledged that nonresident property owners have an interest in the conduct of city affairs but noted that the ordinance did not limit the number of people who could vote with respect to a piece of property or set any minimum property value required for the exercise of the franchise. *Id.* The court noted that as many as twenty-three nonresidents had been registered to vote on a single piece of city property and that fifteen nonresidents were registered to vote as co-owners of one parcel of property with an assessed value of one hundred dollars. The court stated that such an owner does not have a substantial interest in the operation of the city. The court concluded, therefore, that the city ordinance did not further a rational governmental interest. *Id.* For this reason, a provision extending the right to vote in annexation elections to nonresident property owners in the territory to be annexed should contain some minimum limits on property ownership to ensure that these owners have a substantial interest in the election.

Extending the franchise to nonresident property owners may also be subject to a challenge that the system unconstitutionally dilutes the votes of residents. Where the government allocates the franchise in such a manner that residents of a separate area have little or no chance to control their own school board, for example, there may be “grave constitutional concerns,” even where nonresident owners have a substantial interest in the issue. *Duncan v. Coffee County, Tennessee*, 69 F.3d 88, 97 (6th Cir. 1995). In cases where nonresident property owners outnumber residents, for example, a court could find that the classification unconstitutionally dilutes the votes of residents.

3. Additional Qualifications for all Voters—both Residents and Nonresident Property Owners—in Annexation Referendum

a. Qualified to vote for General Assembly

The next question is whether the General Assembly could constitutionally require both residents and nonresident property owners to be qualified to vote for the General Assembly. Under Tenn. Code Ann. § 2-2-102:

A citizen of the United States eighteen (18) years of age or older who is a resident of this state is a qualified voter unless the citizen is disqualified under the provisions of this title or under a judgment of infamy pursuant to § 40-20-112.

The question is whether the General Assembly may constitutionally require each voter—both residents and nonresident property owners—in an annexation referendum to be a citizen of the United States, eighteen years or older, a state resident, and not otherwise disqualified.

The last question is whether the General Assembly may extend the right to nonresident property owners to vote in an annexation referendum so long as they are United States citizens. As discussed above, this is a constitutionally permissible restriction.

United States citizenship is a valid and permissible criterion for determining who is allowed to vote. *See, e.g., People v. Rodriguez*, 111 Cal. Rptr. 238, 239 (Cal. Ct. App. 1973); *Skafta v. Rorex*, 553 P.2d 830, 832 (Colo. 1976), *appeal dismissed*, 430 U.S. 961 (1977). Under the Twenty-Sixth Amendment to the United States Constitution, United States citizens who are eighteen years of age or older may not be denied the right to vote on account of age. But there is no constitutional requirement that younger voters be extended the right to vote. Further, in general, states may properly and constitutionally require persons who desire to vote in state and local elections to be bona fide residents thereof, and nothing in the United States Constitution prohibits the states from denying the right to vote to any person who is not a bona fide resident. Thus, the General Assembly may restrict the right to vote in an annexation referendum to United States citizens eighteen years of age or older who reside in Tennessee and in the county where the election is held.

We assume that, with regard to property owners, the question is whether the General Assembly may constitutionally extend the right to persons who own property in a territory to be annexed so long as they are United States citizens, eighteen years of age or older, and residents of some county in the state. Since property owners do not have a fundamental right to vote in an annexation referendum, further qualifications need only be supported by a rational basis. Each of these restrictions is rationally related to the State's legitimate interest of ensuring that voters in the referendum have a certain level of maturity, can be readily ascertained, and have a reasonable opportunity to inform themselves about the subject of the election.

b. United States Citizenship

The last question is whether the General Assembly may extend the right to nonresident property owners to vote in an annexation referendum so long as they are United States citizens. As discussed above, this is a constitutionally permissible restriction.

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