

Pro-Life Amendment Vote Count Comes Under Fire From Planned Parenthood

In 2014, Tennessee voters added "Amendment 1" to the state Constitution. The key wording was in the beginning: "Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion."

Eight voters, including a board chair of Planned Parenthood of Middle and East Tennessee, challenged the outcome, in which Amendment 1 passed 53 percent to 47 percent.

The process was upheld on April 21, 2016 by Circuit Court Judge Michael Binkley, who said the language for how votes for amendments should be counted is "unambiguous."

However, subsequently, federal judge Kevin Sharp agreed with the plaintiffs and ordered a recount. That decision has been on hold for a year

Yesterday, a three-judge panel of the Sixth Circuit Court of Appeals heard the challengers' arguments.

Judge Brinkley wrote "Article XI, Section 3, (of the Tennessee Constitution) does not restrict or precondition the right of a citizen to vote for or against a constitutional amendment upon that citizen voting in the gubernatorial election." The issue before the panel was not whether the votes were counted in a way different than they had been traditionally but rather whether that the method was unfair, as Judge Sharp concluded it was.

Specifically, under the Tennessee Constitution the universe of voters who count for purposes of ratifying a proposed constitutional amendment is a majority not of all voters

voting but a majority of all those voting for governor.

Put another way, "State election officials have long interpreted the language [in the state Constitution] to mean that passage of an amendment depends on comparing the number of votes cast for governor with the number of votes cast for an amendment," according to Anita Wadhvani of the *Tennessean*. "To succeed, an amendment must get a majority of the number of votes cast for governor."

Plaintiffs maintain that all votes in favor of the amendment should be counted regardless of whether or not those voters also voted for governor.

Moreover, "The lawsuit alleged the vote tabulation method was 'part of a 'coordinated scheme' that 'incentivized proponents of Amendment 1 to forego their own right to vote in the governor's race so as to add 'yes' votes without increasing the number of votes needed to surpass a majority of votes cast in the governor's race,'" according to reporter Kevin Koeninger of *Courthouse News*.

In asking the panel to lift the injunction granted by Judge Sharp, Attorney Sarah Campbell said that the state "did exactly what the Tennessee constitution requires" when it tabulated the votes and passed the amendment.

Campbell noted there were "no allegations of voter intimidation ... or stuffing the ballot box," adding "that even if a state law violation occurred, it does not rise to the level of 'fundamental unfairness' required to plead a federal due process claim," Koeninger reported.

Judging by media accounts, the judges asked pointed questions of both sides. For example, they expressed skepticism at a system that would require voters to cast a ballot in one race for it to count in another.

What about voters who "for whatever reason, chose not to vote

for governor?" [Judge David] McKeague asked.

"What the district court has done is compelled voting," [Judge Ronald] Gilman said.

The ballots were preserved "a recount is possible by hand under the method sought by plaintiffs," Wadhwani reported . "Both sides have the option to appeal any ruling to the U.S. Supreme Court."

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