

Providing Help to Voters with Disabilities: What You Should Know

Voting is a fundamental right! Voters with disabilities have the right to assistance in voting.

Voters with mental or physical disabilities are entitled to receive any assistance they need to cast their ballots.

Who may assist a voter?

Federal law gives voters with disabilities the right to decide whether to get assistance in casting a ballot and who will provide it.

- ☑ Voters can choose a poll worker, friend, family member, caregiver, assisted living provider, facility staff person or almost anyone else.
- ☑ The only people who may not assist a voter are the voter's employer or an agent of that employer, or, if the voter is a member of a union, a union officer or agent of the union.

What can assistance providers do to help a person vote?

- ☑ First, an assistance provider—helper—should ask the voter what choice he or she wants to make. The helper must never make assumptions about how a person wants to vote!
- ☑ The helper must respect the voter's privacy at all times during the voting process.
- ☑ The helper should be familiar with the instructions on how to cast a ballot and be prepared to explain them to the voter and/or demonstrate the voting process.
- ☑ The helper should be prepared to read or explain all ballot choices or questions in a language the voter understands.
- ☑ The helper may mark a ballot for a voter with a disability only if the voter has directed him or her to do so.
- ☑ After the ballot has been completed, the helper should make sure that it accurately reflects the voter's choices. The helper should offer to correct any mistakes and to check the ballot for any election contests or questions that may have been missed.

What actions would not be appropriate?

- ✗ Making decisions for the voter—for example, marking or changing a ballot to reflect a choice other than a choice expressed by the voter.
- ✗ Communicating with the voter in a way that makes the voter feel forced to make certain choices.
- ✗ Pressuring the voter to vote for a particular candidate or in a certain way.
- ✗ Withholding information or giving false information to a voter.
- ✗ Pressuring the voter to cast a vote on every measure or candidate. Everyone has the right to choose whether or not to vote on each [contest](#).
- ✗ Revealing to others how the individual voted. Respect the voter's right to privacy!

What can you do if you have problems assisting?

- ☑ Call Election Protection at 1-866-OUR-VOTE (1-866-687-8683) about any Election Day assistance problems.

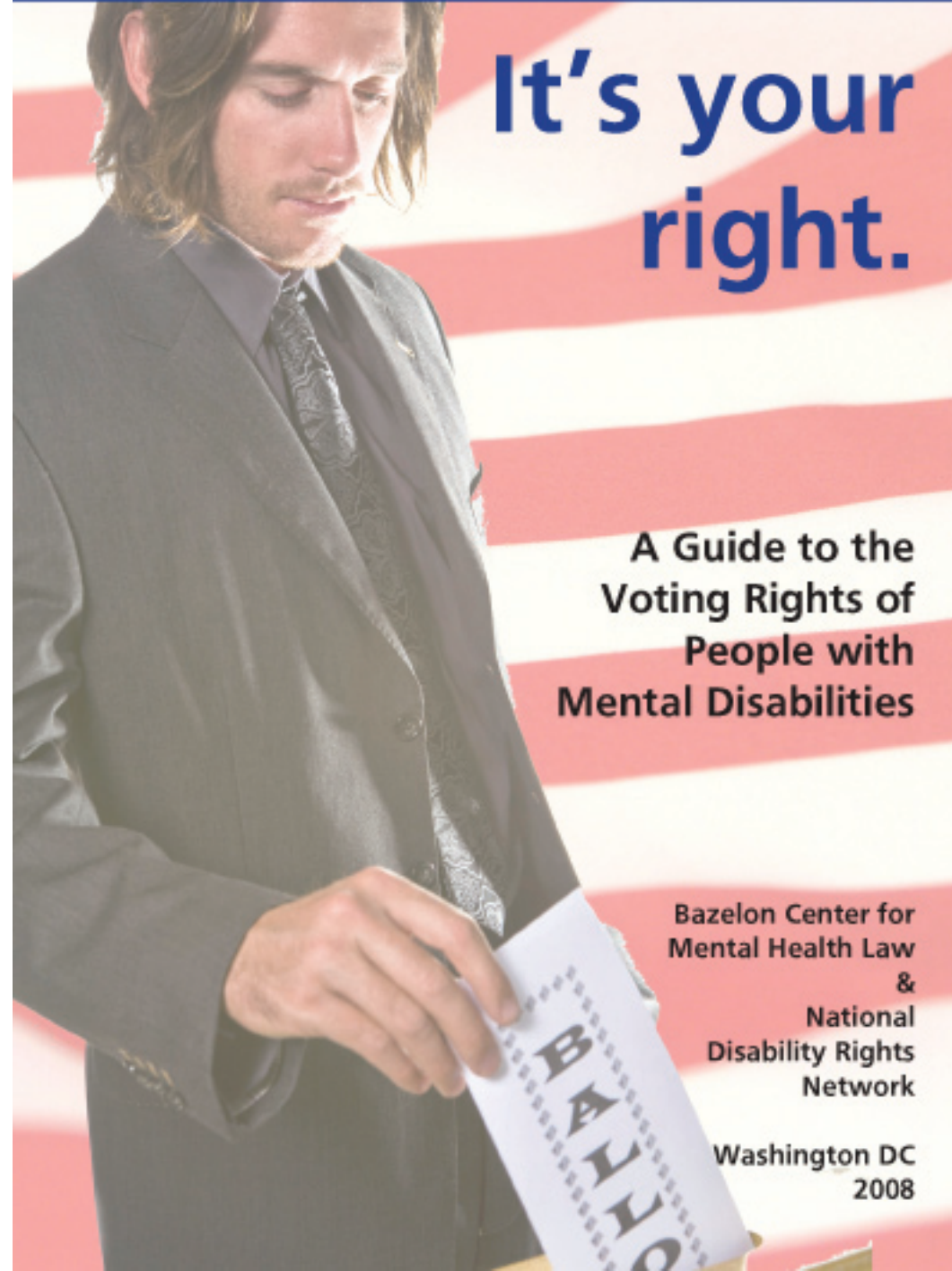
VOTE.

It's your
right.

A Guide to the
Voting Rights of
People with
Mental Disabilities

Bazon Center for
Mental Health Law
&
National
Disability Rights
Network

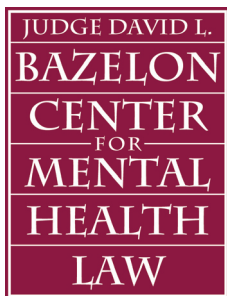
Washington DC
2008



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The guide is a project of the Voting Working Group of the National Disability Rights Network (NDRN). It was written by Bazelon Center deputy legal director Jennifer Mathis and senior staff attorney Lewis Bossing, with assistance by NDRN senior staff attorneys Delores Scott and Christina Galindo-Walsh and members of NDRN's Voting Working Group, and editing and design by Lee Carty, Bazelon Center publications director.



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People with Mental Disabilities Have the Right to Vote


Most people want to vote, including voters with mental disabilities. If you are a voter with a mental disability, you should know your rights.

Knowing your rights will help make sure you can vote. Take this piece of paper with you when you go to vote so you will know what your rights are. You can also show this to others if you run into any problems.

This paper tells lawyers and poll workers where to find the laws that protect your right to vote!

You do have the right to vote!

- If you are a person with a mental disability and understand what it means to vote, federal law protects your right to vote.

 The laws that protect that right: The Constitution and the Americans with Disabilities Act, 42 U.S.C. § 12132; *Doe v. Rowe*, 156 F.Supp.2d 35 (D.Me.2001).

You have the right to get help from a person you choose.

- If you can't read or need help voting because of your disability, you can have someone help you vote.
- You can bring a friend, family member or someone else you trust to help you.
- You can ask the poll worker to help you if you didn't bring anyone with you.

 The law that gives you that right: The Voting Rights Act, 42 U.S.C. §§1973aa-6; The Americans with Disabilities Act, 42 U.S.C. § 12132

If you have a problem, you can get help by calling 1-866-OUR-VOTE

- Lawyers are available to give voters with disabilities and other voters advice and help with voting problems, so call 1-866-OUR-VOTE (1-866-687-8683).

The law says everyone gets to cast a ballot, so don't leave without voting!

- Even if someone says you cannot vote, the law says the poll worker must allow you to vote a special ballot called a Provisional Ballot.
- Later, an election worker will decide whether you are allowed to vote in the election. If you are, your vote will be counted.

 The law that gives you that right: The Help America Vote Act, 42 U.S.C. § 15482

For more information about the rights of voters with disabilities visit www.ndrn.org

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
	<p>unless the court has determined that the person is competent to vote. Wis. STAT. § 6.03(1)(a).</p> <p>Persons may not be denied the right to vote upon the allegation that they are incapable of understanding the objective of the elective process unless they have been so adjudicated by the state. However, any incompetency determination that appoints a guardian or any limited competency determination that does not expressly find that the person is competent for voting will be taken as a determination that the person may not vote. Wis. STAT. § 6.03(3).</p>	<p>is incapable of understanding the objective of the elective process. The determination of the court shall be limited to a finding that the elector is either eligible or ineligible to vote. Wis. STAT. ANN. § 880.33(9).</p>		
WYOMING	<p>All persons adjudicated to be mentally incompetent, unless restored to civil rights, are excluded from the elective franchise. WYO. CONST. art. 6 § 6.</p> <p>No person is a qualified elector who is a currently adjudicated mentally incompetent person. WYO. STAT. ANN. § 22-1-102(a)(xxvi).</p>			

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STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
WEST VIRGINIA	No person who is of "unsound mind" shall be permitted to vote while such disability continues. W. VA. CONST. art. 4, § 1. No person who is of "unsound mind," shall be permitted to vote while such disability continues. W. VA. CODE § 3-1-3. Any person who has been determined to be mentally incompetent by a court of competent jurisdiction is disqualified and shall not be eligible to register or to continue to be registered to vote for as long as that determination remains in effect. W. VA. CODE § 3-2-2(b). If adjudicated incompetent, a person is automatically denied the right to vote. No specific decision regarding capacity for voting is required. 58 W. Va. Op. Atty. Gen. 221, Mar. 28, 1980.	Limited guardianship of the person proceeding includes a voting rights determination. Wis. STAT. ANN. § 880.33(3). All the rights and privileges afforded a proposed incompetent under this section shall be given to any person who is alleged to be ineligible to vote by reason that such person	Receipt of services for mental illness or retardation does not by itself deny persons the right to register and vote; must be adjudged incompetent and finding not reversed. W. VA. CODE § 27-5-9(a). W. VA. CODE § 27-5-9(a) does not conflict with the constitutional provision in art. 4, § 1. 58 W. Va. Op. Atty. Gen. 221, Mar. 28, 1980.	Receipt of services for mental illness or retardation does not by itself deny persons the right to register and vote; must be adjudged incompetent and finding not reversed. W. VA. CODE § 27-5-9(a).
WISCONSIN	Persons adjudged incompetent or partially incompetent excluded from the right of suffrage, unless judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside. Wis. CONST. art. 3, § 2(4)(b). Any person who is incapable of understanding the elective process or under guardianship may not vote,	Limited guardianship of the person proceeding includes a voting rights determination. Wis. STAT. ANN. § 880.33(3). All the rights and privileges afforded a proposed incompetent under this section shall be given to any person who is alleged to be ineligible to vote by reason that such person	A person is not deemed incompetent to vote solely based on admission, detention, or commitment under the developmental disabilities and mental health chapter. Wis. STAT. ANN. § 51.59(1).	A person is not deemed incompetent to vote solely based on admission, detention, or commitment under the developmental disabilities and mental health chapter. Wis. STAT. ANN. § 51.59(1).

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
WASHINGTON	<p>competency has been reestablished. VA. CONST. art. 2, § 1.</p> <p>No person adjudicated incapacitated shall be a qualified voter unless his capacity has been reestablished as provided by law. VA. CODE ANN. § 24.2-101.</p> <p>Incompetent and incapacitated are not conflicting standards. Op. Att'y Gen. of Va., 01-102, Dec. 10, 2001.</p> <p>All persons while they are judicially declared mentally incompetent are excluded from the elective franchise. WA. CONST. art. 6, § 3.</p> <p>"Elector" means any person who possesses all of the qualifications to vote under Article VI of the state Constitution. WASH. REV. CODE ANN. § 29A.04.061.</p> <p>Upon receiving official notice that a court has imposed a guardianship for an incapacitated person and has determined that the person is incompetent for the purpose of rationally exercising the right to vote, under chapter 11.88 RCW, if the person is a registered voter in the county, the county auditor shall cancel the person's voter registration. WASH. REV. CODE ANN. § 29A.08.515.</p>	<p>Imposition of a guardianship for an incapacitated person shall not result in the loss of the right to vote unless the court determines that the person is incompetent for purposes of rationally exercising the franchise in that the individual lacks the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice. The court order establishing guardianship shall specify whether or not the individual retains voting rights. When a court determines that the person is incompetent for the purpose of rationally exercising the right to vote, the court shall notify the appropriate county auditor. RCWA 11.88.010 (5).</p>		<p>The secretary's determination under RCW 71A.16.040 that a person is eligible for services under this title shall not deprive the person of any civil rights or privileges. The secretary's determination alone shall not constitute cause to declare the person to be legally incompetent. WASH. REV. CODE ANN. § 71A.10.030.</p>

Introduction

Voting is a fundamental right in American society—the foundation of our democracy. By expressing our views through voting, we can help ensure that our government develops and implements good policies and protects our civil rights. And votes do count: In 2000, President George W. Bush won the presidential election by taking Florida with a margin of just 930 votes of the six million cast.

Voting is just as important to people with mental disabilities as it is to everyone else. Yet their voting rights are widely misunderstood. As a result, they are often disenfranchised—by unwarranted concerns about their competence to vote, by inappropriate challenges to prevent them from voting, by refusals to provide or permit help with voting or by help that disregards the voter's own choices.

This booklet explains the rights of voters with mental disabilities. It can be a resource for people with mental disabilities, advocates, family members, service providers, election officials, state and local mental health and aging authorities, state legislators and others.

The text focuses on four areas of concern to voters with mental disabilities: (1) voter-competence requirements imposed by state laws or by election officials or service providers, (2) state photo-ID laws, (3) voter challenges and (4) providing help to voters with disabilities. A final section describes the relationship between federal and state laws in this area. To help readers learn specifics about their state, we include a chart listing each state's laws on voter-competence requirements.

While much of the explanation is geared toward lawyers, we also include text boxes with information addressed to voters, family members and advocates. Two one-page reference sheets are also available: a summary of the voting rights of people with mental disabilities and a summary of the types of help that may and may not be provided to voters with disabilities. Versions of these (reduced in size but not content) appear at the back of this booklet.

What is Not Covered Here?

Requirements for physical accessibility of voting systems, including polling places and voting equipment, are outside the scope of this booklet. However, you can find information and resources on the physical accessibility of voting systems on the National Disability Rights Network website, <http://www.ndrn.org/voting/resources>.

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
VERMONT	<p>To be entitled to the privilege of voting, persons must be of "quiet and peaceable behavior." VT. CONST. ch. II, § 42.</p> <p>No disqualifying election statute. Any person over 18 who is a citizen of the United States and a resident of the state of Vermont and has taken the voter's oath may vote. VT. STAT. ANN. TIT. 17 § 2121.</p>	<p>Proposed Legislation: Vermont 2005 House Bill 424 would add the following section: "A person in need of guardianship retains the same legal and civil rights guaranteed to all Vermont residents under the Vermont and United States Constitutions and all the laws and regulations of Vermont and the United States. These rights include: (3) the right to vote." Proposed 14 V.S.A. § 3060a. Bill has passed House and is now in State Senate.</p>	<p>adjudicated to be incompetent and has not been restored to legal capacity. UTAH CODE ANN. § 62A-15-641 (1)(c).</p> <p>When any right of a patient is...denied, the nature, extent, and reason for that...denial shall be entered in the patient's treatment record. Any continuing denial or limitation shall be reviewed every 30 days.... UTAH CODE ANN. § 62A-15-641 (2).</p> <p>Patient has the right to vote on his own initiative, unless he has been adjudicated incompetent and has not been restored to legal capacity, or unless facility determines restriction needed for patient's welfare. VT. STAT. ANN. TIT. 18 § 7705(a)(3).</p>	<p>adjudicated to be incompetent and has not been restored to legal capacity. UTAH CODE ANN. § 62A-15-641(1)(c).</p>
VIRGINIA	<p>As prescribed by law, no person adjudicated to be mentally incompetent shall be qualified to vote until his</p>			

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
TEXAS	<p>Persons adjudicated mentally incompetent shall not be allowed to vote, subject to such exceptions as the Legislature may make. TEX. CONST. art. 6, § 1.</p> <p>A person who has been determined mentally incompetent by a final judgment of a court is not a qualified voter. TEX. ELEC. CODE ANN. Tit. 2, § 11.002(3).</p> <p>To be eligible to register as a voter, must not have been determined mentally incompetent by a final judgment of the court. TEX. ELEC. CODE ANN. Tit. 2, § 13.001(a)(3).</p>		<p>jurisdiction and has not been restored to legal capacity; or (2) The denial is authorized by state or federal statute. TENN. CODE ANN. §33-3-102(a).</p> <p>Patients have the right to register and vote unless specific law limits rights under a special procedure. TEX. HEALTH & SAFETY CODE ANN. Tit. 7, § 576.001(b)(1).</p>	<p>jurisdiction and has not been restored to legal capacity; or (2) The denial is authorized by state or federal statute. TENN. CODE ANN. §33-3-102(a).</p> <p>Persons with mental retardation have the rights, benefits, and privileges guaranteed by the constitution and laws of the United States and this state. TEX. HEALTH & SAFETY CODE ANN. Tit. 7, § 592.011.</p> <p>Persons with mental retardation have the right to a presumption of competency. TEX. HEALTH & SAFETY CODE ANN. Tit. 7, § 592.021.</p>
UTAH	<p>A person who is mentally incompetent may not be permitted to vote, unless right to vote restored as provided by statute. UTAH CONST. art. 4, § 6.</p> <p>No disqualification election statute.</p>		<p>Subject to the general rules of the division, and except to the extent that the director or his designee determines that it is necessary for the welfare of the patient to impose restrictions, every patient is entitled to: . . . exercise . . . the right to . . . vote, unless the patient has been</p>	<p>((Subject to the general rules of the division, and except to the extent that the director or his designee determines that it is necessary for the welfare of the patient to impose restrictions, every patient is entitled to: . . . exercise . . . the right to . . . vote, unless the patient has been</p>

Key Legal Principles

- ☒ A state does not need to require a voter to demonstrate competence, and some states don't.
- ☒ If a state chooses to impose a voter-competence requirement, that requirement cannot be so broad that it takes away the right to vote of people who are capable of voting. For example, a state generally may not have laws that impose a blanket ban on voting by anyone under guardianship.¹
- ☒ If a state chooses to impose a voter-competence requirement, that requirement must be applied to *all* voters. It cannot single out a particular group of voters, such as people who are the subject of guardianship proceedings.²
- ☒ In virtually all states, only a court can find that a person is not competent to vote. In fact, it would present serious constitutional concerns for election officials or anyone else to make such a determination without the procedural safeguards of a court proceeding.³
- ☒ Service providers, such as nursing homes, hospitals, assisted-living facilities and group homes, cannot bar residents from voting based on staff or administrators' decisions that residents are not competent to vote.⁴
- ☒ Questions about a voter's competence can form the basis for a voter challenge only under very limited circumstances, if at all. Most states' laws restrict the grounds on which a voter may be challenged, the people who may bring a challenge and the types of evidence that can form the basis for a challenge. Many states do not permit any voter challenges based on competence.
- ☒ People with disabilities have the right to get help with voting and to decide who will help them vote.⁵
- ☒ A person with a disability can get help from a friend, family member, caregiver, residential service provider or almost anyone else of his or her choosing except an employer or

union member. The person can also ask a poll worker for assistance with voting.⁶

- A person helping a voter with a disability should ask the voter what choice he or she wants to make, if any. It is the voter who makes the choice whether to vote and how to vote, not the person providing help.
- The person providing help should not mark a ballot to reflect any choice other than the choice expressed by the voter.
- The person providing help must respect the voter’s privacy at all times during the voting process.⁷

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
SOUTH DAKOTA	<p>A person is disqualified from registering or voting if adjudicated mentally incompetent. S.C. CODE ANN. § 7-5-120(B)(1).</p> <p>Not entitled to vote if disqualified by law for mental incompetence. S.D. CONST. art. 7, § 2.</p> <p>Names of persons declared mentally incompetent shall be removed from the voter rolls each month. S.D. CODIFIED LAWS § 12-4-18.</p>	<p>The appointment of a guardian or conservator of a protected person does not constitute a general finding of legal incompetence unless the court so orders, and the protected person shall otherwise retain all rights which have not been granted to the guardian or conservator. S.D. CODIFIED LAWS § 29A-5-118.</p>	<p>complying with voting requirements, and voting by absentee ballot. S.C. CODE ANN. § 44-22-80(7).</p> <p>Notwithstanding any other provision of law, no person may be deemed incompetent to register and vote solely by reason of his detention, admission, or commitment under this title. S.D. CODIFIED LAWS § 27A-12-1.2.</p>	<p>materials and ballots, complying with voting requirements, and voting by absentee ballot. S.C. CODE ANN. § 44-26-90(7).</p> <p>No person is incompetent to register and vote solely by reason of a diagnosis of a developmental disability, or by reason of a commitment by a county review board. S.D. CODIFIED LAWS § 27B-7-44 (replaced old language in 2000 under SL 2000, ch 131, § 76).</p>
TENNESSEE	<p>No Constitutional disqualification provision.</p> <p>No disqualification election statute.</p>	<p>May remove the right to vote if placed under a conservatorship. Petition for appointment of a conservator should include the rights that will be removed. Tenn. Code Ann. §34-3-104(8).</p>	<p>No person with mental illness, serious emotional disturbance, or developmental disability hospitalized or admitted, whether voluntarily or involuntarily, or ordered to participate in non-residential treatment or service under this title shall, solely by reason of such hospitalization, admission, or order be denied the right to vote, unless (1) The service recipient has been adjudicated incompetent by a court of competent</p>	<p>No person with mental illness, serious emotional disturbance, or developmental disability hospitalized or admitted, whether voluntarily or involuntarily, or ordered to participate in non-residential treatment or service under this title shall, solely by reason of such hospitalization, admission, or order be denied the right to vote, unless (1) The service recipient has been adjudicated incompetent by a court of competent</p>

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PUERTO RICO	<p>Every person over 18 can vote if he or she fulfills the other conditions determined by law. PR Const. Art. 6, § 4.</p> <p>Each month the court administrator sends the Commonwealth Commission a list of the people who are declared judicially as mentally incompetent. PR ST T. 16 § 3076.</p> <p>Person who has been declared judicially incompetent may be challenged when registered to vote. PR ST T. 16 § 3073.</p> <p>Persons judicially declared unqualified cannot vote. PR ST T. 16 § 3055.</p>			
RHODE ISLAND	<p>No person who has been adjudicated "non compos mentis" shall be allowed to vote. R.I. CONST. art. 2, § 1.</p> <p>Qualified voted defined as someone who is not otherwise disqualified by law. R.I. GEN. LAWS § 17-1-2(13).</p>		<p>Patients admitted to a facility shall not be deprived of the right to vote and participate in political activity. R.I. GEN. LAWS § 40.1-5-5(f)(10).</p>	<p>Community residence resident will not be deprived of right to vote just because of admission and has right to reasonable assistance in registration and voting if desired. RI. ST. § 40.1-24.5-5.</p>
SOUTH CAROLINA	<p>General Assembly shall establish disqualifications for voting by reason of mental incompetence and may provide for the removal of such disqualifications. S.C. CONST. art. 2, § 7.</p>		<p>Patients have the right to vote unless adjudicated incompetent. County boards of voter registration should also reasonably assist clients with obtaining registration materials and ballots,</p>	<p>Residents of facilities have the right to vote unless adjudicated incompetent. County boards of voter registration should also reasonably assist clients with obtaining registration</p>

Voter-Competence Requirements

People with mental disabilities sometimes lose the right to vote because of state voter-competence laws or because election officials, poll workers or service providers improperly impose their own voter-competence requirements. This section describes the ways in which people have lost the right to vote due to these laws and practices. It also describes what voters' rights are and what steps they may take to preserve or restore their rights.

State Voting Laws

Many states require that voters have a certain level of competence in order to vote. These requirements, in state laws or state constitutions, sometimes deprive people with mental disabilities of the right to vote. See the chart of each state's laws on voter competence on page 41.

About 15 states and the District of Columbia have laws that bar voting by individuals who are "under guardianship" or adjudged "mentally incompetent" or "mentally incapacitated." All of these terms generally mean the same thing.⁸ These laws require a court determination of incompetence or incapacity before removing a person's right to vote. Typically, however, such determinations involve competencies other than voting competence.

A finding of incompetence or incapacity generally means that a person is unable to meet basic needs for food, clothing and shelter due to a disability. For example, many individuals are placed under guardianship because they were unable to care for themselves during a psychiatric crisis. Yet they may have a good understanding of how elections work and of the issues at stake in federal, state and local elections. Guardianship hearings rarely include inquiries into a person's understanding of voting issues.

Some 20 states have laws that bar voting *only* if a court has

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determined that an individual specifically lacks the capacity to vote.⁹

- ☒ Three states have laws that bar voting by individuals who are “non compos mentis.” This term has been interpreted differently from one state to the next.¹⁰
- ☒ Nine states have laws that use outmoded and stigmatizing terms such as “idiots” and “insane persons” to describe who is barred from voting based on competence concerns.¹¹ Such laws are rarely enforced because they are virtually impossible to understand and apply.
- ☒ Eleven states—Colorado, Idaho, Illinois, Indiana, Kansas, Maine, Michigan, New Hampshire, North Carolina, Pennsylvania and Vermont—place no disability-related restrictions on the right to vote.¹²

Election Officials

Election officials sometimes impose their own voter-competence requirements and prevent individuals with mental disabilities from voting. They have refused to allow individuals who live in institutions to register and vote or to obtain absentee ballots. Or they have required institutional residents to take examinations not required of others before being permitted to vote. Such practices have been invalidated by the courts as unconstitutional.¹³ Indeed, many states now have laws specifying that individuals do not lose their right to vote because of their residence in an institution.¹⁴

Example: Election officials in New Jersey segregated the ballots submitted by residents of a state psychiatric hospital and refused to count the ballots unless residents could prove that they were competent to vote. This practice was held unconstitutional.¹⁵

Example: Election officials in Virginia refused to provide absentee ballots for people with mental illnesses living in a state psychiatric hospital based on state officials’ interpretation of state law as authorizing absentee ballots for individuals in

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
	<p>A person who is confined to an institution for the mentally ill or mentally retarded can choose to vote either in the district in which the institution is located or where they were registered to vote or resided before they were institutionalized. PENN. CONSOL. STAT. ANN. TIT. 25 § 1302(a)(4).</p> <p>A mentally retarded or mentally ill person cannot be disenfranchised solely because he or she is undergoing treatment for a mental disability or is known to reside in an institution for the treatment of the mentally disabled. 1973 Op.Atty.Gen. No. 48.</p> <p>A person who resides at institution for the mentally ill or mentally retarded in the state cannot lawfully be denied the right to register as a qualified elector in the voting district in which the institution is located. 1973 Op.Atty.Gen. No. 48.</p>			

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
OREGON	restricted. OKLA. STAT. TIT. 26, § 4-101(2). The registration of any registered voter may be cancelled upon judicial determination of mental incapacitation under Title 30 of the Oklahoma Statutes. OKLA. STAT. ANN. TIT. 26 § 4-120. A person "suffering from a mental handicap" is entitled to the full rights of an elector, if otherwise qualified, unless the person has been adjudicated incompetent to vote as provided by law. OR. CONST. art. 2, § 3. No disqualification statute.		Patient may vote unless adjudicated incompetent and finding not reversed. OR. REV. STAT. § 426.385(1)(n). Persons receiving mental health and developmental disability services in connection with alcohol and drug abuse programs retain the rights afforded to all citizens, including the right to vote. OR. REV. STAT. § 430.210(3).	Resident in a facility shall have the right to vote, unless the resident has been adjudicated incompetent and has not been restored to legal capacity. OR. REV. STAT. § 427.031(1).
PENNSYLVANIA	No Constitutional disqualification provision. Subject to state law, anyone who is over twenty one, has been a citizen of the United States for at least one month, and has resided in the state and county for the specified time may vote. PA. CONST. Art. 7, § 1. No disqualification election statute.			

facilities only if they have physical disabilities.¹⁶

Example: Election officials in Arkansas required a group of individuals with developmental disabilities who lived in a group home to pass an examination in order to be permitted to vote. This requirement was not imposed on other voters.

Poll Workers

Poll workers sometimes improperly turn away individuals with mental disabilities at the polls based on their own judgments that these individuals should not be permitted to vote.

Service Providers

Some providers of residential or other services for people with disabilities have inappropriately kept individuals with mental disabilities from registering, voting, or receiving voting assistance. Staff of hospitals, developmental disabilities institutions, nursing homes, group homes, shelters and other settings sometimes decide on their own that residents should not be allowed to vote. Staff of such facilities typically exert significant control over residents' lives, and their decisions have prevented many residents from exercising their lawful right to vote.

Example: A recent study of Philadelphia nursing homes revealed that many residents were denied the right to vote based on staff decisions that they were not competent to vote. Staff at a significant number of nursing homes required residents with cognitive impairments to answer questions to demonstrate their understanding of the election process, including names of candidates or current officeholders and questions about voting procedures.¹⁷ Pennsylvania law does not contain any voter-competence requirement.

Example: Before the November 2004 election, a Department of Veterans' Affairs (VA) nursing home in California refused to permit volunteers to come to the home to provide voter education and registration assistance. Staff told registration workers that the residents were "too demented to vote." After

a threatened lawsuit, the facility allowed the protection and advocacy agency for individuals with disabilities to provide training on voting rights and assist residents who wished to register to vote.¹⁸

Example: Before the November 2004 election, an Ohio nursing home resident was barred by staff from registering to vote because his disability made him unable to create a signature and he used an “X” instead of a signature.

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
NORTH CAROLINA	No Constitutional disqualification provision. No disqualification election statute.		Persons who are adult clients at a facility have the right to register and vote unless that right has been precluded by an unrevoked adjudication of incompetency. N.C. GEN. STAT. § 122C-58.	Persons who are adult clients at a facility have the right to register and vote unless that right has been precluded by an unrevoked adjudication of incompetency. N.C. GEN. STAT. § 122C-58.
NORTH DAKOTA	No person who has been declared mentally incompetent shall be qualified to vote, unless the order has been rescinded. N.D. CONST. art. 2, § 2.	Except upon specific findings of the court, no ward may be deprived of the right to vote. N.D. CENT. CODE § 30.1-28-04(3).	Unless specifically restricted in writing every 14 days by a patient's treating physician, all patients in treatment facilities retain their "civil rights." N.D. CENT. CODE § 25-03.1-40.	Developmentally disabled persons may not be deprived of the right to vote solely because of admission, residency or receipt of services at an institution or facility. N.D. CENT. CODE § 25-01.2-03(1).
OHIO	No "idiot" or "insane person" shall be entitled to the privileges of an elector. OHIO CONST. art 5, § 6. Voter registration is cancelled if the person is adjudicated incompetent for the purpose of voting, OHIO REV. CODE ANN. § 3503.18.		Persons taken into custody either voluntary or involuntarily may vote unless adjudicated incompetent, or unless Revised Code specifically denies the right to vote. OHIO REV. CODE ANN. § 5122.301.	Persons with mental retardation and developmental disabilities have the right to participate in the political process. OHIO REV. CODE ANN. § 5123.62(W).
OKLAHOMA	Legislature may prescribe exceptions for qualification. OKLA. CONST. art. 3, § 1. Ineligible to vote if adjudicated an incapacitated person under Guardianship and Conservatorship Act, unless adjudicated no longer incapacitated; or adjudicated partially incapacitated person and right to vote	Court shall make a specific determination of the voting capacity of a person under guardianship. OKLA. STAT. ANN. TIT. 30 § 3-113(B)(1).		

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
	<p>Persons under constitutional disqualification not qualified under state law. N.M. STAT. ANN. § 1-1-4.</p> <p>Registration of a voter shall be cancelled when it is determined that the person is legally insane under the constitutional provision. N.M. STAT. ANN. § 1-4-26(B).</p> <p>Individuals with mental retardation “who can understand the nature of their actions should be allowed to register and vote.” 1974 Op. Atty Gen. No. 74-35.</p>	<p>civil rights except those which have been expressly limited by court order or have been specifically granted to the guardian by the court. N.M. STAT. ANN. § 45-5-301.1.</p> <p>The same reservation of rights is specified for limited guardianships. N.M. STAT. ANN. § 45-5-312(A).</p>	<p>Receipt of services for mental disability shall not deprive persons of the right to register and vote if otherwise qualified. N.Y. MENT. HYG. LAW § 33.01.</p>	<p>Receipt of services for mental disability shall not deprive persons of the right to register and vote if otherwise qualified. N.Y. MENT. HYG. LAW § 33.01.</p> <p>The commissioner shall include in rules and regulations promulgated for community residence a statement of the rights of persons living in such residences which shall include, but not be limited to ... the right to vote. N.Y. MENT. HYG. LAW § 41.41.</p>
NEW YORK	<p>Right of suffrage and registration of voters laws shall be established by law. N.Y. CONST. ART. 2, § 5.</p> <p>No person who has been adjudged incompetent has the right to vote, unless later adjudged competent. N.Y. ELEC. LAW § 5-106(6).</p> <p>Manhattan Citizens Group, Inc. v. Bass, 524 F. Supp. 1270 (SDNY 1981) (unconstitutional to disenfranchise a person based on admission to a hospital; in dicta, assuming but not deciding that someone adjudicated incompetent would presumably be incapable of voting).</p>		<p>Receipt of services for mental disability shall not deprive persons of the right to register and vote if otherwise qualified. N.Y. MENT. HYG. LAW § 33.01.</p>	

What Are Your Voting Rights?

Only a Court Can Decide that Someone is Not Competent to Vote

An election official, poll worker or service provider cannot make decisions about whether a person is competent to vote. In virtually every state with a voter competency requirement, a court must make the determination that a person does not meet the competency requirement.¹⁹ Even state laws disenfranchising “idiots” and “insane” people have been read to require a court finding of incompetence.²⁰

Indeed, regardless of what state law says, basic principles of federal due process require that a person’s right to vote cannot be taken away without the opportunity to be heard in court.²¹ The decision that a person lacks the competence to vote cannot be made by a long-term care facility, hospital or other service provider, or by a guardian or family member. Nor can it be made by a poll worker or election official.

When voter-competence decisions are made outside of a courtroom, they are not only being made by people who are unauthorized to make them, but they are typically based on factors that have little to do with what state law requires. In fact, many people have been denied the right to vote *even in states that do not have any voter-competence requirement* because service providers or others simply assumed, as in the above examples, that they could legally prevent people with mental disabilities from voting.

If a person is told by a poll worker that he or she is not competent to vote, the person should ask to vote a provisional ballot before leaving the polling place. The provisional ballot will be counted later if the person is eligible to vote.

Can Anyone But a Judge Decide that You Are Not Competent to Vote?

It is not legal for anyone to take away your chance to vote because that person thinks that you are not competent to vote. Election officials and poll workers cannot stop you from voting because of your disability. Staff in hospitals, nursing homes and other institutions cannot refuse to allow residents to register and vote or to obtain absentee ballots. That is unlawful. Only a court can decide that a person lacks the competence to vote.

If you are told on Election Day that you cannot vote, you can demand to vote a provisional ballot.

How Can Someone Retain the Right to Vote or Have it Restored Under State Law?

While advocates may want to consider challenging certain state voter-competence requirements as inconsistent with federal law (see page 12), many individuals may simply wish to use avenues available under state rules to try to keep from losing their right to vote, or to have it restored. This section describes what individuals may do—usually in the context of guardianship proceedings—to accomplish these goals.

In many states, a person is at risk of losing the right to vote when a guardianship is imposed. This is true in most states that have some type of voter-competence requirement. In states where the right to vote is automatically lost when a person is under guardianship, the ward may lose the right to vote even though the subject of voting was never raised. Often neither the ward nor the person seeking guardianship is aware that the right to vote is at stake in a guardianship hearing.

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
NEW HAMPSHIRE	No Constitutional disqualification provision. No disqualification electoral statute.		No person shall be deemed incompetent to vote or to exercise any other civil right solely by reason of that person's admission to the mental health services system. N.H. REV. STAT. ANN. § 135-C:56(I).	Persons may not be deprived of the right to vote because they have or are receiving services for a developmental disability; department rules shall not restrict voting rights. N.H. REV. STAT. ANN. § 171-A:14(I).
NEW JERSEY	On Nov. 6, 2007, NJ voters approved constitutional amendment. New language states: No person shall have the right of suffrage who has been adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting. Previous language stated: No person shall have the right of suffrage who is an "idiot" or "insane" person. N.J. CONST. art 2, § 1, ¶ 6. No person shall have the right of suffrage who is an "idiot" or "insane" person. N.J. STAT. ANN. § 19:4-1(1).		Subject to any other provisions of law and the Constitution of New Jersey and the United States, no patient shall be deprived of the right to vote solely by reason of receiving treatment. N.J. STAT. ANN. § 30:4-24:2(a). Cannot be presumed incompetent because has been examined or treated for mental illness. §30:4-24.2(c) Persons receiving in-patient assessment or treatment may register and vote subject to laws and Constitution. N.J. STAT. ANN. § 30:4-27.11(c)(a).	Admission or residency at a facility or receipt of services shall not deprive persons of their right to register and vote. N.J. STAT. ANN. § 30:6D-4(a). Determination of eligibility for MR services does not create presumption of incompetency; cannot revoke right to vote based solely on placement at residential facility. Carroll v. Cobb, 354 A.2d 355 (N.J. Super. Ct. 1976).
NEW MEXICO	"idiots" and "insane" persons not qualified to vote. N.M. CONST. art. 7, § 1.	An incapacitated person for whom a guardian has been appointed retains all legal and		

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
NEBRASKA	<p>Not qualified to vote if "non compos mentis," unless restored to civil rights. NE. CONST. art. 6, § 2.</p> <p>No person is qualified to vote if "non compos mentis," unless restored to civil rights. NEB. REV. STAT. § 32-313(1).</p> <p>"Non compos mentis" defined as "mentally incompetent" in voter registration materials. NEB. REV. STAT. § 32-312. ("Mentally incompetent" is not synonymous with being under guardianship; the latter is imposed in Nebraska based on "mental incapacity").</p>			
NEVADA	<p>No person who has been adjudged mentally incompetent, unless restored to legal capacity, shall be entitled to the privilege of elector. NV. CONST. art. 2, § 1.</p> <p>The county clerk shall cancel the voter registration if the "insanity" or mental incompetence of the person registered is legally established. NV. REV. STAT. ANN. § 293.540(2).</p>		<p>No person admitted to a public or private mental health facility pursuant to this chapter shall, by reason of such admission, be denied the right to vote, unless specifically adjudicated incompetent and has not been restored to legal capacity. NV. REV. STAT. ANN. § 433A.460(1).</p> <p>Medical director shall evaluate every six months to determine if sufficient cause to remain unable to vote. NV. REV. STAT. ANN. § 433A.480(1).</p>	

Know Your Rights in Guardianship Proceedings

If someone is trying to become your guardian, you should know what having a guardian will mean for your voting rights. If your state bars voting by people who have guardians or who are not able to vote (these states are listed in notes 8 and 9), you should ask the probate judge to keep your right to vote. You should also be prepared to show the judge that you are able to vote.²²

What Must You Show to Retain the Right to Vote?

You should try to present more information than necessary to show that you are able to vote. You should explain your ability to understand what it means to vote and how the voting process works. Have a mental health professional confirm this. If you communicate in a way that the judge may not understand clearly, the mental health professional should be able to explain how you communicate to help the court understand.

What if You Have Already Lost the Right to Vote?

If you have already lost the right to vote when you got a guardian, you can always ask the probate court to restore it. The fact that you were found unable to vote at one time does not necessarily mean that you are unable to vote now.

[box continues on the next page]

Know Your Rights [continued]

Even in states that remove the right to vote from anyone under guardianship, some courts allow people to keep the right to vote, or to have it restored, if they can show they are able to vote.²³

You may wish to contact the protection and advocacy agency in your state to help you figure out how to make sure your right to vote can be kept or restored in guardianship proceedings. You can find contact information for the agency in your state at <http://www.ndrn.org>.

Challenging State Voter-Competence Requirements

Someone who has lost the right to vote based on a state voter-competence requirement may be able to challenge the requirement on the ground that it violates federal law. Laws that bar people who are “mentally incompetent” or under guardianship from voting generally violate the Constitution and the Americans with Disabilities Act (see pages 25-28) if they are used to take away a person’s right to vote based on disability even if the person has the capacity to vote.

Fewer people lose their voting rights in states with laws that remove a person’s right to vote only after a court determines that he or she is not competent to vote. Even these laws, however, typically require certain people—usually those who are the subject of guardianship proceedings—to meet standards that are not imposed on other voters.

Probate courts in these states sometimes ask individuals who are the subject of guardianship proceedings to demonstrate an understanding of elections and politics that goes far beyond what

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
MISSISSIPPI	"idiots" and "insane" persons are not qualified electors. MISS. CONST. art. 12, § 241. "idiots" and "insane" persons shall not be entitled or permitted to vote. MISS. CODE ANN. § 23-15-11.	STAT. § 524.5-310(e).	Admission, treatment, or commitment does not deprive the right to vote. MISS. CODE ANN. § 41-21-101(b).	vote. MINN. STAT. § 252A.12. Admission, treatment, or commitment does not deprive the right to vote. MISS. CODE ANN. § 41-21-101(b).
MISSOURI	No person under guardianship of estate or person because of mental incapacity nor persons involuntarily confined in a mental institution can vote. MO. CONST. art. VIII, § 2. No person adjudicated incapacitated is entitled to vote. MO. REV. STAT. § 115.133(2). Person who had been committed to mental hospital many years earlier but did not have a guardian was not disqualified under the constitutional provision. <i>New v. Corrough</i> , 370 S.W.2d 323 (Mo. 1963).			
MONTANA	Not a qualified elector if of "unsound mind," as determined by a court. MONT. CONST. art 4, § 2. No person adjudicated to be of unsound mind has the right to vote, unless he has been restored to capacity as provided by law. MONT. CODE ANN. § 13-1-111(3).			

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
MASSACHUSETTS	<p>Every citizen...excepting persons under guardianship... shall have a right to vote in such election. MASS. CONST. amend, art. 3</p> <p>Sec of State opinion interpreting above provision to require a specific finding of incompetence to vote before disenfranchising someone.</p> <p>Every citizen...not being a person under guardianship...may have his name entered on the list of voters in such city or town, and may vote therein in any such election. MASS. ANN. LAWS ch. 51 § 1.</p>		No person shall be deprived of the right to vote solely on the basis of admission or commitment to a mental health facility. 104 CODE MASS. REG. 27-13; Boyd v. Board of Registrars of Voters, 334 N.E.2d 629 (Mass. 1975).	
MICHIGAN	<p>Legislature may exclude persons based on mental incompetence. MICH. CONST. art. 2, § 2.</p> <p>No disqualification electoral statute.</p>			
MINNESOTA	<p>Persons under guardianship, "insane," or not mentally competent are not entitled or permitted to vote. MINN. CONST. art. 7, § 1.</p> <p>Not eligible to vote if under guardianship in which the court order revokes the right to vote or adjudicated legally incompetent. MINN. STAT. § 201.014(2)(b)(c).</p>	<p>Unless otherwise ordered by the court, the ward under guardianship retains the right to vote. MINN. STAT. § 524.5-313(c)(8).</p> <p>Each year, within 30 days after the anniversary date of an appointment, a guardian shall send or deliver to the ward a notice ... of the status of the ward's right to vote. MINN.</p>	<p>Persons may not be deprived of the right to vote because of commitment or treatment. MINN. STAT. § 253B.23(2)(a).</p>	<p>Appointment of the commissioner as conservator shall not constitute a judicial finding that the mentally retarded person is legally incompetent except for the restrictions which the conservatorship places on the conservatee. The appointment of a conservator shall not deprive the conservatee of the right to</p>

is expected of the general public before they are permitted to vote. For example, individuals are sometimes asked to provide the names of various federal, state or local office holders, to explain the voting process and to explain their political views. Individuals who do not answer these questions to the satisfaction of the questioner are not permitted to vote.

Such inquiries hold people with mental disabilities to a higher standard than other voters. They also function as a type of unlawful literacy test for people with mental disabilities. The Voting Rights Act requires courts to apply the same standard to everyone (see pages 29-30).

What You Can Do if Told You May Not Vote

If you have been told that you may not register or vote because of a state rule about competence, you may contact the protection and advocacy agency for people with disabilities in your state. You can find its contact information on the web at <http://www.ndrn.org>. The protection and advocacy agency can help you figure out what to do. The Bazelon Center for Mental Health Law may also be able to help. You can reach the Center at (202) 467-5730.

Advocating to Change the Voter-Competence Standard in Your State

We urge advocates and policymakers to promote the replacement of restrictive voter-competence standards with tailored standards that treat voters with disabilities equally.

Voters with Mental Disabilities Should Not Be Held to a Higher Standard

Voter qualifications typically include, in addition to U.S. citizenship, residence in the state where the person is voting, being age 18 or over and, in some states, not having been convicted of a felony within a certain timeframe. No state subjects voters without disabilities to any type of standard to measure voting capacity. We do not expect voters without disabilities to demonstrate the rationale for their votes or their understanding of how the voting process works.

What Standard Should Be Used to Determine Voting Competence?

The need for any voter-competence requirement is remote at best. There is no indication that election systems in any of the states without voter-competence requirements have been compromised by the votes of people with mental disabilities.

To the extent that states choose to have a voter-competence requirement, all their laws and practices must hold all individuals to the same standard.²⁴

Given that the essence of voting is expressing a choice, one appropriate standard for voting competence is whether a person can communicate, with or without accommodations, a choice whether to cast a vote. The American Bar Association’s House of Delegates recently adopted a similar standard: whether a person can communicate, with or without accommodations, “a specific desire to participate in the voting process.”²⁵

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
MAINE	Persons under guardianship for reason of mental illness shall not be electors. ME. CONST. ART. 2 §1. Held unconstitutional by Doe v. Rowe 156 F. Supp.2d 35 (D. Me. 2001). Found that procedures in probate courts did not give adequate due process to Plaintiffs (were not told they would be disenfranchised as a result of the guardianship process). Also found that the provision did not pass strict scrutiny because there was not sufficient correlation between the ends and the means—therefore Art. II §1 violates the Equal Protection Clause. Memorandum from Deputy Secretary of State to All Municipal Clerks and Registrars (Sept. 4, 2001) eliminating the ban on voting by individuals under guardianship by reason of mental illness as of Aug. 9, 2001.		Patients in residential care facilities have the right to vote unless facility determines a need to restrict due to medical welfare, patient is adjudicated incompetent and finding not reversed, or other statute or rule restricts the right, but not solely on admission to a hospital or residential care facility. ME. REV. STAT. ANN. tit. 34-B § 3803(1)(A-C).	Persons with mental retardation or autism may not be denied voting rights because of mental illness, unless under guardianship. ME. REV. STAT. ANN. tit. 34-B § 5605(5).
MARYLAND	State may regulate or prohibit the right to vote of a person under care or guardianship for mental disability. Md. CONST. art 1, § 4; Individual not qualified to be a registered voter if under guardianship for mental disability. Md. CODE ELEC. LAW 3-102(b)(2).		A person may not lose the right to vote solely because of residency in a facility for a mental disorder. Md. HEALTH-GEN. § 10-704.	A person may not lose the right to vote because he or she has or is receiving services for a developmental disability. MD. HEALTH-GEN. § 7-1004.

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
LOUISIANA	<p>Anyone disqualified under the Constitution may not vote. KY. REV. STAT. § 116.025(1).</p> <p>Individuals declared incompetent solely for the purpose of appointing a committee to manage their welfare checks would not be disqualified from voting and are prima facie qualified to vote. 1973 KY Attorney General Op. 73-700.</p> <p>Person declared incompetent but not declared "insane" would be entitled to register to vote if otherwise qualified. 1976 KY Attorney General Op. 76-549.</p> <p>Right to vote may be suspended while interdicted and judicially declared mentally incompetent. LA. CONST. art. 1, § 10(A).</p> <p>An individual who has been fully interdicted after being judicially declared to be mentally incompetent may not vote. An individual who is only partially interdicted is allowed to vote unless there has been a specific suspension of the right to vote. LA. REV. STAT. ANN. § 18:102(A)(2).</p>	<p>in need of a guardianship or conservatorship, the court must specifically determine whether the person retains the right to vote. KY. REV. STAT. 387-580(3)(c). Ward shall only be deprived of right to vote if the court separately and specifically makes a finding on the record. KY. REV. STAT. 387.590(10)</p>	<p>Patients in treatment facilities shall not be deprived of the right to vote because of status as a patient in a treatment facility. LA. REV. STAT. ANN. § 28:171(A).</p>	<p>Department of Health and Hospitals shall establish rules and regulations to ensure that persons with mental retardation who are competent to vote (have not been interdicted or partially interdicted with a specific suspension of the right to vote) are permitted to vote. LA. REV. STAT. ANN. § 18:102.1(B).</p>

In sum, experience in many states suggests that it is unnecessary to impose *any* limitation on the fundamental right to vote of people with mental disabilities. Where states decide to have such limitations, the standard for voting should be the same for a person with a mental disability as for anyone else: whether the person can express a choice.

Photo-Identification Laws

A number of states have begun to require voters to present a driver’s license or other government-issued photo-ID in order to vote. These requirements may place both financial and practical burdens on voters. Even where laws require provision of a free photo-ID to indigent individuals, fees are often required to obtain the necessary documentation, such as a birth certificate. Voters with mental or physical disabilities who do not already have a photo-ID may face particular challenges in obtaining one.

As of June 2008, seven states ask voters to show photo-identification.²⁶ In five of these states, voters lacking a photo-ID can vote if they submit an affidavit and/or provide additional forms of identification. In Indiana and Georgia, voters without a photo-ID can only vote a provisional ballot. In Georgia, these voters must return later with photo-IDs. In Indiana they may return with either photo-IDs or an affidavit explaining that indigence or religious principles prevented them from obtaining one.²⁷

While a state court struck down Missouri’s photo-ID law,²⁸ the U. S. Supreme Court recently upheld Indiana’s law.²⁹ The Supreme Court’s decision was based on the failure in that case to demonstrate that any group of voters was actually subjected to excessive burdens.

The Supreme Court’s decision leaves room for future constitutional challenges to voter-identification laws that present substantial burdens on individuals’ right to vote. Such laws may also violate state constitutions that are more protective than the U.S. Constitution. Finally, they may violate the Americans with Disabilities Act (ADA—see page 27) if they screen out voters with disabilities and are not necessary, or if a state fails to make reasonable modifications necessary to ensure that voter-identification laws do not deprive people with disabilities of equal voting opportunities.³⁰

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
IOWA	No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector. IOWA CONST. art. 2, § 5. A person who is “incompetent to vote” is disqualified from registering and voting. Certification by the clerk of the district court that a court has found the person no longer incompetent shall qualify such person to vote again if otherwise eligible. IOWA CODE § 48A.6(2).	When a guardian is appointed for a person with mental retardation, the court shall make a separate determination as to the ward’s competency to vote. The court shall find a ward incompetent to vote only upon determining that the person lacks sufficient mental capacity to comprehend and exercise the right to vote. I.C.A. § 633.556. When guardianship in which the order determined the right to vote is terminated, person can request reinstatement of voting rights as part of the termination procedure or in a separate determination. I.C.A. § 633.679. The vote of a legal incompetent shall be cast by the guardian along with a written sworn statement. I.C.A. § 468.513.		Being committed does not bar the right to vote unless the court makes a separate determination that the person lacks the mental capacity to comprehend and exercise the right to vote. I.C.A. §222.16. In an order committing a person based on mental retardation, the court shall include a finding as to whether the person has sufficient mental capacity to comprehend and exercise the right to vote. I.C.A. §222.31.
KANSAS	Legislature may exclude persons from voting because of mental illness. KS. CONST. art 5, § 2. No disqualification statute.			
KENTUCKY	“Idiot” and “insane” persons shall not have the right to vote. KY. CONST. § 145(3).	If a court finds that a person is		

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
ILLINOIS	No disqualification statute. Every patient of any hospital or mental institution in this State shall be deemed a resident of the town, city, village or election district or precinct in which he resided next prior to becoming a patient of such hospital or mental institution. However, the term "hospital" does not include skilled nursing facilities. IL ST CH 10 § 5/3-4. Any person who is a resident of a facility licensed or certified pursuant to the Nursing Home Care Act for 30 days or longer, and who is a U.S. citizen and has resided in this State and election district 30 days preceding any election shall be entitled to vote in the election district in which any such home in which he is a resident is located, provided that he shall declare upon oath that it was his bona fide intention at the time he entered said home to become a resident thereof. IL ST CH 10 § 5/3-3.			
INDIANA	No disqualification provision. No disqualification statute.		Detention or commitment does not deprive persons of the right to vote. IND. CODE § 12-26-2-8(a)(1)(F).	

Voter Challenges Based on Mental Competence

Competence challenges to voters with mental disabilities, although they are not permitted in many states, have sometimes been cynically used to affect election results.

Example: Shortly before the November 2004 election, *The New York Times* reported that political party officials in Ohio were training thousands of recruits to challenge voters suspected of being ineligible to vote. Among other things, the recruits were “taught how to challenge mentally disabled voters who are assisted by anyone other than their legal guardians.”³¹

Most states’ laws provide for challenges to a person’s eligibility to vote.³² State law governs who may bring a challenge and what types of evidence must be presented to support a challenge. Visit <http://www.bazon.org/issues/voting> for a link to a chart summarizing each state’s requirements as to the permissible grounds for challenges, the individuals who may bring a challenge, and the evidence and procedures required.

Is Competence a Permitted Ground for Challenging a Voter?

In many states, lack of competence is not a permissible basis for a voter challenge, even if the state has a voter-competence requirement.³³ And if the state does not have a voter-competence requirement, then a person may not be disqualified on the basis of competence.

In some states, competence may form the basis for challenges brought *before* the election, but not for challenges *at* the polling place. Polling-place challenges are sometimes limited to factors that are more easily determined, such as whether the voter is the person he or she claims to be or is voting at the correct precinct.³⁴

Even when challenges based on competence are allowed, many people wrongly believe that individuals with mental disabilities may be challenged based simply on the fact that they

have a disability, that they have a guardian, that their guardian is not present when they vote or other inappropriate grounds.

Who May Challenge a Voter?

Voter-challenge laws also typically restrict who may bring a challenge. While many states allow other registered voters to challenge a voter, in some states only certain election officials or appointed challengers are permitted to bring a challenge.³⁵

What Type of Evidence is Required for a Challenge?

Voter-challenge laws usually require the challenger to present certain types of evidence and follow specific procedures. Some states, for example, require a challenger to demonstrate personal knowledge and/or reason to believe that the challenged voter does not meet the requirements to vote.³⁶ Demanding standards of proof may be required.³⁷ Accordingly, a voter challenge based on competence may require specific proof and personal knowledge that the person challenged does not meet voter qualifications related to competence.

A Person Who is Challenged Cannot be Prevented from Casting a Provisional Ballot

Regardless of the procedures that state law may require for voter challenges, the federal Help America Vote Act entitles a person whose eligibility to vote is in doubt to cast a provisional ballot if the person believes he or she is registered and eligible to vote in the appropriate jurisdiction.³⁸ The provisional ballot will then be counted if it is later determined that the person is eligible to vote. **A voter who is challenged at the polling place should always ask for a provisional ballot if told that he or she is not eligible to vote.**

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
HAWAII	No person who is "non compos mentis" shall be qualified to vote. HAW. CONST. art. 2, § 2. Whenever the clerk receives from the department of health or any informing agency, information of . . . adjudication as an incapacitated person under the provisions of chapter 560 . . . the clerk shall thereupon make such investigation as may be necessary to prove or disprove the information, giving the person concerned, if available, notice and an opportunity to be heard. If after the investigation the clerk finds that the person is . . . incapacitated to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning voting . . . the clerk shall remove the name of the person from the register. HAW. REV. STAT. § 11-23(a).	Definition of mental incapacity as referenced in electoral statutes: "incapacitated person" means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance. HAW. REV. STAT. § 560:5-102.	Admission to psychiatric facility itself does not modify the right to vote. HAW. REV. STAT. § 334-61.	Developmentally disabled persons have the right to vote unless limited by prior court order. IDAHO CODE § 66-412(3)(j).
IDAHO	No disqualification statute.		Mental health facility cannot deny right to vote unless right limited by prior court order. IDAHO CODE § 66-346(a)(6).	

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
FLORIDA	<p>Not qualified to vote if adjudicated, in this or any other state, to be mentally incompetent, until the disability has been removed or civil rights have been restored. FLA. CONST. Art. 6 § 4(a).</p> <p>A resident of a residential facility who has reached his eighteenth birthday and is otherwise qualified to vote is eligible to vote, provided such person has not been adjudicated mentally incompetent. Op. Atty Gen., 074-15, Jan. 9, 1974.</p> <p>Not entitled to vote if adjudicated mentally incapacitated with regard to voting in this or any other state and right not restored. FLA. STAT. § 97.041(2)(a).</p>	<p>FORMS OF GOVERNMENTAL ORGANIZATION - REGULATION OF ELECTIVE FRANCHISE .</p> <p>Right to vote can be removed if a person is determined to be incapacitated. FLA. STAT. § 744.3215(2)(b).</p> <p>Persons under guardianship must be evaluated for voting disqualification. FLA. STAT. § 744.331(3)(d)(2).</p>	<p>Any patient who is eligible to vote has the right to vote and the department shall establish rules to enable patients to obtain voter registration forms, applications for absentee ballots, and absentee ballots. FLA. STAT. § 394.459(7).</p>	<p>No otherwise qualified person shall, by reason of having a developmental disability, be denied the right to vote in public elections. FLA. STAT. § 393.13(3)(j).</p>
GEORGIA	<p>A person adjudicated mentally incompetent cannot register, remain registered, or vote unless the disability has been removed. GA. art. 2, § 1, ¶ III(b); GA. CODE ANN. § 21-2-216(b).</p> <p>A person must be adjudicated mentally incompetent before the right to vote is removed. 1995 Op. Atty Gen. No. 95-27.</p>	<p>The appointment of a guardian is not a determination regarding the right of the ward to vote. GA. CODE ANN. § 29-4-20(b)</p>	<p>Patients may vote if otherwise eligible under state law. Facility administrators shall permit and reasonably assist patients with registration, voting prerequisites, and absentee ballots. GA. CODE ANN. § 37-3-144.</p>	<p>Clients may vote if otherwise eligible. Facility administrators shall permit and reasonably assist patients with registration, voting prerequisites, and absentee ballots. GA. CODE ANN. § 37-4-104.</p>

What You Can Do if Challenged at the Polls

If an election official or another person at the polling place says you are not competent to vote, you should ask for a provisional ballot. You have a right to cast a provisional ballot no matter what the state's laws and regulations say about your eligibility to vote. It will be counted after Election Day if you are registered and eligible to vote. You can contact the protection and advocacy agency in your state to help you show that your provisional ballot should be counted. You can find the agency's contact information on the web at <http://www.ndrn.org>.

Voters Have the Right to Assistance

People who need help in voting because of a disability have the right to help from a person of their choice.³⁹ This can be a family member, a friend, a caregiver, a poll worker or almost anyone else. The only people who are not allowed to help are the person’s employer or an agent of the employer, or, if the voter belongs to a union, an officer or agent of the union.⁴⁰

A helper must respect the voter’s choices and may not substitute his or her own choices for the voter’s. Nor can the helper make assumptions about how the person wants to vote. If the helper cannot reliably determine the voter’s intent, he or she cannot cast a vote for that person.

Who Can Help Me Vote, and How?

A family member, friend or caregiver can come with you to help, or you can ask a poll worker for assistance. You can tell your helper what information to fill in on a registration form, if you cannot complete the form because of a disability. In an election, you can say what choices you want among those listed on a ballot.

Your helper can also explain instructions in your language, demonstrate the voting process, read ballot choices or use simplified language to explain the choices on the ballot. He or she can enter a voting booth with you if your disability makes it difficult to enter the booth alone and vote there without assistance.

If your helper marks a ballot for you, it must be for the choices *you* have expressed, not the helper’s. If you don’t want to cast a vote on an issue or for a candidate, the helper must leave that choice blank.

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
DELAWARE	<p>No person adjudged mentally incompetent . . . or incapacitated under the provisions of this Constitution from voting, shall enjoy the right of an elector. DEL. CONST. art. 5, § 2.</p> <p>No person adjudged mentally incompetent. . . shall be a qualified voter. For purposes of this chapter, the term "adjudged mentally incompetent" refers to a specific finding in a judicial guardianship or equivalent proceeding, based on clear and convincing evidence that the individual has a severe cognitive impairment which precludes exercise of basic voting judgment. 15 DEL. CODE ANN. § 1701</p>			
DISTRICT OF COLUMBIA	<p>Not a qualified elector if mentally incompetent as determined by a court of competent jurisdiction. NEW COLUMBIA CONST. ART. 5 § 1(c).</p> <p>Not a qualified elector if mentally incompetent as adjudged by a court of competent jurisdiction. DC CODE §1-1001.02.</p>	<p>An incapacitated person is not considered incompetent and retains all legal rights and abilities other than those expressly limited or curtailed in the order of appointment of a guardian or in a protective proceeding, or subsequent order of the court. DC Code §21-2004.</p> <p>Persons under guardianship not entitled to the elective franchise. HISTORY OF D. C. CODE, 2001 ED., ACTS RELATING TO THE ESTABLISHMENT OF THE DISTRICT OF COLUMBIA AND ITS VARIOUS</p>	<p>A person admitted or committed for treatment pursuant to this chapter may not, by reason of the admission or treatment, be denied the right to vote unless the person has been adjudicated incompetent and has not been restored to legal capacity. DC CODE § 21-564(a).</p>	

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
COLORADO	<p>CAL. ELEC. CODE § 2208(b). Conservatee's ability to complete affidavit of voter registration shall be reviewed yearly or biennially. CAL. ELEC. CODE § 2209(a).</p> <p>No Constitutional disqualification provision.</p> <p>Right to vote is not lost because of confinement in a state institution for persons with mental illness. COLO. REV. STAT. § 1-2-103(5).</p>		<p>People receiving evaluation, care, or treatment for mental illness shall be given the opportunity to exercise his right to register and to vote in primary and general elections. The agency or facility providing evaluation, care, or treatment shall assist such persons, upon their request, to obtain voter registration forms, applications for absentee ballots, and absentee ballots and to comply with any other prerequisite for voting. COLO. REV. STAT. § 27-10-119.</p>	<p>All developmentally disabled persons who are eligible to vote under the law have the right to vote and service agencies should assist those receiving services with registration, applications, and voting. COLO. REV. STAT. § 27-10.5-119.</p>
CONN-ECTICUT	<p>No mentally incompetent person shall be admitted as an elector. CONN. GEN. STAT. § 9-12(a).</p>	<p>The guardian or conservator of an individual may file a petition in probate court to determine such individual's competency to vote in a primary, referendum or election. CONN. GEN. STAT. § 45a-703.</p>	<p>Persons under hospitalization or treatment may vote unless a specific finding is made in a guardianship proceeding that they are incapable to vote and put under guardianship. CONN. GEN. STAT. § 17a-541.</p>	

A Helper Must Respect the Voter's Privacy

A person who is helping another to vote must respect the person's privacy at all times during the voting process.⁴¹ After the person has completed a ballot, the helper should offer to make sure that the ballot accurately reflects the voter's choices and should offer to correct any mistakes and check the ballot for additional choices that may have been missed.⁴²

Election Officials Must Provide Help

A voter may ask election officials for help. Election officials must ensure that their voting systems are readily accessible to people with mental disabilities.⁴³ They must make reasonable modifications to rules and policies needed to help people with mental disabilities register or vote.⁴⁴ For example, having a poll worker or other election official explain ballot instructions or content in simpler language at the request of a voter with a disability would be a reasonable modification. Election officials may also need to provide assistance by visiting voters with disabilities in nursing homes and other care settings in order to help them apply for, complete and submit absentee ballots, if residents choose to vote by absentee ballot.

Service Providers Must Provide Help

A voter may wish to get help from a service provider. Nursing homes, hospitals, group homes, board-and-care homes and other facilities providing care and services to individuals with disabilities must also make reasonable modifications to their policies and practices to ensure that residents who need help with the voting process receive it.⁴⁵ These modifications usually include helping residents to register, to get to the polling place or to apply for and complete an absentee ballot if the resident chooses to vote by absentee ballot.

Example: On Election Day in November 2004, a number of residents of a state psychiatric hospital in New York were prevented from voting because their privileges to leave the

facility had been taken away as a result of failure to comply with hospital rules. Hospital staff did not attempt to obtain absentee ballots to enable the residents to vote. The matter was resolved after a resident contacted advocates for assistance and the hospital ultimately agreed to take the residents to the polling place to enable them to vote.

In order to promote compliance with the law, states should require nursing homes and other residential facilities for individuals with disabilities and older adults to:

- provide information to residents about how to register to vote in the facility’s jurisdiction and how to change their address for voting purposes if necessary;
- ask all residents whether they want to register and offer help to those who want to do so;
- encourage residents to exercise their right to vote and permit voter education to occur on site; and
- offer assistance to residents in applying for and submitting absentee ballots sufficiently in advance of the deadlines.

Disability Services Offices Must Provide Help with Registration

The National Voter Registration Act, or “Motor Voter” law, requires states to designate as voter registration agencies: (1) all offices that are primarily engaged in providing disability services and that receive state funds, and (2) all offices that provide public assistance.⁴⁶ These agencies must make available to their clients voter registration forms and assistance in completing them, and must accept completed applications and transmit them to state officials.⁴⁷ Such agencies include vocational rehabilitation offices, offices of mental health and mental retardation, offices on aging, offices that process Medicaid applications and other disability services offices.

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
CALIFORNIA	<p>The Legislature shall provide for the disqualification of electors while mentally incompetent CAL. CONST. art. 2, § 4.</p> <p>A person shall be deemed mentally incompetent, and therefore disqualified from voting, if, during the course of any of the proceedings set forth below, the court finds that the person is not capable of completing an affidavit of voter registration in accordance with Section 21150 and a conservator is appointed or the person has pled not guilty by reason of insanity. CAL. ELEC. CODE § 2208(a).</p> <p>If the proceeding under the Welfare and Institutions Code is heard by a jury, the jury shall unanimously find that the person is not capable of completing an affidavit of voter registration before the person shall be disqualified from voting.</p>	<p>An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted by order to the guardian by the court. ARK. STAT. ANN. § 28-65-106.</p> <p>Person under conservatorship is disqualified from voting if court determines that he or she is not capable of completing voter registration affidavit; must review their capability of completing the affidavit during the yearly or biennial review of conservatorship. CAL. PROB CODE § 1910. CAL. ELEC. CODE § 2208 and § 2209.</p>	<p>Conservatorship report shall include recommendation for or against the disqualification of the person from voting. CAL. WEL. and INST. CODE § 5357(c).</p>	

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
ARIZONA	No person who is adjudicated an incapacitated person shall be qualified to vote. ARIZ. CONST. ART. 7, § 2(C). The County Recorder shall cancel a voter's registration if they are adjudicated an incapacitated person under A.R.S. § 14-5101. ARIZ. REV. STAT. § 16-165. Not qualified to register to vote if adjudicated an incapacitated person. ARIZ. REV. STAT. § 16-107(A)(6).	Voter registration cancelled if a person under guardianship is declared an "insane person" in a court proceeding. ARIZ. REV. STAT. § 16-165(C) Incapacitated person defined as any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions regarding his person. A.R.S. § 14-5101(1).	Persons undergoing court-ordered mental health evaluation or treatment are not determined to be legally incompetent. Persons undergoing mental health evaluation or treatment may not be denied the right to vote. ARIZ. REV. STAT. § 36-506(A).	
ARKANSAS	Registration to vote cancelled if a person is adjudged mentally incompetent by a court of competent jurisdiction. ARK. CONST. AMEND. 51, § 11(a)(6).	If guardian appointed prior to Oct. 1, 2001, guardian must obtain express court approval to prohibit voting. ARK. STAT. ANN. § 28-65-302(a)(1)(E). No guardian appointed on or after Oct. 1, 2001 shall authorize an incapacitated person to vote without filing a petition and receiving express court approval. ARK. STAT. ANN. § 28-65-302(a)(2)(E).	No person shall be deemed incompetent to vote solely by reason of that person's admission to a mental health system. ARK. STAT. ANN. § 20-47-220(b).	

How to Address Concerns about Voter Fraud

Some have suggested a need for voter-competence testing to address the possibility of voter fraud when someone helps a person with a disability to vote.⁴⁸ However, such concerns should not be addressed by raising barriers to the voting rights of people with disabilities. The solutions to concerns about voter fraud, to the extent warranted, should focus on those perpetrating the fraud.

Concerns about voter fraud in this context fall into three main categories:

(1) Concerns about caregivers or others substituting their own judgment and decisionmaking when they help a person with a disability vote, rather than following the expressed wishes of the person with a disability. Often people do not realize that this is improper even if the person's prior voting history and views appear to shed light on how the person might wish to vote.⁴⁹ Votes must be based on choices actually communicated by the person whose vote is being cast.

(2) Concerns about coercing a person with a disability to vote a certain way. These concerns have been raised in particular about individuals with disabilities residing in institutional settings, such as nursing homes, where staff often exert significant control over residents' lives.⁵⁰ Concerns have also been raised about whether candidates or political party representatives have engaged in voter intimidation or undue influence when visiting residents of nursing homes to offer assistance with registration or voting.⁵¹ Of course, the experience of being subjected to voting pressures is not unique to people with disabilities.⁵²

(3) Concerns about wholesale fraud where nursing home administrators or others obtain large numbers of residents' absentee ballots and falsify them. Occasional instances of this type of fraud have prompted calls for changing voting procedures in nursing homes and similar institutional settings.⁵³

These concerns have been raised primarily with respect to the

use of absentee ballots, as it is more difficult to detect fraudulent actions that occur outside of the polling place.

All of the concerns described above can and should be addressed through more appropriate means than imposing discriminatory burdens on individuals with mental disabilities. Policymakers, election officials and others can respond by:

- educating assistance providers about what types of assistance are and are not permitted;
- using criminal prosecution to address unscrupulous voter-fraud practices;
- establishing state law procedures requiring election officials and residential service providers for people with disabilities to assist residents of long-term care facilities and other care settings with registration and voting.

Some election officials have successfully addressed concerns about undue influence of voters with cognitive impairments without the need for capacity testing or removing individuals from voter rolls.⁵⁴ A number of states have procedures in place that are designed to promote voting by residents of long-term care facilities, although many of those procedures are voluntary or have other limitations.⁵⁵

State Laws Affecting the Voting Rights of People with Mental Disabilities¹

STATE	State Constitution/ Electoral Statutes: Persons Disqualified	Guardianship/ Conservatorship Statutes	Mental Health Statutes	Developmental Disabilities/ Mental Retardation Statutes
ALABAMA	No person who is mentally incompetent shall be qualified to vote, unless the disability has been removed. ALA. CONST. art. 8, § 177(b). Persons disqualified under the Constitution are not entitled to vote. ALA. CODE § 17-3-9.	In a limited guardianship, the partially incapacitated person retains all legal rights which the court has not seen fit to delegate to the limited guardian. Comment to ALA. CODE § 26-2A-105.	Consumers of mental health services have the same general rights as other citizens of Alabama, including the right to vote and participate in the political process. ALA. CODE § 22-56-4(a)(5).	Persons with developmental disabilities and traumatic brain injury have the right to vote and participate in the political process, subject to applicable laws. ALA. CODE § 38-9C-4(7). Persons with developmental disabilities and traumatic brain injury are presumed competent until a court determines otherwise. ALA. CODE § 38-9C-4(5).
ALASKA	No person may vote who has been judicially determined to be of "unsound mind" unless the disability has been removed. ALASKA CONST. art. 5, § 2. The judicial determination of unsoundness of mind necessary to disqualify a mentally impaired individual from voting must be specifically raised in a guardianship hearing or raised in a separate proceeding. 1992 Alaska Op. Atty. Gen. (Inf.) 123, Aug. 28, 1992.	Guardian may not prohibit a ward from registering or voting. ALASKA STAT. § 13.26.150(e)(6). An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those that have been expressly limited by court order or have been specifically granted to the guardian by the court. ALASKA STAT. § 13.26.090.	Persons undergoing mental health evaluation or treatment may not be denied the right to vote. Undergoing court-ordered mental health treatment is not a determination of legal incapacity. ALASKA STAT. § 47.30.835(a)(b).	

¹ This table is based on the table published by Kay Schriener, Lisa Ochs, & Todd Shields, *Democratic Dilemmas: Notes on the ADA & Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKLEY J. EMP. & LAB. L. 437 (2000). The table was updated by the National Disability Rights Network (NDRN) in June 2004, and by the Bazelon Center for Mental Health Law on a continuous basis since that time.

Resources

You can learn more about voting laws and practices in your state by contacting the protection and advocacy agency for people with disabilities. Contact information for these agencies can be found at <http://www.ndrn.org>.

The local branch of the American Civil Liberties Union may also be able to provide information and assistance. Contact information for local ACLU branches can be found at <http://www.aclu.org/affiliates/index.html>.

Additional resources include:

- the National Disability Rights Network, <http://www.ndrn.org>,
- the Bazelon Center for Mental Health Law, <http://www.bazelon.org>,
- the Advancement Project, <http://www.advancementproject.org>,
- the League of Women Voters, <http://www.lwv.org>, and
- the Secretary of State's office and local election board in your area.

What Is the Legal Framework?

The Relationship Between Federal and State Law

Voting in the United States is a fundamental political right.⁵⁶ The United States Constitution protects the right to vote, but it also gives states the authority to set voting qualifications for both federal and state elections⁵⁷—within certain limits. For example, states cannot set voter-qualification standards that conflict with the Constitution.⁵⁸ The Supreme Court has invalidated discriminatory state voter qualifications that violate the Fourteenth Amendment of the U.S. Constitution.⁵⁹

States must also comply with the U.S. Constitution and federal statutes, which are passed by Congress and apply nationwide. Federal laws govern if they conflict with state laws. Federal laws and the Constitution also set the “floor” for legal protections. States may pass laws that give voters with disabilities more legal protections, but they cannot take away rights that have been established by federal laws and the Constitution.

What Federal Laws Apply?

1. *United States Constitution*

The Equal Protection Clause

- The Equal Protection Clause of the Fourteenth Amendment provides that “no state shall...deny to any person within its jurisdiction the equal protection of the laws.”⁶⁰ Laws and government practices that affect the right to vote must treat people in similar situations on an equal basis. People who have the capacity to vote and meet the age and residency requirements for voting cannot be treated differently from other such voters based on guardianship status.
- A state may take away the right to vote only when it can show that doing so is a “narrowly tailored” way to achieve a

compelling government interest.⁶¹ If there is more than one reasonable way to achieve the government's interest, the way that is least burdensome on people's rights must be chosen.

► **Voter qualifications that make broad categories of people ineligible to vote based on concerns about mental competence (for example, that bar voting by anyone under guardianship) are likely to violate the Equal Protection Clause. In most cases, such broad qualifications would not be narrowly tailored to any government interest because they would disenfranchise many people who have the capacity to vote.**⁶²

The Due Process Clause

► The Fourteenth Amendment states with respect to actions by state governments that “[n]o person shall be... deprived of life, liberty, or property, without due process of law....”⁶³ The Due Process Clause provides that before a state can deprive an individual of a fundamental right, it must adequately notify the individual of the reasons for the deprivation and give him or her the opportunity to be heard before the right is taken away.⁶⁴

► **Removal of a person's right to vote based on such factors as guardianship status or hospitalization may violate due process if the person is not given notice that he may lose the right to vote and a chance to challenge that loss.**⁶⁵

► In addition, the Due Process Clause provides similar protections to those provided by the Equal Protection Clause. The Due Process Clause “forbids the government to infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”⁶⁶ The right to vote is such a fundamental right.⁶⁷ Accordingly, government officials may not use competency standards to restrict individuals' right to vote, unless such standards are narrowly tailored to serve a compelling government interest.

Belchertown, 334 N.E.2d 629 (Mass. 1975) (residence in state institution for individuals with mental retardation did not make individuals ineligible to vote).

72 42 U.S.C. §§ 12131(2), 12132; 28 C.F.R. § 35.130(b)(7).

73 42 U.S.C. §§ 12181(7), 12182. Title III of the ADA bars these entities from discriminating based on disability in the full and equal enjoyment of their goods, services, facilities, privileges, advantages or accommodations. *Id.* § 12182(a); 28 C.F.R. § 36.201(a). The ADA also requires these entities to make reasonable modifications in their policies and practices to enable people with disabilities to have equal opportunities. 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302(a).

74 Section 504 is codified at 29 U.S.C. § 794.

75 29 U.S.C. § 794(a).

76 *Id.*

77 *Barnes v. Gorman*, 536 U.S. 181, 184-85 (2002).

78 HAVA is codified at 42 U.S.C. § 15301 *et seq.*

79 42 U.S.C. § 15481(a)(3)(A). HAVA defines “voting systems” to include voting equipment as well as “the practices and associated documentation used (A) to identify system components and versions of such components; (B) to test the system during its development and maintenance; (C) to maintain records of system errors and defects; (D) to determine specific system changes to be made to a system after the initial qualification of the system; and (E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).” *Id.* § 15481(b).

80 42 U.S.C. § 1971(a)(2)(A).

81 *Id.* § 1971(a)(2)(C).

82 *Id.* § 1971(a)(3)(B).

83 *Id.* § 1973aa.

84 The NVRA is codified at 42 U.S.C. § 1973gg *et seq.*

85 *Id.* § 1973gg-6(a)(3)(B).

86 *Id.* § 1973gg-6(b)(1).

Carnahan, 499 F.3d 803, 808-09 (8th Cir. 2007) (Missouri law would violate Equal Protection Clause if it categorically barred individuals “adjudged incapacitated” from voting).

63 U.S. Const., amend. XIV.

64 *Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18, 24 (1981) (explaining that due process “expresses the requirements of ‘fundamental fairness’”).

65 *Doe v. Rowe* 156 F. Supp 2d at 47-51 (D. Me. 2001) (Maine’s ban on voting by individuals under guardianship by reason of mental illness violated procedural Due Process because such individuals were not given notice and an opportunity to be heard before losing the right to vote).

66 *Reno v. Flores*, 507 U.S. 292, 302 (1993) (*emphasis in original*).

67 *Id.*; see also *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (same).

68 Title II of the 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, programs, or activities of a public entity or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. “Public entities” include “any State or local government” and “any department, agency, special purpose district, or other instrumentality of a State or local government.” *Id.* § 12131(1).

69 The ADA and Section 504 of the Rehabilitation Act require an individualized assessment to determine if a person with a disability is qualified. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987) (involving Section 504 of the Rehabilitation Act, which affords virtually identical rights to those under the ADA); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001). Additionally, the ADA bars public entities from using voting eligibility criteria that unnecessarily screen out people with disabilities from voting. *Doe v. Rowe*, 156 F. Supp.2d at 58; 28 C.F.R. § 35.130(b)(3) (barring public entities from using criteria or methods of administration that have the effect of subjecting people with disabilities to discrimination on the basis of disability); *id.* § 35.130(b)(8) (barring public entities from applying eligibility criteria that screen out or tend to screen out people with disabilities or any class of people with disabilities from fully and equally enjoying any service, program or activity unless such criteria can be shown to be necessary for the provision of the services).

70 *Doe v. Rowe*, 156 F. Supp.2d at 58-59.

71 State laws generally do not permit individuals to be excluded from voting based simply on residence in a facility for people with disabilities. See, e.g., *In the Matter of Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hospital*, 750 A.2d 790 (N.J. Super. App. Div. 2000) (ballots could not be challenged based simply on voters’ residence in a state psychiatric hospital); *Carroll v. Cobb*, 354 A.2d 355 (N.J. Super. App. Div. 1976) (individuals could not be barred from registering to vote based on residence in state institution for people with mental retardation); *Boyd v. Board of Registrars of Voters of*

2. *The Americans with Disabilities Act*

► The Americans with Disabilities Act (ADA) bars disability discrimination in the services, programs and activities of state and local government entities, including facilities that provide services to individuals with disabilities as well as state and local election authorities.⁶⁸ These programs would likely violate the ADA if they prevent qualified individuals with disabilities from voting.

► **Public entities may not exclude qualified voters with disabilities from the voting process.**

The ADA prohibits public entities from excluding qualified people from voting based on disability if they meet the essential requirements for voting.

Before a public entity may exclude a voter based on disability, it must conduct an individualized assessment of whether the person meets the essential requirements to vote.⁶⁹ For example, a state that wishes to impose a requirement that individuals have the mental capacity to vote cannot take away the right to vote from all people under guardianship without assessing whether each individual has the capacity to vote.⁷⁰

Laws or practices that categorically bar people from voting based on guardianship status, residence in a hospital, nursing home, group home or developmental disabilities center, or similar factors would likely violate the ADA because they bar voting by people who have the capacity to vote and meet the essential requirements for voting.⁷¹

► **Public entities must provide reasonable modifications to voting policies, practices and procedures.**

The ADA also requires public entities to make reasonable modifications to policies, practices and procedures that are necessary for people with disabilities to have an equal opportunity to participate in government programs, such as registering to vote and casting a ballot.⁷² For example, a state hospital may have to modify its practices in order to

assist residents in obtaining and submitting absentee ballots. Alternatively, the hospital might choose to transport residents or allow them to go to their polling place.

Public facilities that prevent qualified people with disabilities from registering or voting based on inappropriate grounds, such as the staff's view that the person lacks the capacity to vote, likely violate the ADA.

Similarly, public facilities that bar voter-education or registration activities from their facilities on the ground that residents are too disabled to vote, or that prevent residents from attending voter-education sessions, likely violate the ADA.

► Privately operated service providers must not discriminate against people with disabilities with respect to voting.

Title III of the ADA prohibits disability discrimination by privately operated places of public accommodation, such as privately operated nursing homes, group homes or homeless shelters.⁷³ These facilities are subject to the same requirements as publicly operated facilities

3. *Section 504 of the Rehabilitation Act of 1973*⁷⁴

► Section 504 of the Rehabilitation Act (Section 504) applies to entities that receive federal funding. It prohibits disability-based discrimination in any program or activity that receives federal financial assistance.⁷⁵ It also applies to federal executive branch agencies, such as the Department of Veterans' Affairs.⁷⁶ Section 504 provides the same rights and remedies as Title II of the ADA.⁷⁷

► Entities that may be covered by Section 504 include state and local agencies that operate elections or enforce election laws, government-operated facilities providing services to people with disabilities, private service providers and federally operated facilities providing services to individuals with disabilities.

- 54 See, e.g., Deborah Markowitz, *Voting and Cognitive Impairments: An Election Administrator's Perspective*, 38 *McGeorge L. Rev.* 871, 874-77 (2007). In this article, Markowitz, Vermont's Secretary of State, describes how her office handled a variety of different situations in which concerns were raised about undue influence on voters with cognitive impairments. Vermont does not have any voter competence requirement.
- 55 Amy Smith and Charles P. Sabatino, *Voting by Residents of Nursing Homes and Assisted Living Facilities: State Law Accommodations*, *BIFOCAL*, vol. 26, no. 1, at 1 (Fall 2004), <http://www.abanet.org/aging/publications/bifocal/261.pdf> (describing state procedures for assisting voters in nursing homes and other long term care facilities).
- 56 See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (referring to "the political franchise of voting" as a "fundamental political right, because preservative of all rights").
- 57 U.S. Const., art. I, § 2, cl. 1 ("the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature"); art. I, § 4, cl. 1 ("[t]he 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 . . .").
- 58 See, e.g., *Bullock v. Carter*, 405 U.S. 134-140-41 (1972) ("Although we have emphasized on numerous occasions the breadth of power enjoyed by the States in determining voter qualifications and the manner of elections this power must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment).
- 59 See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (durational residency requirement for Tennessee voters that deprived some individuals of the right to vote violated Fourteenth Amendment's Equal Protection Clause); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666-67 (1966) (poll tax violated Equal Protection Clause); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (bar on voting by members of the military who moved to Texas during the course of military service violated the Equal Protection Clause).
- 60 U.S. Const., amend. XIV.
- 61 See *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (if a state law grants the right to vote to some citizens and denies it to others, court "must determine whether the exclusions are necessary to promote a compelling state interest.") (quoting *Kramer v. Union Free Sch. Dist.*, 375 U.S. 621, 627 (1969)). Although not every restriction on the right to vote must be judged under this strict standard, restrictions that are severe or take away the right to vote altogether must meet this test. *Burdick v. Takushi*, 504 U.S. 428 (1992).
- 62 See, e.g., *Doe v. Rowe*, 156 F. Supp.2d at 51-56 (Maine's ban on voting by individuals under guardianship by reason of mental illness violated Equal Protection Clause); *Missouri Protection and Advocacy Servs., Inc. v.*

- 42 *Id.* (each voting system in a federal election must permit a voter to verify his or her votes (privately and independently) before the ballot is cast, and to change or correct any errors).
- 43 Americans with Disabilities Act, 42 U.S.C. § 12132; 28 C.F.R. § 35.150(a); Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a); Help America Vote Act, 42 U.S.C. § 15481(a)(3)(A) (requiring voting systems in federal elections to be “accessible for individuals with disabilities . . . in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.”).
- 44 Americans with Disabilities Act, 42 U.S.C. §§ 12131(2), 12132; 28 C.F.R. § 35.130(b)(7); Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a).
- 45 Americans with Disabilities Act, 42 U.S.C. § 12182(b)(2)(A)(ii), 28 C.F.R. § 36.302(a) (privately operated facilities), 42 U.S.C. §§ 12131(2), 12132; 28 C.F.R. § 35.130(b)(7) (publicly operated facilities); Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) (facilities receiving federal financial assistance).
- 46 42 U.S.C. § 1973gg-5(a)(2).
- 47 *Id.* § 1973gg-5(a)(4)(A).
- 48 *See, e.g.,* Karlawish et al., *supra* note 24, at 1348 (recommending that people assisting cognitively impaired individuals in applying for an absentee ballot or in going to the polling place use a screening tool to decide whether the person is competent to vote, and if there is doubt about the person’s competence to vote, “it is probably appropriate to regard the impaired person as incompetent to vote, at least until a more authoritative determination is available.”); Jessica A. Fay, *Elderly Voters Go Postal: Ensuring Ballot Integrity for Older Voters*, 13 *Elder L. J.* 453, 481 (2005) (responding to voter fraud concerns by recommending that, among other things, nursing homes should conduct competency tests to ensure that residents have the competence to vote).
- 49 *See, e.g.,* Karlawish et al., *supra* note 24, at 1347 (noting example of spousal caregiver who voted a straight Democratic ticket for her husband, who had Alzheimer’s disease, because he had always voted a straight Democratic ticket in the past).
- 50 *See, e.g., id.* at 1349.
- 51 *See, e.g.,* Daniel P. Tokaji and Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 *McGeorge L. Rev.* 1015, 1026 (2007).
- 52 *See, e.g., id.* (noting the voting pressures sometimes experienced by spouses and by young adults still dependent on their parents).
- 53 *See, e.g.,* Joan L. O’Sullivan, *Voting and Nursing Home Residents: A Survey of Practices and Policies*, 4 *J. Health Care L. & Pol’y* 325 (2001) (describing allegations of nursing home-based voter fraud in Maryland and Illinois); Fay, *supra* note 48.

4. *Help America Vote Act (HAVA)*⁷⁸

- The Help America Vote Act of 2002 (HAVA) set new standards for voting systems in federal elections. These standards include ensuring that voting systems are accessible for all voters with disabilities. For example, HAVA requires every precinct to have at least one voting machine or system that is accessible to voters with disabilities. HAVA also requires that each voter be able to vote secretly and independently. HAVA authorizes state and local governments to apply for grants to improve voting accessibility and to train elections officials and poll workers to assist voters with disabilities. HAVA also requires states receiving grants to set up a process for resolving accessibility complaints.
- HAVA’s accessibility mandate is broad: Voting systems “shall be accessible for individuals with disabilities . . . in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.”⁷⁹ Voting-system accessibility under HAVA therefore includes ensuring that people with mental disabilities who have the capacity to vote are not denied equal access to registration and voting.
- **Overbroad voter-competency standards imposed by state law would likely run afoul of HAVA, as would denials of the right to vote based on competency determinations made by individuals (such as election officials, long-term care providers or poll workers) who are not qualified to make such determinations.**

5. *Voting Rights Act*

- **The Voting Rights Act (VRA) governs federal election procedures.** It provides that no person “acting under color of law” shall “in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law

or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote.”⁸⁰ This means that any test for determining whether someone is qualified to vote must be applied to all voters equally.

➤ **Voting-qualification standards, such as competency tests, that single out individuals or classes of individuals for different treatment violate the VRA.**

➤ The VRA also prohibits states from using “literacy tests” as a voting qualification unless they are given to all voters, are conducted wholly in writing and are in compliance with other requirements.⁸¹ The Act defines literacy tests to include “any test of the ability to read, write, understand or interpret any matter.”⁸² **These provisions of the VRA prohibit states from requiring voters with disabilities to pass a voter-competency test that is not required of all voters.**

➤ In addition, Section 208 of the VRA guarantees the right of people with disabilities to have voting assistance from a person of their choosing so long as that person is not the *voter’s employer, an agent of the employer, or an officer or agent of the voter’s union.*⁸³

6. *National Voter Registration Act*⁸⁴

➤ The National Voter Registration Act (NVRA) permits, but does not require, states to enact laws authorizing removal of voters from the registration rolls based on “mental incapacity.”⁸⁵

➤ Another provision of the NVRA, however, states that “[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office—shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965.”⁸⁶ The VRA, as discussed above, requires that any voting standards that states establish be applied equally to all voters. **Thus, both the VRA**

33 *See, e.g.,* Cal. Elec. Code § 14240 (challenges permitted on grounds that (1) the voter is not the person whose name appears on the index, (2) the voter is not a resident of the precinct, (3) the voter is not a U.S. citizen, (4) the voter has already voted that day, or (5) the voter is presently on parole for the conviction of a felony); Ohio Rev. Code § 3505.20 (challenges at polling place permitted only on grounds that person is not a citizen, has not resided in state for 30 days, or is not of legal voting age).

34 *See, e.g.,* Haw. Rev. Stat. § 11-25(a) (challenges prior to election day permitted “for any cause not previously decided by the board of registration or the supreme court in respect to the same person”); § 11-25(b) (challenges on election day permitted only on the grounds that the voter is not the person he or she claims to be or that the voter is not entitled to vote in that precinct).

35 *See, e.g.,* Cal. Elec. Code § 14240 (“On the day of the election no person, other than a member of the precinct board or other official responsible for the conduct of the election, shall challenge or question any voter concerning the voter’s qualifications to vote.”); 15 Del. Code § 4934 (only the polling place challenger appointed by each political party may bring a challenge).

36 *See, e.g.,* Minn. Stat. § 204C.12 (challenger must complete form stating under oath the basis for the challenge and that the challenge is based on challenger’s personal knowledge); Tx. Elec. Code § 16.092 (challenger must file sworn statement of the specific qualification for registration that the challenged voter has not met based on the personal knowledge of the challenger); Rev. Code Wash. § 29A.08.810(3) (challenger must file signed affidavit swearing that the challenged voter does not meet particular qualifications or does not reside at the address given on his or her voter registration record, based on challenger’s personal knowledge and belief after challenger has exercised due diligence to personally verify the evidence presented; challenge cannot be based on unsupported allegations); Alaska Stat. §15.15.210 (challenger must have good reason to suspect that questioned person is not qualified to vote); Conn. Gen. Stat. § 9.232(c) (challenger must know, suspect or reasonably believe person is not qualified to vote).

37 *See, e.g.,* Ariz. Rev. Stat. § 16-121.01 (challenger must show clear and convincing evidence that challenged voter does not meet certain requirements); Rev. Code Wash. § 20A.08.840(4) (same).

38 42 U.S.C. § 15482.

39 Voting Rights Act, 42 U.S.C. § 1973aa-6.

40 *Id.*

41 Help America Vote Act, 42 U.S.C. § 15481(a)(3)(A) (each voting system in a federal election must be accessible to individuals with disabilities in a manner that provides the same opportunities for privacy and independence as other voters have).

25 American Bar Association, Commission on Law and Aging *et al.*, Report to the House of Delegates (Aug. 13, 2007), at http://www.abanet.org/aging/docs/Voting_Rec_FINAL_approved.doc. The ABA proposal also requires that no prohibition on voting take place unless it is ordered by a court of “competent jurisdiction,” that has afforded the individual “appropriate due process protections,” and that the court’s order is based on “clear and convincing evidence.” *Id.*

Another possible standard was recommended by the American Bar Association’s Commission on the Mentally Disabled (now the Commission on Mental and Physical Disability Law): the ability to provide the information needed to register to vote. *See* Sales, STATE LEGISLATIVE ISSUES, *supra* note 56, at 111 (“Any person who is able to provide the information, whether orally or in writing, through an interpreter or interpretive device or otherwise, which is reasonably required of all persons seeking to register to vote, shall be considered a qualified voter.”).

26 These states are Florida, Georgia, Hawaii, Indiana, Louisiana, Michigan and South Dakota. National Conference of State Legislatures, Requirements for Voter Identification 1 (updated June 18, 2008), <http://www.ncsl.org/programs/legismgt/elect/taskfc/voteridreq.htm>.

27 *Id.*

28 *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006) (Missouri statute requiring voters to present certain forms of state or federal photo identification violated Missouri’s constitution because it interfered with the right to vote and was not narrowly tailored to the state’s interests in preserving electoral integrity and preventing voter fraud). A federal court granted a preliminary injunction to stop enforcement of Georgia’s photo-identification law, but the plaintiffs ultimately lost. *Common Cause/Georgia v. Billups*, 439 F. Supp.2d 1294 (N.D. Ga. 2006) (granting preliminary injunction); 504 F. Supp.2d 1333 (N.D. Ga. 2007) (plaintiffs lacked standing, the law did not impose severe burdens on the right to vote, and it was rationally related to the state’s interest in curbing voter fraud).

29 *Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610 (2008). The Court rejected a constitutional challenge to Indiana’s voter identification law, finding that the evidence presented was not sufficient for the Court to conclude that the law imposed excessively burdensome requirements on any class of voters. Because the law imposed only a limited burden on voters generally, that burden did not outweigh the state’s interests in deterring voter fraud, modernizing elections, and safeguarding public confidence in elections.

30 42 U.S.C. §§ 12131(2), 12132; 28 C.F.R. §§ 35.130(b)(7), (b)(8).

31 Michael Moss, *Big G.O.P. Bid to Challenge Voters in Key State*, NEW YORK TIMES, Oct. 23, 2004, at A1, A12.

32 Oklahoma’s election code appears to be the only one that does not provide for any type of voter challenge. Okla. Stat. Ann. tit. 26, art. 7.

and the NVRA bar states from using voting standards that treat individuals with mental disabilities differently from other voters.

Notes

- 1 These limitations are imposed by the the United States Constitution, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Help America Vote Act. See notes 60-78 and accompanying text, and p. 12 (Challenging State Voter-Competence Requirements).
- 2 This limitation is imposed by the Voting Rights Act, 42 U.S.C. § 1971(a)(2)(A). See notes 80-82 and accompanying text, and p. 12 (Challenging State Voter-Competence Requirements).
- 3 *See* notes 63-65 and accompanying text concerning the Due Process Clause of the U.S. Constitution and p. 9 (Only a Court Can Decide that Someone is Not Competent to Vote)
- 4 *See* notes 68-77 and accompanying text, and p. 9 (Only a Court Can Decide that Someone is Not Competent to Vote).
- 5 *See* note 83 and accompanying text, and pp. 20-22 (Voters Have the Right to Assistance; Election Officials Must Provide Help; Service Providers Must Provide Help; Disability Services Offices Must Provide Help with Registration).
- 6 *See id.*
- 7 *See* notes 78-79 and accompanying text, and p. 21 (A Helper Must Respect the Voter’s Privacy).
- 8 A finding of “mental incapacity” or “mental incompetence” generally means that a person is in need of guardianship. Jurisdictions with this type of exclusion are Alabama, Arizona, the District of Columbia, Louisiana, Maryland, Missouri, Montana, Nevada, New York, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia and Wyoming. For citations to these legal provisions, see chart on pp. 41-66. Some additional states have similar provisions in their laws, but state attorney general opinions have interpreted those provisions more narrowly.
- 9 These states are Alaska, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Kentucky, Massachusetts, Minnesota, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Texas, Washington and Wisconsin. For citations to these legal provisions, see chart on pp. 41-66.
- 10 Nebraska law defines “non compos mentis” to mean “mentally incompetent.” Neb. Rev. Stat. § 32-312. Hawaii law does not define the term, but provides that a person may be disenfranchised on competence grounds

only if determined to lack the capacity to vote. Haw. Rev. Stat. § 11-23(a). Rhode Island does not define the term, but the state's election board recently overturned local election officials' decision to remove two hospitalized men from the voter rolls based on earlier rulings that each was not guilty by reason of insanity. The state board concluded that such a finding was not sufficient to render the men "non compos mentis" for purposes of voting. David Scharfenberg, *Election Board Won't Take Away Men's Vote*, PROVIDENCE JOURNAL, May 29, 2008, http://www.projo.com/news/content/INSANE_VOTERS_05-29-08_3HAA708_v17.349e81a.html.

- 11 These states are Arkansas, Iowa, Kentucky, Mississippi, New Mexico, Ohio, Minnesota, New Jersey and Nevada. New Jersey and Nevada recently eliminated such voting bans from their state constitutions, but similar language remains in their statutes. For citations to these legal provisions, see chart on pp. 41-66. In all of these states except Mississippi and New Mexico, more specific statutory provisions concerning voter competence effectively trump the "idiots" and "insane" language.
- 12 Eight of these—Colorado, Idaho, Illinois, Indiana, New Hampshire, North Carolina, Pennsylvania and Vermont—have laws that contain no voter-competence requirement. Two others—Kansas and Michigan—have constitutional provisions authorizing the legislature to impose certain voter-competence requirements but their legislatures have not done so. Maine's constitution and statutes bar voting by individuals under guardianship due to mental illness, but the Secretary of State's office has instructed election officials to disregard this requirement following a federal court ruling declaring it unlawful. Memorandum from Julie L. Flynn, Deputy Secretary of State, to All Municipal Clerks and Registrars (Sept. 4, 2001) (citing *Doe v. Rowe*, 156 F. Supp.2d 35 (D. Me. 2001)). For citations to these legal provisions, see chart on pp. 41-66.
- 13 See, e.g., *Carroll v. Cobb*, 354 A.2d 355 (N.J. Super. App. Div. 1976); *Boyd v. Board of Registrars of Voters of Belchertown*, 334 N.E.2d 629 (Mass. 1975).
- 14 Missouri's constitution, however, provides that individuals "involuntarily confined in a mental institution" are ineligible to vote. Mo. CONST. art. 8 § 2.
- 15 *In the Matter of Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hospital*, 750 A.2d 790 (N.J. Super. App. Div. 2000) (ballots of state hospital residents cannot be segregated or challenged without a particularized showing of incompetence).
- 16 *Harvey v. Kaine*, No. 3:06-cv-00653-HEH (E.D. Va. Filed Oct. 2, 2006), settled Nov. 15, 2006. Two state hospital residents filed suit against state and county officials to challenge the interpretation of state law as violative of the United States Constitution, the ADA, and Section 504. Shortly after the suit was filed, the state changed its interpretation to authorize absentee ballots for individuals in facilities due to their mental disabilities. See Greg A. Lohr, *Mental Patients Sue State, Allege Denial of Voting Rights*, STYLE WEEKLY, Oct. 25, 2006, <http://www.styleweekly/article.asp?idarticle=13257>.
- 17 Jason H. T. Karlawish et al., *Identifying the Barriers and Challenges to Voting by Residents in Nursing Homes and Assisted Living Settings*, J. AGING & SOC. POL'Y, vol. 20 issue 1, at 65, 72 (2008).
- 18 In 2008, the VA adopted a policy of barring all voter registration drives at VA facilities, but has since narrowed that policy to permit state and local government officials and non-partisan groups to conduct voter registration efforts at VA facilities.
- 19 Most state laws explicitly require this determination to be made by a court or state that a person must be "adjudicated" or "adjudged" incapacitated, indicating that a court or other tribunal must decide. While some state laws simply exclude "mentally incompetent" voters, competence determinations must generally be made by probate courts in the context of guardianship proceedings.
- 20 *In the Matter of Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hospital*, 750 A.2d at 794-95 (N.J. Super. App. Div. 2000) (requiring county board of elections to demonstrate a particularized showing before a court that voters were incompetent before ballots could be disqualified).
- 21 See, e.g., *Doe v. Rowe*, 156 F. Supp.2d at 47-49. Government entities must provide due process before taking away a person's right to vote. Private entities such as long-term care facilities perform a core government function when they determine whether individuals are competent to vote, and thus should also be subject to due process requirements. See Nina A. Kohn, *Preserving Voting Rights in Long-Term Care Institutions: Facilitating Voting While Maintaining Election Integrity*, 38 MCGEORGE LAW REVIEW 1065, 1081 (2007).
- 22 There is some risk that raising these issues in the probate court proceedings may foreclose a person from later making certain arguments if he or she should wish to challenge the state law. For example, a person's request that the probate judge determine his competence to vote may be viewed as a concession that the state law allows individuals under guardianship to retain their voting rights.
- 23 *Missouri Protection and Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803 (8th Cir. 2007) (interpreting Missouri law to permit individuals under full guardianship to retain their right to vote in some circumstances despite statutory and constitutional language making individuals under full guardianship ineligible to vote).
- 24 One recent proposal urges that states eliminate overbroad voting restrictions by adopting a voter-competence test to determine whether individuals understand the nature and effect of voting. See Karlawish et al., *Addressing the Ethical, Legal and Social Issues Raised by Voting by Persons with Dementia*, 11 J. AMER. MEDICAL ASS'N 1345 (2004). Unless such a test is given to all who wish to register or vote, however, it would result in the application of a different standard to individuals who are singled out for this type of testing. Thus, such a test would function much the way literacy tests were used.