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**LET ELDERS AGE
INDEPENDENTLY
and with DIGNITY**

**A CALL FOR
ADVOCACY**

Home Equity Scams
Power-of-Attorney Abuses
Medicare Advantage
and Dual Eligibles
Preemption in Medicare
and Medicaid Cases

Fair Housing Rights in
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Sargent Shriver National Center on Poverty Law



Voting Rights of Older Adults with Cognitive Impairments

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In recent years the voting rights of individuals, in particular older adults, with cognitive impairments have come under increasing scrutiny. That many individuals with cognitive impairments have been inappropriately disenfranchised has become increasingly apparent, and the prospect of absentee ballot fraud in long-term care facilities such as nursing homes has generated significant concern.¹ In 2007 a symposium on facilitating voting as people age led the American Bar Association to adopt recommendations to address voting by individuals with cognitive impairments and voter competency issues.² In 2008 the Senate Special Committee on Aging held a hearing exploring voting barriers—including voting in long-term care settings, voter competence requirements, and voter identification laws—faced by older adults due to their cognitive as well as physical disabilities.³ Several recent studies have explored the practice of long-term care facility staff preventing residents from voting.⁴

¹See, e.g., Jason H. Karlawish et al., *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia*, 292 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 1345 (2004); Kyle Sammin & Sally Balch Hurme, *Guardianship and Voting Rights*, 29 BIFOCAL 1, 13 (2004), www.abanet.org/aging/publications/bifocal/261.pdf; Kay Schriener et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW 437 (2000). On the issue of absentee ballot fraud see, e.g., Karlawish et al., *supra*; Jessica A. Fay, *Elderly Voters Go Postal: Ensuring Ballot Integrity for Older Voters*, 13 ELDER LAW JOURNAL 453, 481 (2005).

²Commission on Law and Aging et al., American Bar Association, Report to the House of Delegates (Aug. 13, 2007), www.abanet.org/aging/docs/Voting_Rec_FINAL_approved.doc. See also Charles P. Sabatino & Edward D. Spurgeon, *Symposium: Facilitating Voting as People Age: Implications of Cognitive Impairment*, 38 McGEORGE LAW REVIEW 843 (2007) (symposium convened by the American Bar Association (ABA)).

³*Older Voters: Opportunities and Challenges in the 2008 Elections: Hearing Before the S. Special Comm. on Aging*, 110th Cong. (2008), http://aging.senate.gov/hearing_detail.cfm?id=291548&.

⁴Jason H. Karlawish et al., *Identifying the Barriers and Challenges to Voting by Residents in Nursing Homes and Assisted Living Settings*, 20 JOURNAL OF AGING AND SOCIAL POLICY 65 (2008); Richard Bonnie et al., Interview: How Does Voting Occur in Long-Term Care: Interview Script and Responses (Spring 2005) (unpublished manuscript) (in my files); Joan L. O'Sullivan, *Voting and Nursing Home Residents: A Survey of Practices and Policies*, 4 JOURNAL OF HEALTH CARE LAW AND POLICY 325 (2002).

This increased attention to voting by people with cognitive impairments has created opportunities to eliminate inappropriate laws and practices that disenfranchise individuals with cognitive disabilities. For example, a number of states have recently eliminated or narrowed voter qualification requirements that inappropriately disenfranchised people with cognitive disabilities.⁵ Strategies to change law and policy may be used to achieve reenfranchisement of voters with cognitive disabilities.

I. Disenfranchisement of Individuals with Cognitive Impairments

Individuals with cognitive impairments may be disenfranchised not only by state law restricting their right to vote but also by practices of public and private entities.

A. State Law Voter Capacity Requirements

A majority of states have constitutional or statutory provisions barring voting by individuals who do not meet a certain mental capacity standard.⁶ A chart summarizing each state's laws concerning voter capacity is available on the Bazelon Center's website.⁷ While these requirements tend to be enforced unevenly, they

often result in people with cognitive disabilities losing the right to vote.⁸

While state laws that bar voting by "idiots" and "insane people" were common twenty-five years ago, there has been a movement away from this outmoded and stigmatizing terminology.⁹ Most of these provisions have been replaced by provisions barring voting by "mentally incompetent" or "mentally incapacitated" individuals. Many states narrow these standards further and bar from voting persons who lack the specific capacity to vote. Other states do not have capacity-based restrictions to voting. Today only nine states retain a bar on voting by "idiots" or "insane people."¹⁰ Ironically, laws excluding "idiots" and "insane people" tend to disenfranchise fewer individuals than more specific exclusions because they are virtually impossible to understand and apply.

About fifteen states and the District of Columbia bar individuals from voting based on "mental incapacity" or guardianship status.¹¹ A determination of incapacity has little relevance to a person's ability to understand the voting process.¹² Instead incapacity refers to a person's inability to meet basic health and safety needs.

⁵New Jersey, Delaware, and Nevada recently repealed state constitutional provisions disenfranchising "idiots" and "insane people": S. Con. Res. 134, 212th Leg., 2006–2007 Leg. Sess. (N.J. 2007) (a concurrent resolution to amend Article II, Section 1, Paragraph 6 of the New Jersey Constitution) and ballot referendum, New Jersey Public Question No. 4 (approved Nov. 6, 2007); 73 Del. Laws, c. 99 (effective May 8, 2001); Assemb. J. Res. 3, 71st Sess. (Nev. 2003). See also 2004 Ga. Laws 460 (effective July 1, 2005) (amending statute to provide that appointment of a guardian does not affect ward's right to vote).

⁶See Schriener et al., *supra* note 1 (tracing the development of such voter capacity requirements).

⁷Bazelon Center for Mental Health Law & National Disability Rights Network, *State Laws Affecting the Voting Rights of People with Mental Disabilities* (updated continuously), www.bazelon.org/pdf/voter_qualification_chart6-08.pdf.

⁸See, e.g., *Missouri Protection and Advocacy Services v. Carnahan*, 499 F.3d 803, 805, 809 & n.5 (8th Cir. 2007), and *Doë v. Rowe*, 156 F. Supp. 2d 35, 38, 43 (D. Me. 2001) (describing varied practices of local probate courts in implementing blanket voting bans contained in state law).

⁹BRUCE DENNIS SALES ET AL., *DEVELOPMENTAL DISABILITIES STATE LEGISLATIVE PROJECT OF THE AMERICAN BAR ASSOCIATION'S COMMISSION ON THE MENTALLY DISABLED, DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES 100* (1982).

¹⁰Those states are Arkansas, Iowa, Kentucky, Minnesota, Mississippi, New Jersey, New Mexico, Nevada, and Ohio. 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 www.bazelon.org/pdf/voter_qualification_chart6-08.pdf.

¹¹A finding of "mental incapacity" or "mental incompetence" generally means that a person is in need of guardianship. States with this type of exclusion are Alabama, Arizona, 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 Bazelon Center for Mental Health Law, *State Laws Affecting the Voting Rights of People with Mental Disabilities* (2008), www.bazelon.org/pdf/voter_qualification_chart6-08.pdf. This list does not include states where provisions of this type have been construed more narrowly by state attorney general opinions.

¹²See Paul S. Appelbaum, *I Vote. I Count: Mental Disability and the Right to Vote*, 51 *PSYCHIATRIC SERVICES* 849 (2000).

Three states have provisions barring voting by individuals who are *non compos mentis*. This term has been interpreted differently from one state to the next. Nebraska defines it to mean “mentally incompetent.”¹³ Hawaii does not define the term but allows disenfranchisement on competence grounds only if a person lacks the specific capacity to vote.¹⁴ Rhode Island does not define the term, but the state’s election board recently overturned a decision by local election officials’ to remove two hospitalized men from the voter rolls. The election board based its decision on earlier criminal proceedings in which each man had been found 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.¹⁵

The most common type of voter capacity requirement bars voting by individuals who lack the specific capacity to vote. Twenty states impose this kind of bar to voting.¹⁶ State laws requiring that individuals have the specific capacity to vote should disenfranchise fewer individuals than broad bans on voting by anyone under guardianship. These laws, however, do hold certain voters to higher standards than other voters.

Specific voting capacity restrictions apply in practice only to older voters and voters with disabilities. The determination of whether a person has voting capacity must typically be made in guardianship or conservatorship proceedings.¹⁷ Thus

only the subjects of these proceedings—usually older adults and people with disabilities—undergo voting capacity determinations. Voting capacity determinations require these voters to meet requirements not imposed on other voters. In making these determinations, courts typically require the voter to demonstrate a level of knowledge not required of other voters. These inquiries may require them to explain the voting process, explain the voter’s own political views, or give the names of federal, state, or local officeholders.

Eleven states do not impose any capacity-based restrictions on voting. Eight of these—Colorado, Idaho, Illinois, Indiana, New Hampshire, North Carolina, Pennsylvania, and Vermont—have laws that do not have a voting capacity requirement.¹⁸ Two others—Kansas and Michigan—have constitutional provisions authorizing the legislature to enact certain voter capacity requirements but their legislatures have not done so.¹⁹ 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.²⁰

B. Practices that Disenfranchise People with Cognitive Disabilities

Many people with cognitive disabilities have lost opportunities to register, vote, and receive voting assistance because

¹³NEB. REV. STAT. § 32-312 (2007). In Nebraska “mental incompetence” is not synonymous with guardianship, and some individuals under guardianship may retain their right to vote. See Nebraska Advocacy Services, Guide to Voter Eligibility in Nebraska (n.d.), www.nebraskaadvocacy.org/includes/downloads/idetovoteregibilityadobe.pdf?PHPSESSID=afad016dfe761b3da9c430efc0bad9ec.

¹⁴HAW. REV. STAT. § 11-23(a) (2007).

¹⁵David Scharfenberg, *Election Board Won’t Take Away Men’s Vote*, PROVIDENCE JOURNAL, May 29, 2008, www.projo.com/news/content/INSANE_VOTERS_05-29-08_3HAA708_v17.349e81a.html.

¹⁶Those 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 Bazelon Center for Mental Health Law, *supra* note 11.

¹⁷See, e.g., CAL. ELEC. CODE § 2208(a) (2008); DEL. CODE ANN. 15, § 1701 (2008).

¹⁸See Bazelon Center for Mental Health Law, *supra* note 11.

¹⁹KAN. CONST. art. V, § 2 (authorizing the legislature to bar voting by individuals “because of mental illness”); MICH. CONST. art. II, § 2 (authorizing the legislature to remove the right to vote based on “mental incompetence”).

²⁰Memorandum from Julie L. Flynn, Deputy Secretary of State, to All Municipal Clerks and Registrars (Sept. 4, 2001) (in my files).

election officials, service providers, caregivers, family members, guardians, or others decided—without judicial involvement—that these individuals were not competent to vote. Gauging the scope or frequency of these practices is difficult. Court cases, news articles, and other anecdotal information, however, suggest that they are common.

Election Officials. Election officials have sometimes prevented individuals with cognitive disabilities from voting. Some officials have refused to allow institutional residents to register and vote, others have refused to provide such individuals with absentee ballots, and still others have required institutional residents to take examinations not required of others before being permitted to vote.²¹ In recognition of these problems, a number of states now have laws specifying that individuals do not lose their right to vote simply because they are being served in a hospital or other institutional setting.²²

Service Providers. Frequently, providers of residential services for older adults and people with cognitive disabilities prevent clients from voting based on the providers' determinations that these individuals should not vote. Several recent studies found that long-term care facility staff routinely screened residents for voting capacity before permitting residents to vote or assisting them in voting.²³

Facility staff decided who should vote by asking questions about voting procedures or the identity of current political figures and by doing formal and informal cognitive assessments.²⁴

C. Photo Identification Laws

Voter identification requirements may disenfranchise some older adults and people with disabilities, albeit less directly than the voter capacity requirements and the practices discussed above. Requirements that voters present photo identification are particularly troubling because many older adults and people with disabilities do not have a driver's license or other photo identification. A Wisconsin study, for example, found that 23 percent of Wisconsin residents 65 and older do not have a driver's license or other photo identification.²⁵ To boot, older adults and people with disabilities face disproportionate economic and transportation barriers in obtaining photo identification or the documents needed to secure photo identification.

Photo identification requirements began to appear after Congress enacted the Help America Vote Act in 2002.²⁶ The Act requires states to adopt a minimum voter identification requirement.²⁷ The Act mandates that voters who are registering by mail and had not voted in the state give proof of identification.²⁸ The Act does not

²¹See, e.g., *In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hospital*, 750 A.2d 790 (N.J. Super. Ct. App. Div. 2000); *Carroll v. Cobb*, 354 A.2d 355 (N.J. Super. Ct. App. Div. 1976); *Boyd v. Board of Registrars of Voters of Belchertown*, 334 N.E.2d 629 (Mass. 1975) (officials did not allow institutionalized disabled residents to register). See also *Harvey v. Kaine*, No. 3:06-cv-00653-HEH (E.D. Va. filed Oct. 2, 2006), settled Nov. 15, 2006 (Virginia election officials refused to provide absentee ballots for state psychiatric hospital residents based on their reading of state law to authorize absentee ballots for individuals in facilities only if they have physical disabilities). Interview with Christina Galindo-Walsh, Senior Staff Attorney, National Disability Rights Network (June 18, 2007) (describing situation in which election officials required residents of an Arkansas group home for individuals with developmental disabilities to pass an examination that was not required of other voters).

²²See, e.g., IND. CODE § 12-26-2-8(a)(1)(F) (2008); ME. REV. STAT. ANN. tit. 34-B § 3803(1)(A-C) (2008); 104 CODE MASS. REG. 27.13 (2008). But see Mo. CONST. art. VIII § 2 (barring voting by individuals "involuntarily confined in a mental institution").

²³Karlawish et al., *supra* note 4 (surveying eighty-four nursing homes and assisted-living facilities in Philadelphia); Bonnie et al., *supra* note 4 (surveying thirty long-term care facilities in Virginia); O'Sullivan, *supra* note 4 (surveying ten nursing homes in Maryland).

²⁴Karlawish et al., *supra* note 4; Bonnie et al., *supra* note 4; O'Sullivan, *supra* note 4, at 351–52.

²⁵JOHN PAWASARAT, EMPLOYMENT AND TRAINING INSTITUTE, UNIVERSITY OF WISCONSIN—MILWAUKEE, THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN 1 (2005), www.uwm.edu/Dept/ETV/barriers/DriversLicense.pdf.

²⁶Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. § 15301–15545 (Supp. 5 2006)).

²⁷Samuel P. Langholtz, *Fashioning A Constitutional Voter-Identification Requirement*, 93 Iowa Law Review 731, 747 (2008).

²⁸42 U.S.C. § 15483(b)(1)–(3) (Supp. 5 2006).

mandate that states adopt photo identification laws. Nevertheless, a number of states have adopted voter identification laws with requirements that are more onerous than the Act's requirements.²⁹ As of June 2008, seven states ask voters to show photo identification.³⁰ In five of these states, voters lacking photo identification must submit an affidavit or other forms of identification or submit both an affidavit and other forms of identification. In Indiana and Georgia, voters without photo identification may cast only a provisional ballot and must return later with photo identification (Georgia) or an affidavit explaining that indigence or religious principles prevented them from obtaining photo identification (Indiana).³¹

II. Legal Avenues to Avoid Disenfranchisement

Advocates may challenge the laws and practices that disenfranchise older adults with cognitive impairments in a number of ways.

A. State Voter Capacity Laws

The U.S. Constitution authorizes states to set voting qualifications for both federal and state elections.³² That authority has limits. States may not set voter qualification standards that conflict with the Constitution.³³ The U.S. Supreme Court has invalidated discriminatory state vot-

er qualification requirements that violate the Fourteenth Amendment.³⁴ Federal statutes also have supremacy over state laws to the extent that they conflict. Both the federal Constitution and the Americans with Disabilities Act (ADA) prohibit states from imposing voting capacity requirements that exclude people who are capable of voting.³⁵

Exclusion of Voters Who Are "Mentally Incompetent" or Under Guardianship. The ADA prohibits state and local governments from using eligibility criteria that screen out people with disabilities from government programs unless the criteria are necessary to the program at issue.³⁶ Overbroad voting eligibility criteria such as guardianship status and "mental competence" are not "necessary." These criteria have little to do with a person's capacity to vote, and many states have successfully limited voting to qualified persons by using less restrictive criteria—or by not using any capacity criteria at all—in their voting programs. The ADA requires an individualized assessment rather than a blanket policy to determine whether a person with a disability is qualified to participate in a program.³⁷ Government programs and activities receiving federal financial assistance are also subject to Section 504 of the Rehabilitation Act, which imposes the same requirements as the ADA.³⁸

²⁹See National Conference of State Legislatures, Requirements for Voter Identification (2008), www.ncsl.org/programs/legismgt/elect/taskfc/VoterIDReq.htm (updated regularly) (twenty-five states have broader voter identification requirements than the Help America Vote Act's).

³⁰*Id.* at 1. These states are Florida, Georgia, Hawaii, Indiana, Louisiana, Michigan, and South Dakota.

³¹*Id.* at 5.

³²U.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").

³³See, e.g., *Bullock v. Carter*, 405 U.S. 134, 140–41 (1972).

³⁴See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (Tennessee voter durational residency requirement that deprived some individuals of the right to vote violated Fourteenth Amendment's equal protection clause); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (bar on voting by military members who moved to Texas during military service violated the equal protection clause).

³⁵Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (Supp. 5 2006).

³⁶*Id.* § 12132; 28 C.F.R. § 35.130(b)(8) (2007).

³⁷See, e.g., *School Board of Nassau County v. Arline*, 480 U.S. 273, 287 (1987); *PGA Tour Incorporated v. Martin*, 532 U.S. 661, 690 (2001) (involving Section 504 of the Rehabilitation Act, which affords virtually identical rights to those under the Americans with Disabilities Act).

³⁸Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (Supp. 5 2006).

The equal protection clause provides similar protection. It requires a state that imposes “severe” restrictions on the right to vote to demonstrate that these restrictions are “narrowly drawn to advance a state interest of compelling importance.”³⁹ Even if states have a compelling interest in maintaining election integrity, blanket bans on voting by all people who are under guardianship, “mentally incompetent,” or “*non compos mentis*” are not narrowly drawn to advance this interest. These bans disenfranchise individuals based on their ability to make decisions about health care, financial matters, and other matters that have virtually nothing to do with their ability to make voting decisions. States can meet their goals through more narrowly tailored means.

The U.S. Supreme Court indicated in *Tennessee v. Lane* that overbroad voting capacity criteria are unconstitutional.⁴⁰ The Court there included a reference to overbroad voting capacity criteria in its description of unconstitutional disability-based discrimination. It cited *Doe v. Rowe*, a federal district court decision that found that Maine’s bar on voting by individuals under guardianship by reason of mental illness violated the equal protection clause as well as the ADA and Section 504.⁴¹

Rowe held that Maine’s law was not narrowly tailored to the state’s interest of ensuring electoral integrity as “there is little to no correlation between the State’s interest and the disenfranchisement of Jill Doe and June Doe, two women who suffer from mental illness but, according to their physicians, understand the nature and effect of the act of voting.”⁴²

The state had “disenfranchised a subset of mentally ill citizens based on a stereotype rather than any actual relevant incapacity.”⁴³

In a similar case challenging Missouri’s bar on voting by individuals under full guardianship, the Eighth Circuit did not reach the merits of the challenge because it found that Missouri’s law did not impose a categorical voting ban and that the plaintiffs lacked standing.⁴⁴ The court noted, however, “if appointment of a full guardian categorically prohibited the ward from voting because he or she was ‘adjudged incapacitated’... these statutes would not withstand close equal protection scrutiny when challenged, for example, by a person whose guardian was appointed solely because of a physical disability.”⁴⁵

The National Voter Registration Act, enacted in 1993, does permit states to remove voters from the registration rolls based on “mental incapacity.”⁴⁶ The Act does not give states unfettered discretion, however, in setting voter capacity standards. Instead it requires that state programs and activities whose goal is to protect electoral integrity by ensuring accurate registration rolls must be “uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965.”⁴⁷ Thus the National Voter Registration Act is consistent with the nondiscrimination requirements of the ADA and the equal protection clause.

Exclusion of Voters Who Lack the Specific Capacity to Vote. Different hurdles arise when challenging state laws that bar voting only by individuals who have been determined to lack the specific capacity

³⁹*Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

⁴⁰*Tennessee v. Lane*, 541 U.S. 509 (2004).

⁴¹*Id.* at 525 & n.13 (citing *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001)).

⁴²*Rowe*, 156 F. Supp. 2d at 52.

⁴³*Id.*

⁴⁴*Missouri Protection and Advocacy Services v. Carnahan*, 499 F.3d 803 (8th Cir. 2007).

⁴⁵*Id.* at 808–9.

⁴⁶National Voter Registration Act, 42 U.S.C. § 1973gg-6(a)(3)(B) (Supp. 5 2006).

⁴⁷*Id.* § 1973gg-6(b)(1).

to vote. These laws appear tailored to the relevant capacity at issue. These laws are problematic, however, because they subject certain individuals to a higher standard than the general population. These laws are not actually applied to all voters. Instead, as in the voter literacy requirements of past years, they are applied only to a targeted group of people—generally people who are the subject of guardianship proceedings. This runs afoul of the Voting Rights Act.⁴⁸

The Voting Rights Act provides that, in determining whether someone is qualified under state law to vote, no person “acting under color of law” shall “apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law ... to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote.”⁴⁹ When probate courts make inquiries to determine whether individuals have the capacity to vote under state law (e.g., inquiries about the person’s understanding of the voting process, knowledge of political officeholders, political views, or ability to make electoral choices), they violate the Voting Rights Act because members of the general public are not required to undergo the same scrutiny. Asking these questions only of targeted individuals amounts to applying a different standard,

practice, or procedure to the targeted individuals from that used to determine whether others are qualified to vote.

Exclusion of “Idiots” and “Insane” Voters. Laws barring voting by “idiots” or “insane” people are rarely invoked to disenfranchise individuals, and most states with these laws have more specific provisions that trump the “idiots” and “insane” language (see I.A). While these laws might be challenged on their face as unconstitutionally vague, courts that have considered such laws have simply interpreted them as not applying in the situations where election officials invoked them.⁵⁰

B. Disenfranchising Practices

The actions of election officials, service providers, and others to deny individuals, based on competency, the opportunity to register or vote may violate state election laws. In virtually every state with a voter competency requirement, a court must make the determination that a person does not meet the competency requirement.⁵¹ Even state laws disenfranchising “idiots” and “insane” people have been interpreted to require that a court determine whether an individual is incompetent.⁵²

The ADA bars election officials, poll workers, and public and private service providers from imposing their own cri-

⁴⁸Voting Rights Act, 42 U.S.C. §§ 1971 *et seq.* (Supp. 5 2006).

⁴⁹*Id.* § 1971(a)(2)(A).

⁵⁰See, e.g., SALES *ET AL.*, *supra* note 9, at 107–8 (arguing that laws disenfranchising “idiots” or “insane” people violate the due process clause because they are “so vague and indefinite as really to be no rule or standard at all”). See also *In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hospital*, 750 A.2d 790 (N.J. Super. Ct. App. Div. 2000) (ban on “idiots” and “insane” people voting did not justify presumption that state hospital residents were ineligible to vote); *Carroll v. Cobb*, 354 A.2d 355 (N.J. Super. Ct. App. Div. 1976) (same for residents of developmental disabilities institution).

⁵¹Most state laws either explicitly require that a person must be “adjudicated” or “adjudged” incapacitated, that is, that the determination must be made by a court or the state. Thus a court or other tribunal must decide whether a person meets voter competency requirements. While some state laws simply exclude “mentally incompetent” voters, competence determinations must generally be made by probate courts.

⁵²*In re Absentee Ballots*, 750 A.2d at 794–95 (requiring county board of elections to make particularized showing before a court that voters were incompetent before disqualifying the voters’ ballots); cf. *Carroll*, 354 A.2d at 359 (“it should be abundantly evident that a lay person is completely unequipped to determine whether an applicant is either an ‘idiot’ or an ‘insane person’”).

teria to exclude individuals with disabilities from voting or registering.⁵³ It also requires them to make reasonable modifications of policies, practices or procedures in order to afford individuals with disabilities equal opportunity to vote.⁵⁴ Reasonable modifications of policies may include having a poll worker explain in simpler language ballot instructions or contents to a voter with a cognitive disability and having a service provider help clients with cognitive disabilities obtain and submit absentee ballots.⁵⁵

C. Photo Identification Requirements

As noted above, photo identification requirements for voting may place financial and practical burdens on older adults and people with disabilities. Photo identification laws may violate state constitutions that are more protective than the U.S. Constitution. They may also violate the ADA if they screen out voters with disabilities and are not necessary.⁵⁶

While a state court ruling struck down Missouri's photo identification law, the U.S. Supreme Court recently upheld Indiana's voter identification law.⁵⁷ The Court's decision was based on the lack of proof that any group of voters was actually subjected to excessive burdens. The Court's decision leaves room for future

constitutional challenges to voter identification laws that do present substantial burdens on an individual's right to vote.

D. Advocating for Individuals in Guardianship Proceedings

Apart from bringing systemic challenges to laws or practices, advocates may help prevent clients from losing voting rights in guardianship proceedings. An advocate for a prospective ward should find out how guardianship affects voting rights in the state. In some jurisdictions, if the issue of voting is not raised during the guardianship proceeding, the subject, if a guardianship is imposed, loses the right to vote. In those jurisdictions, then, the advocate or subject of the guardianship proceeding should be prepared to present evidence of competency to vote and ask to retain the right to vote during the guardianship proceeding.⁵⁸

Few states have guidelines concerning what type of showing is required to preserve the right to vote. Evidence from a mental health professional showing that the person's ability to understand what it means to vote and how the voting process works should be more than sufficient and is a prudent approach to demonstrating voting competence. If the person who is the subject of the proceeding communicates in a manner that may not be un-

⁵³Public entities may not use eligibility criteria that screen out people with disabilities from participation in a program, service, or activity unless the criteria are necessary to the program, service, or activity (42 U.S.C. § 12132 (Supp. 5 2006); 28 C.F.R. § 35.130(b)(8) (2007)). Similarly, places of public accommodation, including social service providers such as nursing homes, hospitals, and homeless shelters, may not impose eligibility criteria that screen out individuals with disabilities from fully and equally enjoying services, privileges, or advantages unless the eligibility criteria are necessary (42 U.S.C. § 12182(b)(2)(A)(1) (Supp. 5 2006); 28 C.F.R. § 36.301(a) (2007)). Help in registration and voting is among the services or privileges afforded by residential service providers to the individuals they serve. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, imposes parallel requirements on recipients of federal funds and applies to most government entities and residential service providers for people with disabilities.

⁵⁴42 U.S.C. § 12132 (Supp. 5 2006); 28 C.F.R. § 35.130(b)(7) (2007) (public entities); 42 U.S.C. § 12182(b)(2)(A)(2) (Supp. 5 2006); 28 C.F.R. § 36.302(a) (2007) (public accommodations).

⁵⁵The Voting Rights Act also entitles voters with disabilities to receive help from a person of their choice as 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 (42 U.S.C. § 1973aa-6 (Supp. 5 2006)).

⁵⁶42 U.S.C. § 12132 (Supp. 5 2006); 28 C.F.R. §§ 35.130(b)(8) (Supp. 5 2006).

⁵⁷*Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006). *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008) (the law imposed only a limited burden on voters, and that burden did not outweigh the state's interests in deterring voter fraud, modernizing elections, and safeguarding public confidence in elections). 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 the law was rationally related to the state's interest in curbing voter fraud)).

⁵⁸There is some risk that raising these issues in probate court proceedings may complicate arguments in later proceedings if the person subsequently challenges the state law or policies concerning voting by individuals under guardianship.

derstood by the judge, the mental health professional should explain to the court the person's method of communication to help the court understand the person.

A ward who has already lost the right to vote can always ask the probate court to restore that right. Even in states with laws barring anyone under guardianship from voting, some courts have permitted people under guardianship to retain the right to vote or have it restored.

E. Understanding Voter Challenges

Advocates for voters with cognitive disabilities should know state-law requirements concerning voter challenges. State laws typically specify a limited set of reasons for which a prospective voter may be challenged. In many states, lack of competence is not a permissible basis for a voter challenge, even if the state has a voter competence requirement.⁵⁹ Even when competence is a permissible basis for challenging a voter, the challenger may be required to show specific proof and personal knowledge that the person challenged does not meet voter qualifications related to competence.

III. Advocating Policy Changes

Advocates should seize opportunities to promote legislative and policy changes that will improve access to the franchise

for individuals with cognitive impairments. Advocates should consider urging state and local policymakers to adopt changes such as the following:

- Implement mobile voting programs. In these programs, election officials visit long-term care facilities and other settings and provide ballots and assistance to individuals who have difficulty getting to a polling place.⁶⁰
- Require long-term care facilities to give residents information about how to register to vote and offer help in registration and voting. This applies, at the least, to facilities where election officials are unavailable to help in voting.⁶¹
- Ensure that any voter capacity standard is applied equally to all voters. States that choose to have a voter capacity standard must either subject every voter to the capacity inquiry or use a capacity standard that is no greater than that expected of all voters—for example, a standard requiring simply that a voter be able to communicate, with or without accommodations, a choice whether to cast a vote.⁶²

Adopting such policy changes will go a long way toward reducing the disenfranchisement of older adults with cognitive disabilities.⁶³

⁵⁹See, e.g., CAL. ELEC. CODE § 14240 (2008); OHIO REV. CODE § 3505.20 (2008).

⁶⁰See, e.g., Christine Vestal, *States Help Seniors Cast Their Votes*, STATELINE.ORG, March 25, 2008, www.stateine.org/live/details/story?contentid=294441 (describing Vermont's pilot mobile voting program for long-term care facility residents).

⁶¹For a description of state procedures for assisting voters in nursing homes and other long-term care facilities, see Amy Smith & Charles P. Sabatino, *Voting by Residents of Nursing Homes and Assisted Living Facilities: State Law Accommodations*, 26 BIFOCAL 1 (2004), www.abanet.org/aging/publications/bifocal/261.pdf.

⁶²A similar standard was recently recommended by the American Bar Association (Commission on Law and Aging et al., *supra* note 2, at 1 (state constitutions and statutes that permit exclusion from voting based on mental incapacity should explicitly state that the right to vote is retained except when a court finds by clear and convincing evidence that a "person cannot communicate, with or without accommodations, a specific desire to participate in the voting process"))).

⁶³Additional recommendations to improve voting access for older adults with cognitive impairments came out of a 2007 ABA-convened symposium (see Sabatino & Spurgeon, *supra* note 2).

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