

# VOTE.

A black and white photograph of a man with long hair, wearing a suit and tie, looking down at a ballot he is holding. The ballot has the word 'BALLOT' printed on it in large, bold letters.

**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**

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## 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. For these reasons, the right to vote in all types of public elections is enshrined in our federal and state constitutions.

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 poll workers' refusal 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. The last section describes the relationship between federal and state laws in this area. To help readers learn specifics about their state, the booklet includes two charts listing each state's laws on (A) voter-competence requirements and (B) voter challenges.

While much of the explanation is geared toward lawyers, we also include information addressed to voters, family members and advocates. Voters and advocates may find the information in the boxes useful to help clarify an individual's voting rights. Two one-page reference sheets are also available: a summary of the voting rights of people with mental disabilities of their voting rights and a summary the types of help that may and may not be provided to voters with disabilities.

### *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's website, <http://www.ndrn.org/voting/resources>.

## 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 may not have laws that impose a blanket ban on voting by anyone under guardianship.<sup>1</sup>
- ☒ 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.<sup>2</sup>
- ☒ 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.<sup>3</sup>
- ☒ Service providers, such as nursing homes, hospitals, assisted-living facilities and group homes, cannot bar residents from voting based on decisions by staff or administrators that residents are not competent to vote.<sup>4</sup>
- ☒ 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. A large number of 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.<sup>5</sup>
- ☒ 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.<sup>6</sup>

- ☒ 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.<sup>7</sup>

## 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 \_\_\_\_.

About 15 states and the District of Columbia have laws that bar voting by individuals who are under guardianship. Such laws typically state that individuals who are "under guardianship" or "adjudged incompetent" or "adjudicated incapacitated" cannot vote.<sup>8</sup> 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 are unable to care for themselves when they fail to take psychiatric medications. 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.
- ☒ About 19 states have laws that bar voting by individuals under

guardianship from voting *only* if a court has determined that they specifically lack the capacity to vote.<sup>9</sup>

- ☒ 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.<sup>10</sup>
- ☒ 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.<sup>11</sup> 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.<sup>12</sup>

### *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.<sup>13</sup> Indeed, many states now have laws specifying that individuals do not lose their right to vote because of their residence in an institution.<sup>14</sup>

**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.<sup>15</sup>

**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

facilities only if they have physical disabilities.<sup>16</sup>

**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. Many other voters with mental disabilities are harassed and humiliated before being able to exercise their rights.

### *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.<sup>17</sup> Pennsylvania law does not contain any voter-eligibility requirement related to competence.

**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 system for individuals with disabilities to come to provide training on voting rights and assist residents who wished to register to vote.

In 2008, however, the VA adopted a policy of barring all voter registration drives at VA facilities. This policy was used to bar Connecticut’s Secretary of State from conducting voter registration efforts at a VA medical facility.<sup>18</sup>

**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.

## What Are Your Rights?

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

An election official, poll worker, 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.<sup>19</sup> Even state laws disenfranchising “idiots” and “insane” people have been interpreted to require a particularized showing of incompetence before a court.<sup>20</sup>

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.<sup>21</sup> Accordingly, 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.

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

While advocates may want to consider raising systemic challenges to the use of state voter-competence requirements (see page \_\_\_), many individuals may simply wish to use whatever avenues are available to them 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 losing the right to vote may be a consequence of the guardianship.

### Know Your Rights in Guardianship Proceedings

If you are involved in a guardianship proceeding, you need to be aware of what guardianship will mean for your voting rights. If your state is among those that bar voting by people who are placed under guardianship or who are found incompetent to vote (see the states listed in notes 5 and 6), you should ask the judge to retain your voting rights and should be prepared to present evidence about your competence to vote.<sup>22</sup>

*[box continues on the next page]*

### *Know Your Rights [continued]*

#### **What Must You Show to Retain the Right to Vote?**

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

#### **What if You Have Already Lost the Right to Vote?**

If you have already lost the right to vote in a guardianship proceeding, you can always ask the probate court to restore it. The fact that you were found to lack voting competence at one time does not mean that you now lack competence to vote. Often, no determination about competence to vote is made before an individual loses the right to vote. Even in states that remove the right to vote from anyone under guardianship, some courts have interpreted these rules to allow people to retain the right to vote, or to have it restored, if they can demonstrate voting competence.<sup>23</sup>

You may wish to contact the protection and advocacy agency in your state to help you figure out how to ensure that your right to vote can be retained 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

If you have lost the right to vote based on a state voter-competence requirement, you may be able to challenge the requirement on the ground that it violates federal law. These requirements generally violate federal law if they are used to take away a person's right to vote based on disability (for example, based on guardianship status) 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 people who are the subject of guardianship proceedings—to meet standards that are not imposed on other voters. Federal law requires courts to apply the same standard to everyone.

If you have lost the right to vote based on a voter-competence requirement that you think may violate federal law, you may wish to contact the protection and advocacy agency for people with disabilities in your state. Contact information for these agencies is 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 provide assistance. You can reach the Center at (202) 467-5730.

## Advocating to Change the Voter-Competence Standard in Your State

**W**e urge advocates 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.

Probate courts, service providers and others sometimes ask individuals who are the subject of guardianship proceedings to demonstrate an understanding of elections and politics that goes far beyond what 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 and to explain their political views. Individuals who do not answer these questions to the satisfaction of the courts are not permitted to vote. Such inquiries function as a type of unlawful literacy test for people with mental disabilities.

### *What Standard Should Be Used to Determine Voting Competence?*

As discussed above, voters with mental disabilities are frequently required to meet voter-competence standards that go far beyond what is expected of other voters. Equal treatment requires that either these standards be eliminated or that the same competence standards be applied to all voters.

The need for any voter-competence requirement is remote at best. There is no indication that the 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.<sup>24</sup>

Given that the essence of voting is expressing a choice, one appropriate standard for determining voting competence is determining 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."<sup>25</sup>

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 adopt requirements that 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.<sup>26</sup> In five of these states, voters lacking a photo-ID can 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.<sup>27</sup>

While a state court struck down Missouri's photo-ID law,<sup>28</sup> the U. S. Supreme Court recently upheld Indiana's law.<sup>29</sup> 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 any 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 \_\_\_) 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.<sup>30</sup>

## 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 Republican 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.”<sup>31</sup>

Most states’ laws provide for challenges to a person’s eligibility to vote.<sup>32</sup> State law governs who may bring a challenge and what types of evidence must be presented to support a challenge. The chart on page \_\_\_ summarizes 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.<sup>33</sup> And if the state does not have a voter-competence requirement, then a person may not be disqualified on the basis of competence—and a challenge may not be based on 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.<sup>34</sup>

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.<sup>35</sup>

### *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.<sup>36</sup> Demanding standards of proof may be required.<sup>37</sup> 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.<sup>38</sup> 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.**

## 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.<sup>39</sup> 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.<sup>40</sup>

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, 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 voting 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 a candidacy, the helper must leave that choice blank.

## *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.<sup>41</sup> 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.<sup>42</sup>

### *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.<sup>43</sup> They must make reasonable modifications to rules and policies needed to help people with mental disabilities register or vote.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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.

## **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.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup> Of course, the experience of being subjected to voting pressures is not unique to people with disabilities.<sup>52</sup>

**(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.<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup>

## What Is the Legal Framework?

### The Relationship Between Federal and State Law

**V**oting in the United States is a fundamental political right.<sup>56</sup> 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 elections<sup>57</sup>—within certain limits. For example, states cannot set voter-qualification standards that conflict with the Constitution.<sup>58</sup> The Supreme Court has invalidated discriminatory state voter qualifications that violate the Fourteenth Amendment of the U.S. Constitution.<sup>59</sup>

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 forth the “floor” for legal protections. States may pass laws that give voters with disabilities more legal protections, but they cannot take away rights of voters with disabilities 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.”<sup>60</sup> 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.<sup>61</sup> 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.**<sup>62</sup>

#### 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...”<sup>63</sup> 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.<sup>64</sup>

➤ **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.**<sup>65</sup>

➤ 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.”<sup>66</sup> The right to vote is such a fundamental right.<sup>67</sup> 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.

## 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.<sup>68</sup> These programs would 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.<sup>69</sup> For example, a state that wishes to impose a requirement that voters 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.<sup>70</sup>

**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 violate the ADA because they bar voting by people who have the capacity to vote and meet the essential requirements for voting.**<sup>71</sup>

➤ 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.<sup>72</sup> 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, 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, 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.<sup>73</sup> These facilities are subject to the same requirements as publicly operated facilities

### 3. *Section 504 of the Rehabilitation Act of 1973*<sup>74</sup>

- 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.<sup>75</sup> It also applies to federal executive branch agencies, such as the Department of Veterans' Affairs.<sup>76</sup> Section 504 provides the same rights and remedies as Title II of the ADA.<sup>77</sup>

- 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.

### 4. *Help America Vote Act (HAVA)*<sup>78</sup>

- 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."<sup>79</sup> 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 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.”<sup>80</sup> 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.<sup>81</sup> The Act defines literacy tests to include “any test of the ability to read, write, understand or interpret any matter.”<sup>82</sup> **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.*<sup>83</sup>

## 6. *National Voter Registration Act*<sup>84</sup>

➤ 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.”<sup>85</sup>

➤ 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.”<sup>86</sup> The VRA, as discussed above, requires that any voting standards that states establish be applied equally to all voters. **Thus, both the VRA**

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

## 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.

## Notes

- 1 These limitations are imposed by the United States Constitution, the Americans with Disabilities Act, and several other federal laws. See notes 60-77 and accompanying text; p. \_\_ (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; p. \_\_ (Challenging State Voter-Competence Requirements) .
- 3 See notes 63-65 and accompanying text concerning the Due Process Clause of the U.S. Constitution; p. \_\_ (Only a Court Can Decide that Someone is Not Competent to Vote).
- 4 See notes 68-77 and accompanying text; p. \_\_ (Only a Court Can Decide that Someone is Not Competent to Vote) .
- 5 See note 83 and accompanying text; pp. \_\_ (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; p. \_\_ (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 p. \_\_. 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, Kentucky, Massachusetts, Minnesota, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Texas, Washington and Wisconsin. For citations to these legal provisions, see chart on p. \_\_.
- 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](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 p. \_\_. Most of these states’ laws contain other more specific provisions that 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 p. \_\_.
  - 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 David Gambacorta, *VA Getting Heat Over Policy Banning Voter Registration Drives*, PHILADELPHIA DAILY NEWS, July 26, 2008, [http://www.philly.com/philly/news/20080726\\_VA\\_getting\\_heat\\_over\\_policy\\_banning\\_voter-registration\\_drives.html](http://www.philly.com/philly/news/20080726_VA_getting_heat_over_policy_banning_voter-registration_drives.html). This policy was adopted after a federal appeals

court upheld the VA's decision to bar a local Democratic Party leader from conducting voter registration efforts at VA facilities. *Preminger v. Secretary of Veterans' Affairs*, 517 F.3d 1299 (D.C. Cir. 2008).

- 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 (8<sup>th</sup> 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 individuals wishing 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.
- 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.
- 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 persona 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).
- 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). See notes 30-35 and accompanying text.
- 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.

- 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.*

- Carnahan*, 499 F.3d 803, 808-09 (8<sup>th</sup> 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*

*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).