



## **VOTING RIGHTS OF INDIVIDUALS SUBJECT TO GUARDIANSHIP: A PRIMER FOR PRACTITIONERS**

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## I. Introduction and Background

Voting is one of the most sacred rights of our democracy. Discriminatory laws restricting or erecting barriers to voting have been regularly struck down by courts. Federal law, however, permits disenfranchisement of individuals due to “mental incapacity.”<sup>1</sup> Restrictions on voting based on “mental incapacity,” many of which pre-date current federal law, exist in most states.<sup>2</sup> This memorandum focuses on voting restrictions that disenfranchise some or all people with disabilities who are subject to a guardianship or conservatorship.<sup>3</sup> A 2020 *60 Minutes* piece highlights this problem, the impact it has on people who have lost the right to vote in the guardianship process, and their advocacy efforts to reform the law.<sup>4</sup>

Laws or practices that bar people from voting based on guardianship or disability status, without an individualized inquiry into their capacity to vote (as well as other protections discussed herein), are ripe for legal challenge as a violation of constitutional and anti-discrimination protections. This memorandum discusses how such laws, policies, and practices may:

- Violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution if they are not narrowly tailored to serve a compelling state interest;
- Fail to offer constitutionally required due process protections such as notice and the opportunity to be heard;

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<sup>1</sup> National Voter Registration Act, 52 U.S.C. § 20507(a)(3)(B), formerly cited as 42 U.S.C. § 1937gg-6.

<sup>2</sup> See generally, Bazelon Center for Mental Health Law, Autistic Self-Advocacy Network, National Disability Rights Network, Schulte, Roth & Zabel LLP, and Akin Gump Strauss Hauer & Feld LLP, *VOTE. It's Your Right: A Guide to the Voting Rights of People with Mental Disabilities*, 2020 (“VOTE Guide”)

<https://secureservercdn.net/198.71.233.254/d25.2ac.myftpupload.com/wp-content/uploads/2020/10/Bazelon-2020-Voter-Guide-Full.pdf>; for specific state voter competency laws as of October, 2020, see chart entitled *State Laws Affecting the Voting Rights of People with Mental Disabilities* at 31 *et seq.* and 13-14, n. 45-49. The VOTE Guide has been an indispensable resource in preparing this memo; we are grateful to Jennifer Mathis of the Bazelon Center and the other contributors for their expertise and thorough and up-to-date examination of this issue.

<sup>3</sup> See U.S. Department of Justice website explaining guardianship and conservatorship: <https://www.justice.gov/elderjustice/guardianship#:~:text=Guardians%20are%20appointed%20when%20a,of%20rights%20from%20the%20individual.>

<sup>4</sup> <https://www.youtube.com/watch?v=ai5UPNolmsU>

- Fail to allow voters with disabilities assistance to vote, in violation of the Voting Rights Act;
- Violate the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504) by discriminating against classes of people with disabilities and failing to offer and allow for reasonable modifications or reasonable accommodations.
- Impermissibly require a test or standard for competency not demanded of other voters, in violation of the Equal Protection Clause, the ADA/Section 504, and the Voting Rights Act.

This memorandum also explores model approaches in states that have adopted laws emphasizing expression of desire, rather than testing capacity, to vote,<sup>5</sup> and recommendations adopted by the American Bar Association<sup>6</sup> and the Uniform Law Commission<sup>7</sup> that provide maximum protection of the right to vote and still allow states to impose voting restrictions consistent with federal law.

## II. Voting is a Fundamental, But Not Absolute, Right for Some People with Disabilities

Voting is a fundamental right, protected by the United States Constitution.<sup>8</sup> As the Supreme Court has stated, “for reasons too self-evident to warrant amplification... voting is of the most fundamental significance under our constitutional structure.”<sup>9</sup> The Constitution itself prohibits excluding certain categories of people from voting, and courts have regularly struck down

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<sup>5</sup> See *infra*, Section V (model approaches and criticism of capacity testing) and Appendix (model state laws); see also VOTE Guide, *supra* note 2, at 13 n. 46 and 20 n. 64 and accompanying text.

<sup>6</sup> [https://www.americanbar.org/groups/public\\_interest/election\\_law/policy/07a121/](https://www.americanbar.org/groups/public_interest/election_law/policy/07a121/)

<sup>7</sup> See Appendix; see also Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act, adopted July, 2017 at:

<https://www.uniformlaws.org/committees/community-home?communitykey=2eba8654-8871-4905-ad38-aabbd573911c>

<sup>8</sup> *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”).

<sup>9</sup> *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

restrictions on the franchise as unconstitutional.<sup>10</sup> The right is not absolute, however. The Supreme Court has found that “[s]tates have the power to impose voter qualifications and to regulate access to the franchise.”<sup>11</sup> While states may not set qualification requirements that run afoul of the Constitution, the federal National Voter Registration Act (“NVRA”) does permit disenfranchisement of individuals based on “mental incapacity.”<sup>12</sup> Most states have enacted restrictions on the voting rights of people with disabilities.<sup>13</sup> The term “mental incapacity” has not been defined in the NVRA or in cases; for purposes of this memorandum, references to “mental incapacity” and “mental disability” encompass the broadest definitions including intellectual/developmental disabilities, psychiatric disabilities, brain injuries, and dementia, unless otherwise specified.

State reluctance to ensure the electorate encompasses people with all types of disabilities may include concerns about potential undue influence over voters who may lack mental capacity, as well as concerns about preserving election integrity and maintaining a “political community” of informed voters.<sup>14</sup> Constitutional protections and disability rights, however, demand a narrowly tailored and individualized approach.

*There is, of course, an important value in safeguarding the democratic process against corruption or undue influence. But the means selected for achieving this legitimate goal should be equally applicable to all citizens and not have a discriminatory impact on a selected subgroup. This concern, even if specially relevant to persons with mental disabilities, can be addressed through less restrictive*

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<sup>10</sup> See discussion in Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 McGeorge L. Rev. 917, 919-920 (2007).

<sup>11</sup> *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

<sup>12</sup> National Voter Registration Act, 52 U.S.C. §§ 20507(a)(3)(B), (b)(1), formerly cited as 42 U.S.C. § 1937gg-6.

<sup>13</sup> See VOTE Guide, *supra* note 2, at 13-14, n. 45-49 and 31 *et seq.*

<sup>14</sup> Note that the Supreme Court struck down restrictions aimed at limiting voting by people who are less informed or sophisticated in *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 631 (1969). See discussion of competing interests at Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, *supra* note 10 at 24-925; see also Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 McGeorge L. Rev. 931, 964 (2007) and Charles Kopel, *Suffrage for People with Intellectual Disabilities and Mental Illness: Observations on A Civic Controversy*, 17 Yale J. Health Pol’y, L. & Ethics 209, 225-232 (2017).

*means which do not wholly preclude persons with more severe impairments from all participation in the political process.*<sup>15</sup>

Without a uniform definition of mental incapacity, states have a lot of leeway to decide whose voting rights may be restricted. In the words of expert commentators, “While federal election law permits state laws to disenfranchise persons ‘by reason of... mental incapacity,’ serious questions are raised as to who is mentally incapable of voting and whether existing laws address any genuine state interest in protecting the electoral process from fraud or reaching the goal of an intelligent electorate.”<sup>16</sup> Many laws disenfranchising individuals based on disability and/or guardianship status pre-date the National Voter Registration Act and are based on historical assumptions and outmoded ideas about the capability of people with intellectual or psychiatric disabilities.<sup>17</sup>

### III. Disenfranchisement of People Subject to Guardianship

Most states restrict voting rights in some way for certain people with disabilities who may lack the mental capacity to vote.<sup>18</sup> These restrictions may occur as:

- Categorical disenfranchisement of people who are subject to guardianship, which totally deprives certain individuals of their fundamental right to vote based on their guardianship or disability status. This approach is outdated, overbroad, and violates numerous constitutional and statutory protections. In at least 12 states, blanket bans forbid people subject to guardianship from voting based on provisions in state constitutions, guardianship, election, or disability laws, and/or state or local policies or practices.
- In some states, people who are subject to a “full” or “plenary” guardianship automatically lose the right to vote. Some people who

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<sup>15</sup> Steven J. Schwartz, *Abolishing Competency as a Construction of Difference: A Radical Proposal to Promote the Equality of Persons with Disabilities*, 47 U. Miami L. Rev. 867, 871 (1993).

<sup>16</sup> Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, *supra* note 14, at 932.

<sup>17</sup> See discussion of historical treatment of voters with mental disabilities in Benjamin O. Hoerner, *Unfulfilled Promise: Voting Rights for People with Mental Disabilities and the Halving of HAVA’s Potential*, 20 Tex. J. C.L. & C.R. 89, 107-109 (2015).

<sup>18</sup> VOTE Guide, *supra*, at 13-14 and 31 *et seq.*

have a “limited” guardianship may still be able to vote unless the court determines that they do not have the capacity to do so.<sup>19</sup>

- In some states, individuals subject to guardianship lose the right to vote along with other rights upon a judicial finding of “mental incapacity” or “mental incompetence,” but may be able to retain their voting rights if they petition the court. In other states, the individual will retain the right to vote unless the court determines that they lack capacity.
- Several states have no disability-related restrictions on the right to vote.<sup>20</sup>

To find out if someone is registered to vote, go to <https://www.vote.org/>.<sup>21</sup>

#### A. Disenfranchisement Based on Guardianship and Disability Status

While little litigation has been pursued in this area, the few decided cases are instructive in understanding how best to protect the rights of individuals in the guardianship process and adhere to constitutional and statutory requirements. In the seminal case of *Doe v. Rowe*, a federal district court struck down Maine’s constitutional provision which disenfranchised individuals under guardianship “by reason of mental illness.”<sup>22</sup> The case was brought in 2000 by the Maine Protection and Advocacy agency (“P&A”), now Disability Rights Maine, and three women who were subject to guardianship. In each of the plaintiffs’ cases, the probate court in the

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<sup>19</sup> *see generally*

[https://www.americanbar.org/groups/senior\\_lawyers/publications/voice\\_of\\_experience/2022/voice-of-experience-february-2022/understanding-guardianship/#:~:text=A%20%22plenary%20guardianship%22%20is%20a,and%20guardians%20of%20the%20estate](https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2022/voice-of-experience-february-2022/understanding-guardianship/#:~:text=A%20%22plenary%20guardianship%22%20is%20a,and%20guardians%20of%20the%20estate) for discussion of types of guardianships.

<sup>20</sup> Effective November 1, 2021, Oklahoma has become the latest state to reform its law, weakening the state’s blanket ban on voting for people subject to full guardianships. Pursuant to HB 1752, enacted in May 2021, courts must determine whether Oklahomans subject to both full and limited guardianships retain the right to vote and courts must issue findings of fact as to such determination. Okla. Stat. Ann. tit. 30, § 3-113 as amended by ELECTIONS, 2021 Okla. Sess. Law Serv. Ch. 544 (H.B. 1752).

<sup>21</sup> NDRN does not warrant, certify or make any assurances or guarantees about the security, operation, or usefulness of [www.vote.org](https://www.vote.org/) and have no responsibilities in regard to the website. We provide the link to this website simply for the benefit of the reader. Anyone entering information into [www.vote.org](https://www.vote.org/) assumes any risks associated with using the website.

<sup>22</sup> 156 F. Supp.2d 35 (D. Maine 2001).

guardianship proceeding did not specifically consider whether the individual had the capacity to vote, nor did the court notify the individuals that, as a result of the guardianship proceedings, they might lose the right to vote. All of the plaintiffs were under a full (not limited) guardianship.

Upon the court's order in its attempt to narrow the effect of the constitutional ban and avoid finding a constitutional violation, two of the plaintiffs sought modifications of their guardianship orders to reinstate the right to vote. The first plaintiff was granted the modification, making her eligible to vote, while the second plaintiff's modification request was denied based on the constitutional prohibition. The court noted that examinations of the plaintiffs indicated that the plaintiffs were able to understand the act of voting.

During the litigation, defendants broadened the definition of "mental illness," which would expand the group of individuals disenfranchised by reason of their guardianship status, but would no longer arbitrarily single out people with psychiatric disabilities.<sup>23</sup> Defendants also proposed new procedures, in which a person subject to guardianship would retain the right to vote unless the petitioner "raises the issue of voting."<sup>24</sup> In that event, the court would then be required to specifically consider the individual's capacity.<sup>25</sup> The court held that, if implemented, the proposed changes would likely satisfy judicial scrutiny but held that the blanket ban in effect, without a formalized individualized inquiry and due process rights, violated the Equal Protection and Due Process clauses of the U.S. Constitution,<sup>26</sup> and the ADA.<sup>27</sup>

#### B. [Conflicting Constitutional, Statutory, and/or Administrative Provisions](#)

Some states have attempted to circumvent blanket voting bans by interpreting state guardianship and/or election laws or practices as nonetheless providing for an individualized determination of voting capability. The Eighth Circuit Court of Appeals has done just that, dismissing two cases on the ground that plaintiffs lacked standing to bring their claims, but conceding that a categorical ban would fail constitutional inquiry. In *Missouri Protection and Advocacy Services v. Carnahan* ("MoPAS"), a case brought by the Missouri P&A, the Eighth Circuit affirmed

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<sup>23</sup> *Doe* at 44.

<sup>24</sup> *Id.* at 50.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 47-56.

<sup>27</sup> *Id.* at 58-59.



a decision granting defendants', and denying plaintiffs', motions for summary judgment, holding that despite the language of Missouri's constitution depriving individuals with disabilities under guardianship the right to vote, courts do in fact retain the authority to preserve the right to vote in a guardianship proceeding.<sup>28</sup> The court suggested, however, that a categorical exclusion without an individualized inquiry would not withstand equal protection scrutiny or a disability discrimination challenge.<sup>29</sup>

Relying heavily on the *MoPAS* decision, a federal district court in Minnesota denied plaintiffs' motion for summary judgment, reasoning that "notwithstanding the state constitution's apparent categorical ban on the rights of persons 'under guardianship' to vote, a ward is presumed to retain the right to vote as set forth by Minnesota statute."<sup>30</sup> The court in *Minnesota Voters Alliance v. Ritchie* attempted to reconcile conflicting provisions of the constitution and state law by reasoning that the constitution does not define "person under guardianship," and, stressing the importance of the right to vote, concluded that state guardianship laws preserve voting rights unless they are specifically removed.<sup>31</sup> "Thus, the constitutional prohibition against voting based on guardianship status applies only when there has been an individualized judicial finding of incapacity to vote."<sup>32</sup> The court nonetheless agreed with the court in *MoPAS* that a categorical denial of voting rights of people subject to guardianship, without an individualized judicial finding of incapacity, "would not withstand close constitutional scrutiny."<sup>33</sup> The Eighth Circuit affirmed the judgment for defendants, upholding the lower court's dismissal on standing grounds.<sup>34</sup>

The same year, however, a Minnesota state court refused to engage in the legal contortions of the *Minnesota Voters Alliance* court, holding that notwithstanding statutory language that allows court discretion to retain or restore voting rights, the categorical ban in Minnesota's constitution bars

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<sup>28</sup> *Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 808-809 (8th Cir. 2007). This was an erroneous conclusion, however, because just two years later, a state court in Missouri refused to reinstate the voting rights of a person subject to guardianship because the blanket ban in the constitution and state laws precluded it from exercising any discretion to do so. *Estate of Posey v. Bergin*, 299 S.W.3d 6, 25 (2009).

<sup>29</sup> *Mo. Prot. & Advocacy Servs., Inc.* at 810 n. 8, 812.

<sup>30</sup> *Minnesota Voters Alliance v. Ritchie*, 890 F. Supp. 2d 1106 (D. Minn. 2012), *aff'd*, 720 F.3d 1029 (8th Cir. 2013).

<sup>31</sup> *Id.* at 1115-1117.

<sup>32</sup> *Id.* at 1117.

<sup>33</sup> *Id.* at 1116.

<sup>34</sup> *Minnesota Voters Alliance v. Ritchie*, 720 F.3d 1029, 1033 (8th Cir. 2013).

giving courts such discretion and thus, concluded that the state constitution violates the U.S. Constitution.<sup>35</sup> The court in *In re Guardianship of Erickson* noted that “[e]ven if the Constitution allows the Legislature to determine who may be placed under a guardianship, no amount of statutory finagling can preserve for those placed under a guardianship a right that the Constitution says they cannot have.”<sup>36</sup> The court observed that the Minnesota constitution's blanket ban violated the Equal Protection Clause facially and as applied, and the Due Process Clause, citing *Doe v. Rowe*.<sup>37</sup>

At least one state has relied on administrative guidance to interpret a blanket constitutional voting ban to require an individualized determination of competence.<sup>38</sup> As the Eighth Circuit has made clear, however, in the *MoPAS* and *Minnesota Voters Alliance* cases, courts may be reluctant to address a constitutional challenge head-on and will seek out ways to avoid doing so. These state schemes, which consist of a confusing array of laws, administrative guidance, and policies, lead to a lack of consistency and uniformity and do not insulate the state from legal challenge.

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<sup>35</sup> *In re Guardianship of Erickson* 2012 Minn. Dist. Lexis 193 \*25 (2012).

<sup>36</sup> *Erickson* at \*8.

<sup>37</sup> *Id.* at \*\* 13-20.

<sup>38</sup> See, e.g., Massachusetts Secretary of State guidance:

<https://f.hubspotusercontent00.net/hub/29051/file-13683957.pdf/guardianship.pdf>

(noting that courts and commentators had expressed “substantial” doubts about the constitutionality of a blanket provision that deprived all individuals under guardianship of the right to vote and establishing that the constitutional provision only applies to those guardianship orders that expressly contain a finding prohibiting voting).

## IV. Constitutional and Statutory Framework for Asserting Voting Rights of Individuals Subject to Guardianship

The right to vote has been recognized by the Supreme Court as a liberty interest protected under the 14th Amendment to the Constitution. If a state interferes with a fundamental liberty interest of a U.S. citizen, it cannot do so without due process, or in a way that violates the Equal Protection clause of the 14th Amendment. Similarly, people with disabilities have protections and rights under federal civil rights laws, such as the ADA, Section 504, and the Voting Rights Act, as well as state civil rights laws. Bans on voting based on guardianship or disability status, without an individualized determination of capacity, run afoul of these protections as discussed below.

### A. Procedural Due Process

The 14th Amendment to the U.S. Constitution states that “[n]o State...shall...deprive any person of life, liberty, or property, without due process of law...”<sup>39</sup> Procedural due process “imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”<sup>40</sup> The *Doe v. Rowe* court held that “the fundamental nature of the right to vote gives rise to a liberty interest entitled to due process protection.”<sup>41</sup>

Under the Due Process Clause, a state constitutional provision or statute restricting voting must be scrutinized by balancing: 1) the voters' interest in participating in the electoral process; 2) the risk that the restriction will erroneously prevent capable persons from voting; and 3) the state's interest in protecting the electoral process.<sup>42</sup> (See Section II for discussion of competing interests of voters and states). A due process challenge may be a “facial” or an “as applied” challenge.

An “as applied” due process violation occurs when a state fails to provide adequate notice and hearing before restricting the voting rights of a person

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<sup>39</sup> U.S. Const. amend. XIV §1.

<sup>40</sup> *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

<https://www.uniformlaws.org/committees/community-home?communitykey=2eba8654-8871-4905-ad38-aabbd573911c>

<sup>41</sup> *Doe* at 47.

<sup>42</sup> *Mathews* at 334.

subject to guardianship. In *Doe v. Rowe*, the court found that the state scheme violated due process protections because individuals in guardianship proceedings “were not given notice that as a result of the guardianship proceeding they would be disenfranchised...[leading] to an inadequate opportunity to be heard.”<sup>43</sup> According to the court, due process requires that notice be specific to the right to vote and should provide “the same level of notice and opportunity for hearing that is provided for all other aspects of guardianship.”<sup>44</sup> Thus, if a state fails to give specific notice regarding the right to vote, it is vulnerable to a due process challenge.<sup>45</sup> Note, however, that the federal district court in *Minnesota Voters Alliance* found that the general notice and other procedural protections in the guardianship process were sufficient, and that the individual is not entitled to specific notice of the termination of their voting rights.<sup>46</sup>

A state constitutional provision or statute is “facially invalid” if it is unconstitutional in all circumstances.<sup>47</sup> This might result from lack of a requirement to conduct an individualized assessment or make judicial findings before terminating voting rights, inconsistency between courts’ application of state laws, or a lack of “uniformly adequate notice.”<sup>48</sup> In *Doe*, the defendants developed new (and conflicting) procedures mid-litigation providing that a person subject to guardianship would retain the right to vote unless the petitioner specifically sought to disenfranchise the individual and the court would need to specifically consider the individual’s capacity to vote before restricting that right.<sup>49</sup> The *Doe* court considered defendants’ revised plans favorably, but found that since the new procedures had not been adopted, the blanket ban was facially invalid.<sup>50</sup>

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<sup>43</sup> *Doe* at 48.

<sup>44</sup> *Id.* at 49.

<sup>45</sup> See, e.g., Virginia’s notice requirement, at Va. Code § 64.2-2004 (2014). While Virginia remains a state that categorically excludes persons subject to guardianship from voting, it may avoid due process violations by requiring notice and an opportunity to be heard.

<sup>46</sup> *Minn. Voters All.*, 890 F.Supp.2d at 1117-1118.

<sup>47</sup> *Doe* at 49 n. 17.

<sup>48</sup> *Id.* at 50.

<sup>49</sup> *Id.* at 50.

<sup>50</sup> *Id.* at 50-51.

## B. Equal Protection

The 14th Amendment to the U.S. Constitution prohibits states from denying “equal protection of the laws.”<sup>51</sup> Under the Equal Protection Clause, a state's restriction of voting rights must be closely correlated to the state's interest in protecting the electoral process and must be narrowly tailored to achieve that aim.<sup>52</sup> The Equal Protection Clause prohibits states from setting voter qualifications that “invidiously discriminate.”<sup>53</sup> “In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.”<sup>54</sup> According to the Supreme Court, “[t]his careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.”<sup>55</sup>

As with procedural due process, a provision may be invalid as applied or be facially invalid. In *Doe v. Rowe*, the court ruled that Maine's constitutional restriction on voting by persons “under guardianship for mental illness” violated the Equal Protection Clause both facially and as applied.<sup>56</sup> Because the constitutional ban arbitrarily denied the vote to mentally ill persons under guardianship while allowing persons with other disabilities under guardianship to vote, it was held to be unconstitutional as applied.<sup>57</sup> The court also found Maine’s categorical exclusion “either fatally underinclusive or overinclusive” insofar as “‘mental illness’ cannot serve as a proxy for mental incapacity with regards to voting.”<sup>58</sup> It thus violated the Equal Protection Clause because the ban was not narrowly tailored to serve the state’s compelling interest in “ensuring that ‘those who cast a

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<sup>51</sup> U.S. Const. amend. XIV §1.

<sup>52</sup> *Dunn v. Blumstein* at 330 (holding that durational residency requirements violate the Equal Protection Clause because they were unnecessary to promote a compelling interest, either to prevent fraudulent voting by non-residents or to further the goal of having knowledgeable voters).

<sup>53</sup> *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966).

<sup>54</sup> *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

<sup>55</sup> *Kramer v. Union Free Sch. Dist. No. 15* at 626.

<sup>56</sup> *Doe* at 56.

<sup>57</sup> *Id.* at 52.

<sup>58</sup> *Id.* at 55-56.

vote have the mental capacity to make their own decision by being able to understand the nature and effect of the voting act itself.”<sup>59</sup>

Even in cases without a positive outcome for plaintiffs, courts have held that blanket bans on voting by individuals subject to guardianship may not withstand Equal Protection scrutiny absent an individualized inquiry into the person’s mental capacity. In *MoPAS*, the court noted that “the blanket disenfranchisement of those who are mentally incapacitated may be a subject warranting equal protection scrutiny.”<sup>60</sup>

### C. ADA/Section 504

Individuals with disabilities unquestionably have a right to be free from discrimination in the electoral process.<sup>61</sup> Squaring this right with states’ authority to disenfranchise individuals who lack the mental capacity to vote presents difficult questions that have largely yet to be answered by courts.

The ADA prohibits disability discrimination in the services, programs, and activities of state and local government entities, including state and local election authorities.<sup>62</sup> Section 504<sup>63</sup> applies to entities that receive federal funding and generally provides the same rights and remedies as the ADA.<sup>64</sup> This section will generally refer to the ADA for brevity’s sake, but is largely applicable to Section 504 as well. 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<sup>65</sup> of the services,

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<sup>59</sup> *Id.* at 51. Note that the *Doe* court accepted this standard only for purposes of its Equal Protection analysis but later commentators adopted it as a standard for measuring functional capacity. See Section V.C. for more discussion on functional capacity testing as a disfavored means of assessing capacity.

<sup>60</sup> *Mo. Prot. & Advocacy Servs., Inc.* at 810 n.8; see also *Minn. Voters All.*, 890 F.Supp.2d at 1117 (accord with *MoPAS* that a categorical ban without individualized inquiry would violate the Equal Protection clause).

<sup>61</sup> 42 U.S.C. §12132; 28 C.F.R. §35.130. See Section 504 29 U.S.C. § 794 and regulations at 28 C.F.R. § 41.51.

<sup>62</sup> 42 U.S.C. § 12101 *et seq.*; Section 504 prohibits disability discrimination by entities receiving federal financial assistance. 29 U.S.C. § 794(a).

<sup>63</sup> 29 U.S.C. § 794(a).

<sup>64</sup> *Barnes v. Gorman*, 536 U.S. 181, 184-85 (2002).

<sup>65</sup> In *People First v. Merrill*, where the U.S. Supreme Court issued a stay preventing Alabama from allowing curbside voting during COVID, Justice Sotomayor’s dissent describes “benefit” as follows: “But under the ADA, ‘[t]he benefit itself ... cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the

programs, or activities of a public entity or be subjected to discrimination by any such entity.”<sup>66</sup>

Plaintiffs who are disenfranchised by reason of mental incapacity would need to establish that they are qualified individuals with disabilities, that they were excluded from participation in the state’s electoral program or otherwise discriminated against, and such exclusion or discrimination was by reason of disability.<sup>67</sup> Thus, the critical question in a case challenging disenfranchisement of people on the basis of their disability or guardianship status is what is meant by “qualified” in the voting context. Said another way, if mental capacity is an “essential eligibility requirement for the activity of voting,”<sup>68</sup> then what level of mental capacity is required to sustain an ADA challenge to a categorical ban based on disability or guardianship status? At the outset, any blanket ban that does not allow for an individualized inquiry of capacity will run afoul of the ADA and Section 504; the determination of who is a qualified individual under these statutes must be made on an individualized basis.<sup>69</sup>

Regulations implementing the ADA support the argument that excluding qualified individuals from voting based on guardianship status or disability will not withstand judicial scrutiny. The regulations prohibit state and local governments from: denying qualified individuals an equal opportunity to participate in their programs;<sup>70</sup> using eligibility criteria that screen out classes of people with disabilities unless the criteria are necessary to the

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meaningful access to which they are entitled.’ *Alexander v. Choate*, 469 U.S. 287, 301, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985).” 141 S. Ct. 25, 27 (2020).

<sup>66</sup> 42 U.S.C. § 12132; see also Section 504 at 29 U.S.C. § 794(a). Under the ADA, “public entities” include “any State or local government” and “any department, agency, special purpose district, or other instrumentality of a State or local government.” 42 U.S.C. § 12131(1); Under Section 504, “program or activity” receiving federal financial assistance is defined at 29 U.S.C. § 794(b).

<sup>67</sup> *Doe* at 58.

<sup>68</sup> *Id.* at 58-59.

<sup>69</sup> See, e.g., *School Board of Nassau County v. Arline*, 480 U.S. 273, 287 (1987) (analyzing Section 504); *PGA Tour Incorporated v. Martin*, 532 U.S. 661, 690 (2001) (it is a “basic requirement” of the ADA that “the need of a disabled person be evaluated on an individual basis”).

<sup>70</sup> 28 C.F.R. § 35.130(b)(1)(i)-(iv), (vii); 28 C.F.R. § 41.51(b)(1)(i)-(iv), (vii) (Section 504 regulations).

program being offered;<sup>71</sup> and utilizing criteria or methods of administration that discriminate.<sup>72</sup> It would be difficult to justify the types of restrictions at issue in *Doe* and *MoPAS* under these regulations, although the courts did not specifically analyze them.

The *Prye* court suggested that a blanket ban on voting by people who have a guardian appointed might violate the ADA and Section 504.<sup>73</sup> On appeal in *MoPAS*, the Eighth Circuit suggested that if, in fact, Missouri's scheme failed to afford "an individualized inquiry into whether the ward is mentally competent to vote," it might run afoul of the ADA.<sup>74</sup> The circuit court rejected plaintiffs' contention that Missouri's scheme creates an "unwarranted presumption" of incompetency, holding that unless confronted with individuals who had been disqualified from voting, it would not rule on whether Title II of the ADA restricts the state's ability to make mental capacity an essential eligibility requirement of the state's electoral program.<sup>75</sup>

The paucity of cases analyzing the ADA in the context of a categorical ban on voting based on mental capacity leaves open the possibility of a number of outcomes in lawsuits bringing these claims. At a minimum, courts should view any categorical ban that does not require an individualized inquiry as to the individual's capacity with heavy skepticism.<sup>76</sup> Moreover, while the few cases discussed here focused only on the ADA's prohibition on discrimination, public entities also have affirmative obligations to make reasonable modifications to policies, practices and procedures that are necessary for people with disabilities to have an equal opportunity to

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<sup>71</sup> 28 C.F.R. §35.130(b)(8).

<sup>72</sup> 28 C.F.R. § 35.130(b)(3). This regulation was cited by the *Doe* court in support of its finding that plaintiffs had been discriminated against on the basis of their disabilities. *Doe* at 58; 28 C.F.R. § 41.51(b)(3) (Section 504).

<sup>73</sup> *Prye* at \*6.

<sup>74</sup> *Mo. Prot. & Advocacy Servs., Inc.* at 812.

<sup>75</sup> *Id.*

<sup>76</sup> In support of its holding that Maine's categorical disenfranchisement of individuals subject to guardianship by reason of "mental illness" violates the ADA, the court in *Doe v. Rowe* found that at least some of these individuals have the capacity to vote and therefore meet the essential eligibility criteria under the ADA. *Doe* at 59. The *Doe* court cited to *Therault v. Flynn*, which explained that the ADA prohibits "rejecting an applicant automatically as a result of his disease or its symptoms, without considering the individual's abilities." 162 F.3d 46, 50 (1<sup>st</sup> Cir. 1998).



participate in government programs.<sup>77</sup> These obligations should extend to accommodations or modifications needed to assist an individual to establish that they desire and have the capacity to vote, and to participate in all aspects of the voting process.<sup>78</sup> These ADA/Section 504 protections, as yet untested in the mental capacity context, are consistent with model approaches discussed in Section V.D., *infra*.

#### D. Voting Rights Act

While the National Voter Registration Act allows states to remove people from the voter rolls based on mental incapacity,<sup>79</sup> they must do so in ways that are “uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965.”<sup>80</sup> While never tested in court in the context of disability, it is potentially a violation of the Voting Rights Act to impose standards, or require a competency test, only for certain individuals based on their guardianship or disability status.

The Voting Rights Act states that:

*No person acting under color of law shall--*

*(A) 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>81</sup>

This language strongly suggests that standards or tests that single out individuals or classes of individuals based on guardianship or disability status violate the Voting Rights Act. Strengthening this argument, the Voting Rights Act expressly 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>82</sup> Literacy tests include “any test of the ability to read, write, understand or interpret any

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<sup>77</sup> 42 U.S.C. §§ 12131(2), 12132; 28 C.F.R. § 35.130(b)(7).

<sup>78</sup> See Section V.B. for discussion of accommodations to consider in this context.

<sup>79</sup> 52 U.S.C. § 20507(a)(3)(B), formerly cited as 42 U.S.C. § 1937gg-6.

<sup>80</sup> 52 U.S.C. § 20507(b)(1), formerly cited as 42 U.S.C. § 1937gg-6.

<sup>81</sup> 52 U.S.C. § 10101(a)(2)(A), formerly cited as 42 USC § 1971(a)(2)(A).

<sup>82</sup> *Id.* at (a)(2)(C).

matter.”<sup>83</sup> Literacy tests are a form of voter competency test and are therefore analogous to disfavored capacity tests discussed, *infra*, in Section V.C.<sup>84</sup>

However, it is unclear if the “unequal standards” provision of the Voting Rights Act can be applied on grounds other than race. In *Frazier v. Callicutt*, the Voting Rights Act was held to apply to differing, non-racial standards that imposed an additional burden on students at certain colleges in Mississippi.<sup>85</sup> More recently, however, a federal district court held that “[t]here is not support for this theory in § [10101], however, because well-settled law establishes that § [10101] was enacted pursuant to the Fifteenth Amendment for the purpose of eliminating racial discrimination in voting requirements. In this case at bar, Plaintiffs have not alleged, much less proven, any discrimination based on race.”<sup>86</sup>

Section 208 of the Voting Rights Act may also support a claim, in addition to the ADA/Section 504, for the right to assistance to demonstrate mental capacity and/or desire to vote. Section 208 provides that voters with disabilities “may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.”<sup>87</sup> The Voting Rights Act defines the term “voting” very broadly.<sup>88</sup> This provision supports a claim that individuals subject to guardianship are entitled to a range of assistance in completing the voting process. It is untested, but plausible, to argue that Section 208 extends to assistance in demonstrating qualifications to vote.<sup>89</sup>

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<sup>83</sup> *Id.* at (a)(3)(B).

<sup>84</sup> If any state adopted a legally sufficient literacy test, people with disabilities who cannot write would be entitled to a reasonable accommodation. The comparison is raised here, however, to illustrate what would be required for a form of competency test to survive legal scrutiny under federal law.

<sup>85</sup> 383 F. Supp. 15, 20 (N.D. Miss. 1974), referring to former citation at 42 U.S.C. § 1971(a)(2)(A).

<sup>86</sup> *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 839 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008).

<sup>87</sup> 52 U.S.C. § 10508, formerly cited as 42 U.S.C. § 1973aa-6.

<sup>88</sup> 52 U.S.C. § 10310(c)(1) (formerly 42 U.S.C. § 1973l): *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017).

<sup>89</sup> A recent federal court decision noted that “[t]he purpose [of Section 208] was to create a guaranteed right to the voting process that could not be narrowed or limited by state

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legislation.” *Disability Rts. N. Carolina v. N. Carolina State Bd. of Elections*, No. 5:21-CV-361-BO, 2022 WL 2678884 \*4 (E.D.N.C. July 11, 2022).

## V. Determining Capacity to Vote

Persons subject to guardianship are judicially determined to lack capacity to make decisions in some or all aspects of their lives.<sup>90</sup> Depending on whether an individual is placed under a full (plenary) or a limited guardianship, the rights preserved or restricted may be enumerated. State laws and local practices vary, and courts may give differing amounts of attention to the individual's capacity to vote. "[I]n determining the need for a guardian, the court focuses on the individual's ability to make decisions about how to manage their property or take care of their personal or medical affairs. Such emphasis on lack of self-care or financial management skills is not dispositive of whether the individual understands the nature of the election process."<sup>91</sup> Given the importance of the right to vote, for individuals who may be deprived of that right and to our democracy in general, it is critical that individuals not be disenfranchised without receiving all of the constitutional and civil protections to which they are entitled.

### A. Evolving Consensus: Expression of Desire to Vote

Much work has been done in recent years to establish a standard for voter competency for people with mental disabilities that adheres to federal constitutional and civil rights protections of people with disabilities, and addresses concerns about election integrity. The evolving consensus among legal and subject matter experts, but which is not the law or practice in most states, is that a person under guardianship retains the right to vote unless the individual cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process. This approach, which moves away from a "capacity" or "functional" test, includes the critical components of: 1) a presumption that the right to vote is retained; 2) a standard that does not exceed what is required of other

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<sup>90</sup> For discussion of guardianship, see generally National Council on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination* (2018), available at:

[https://ncd.gov/sites/default/files/NCD\\_Guardianship\\_Report\\_Accessible.pdf](https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf); see also Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, *supra* note 14, at 946-949.

<sup>91</sup> Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, *supra* note 14, at 949, citing to a related circumstance about whether a person under guardianship is an incompetent witness (*Kokes v. Angelina Coll.*, 148 S.W.3d 384, 389 (Tex. Ct. App. 2004) (holding that being subject to a guardianship is not dispositive of competency to give testimony).

voters; and 3) individually tailored accommodations consistent with Equal Protection and ADA requirements.

This approach was first adopted in 2007 as a recommendation of the American Bar Association for a Symposium called *Facilitating Voting as People Age: Implications of Cognitive Impairment*, and was adopted that year by the American Bar Association House of Delegates as its Legislative Policy.<sup>92</sup> The director of the ABA Commission on Law and Aging described the rationale for this approach as follows:

*Being able to communicate a specific desire to participate in the voting process was chosen as the determining criteria because that is the threshold step of voting. The subsequent steps to complete the task of voting are self-determinative of capacity, much like the capacity to ride a bicycle can accurately be determined only by allowing the individual to mount a bike and start peddling. If capacity is lacking, the task just won't be completed. Likewise, an individual simply will not be able to make or communicate a choice on a ballot, even with assistance, if capacity to vote is lacking. The process stops by its own lack of momentum.*<sup>93</sup>

The Uniform Law Commission adopted similar language in the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) in 2017.<sup>94</sup> Six states have now passed legislation with similar language.<sup>95</sup> Three of those states — California, Maryland, and New

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<sup>92</sup> American Bar Association House of Delegates, Adopted Recommendations, 2007: [https://www.americanbar.org/groups/public\\_interest/election\\_law/policy/07a121/](https://www.americanbar.org/groups/public_interest/election_law/policy/07a121/)

<sup>93</sup> Charles P. Sabatino, *Guardianship and the Right to Vote*, Human Rights Magazine Vol. 25 No. 3, June 2020:

[https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/voting-in-2020/guardianship-and-the-right-to-vote/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/guardianship-and-the-right-to-vote/).

<sup>94</sup> Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act: [https://higherlogicdownload.s3-external-1.amazonaws.com/UNIFORMLAWS/17c2bb02-86d8-fa14-df3a-ac9e720b7ecd\\_file.pdf?AWSAccessKeyId=AKIAVRDO7IEREB57R7MT&Expires=1680058006&Signature=r1l2fqCh4D4n3pnzcY%2B%2FOsArVJU%3D](https://higherlogicdownload.s3-external-1.amazonaws.com/UNIFORMLAWS/17c2bb02-86d8-fa14-df3a-ac9e720b7ecd_file.pdf?AWSAccessKeyId=AKIAVRDO7IEREB57R7MT&Expires=1680058006&Signature=r1l2fqCh4D4n3pnzcY%2B%2FOsArVJU%3D)

<sup>95</sup> See Appendix. While Oklahoma did not go as far as adopting the protections and rights in the ABA and UGCOPPA approaches, it has become the latest state to reform its guardianship law, weakening the state's blanket ban on voting for people subject to

Mexico, do not use the word “specific” to modify communicating an individual’s desire to vote.<sup>96</sup>

NDRN recommends avoiding use of the word “specific” if possible, as it could allow for an overly narrow interpretation of an acceptable level or type communication of desire to vote.

#### B. Accommodations That Should Be Made Available

One unresolved question is, by adopting the preferred language discussed above, what are the accommodations that should be provided to people with disabilities to determine whether they can communicate a desire to participate in the voting process? Federal law requires that a person with a disability be allowed to receive help to register to vote, to understand a ballot, to navigate the voting process, and to cast a ballot.<sup>97</sup>

Accommodations should also be available to assist people in guardianship proceedings to communicate their desire to vote and/or to demonstrate their competency to do so.<sup>98</sup> Legally, accommodations are limited by whether they are “reasonable.”<sup>99</sup>

Accommodations could include:

- **Supported Decision-Making** which can generally be described as “occur[ing] when people with disabilities use friends, family members,

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full guardianships. Effective November 1, 2021, courts must determine whether Oklahomans subject to both full and limited guardianships retain the right to vote and issue findings of fact as to such determination. Okla. Stat. Ann. tit. 30, § 3-113 as amended by ELECTIONS, 2021 Okla. Sess. Law Serv. Ch. 544 (H.B. 1752).

<sup>96</sup> See Appendix.

<sup>97</sup> Section 208 of the Voting Rights Act (VRA) entitles voters who require assistance to vote because of blindness, disability, or inability to read or write, to “assistance by a person of the voter’s choice,” so long as the assistant is not “the voter’s employer or agent of that employer or officer or agent of the voter’s union.” 52 U.S.C. § 10508; *OCA-Greater Houston, supra*, 867 F.3d at 614-615 (5th Cir. 2017 (“[t]o vote...includes steps in the voting process before entering the ballot box, ‘registration,’ and it includes steps in the voting process after leaving the ballot box, ‘having such ballot counted properly.’”)) (quoting the Voting Rights Act, 52 U.S.C. § 10310(c)(1)); emphasis in original).

<sup>98</sup> Public entities have affirmative obligations 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 guardianship proceedings and voting processes. 28 C.F.R. § 35.130(b)(7).

<sup>99</sup> *Id.*

and professionals to help them understand the everyday situations they face and choices they must make, allowing them to make their own decisions without the need for a substitute decision maker, such as a guardian.”<sup>100</sup> Supported decision-making is generally considered to be an alternative to guardianship. However, supported decision-making principles are ideally suited to assisting anyone with mental disabilities in the voting process, including demonstrating competency and a desire to participate in the voting process.

To vote using supported decision-making principles works in the same way that most adults make their voting decisions—by seeking advice, input, and information from others who are knowledgeable and whom the person trusts, and relying on information produced by campaigns and other sources. For examples of how supported decision-making can be used to help people vote, see Disability Vote California’s [Guide for Family Members and Supporters](#) and [Guide for Service Providers](#).

- **Assistance by a person of their choosing and/or modifications to remove physical or other barriers, including assistive technology.**<sup>101</sup> Assistance or modifications might include verbal or non-verbal prompts, use of a picture board, video, or graphics, and/or ensuring that the individual is permitted to work with a person with whom they are comfortable to express their desire to vote.

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<sup>100</sup> National Council on Disability, *Beyond Guardianship: Toward Alternatives that Promote Greater Self-Determination*, March, 2018, [https://ncd.gov/sites/default/files/NCD\\_Guardianship\\_Report\\_Accessible.pdf](https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf) at 130. See discussion of supported decisionmaking generally at 130-138 and specific example of supported decisionmaking in the voting context: “My Mama [and I] have a system where I slap her left hand or right hand to make my choice. If I don’t slap either one, it means I don’t like either choice. So anyway, I voted three times now for president and governor.” See also, Resolution and Report, American Bar Association, Commission on Disability Rights, Section of Civil Rights and Social Justice, Section of Real Property, Trust and Estate Law, Commission on Law and Aging, Report to the House of Delegates (Adopted August, 2017) [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/supported-decision-making-resolution-final.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/supported-decision-making-resolution-final.pdf).

<sup>101</sup> Discussion of assistance and modifications to enable people with disabilities to vote is at: [https://www.ada.gov/ada\\_voting/ada\\_voting\\_ta.htm](https://www.ada.gov/ada_voting/ada_voting_ta.htm).

- ***Other individualized means of expression and communication***<sup>102</sup> such as nonverbal means of communication, using language that is preferred and understandable to the individual, avoiding a distracting or hectic environment, and/or timing the conversation(s) to optimize the individual's attention and comprehension.

For more information on accommodations in the voting process, see NDRN's [Voting Accommodations for People with Mental Disabilities](#).

### C. Capacity Tests are Disfavored and Likely Illegal

No category of voters, other than people with mental disabilities, are subject to a qualifying standard for voting. Although federal law allows states to disenfranchise individuals for lack of "mental capacity,"<sup>103</sup> no guidance was provided to states on how to define or determine this term and thus, states have significant discretion as to whether and how to prohibit individuals from registering to vote, and casting a ballot, if they are determined to lack mental capacity. In today's climate, amid rampant (albeit largely unfounded) concerns over voter fraud, it may be important to respond to, and potentially consider, proposals for testing the capacity of individuals subject to guardianship to vote. This approach is disfavored from a legal and disability rights perspective, but we include discussion of capacity tests here in order to provide context for a preferable approach that comports with an evolving consensus and protects the legal rights of affected individuals.

There is a long history of using functional capacity tests in the United States, to determine whether an individual with disabilities is competent to vote, and relatedly, to qualify as a juror, execute a will, etc.<sup>104</sup> Such tests arguably violate the ADA/Section 504, the Voting Rights Act, and the Equal Protection Clause of the U.S. Constitution insofar as they make demands on people with disabilities that are not applied to other voters. People with disabilities should not be held to a higher standard of voter competency

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<sup>102</sup> See American Bar Association Commission on Law and Aging and the Penn Memory Center, *Assisting Cognitively Impaired Individuals with Voting: A QUICK GUIDE* [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2020-voting-guide.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-voting-guide.pdf).

<sup>103</sup> National Voter Registration Act, 52 U.S.C. § 20507(a)(3)(B), formerly cited as 42 U.S.C. § 1937gg-6.

<sup>104</sup> For a comprehensive historical discussion of cases challenging voter qualifications, see Smith, Joel E., *Voting Rights of Persons Mentally Incapacitated*, 80 A.L.R.3d 1116, 1119-20 (1977).



than other voters, and people subject to guardianship should not be held to a higher standard than other people with disabilities. Also important is to keep in mind that there is no scientific right answer to the question of competency to vote; restricting the right to vote in the guardianship context is a policy choice about decisional capacity,<sup>105</sup> which must consider the legal rights and protections afforded to the fundamental right to vote in general and to people with disabilities in particular.

Standards for measuring capacity that focus on the individual's ability to understand the voting process, such as the one the court in *Doe v. Rowe* adopted, have been described as employing a "functional standard" to demonstrate competency.<sup>106</sup> While not discussed in any depth, the *Doe* court found, for purposes of its Equal Protection analysis, that mental capacity is "being able to understand the nature and effect of the voting act itself."<sup>107</sup> Some state statutes have adopted a similar functional testing approach. For example, the Wisconsin guardianship statute provides that a court may declare incapacity to vote "if the court finds [by clear and convincing evidence] that the individual is incapable of understanding the objective of the elective process."<sup>108</sup> New Jersey's amended state constitution now prohibits voting by a person "who has been adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting."<sup>109</sup>

It appears that only one voter competency test has been considered and tested in a limited way with individuals with dementia. The Competence Assessment Tool for Voting (CAT-V) was "designed to provide a consistent standard that can be relied upon to evaluate whether the individual understands the nature and purpose of casting a ballot."<sup>110</sup> The developers of the CAT-V attempted to operationalize the functional standard articulated by the *Doe* court in Maine and in effect in Washington State at the time

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<sup>105</sup> Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, *supra* note 14, at 962-966; see also Naomi Doraisamy, *Out of Mind, Out of Sight: Voting Restrictions Based on Mental Competency*, *supra* note 56, at 148-149.

<sup>106</sup> Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, *supra* note 14, at 960-966.

<sup>107</sup> *Doe* at 51.

<sup>108</sup> WIS. STAT. ANN. § 54.25(2)(c)(1)(g), § 54.25(2)(c)(2).

<sup>109</sup> N.J. Const. art 2, § 1, ¶ 6.

<sup>110</sup> Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, *supra* note 14, at 934.

CAT-V was developed.<sup>111</sup> Notably, both Maine and Washington State have abandoned this standard, and instead, have become the only two states to adopt the provisions in UGCOPAA.<sup>112</sup> It does not appear that any states have modified their laws or practices to adopt the CAT-V or other, similar, functional capacity test.<sup>113</sup>

#### Considerations in Using a Capacity Test:

1. A test should be a low threshold exercise, posing a minimal impediment to enfranchisement<sup>114</sup> or conversely, a high threshold for disenfranchisement.
2. A test should avoid a cut-off score but include a process by which a low score will require further evaluation of the individual and an ultimate determination by a court.<sup>115</sup>
3. Any capacity testing for voting must be done by qualified professionals through guardianship proceedings, not by election officials or facility staff, and include specific findings made by the court.
4. Testing should start with the presumption that the individual retains capacity to vote unless and until demonstrated otherwise.
5. A finding of incapacity must be made by a court using at least a clear and convincing standard.
6. Any testing for voting competence arguably runs afoul of the Equal Protection Clause, the Voting Rights Act and the ADA, and thus, any testing should be given to all prospective voters, not just people subject to guardianship or classes of people with disabilities.

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<sup>111</sup> *Id.* at 964-965.

<sup>112</sup> <https://www.uniformlaws.org/committees/community-home?communitykey=2eba8654-8871-4905-ad38-aabbd573911c&tab=groupdetails>.

<sup>113</sup> For critical discussion of CAT-V and other capacity tests, see Charles Kopel, *Suffrage for People with Intellectual Disabilities and Mental Illness: Observations on A Civic Controversy*, *supra* note 14, at 234-241.

<sup>114</sup> Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, *supra* note 14, at 962-966.

<sup>115</sup> *Id.* at 966.

#### D. Model Standards for Establishing Mental Capacity

Although there has been little litigation in this area, much has been written about the limited cases and about capacity determinations in general, and a model standard has evolved with near consensus among legal and subject matter experts. The 2007 ABA Symposium, *Facilitating Voting as People Age: Implications of Cognitive Impairment*, included robust consideration of capacity and voting.<sup>116</sup>

The relevant Capacity and Voting recommendations adopted at the Symposium state:

- A. *Presumption of Capacity. To promote the democratic process to the fullest extent possible, no governmental entity should exclude any otherwise qualified person from voting on the basis of medical diagnosis, disability status, or type of residence. A person's capacity to vote should be presumed regardless of guardianship status. State laws, including guardianship and election laws, should explicitly state that the right to vote is retained except by court order in accordance with the following two recommendations, 2(B) and 2(C).*
- B. *Due Process Protection. If state law permits exclusion of a person from voting on the basis of incapacity, such exclusion should have legal effect only if:*
  - 1. *The exclusion is based on a determination by a court of competent jurisdiction;*
  - 2. *Appropriate due process protections have been afforded; and*
  - 3. *The court states on the record that the basis for the exclusion has been established by clear and convincing evidence.*
- C. *Capacity Standard. If state law permits exclusion of a person from voting on the basis of incapacity, a person should be determined to lack capacity only if the person cannot communicate, with or without accommodations, a specific desire to participate in the voting process.*<sup>117</sup>

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<sup>116</sup> Symposium Introductory Remarks:

[https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/introduction.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/introduction.pdf)  
. Description of process is at 845-846; summary of Capacity Working Group is at 849-853.

<sup>117</sup> <https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1172&context=mlr>

These recommendations have become the basis for practically all statutory changes since their adoption. The ABA House of Delegates adopted this language as its Legislative Policy in 2007<sup>118</sup> and in 2017 UGCOPAA was adopted,<sup>119</sup> incorporating almost identical language. See Appendix for full text of, and differences between, the ABA Legislative Policy and UGCOPAA. Since 2007, six states have passed or modified legislation which incorporates the concepts or language of the ABA Legislative Policy.<sup>120</sup>

Finally, Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (“CRPD”), contains language that supports the approach adopted by the ABA, UGCOPAA, and six states. Article 12 provides that “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”<sup>121</sup> Article 12 presumes capacity, shifting focus from “protection” (pursued through guardianship) to rights (achieved with supports such as supported decision-making).<sup>122</sup> The United States has signed, but not ratified, the CRPD;<sup>123</sup> this language is therefore not controlling, but supports the model approach discussed above.

## VI. Conclusion

The right to vote is one of the most important and basic rights of our democracy. As disability rights have evolved, longstanding assumptions about people with disabilities are starting to give way to the recognition that people with cognitive and psychiatric disabilities are fully capable of the presumption of competence that other voters enjoy. This same trend is

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<sup>118</sup> [https://www.americanbar.org/groups/public\\_interest/election\\_law/policy/07a121/](https://www.americanbar.org/groups/public_interest/election_law/policy/07a121/)

<sup>119</sup> <https://www.uniformlaws.org/committees/community-home?communitykey=2eba8654-8871-4905-ad38-aabbd573911c>

<sup>120</sup> These states are: California, Maine, Maryland, Nevada, New Mexico, and Washington State. See Appendix for statutory language and citations.

<sup>121</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-12-equal-recognition-before-the-law.html>.

<sup>122</sup> See discussion at: Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, Hum. Rts. Brief, Winter 2012, at 8; see also Charles Kopel, *Suffrage for People with Intellectual Disabilities and Mental Illness: Observations on A Civic Controversy*, *supra* note 14. at 220-225.

<sup>123</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en).

occurring with respect to people subject to guardianship and conservatorship, insofar as legal and subject matter experts have adopted recommendations, and several states have updated laws, that preserve the right to vote and protect the constitutional and civil rights of individuals subject to guardianship. While antiquated state constitutional provisions and laws remain in effect, they are ripe for legal challenges and legislative updates. The American Bar Association, the Uniform Law Commission, the Convention on the Rights of Persons with Disabilities, and six states have led the way for the remaining states to conform their constitutions and laws. With voting rights such a prominent issue in today's discourse, it is especially important not to ignore this group of individuals who deserve the same rights, protections, and dignity afforded to the rest of our society.

## VII. Appendix

### Model Laws and Policies

#### A. American Bar Association

In 2007, the American Bar Association's House of Delegates adopted the following legislative policy:

*FURTHER RESOLVED, That the American Bar Association urges federal, state, local, and territorial governments to ensure that no governmental entity exclude any otherwise qualified person from voting on the basis of medical diagnosis, disability status, or type of residence. State constitutions and statutes that permit exclusion of a person from voting on the basis of mental incapacity, including guardianship and election laws, should explicitly state that the right to vote is retained, except by court order where the following criteria must be met:*

- *The exclusion is based on a determination by a court of competent jurisdiction;*
- *Appropriate due process protections have been afforded;*
- *The court finds that the person cannot communicate, with or without accommodations, a specific desire to participate in the voting process; and*
- *The findings are established by clear and convincing evidence.*<sup>124</sup>

Thus, the ABA policy includes a presumption that individuals subject to guardianship retain the right to vote, and that the burden of removing the franchise is placed on the court to make findings, established by clear and convincing evidence, that the person cannot communicate a specific desire to vote, with or without accommodations. The person would receive notice and the opportunity for a hearing before disenfranchisement.

#### B. UGCOPAA

In 2017, the Uniform Law Commission adopted the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA)<sup>125</sup> which provides that: (1) courts' guardianship orders must specifically state whether the individual retains the right to vote, and if not, must include findings that support removing that right, which, if consistent with states'

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<sup>124</sup> [https://www.americanbar.org/groups/public\\_interest/election\\_law/policy/07a121/](https://www.americanbar.org/groups/public_interest/election_law/policy/07a121/)

<sup>125</sup> <https://www.uniformlaws.org/committees/community-home?communitykey=2eba8654-8871-4905-ad38-aabbd573911c>

voting laws and policy preferences, “must include a finding that the adult cannot communicate, with or without support, a specific desire to participate in the voting process”;<sup>126</sup> and (2) the individual is entitled to notice about the guardianship proceeding and that the right to vote is retained unless removed by the court.<sup>127</sup>

Similar to the ABA standard, the presumption under UGCOPAA would be to retain voting rights even when an individual is placed under guardianship, the individual would receive notice about the guardianship proceeding and the rights at issue, including voting, and the court must make findings that support removing the right to vote. Left to states to decide is whether they will adopt laws or policies that require that the court make findings that the individual “cannot communicate, with or without support, a specific desire to participate in the voting process.” This language is similar to the ABA policy language, but notably, does not include a standard of proof by which the court must make a finding to support disenfranchisement and does not obligate states to consider support or accommodations with which an individual might be able to communicate a desire to vote. The only states that have adopted the UGCOPAA are Washington and Maine.<sup>128</sup>

### C. Model State Laws

Although 22 states’ laws provide that an individual subject to guardianship retains the right to vote unless a court specifically removes it,<sup>129</sup> only six states have adopted laws that most closely comport with the ABA and UGCOPAA standards. Those states are: California, Maine, Maryland, Nevada, New Mexico, and Washington State.<sup>130</sup>

**California** requires that for an individual under guardianship (called conservatorship in California) to be deprived of the right to vote, “the court

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<sup>126</sup> UGCOPAA § 310(a)(3).

<sup>127</sup> UGCOPAA § 604.

<sup>128</sup> <https://www.uniformlaws.org/committees/community-home?communitykey=2eba8654-8871-4905-ad38-aabbd573911c&tab=groupdetails>.

<sup>129</sup> These states are Alaska, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Kentucky, Maryland, Maine, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Texas, Washington, Wisconsin, and Wyoming. VOTE Guide, *supra* note 2, at 13-14 n. 46.

<sup>130</sup> VOTE Guide, *supra* note 2, at 13-14 n. 46 and 20 n. 64 and accompanying text. See *also*, Washington’s adoption of UGCOPAA, effective January 1, 2022, Wash. Rev. Code Ann. §§ 11.130.310 and 11.130.655 (West).

[must] find by clear and convincing evidence that the person cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process.”<sup>131</sup>

After the *Doe* case, **Maine**’s statutes were amended, consistent with UGCOPAA, to establish that an individual subject to guardianship retains the right to vote unless the court orders otherwise. If the court removes the right to vote, it must include findings that support removing that right, which must include a finding that the person cannot communicate, with or without support, a specific desire to participate in the voting process.<sup>132</sup>

In **Maryland**, an individual under guardianship for mental disability is not competent to vote if “a court of competent jurisdiction has specifically found by clear and convincing evidence that the individual cannot communicate, with or without accommodations, a desire to participate in the voting process.”<sup>133</sup>

In **Nevada**, “[a] person is not ineligible to vote on the ground that the person has been adjudicated mentally incompetent unless a court of competent jurisdiction specifically finds by clear and convincing evidence that the person lacks the mental capacity to vote because he or she cannot communicate, with or without accommodations, a specific desire to participate in the voting process and includes the finding in a court order.”<sup>134</sup>

**New Mexico** provides that individuals who lack the mental capacity to vote are “limited only to those persons who are unable to mark their ballot and who are concurrently also unable to communicate their voting preference.”<sup>135</sup>

**Washington State** adopted UGCOPAA, effective January 1, 2022.<sup>136</sup>The law provides that an individual subject to guardianship retains the right to vote unless the court orders otherwise. If the court removes the right to vote, it must include findings that support removing that right, which must

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<sup>131</sup> Cal. Elec. Code § 2208.

<sup>132</sup> Me. Rev. Stat. tit. 18-C, § 5-310(2).

<sup>133</sup> Md. Code, Elec. Law § 3-102(b)(2).

<sup>134</sup> Nev. Rev. Stat. § 293.5415.

<sup>135</sup> N.M. Const. Art. VII, § 1.

<sup>136</sup> Wash. Rev. Code §§ 11.130.310 and 11.130.655.



include a finding that the person cannot communicate, with or without support, a specific desire to participate in the voting process.

D. [United Nations Convention on the Rights of Persons with Disabilities](#)

Although not controlling, Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (“CRPD”), contains language that supports the approach adopted by the ABA, UGCOPAA, and the six states listed above. Article 12 provides that “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”<sup>137</sup>

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<sup>137</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-12-equal-recognition-before-the-law.html>.