

No. 06-41573

**In the United States Court of Appeals  
For the Fifth Circuit**

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**WILLIE RAY; JAMILLAH JOHNSON; GLORIA MEEKS;  
REBECCA MINNEWEATHER;  
PARTHENIA MCDONALD; WALTER HINOJOSA;  
TEXAS DEMOCRATIC PARTY,**

*Plaintiffs-Appellees,*

v.

**GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS;  
ROGER WILLIAMS, SECRETARY OF STATE FOR THE STATE OF TEXAS.**

*Defendants-Appellants.*

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS, MARSHALL DIVISION**

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**BRIEF *AMICI CURIAE* OF AARP AND LEAGUE OF WOMEN  
VOTERS OF TEXAS IN SUPPORT OF PLAINTIFFS-APPELLEES**

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## INTERESTS OF THE *AMICI*

This case concerns the validity of Sections 86.006(f) and (h) of the Texas Election Code, which *amici* assert, as the district court held, create unjustified restrictions on persons assisting voters in exercising the franchise, and thus, unduly limit the rights of Texas voters – especially older and disabled voters – across the political spectrum. The parties’ briefs acknowledge that the lion’s share of persons affected by these 2003 election law amendments are older voters.<sup>1</sup> Moreover, the district court found that in Texas “assist[ance] to voters in casting their mail-in ballots” has been widespread on the part of “individuals,” both “major Texas political parties” and “other organizations,” and “is particularly beneficial to elderly, homebound, disabled, and illiterate voters.”<sup>2</sup> Texas law itself recognizes the difficulty many older or disabled individuals have voting in person, by guaranteeing that persons over age 65 or with a disability preventing their appearing at the polls may vote by mail, *see* Tex. Elec. Code §§ 82.002(a), 82.003.

*Amici* are organizations whose mission includes advocating public policies that make it easier for Americans to vote, and policies that assist voters, including

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<sup>1</sup> *See* Appellants’ Brief (“State Br.”) 1-2 (identifying the focus of Sections 86.006 (f) & (h) as “elderly voters”; Appellees’ Brief (“App. Br.”) 9-10 (explaining the focus of voter assistance, and thus of the 2003 amendments, is “the many voters who vote by mail-in ballot [who] are elderly or physically impaired.”

<sup>2</sup> *Ray v. Texas*, No. 2:06-CV-385 (E.D. Tex. Oct. 31, 2006) at 3 (Findings of Fact and Conclusions of Law, hereafter “DCT Dec.”) (Findings of Fact 14-15).

older and disabled voters, to participate in the political process. *Amicus* AARP is a nonprofit, nonpartisan membership organization of more than 38 million people age 50+ that is dedicated to assuring that older Americans have independence, choice and control in ways that are beneficial to them and to society as a whole. AARP has offices in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. AARP's objectives include supporting "procedures that encourage and promote maximum participation in the electoral process," and a voting process that "is not burdensome, nor hampers access" to the franchise. AARP's electoral reform advocacy reflects concern for voters of all ages, but focuses especially on needs of older voters, regardless of party affiliation. Addressing the interests of voters with disabilities is important to AARP because older persons have a higher incidence of disabilities than other age groups.<sup>3</sup> To these ends, AARP has participated in electoral reform legal cases in various federal and state courts.

*Amicus* League of Women Voters of Texas (LWV-TX), along with the League of Women Voters of the United States (LWVUS), has a historic interest in

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<sup>3</sup> AARP has taken no prior position on the specific statutory provisions on appeal. AARP offered limited support for Texas House Bill 54, which included many terms on mail-in voting. (AARP "registered" for the bill generally, without providing testimony.) AARP took no further action on HB 54 as it moved through the legislature and became law in 2003. Based on implementation of §§ 86.006(f) and (h) and the record in this case, AARP concluded, as the district court held, that these provisions contain unduly harsh sanctions, unfairly sacrifice older and disabled voters' rights, and are not needed to deter and prevent mail-in vote fraud.



voter rights and the electoral process. The right of every citizen to vote has been a basic League principle since its origin. For many years LWV-TX has undertaken numerous activities to educate voters, including older voters and voters with disabilities, about public issues. In addition, LWV-TX has a long history of actively monitoring the electoral system in Texas and from time to time, advocating reforms in the system.

*Amici* believe, as the district court held, that Sections 86.006(f) and (h) – by threatening criminal sanctions for merely possessing the ballot of a voter, even with that voter’s consent, and by denying a defense to such charges (except in limited circumstances) for friends, neighbors and other non-relatives who frequently assist older and disabled voters not living in the same household – “unduly burdens” aid to many older and disabled voters, in that it “prevents ... and dissuades ... under the pain of prosecution,” persons inclined to assist older and disabled voters from doing so. DCT Dec. 7 (Findings of Fact ¶27), 13 (Conclusions of Law ¶21). In Sections 86.006(f) and (h), *amici* submit, Texas has established policies at odds with laudable efforts by groups like *amici* to actively encourage political participation, especially by older voters and voters with

disabilities. The challenged provisions of state law thus undermine Texas' own interest in facilitating broader engagement by its citizens in the electoral process.<sup>4</sup>

## INTRODUCTION AND SUMMARY OF ARGUMENT

The district court properly evaluated Section 86.006 under legal standards articulated in *Anderson v. Celebreeze*, 460 U.S. 780 (1983). The same standards likewise govern this Court's review. The *Anderson* Court explained:

[a reviewing court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged position is constitutional.

460 U.S. at 788; DCT Dec. at 9 (Conclusion of Law 9) (*quoting same*). *Accord* *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). In assessing these factors, the

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<sup>4</sup> This brief addresses *only* the validity of the district court's ruling that "[Section] 86.006's prohibition on the possession of carrier envelopes and ballots provided to others unduly burdens the First and Fourteenth Amendment rights of the plaintiffs under circumstances in which the voter consents to that possession." DCT Dec. at 12-13 (Conclusion of Law 20). *Amici* do not address and express no view of the parties' arguments in regard to Appellants' assertions that the district court should have dismissed Appellees' claims under 42 U.S.C. § 1983 for lack of subject matter jurisdiction and under 42 U.S.C. § 1971 for lack of standing. *Amici* also take no position on the impact of Section 86.006 on any political party. All parties consent to the filing of this brief.

district court applied a balancing test, having determined “that strict scrutiny does not apply” in light of its further conclusion that “[a]lthough there is a fundamental right to vote ... there is no corresponding fundamental right to receive and cast an absentee ballot.” *Id.* at 10 (Conclusions of Law 11-12 (relying on *McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802 (1969))).

Moreover, the district court ruled “that the affirmative defenses provided under [Section 86.006] would be construed ... as exceptions to criminal liability.” *Id.* at 12 (Conclusion of Law 18). In other words, the district court accepted as established the State’s assertion that Texas would not prosecute absentee voter assistants who might benefit from an affirmative defense set forth in Section 86.006(f).<sup>5</sup> In the main, these defenses apply to relatives of a voter and to other registered voters residing at the same address, as well as to any person who handles a voter’s ballot, in order to mail it, and who also provides lawfully required identifying information on the outside of the ballot.<sup>6</sup>

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<sup>5</sup> *Id.* at 11-12 (Conclusions of Law 17-18).

<sup>6</sup> *Id.* at 6 (reproducing Sections 86.006(f)(1), (2) and (4), as well as (3), (5) and (6); the latter three address early voting clerks (3), postal services employees (5), and UPS or similar “common or contract carrier” employees (6). Subsection (4) covers any “person who possesses the carrier envelope to [mail it] and who provides the information required by Section 86.0051(b)”). Section 86.0051(b) requires a “person other than the voter who deposits the carrier envelope in the mail or with a common or contract carrier [to] provide the person’s signature, printed name, and residence address on the reverse die of the envelope.” *Id.* at 17 (Finding of Fact 27).

Employing the standards embraced by the district court – *i.e.*, not exploring if more exacting scrutiny of the challenged provisions is proper (and treating Section 86.006(f) defenses as exceptions<sup>7</sup>), *amici* contend that each of the *Anderson* factors supports affirmance in this case. First, the principally affected populations, older and disabled voters, will endure serious injury to their voting rights if “mere possession of [their] ballot or carrier envelope” by another may result in “criminal penalties” to the person assisting them and also “disqualification of the[ir] vote.” *Id.* at 12 (Conclusion of Law 19). Moreover, publicly available information regarding practices throughout the United States reinforces the district court’s conclusion.

Second, the district court correctly ruled that it “goes too far” to premise “criminal penalties and disqualification of the vote” on the State’s interest in “curtailing voter fraud.” *Id.* at 12 (Conclusion of Law 19).<sup>8</sup> Although the district court did not explain this portion of its ruling in detail, that judgment is fully

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<sup>7</sup> The district court’s judgment seems wise, given recent steps by the Texas Legislature to achieve this very result. *See* Texas House Bill 1987 (2007), available at [www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=80R&Bill=HB1987](http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=80R&Bill=HB1987).

<sup>8</sup> This is so, the district court recognized, despite the fact that the State’s anti-fraud concerns are “well-recognized and compelling,” and further, suffice to justify Section 86.0051(b)’s “disclosure requirement” (*i.e.*, the mandate that assistors who mail in a voter’s ballot identify themselves in writing on the ballot envelope). *Id.* at 11-2 (Conclusions of Law 14, 19)

consistent with *Anderson*. That is, the State failed to identify any sort of “precise” linkage between its interest in “curtailing voter fraud,” in the form of so-called “vote harvesting,” and the means to do so set out in Section 86.006 (f) and (h). For instance, the State’s chief argument on this point – that the district court should have read §§ 86.006(f) and 86.0051(b) to require *all* persons possessing a voter’s ballot (not just the one putting it in the mail) to provide identifying data, and thereby avoid fear of prosecution, State Br. 52-54 – would require this Court to rewrite the law. This falls far short of showing the law serves the State’s asserted interest with “precision.”

Third, the State is unable to demonstrate that the sanctions imposed by §§ 86.006(f) and (h) are “necessary” to serve its interest in curtailing voter fraud. The district court correctly identified other provisions of Texas election law serving that interest “sufficiently.” In addition, Texas failed to consider or adopt a variety of alternative effective approaches less harmful to older and disabled voters’ rights. The enormous potential harm to voting rights threatened by §§ 86.006(f) and (h), the current lack of aid to older and disabled voters, and the rapid growth of this share of the electorate all further undermine the State’s necessity argument.

## ARGUMENT

### I. SECTION 86.006, WHICH CRIMINALIZES MERE POSSESSION OF A VOTER'S MAIL-IN BALLOT, EVEN WITH THAT VOTER'S CONSENT, CANNOT SATISFY THE CRITERIA BY WHICH SUCH BURDENS ON THE RIGHT TO VOTE ARE ASSESSED.

The district court weighed the correct factors, and properly supported its conclusion that the sanction scheme in Sections 86.006(f) and (h) punishing “mere possession of a ballot or carrier envelope ... when possession occurs with the voter’s consent” was unconstitutional. DCT Dec. at 12 (Conclusion of Law 19). The district court’s sound judgment is supported by other record evidence as well as information in the public domain of which this Court should take note.

#### A. The Character And Magnitude Of Potential Injury To Mail-In Voters, Especially Older And Disabled Voters, Is Enormous.

While the district court stressed potential injury to those who assist absentee voters in Texas, *amici* urge this Court to look with equal vigor to evidence of harm likely to voters themselves, such as that provided by plaintiff Parthenia McDonald. To be sure, the district court used broad language to identify the injury in question, DCT Dec. at 13 (holding Section 86.006 “unduly burdens the First and Fourteenth Amendment rights of the plaintiffs”). Yet in characterizing those rights, the trial court naturally focused on the law’s effect in “dissuad[ing]” campaign workers “from participating in legitimate organizational efforts ... even when these efforts

do not involve providing illegal assistance to voters or engaging in voter fraud.” *Id.* at 11 (Conclusion of Law 13). *Amici*, organizations involved in non-partisan voter education activity, appreciate the damage caused to fundamental rights when government impedes grassroots political activity; however, denying to *actual voters* assistance *they* may need to cast their ballots also warrants emphasis as proof of serious injury threatened by implementation of Sections 86.006(f) and (h).

**1. Given The Size And Growth Of The Older And Disabled Voting Population, And Lack Of Attention To Their Voting Access Needs, Section 86.006 Threatens Serious Harm.**

The sheer force of demographic trends indicates that mail-in voting will become a bigger phenomenon in Texas elections in coming years. By now it is past disputing that the older population of the U.S. “is about to face its single largest sustained growth in history.”<sup>9</sup> Due to the “Baby Boom” generation, the size of the age 65+ cohort – on which Texas already has bestowed the right to vote absentee – is expected to double by 2030 (by comparison with the year 2005).<sup>10</sup> Moreover, if current patterns persist, older persons will continue to be the group

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<sup>9</sup> Jessica A. Fay, “Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters,” 13 ELDER L. J. 453, 461 (2005).

<sup>10</sup> *Id.* If “older voters” are denied as voters age 50+ (as AARP does), the size of the cohort and its influence on national, state and local politics is and will become all the greater.

with the highest percentage of registered voters and the highest percentage of registered voters who vote, not to mention “the most informed electors” (whether because of their accumulated experience or because those forced or able to retire have more time to absorb information about candidates).<sup>11</sup> To the extent Section 86.006 “goes too far” in impeding assistance to mail-in voters, that harm is likely to grow with the expansion of the nation’s and Texas’ older population.

A burgeoning older electorate also portends an increase in the number of individuals who will be entitled – and need – to vote by mail in Texas by virtue of the fact that they will have a qualifying disability – *i.e.*, a disability preventing them from appearing in person at the polls. Tex. Elec. Code § 82.003. In addition to national data showing a greater incidence of disabilities is associated with advancing age,<sup>12</sup> the best available empirical study of polling places, by the U.S. General Accounting Office,<sup>13</sup> indicates that progress remains limited in making in-person voting accessible to people with disabilities. For instance, in the November

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<sup>11</sup> *Id.* at 460.

<sup>12</sup> *See, e.g.*, AARP Public Policy Institute “Beyond 50 2003, A Report to the Nation on Independent Living and Disability” 34-42 (2003) (despite improving overall health among persons age 50+ disability rates continue to climb for age subgroups of this cohort, and are greater for each successively older age subgroup).

<sup>13</sup> U.S. Gen. Accounting Office, VOTERS WITH DISABILITIES – ACCESS TO POLLING PLACES AND ALTERNATIVE VOTING METHODS (Oct. 2001)(GAO Study), *available at* <http://www.gao.gov/new.items/d02127.pdf>.



2000 elections, 84% of polling places had at least one impediment that could deter persons with disabilities from voting. And even assuming a polling place is physically accessible, it remains off limits to voters with disabilities not accommodated by available voting equipment; thus, in November 2000 none of the polling places surveyed by GAO had machines permitting blind persons to vote, and the agency also observed that various forms of voting equipment continue to “pose challenges for people with mobility, vision, or dexterity impairments.”<sup>14</sup>

Analysts of federal legislation intended to improve accessibility of polling places are consistent in observing that a great deal remains to be done. Thus, despite a variety of laws enacted by Congress, “voting participation rates [for people with disabilities] have remained low and accessibility inadequate.”<sup>15</sup>

Another academic commentator concludes: “... the cumulative effect of these problems is decreased voting levels for people with disabilities.”<sup>16</sup>

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<sup>14</sup> GAO Study at 7, 32.

<sup>15</sup> Daniel P. Tokaji & Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 MCGEORGE LAW REVIEW \_\_ (forthcoming) (Draft at 24).

<sup>16</sup> Michael E. Waterstone, “Lane, Fundamental Rights, and Voting,” 56 ALA. L. REV. 793, 827 (2005). See Michael E. Waterstone, “Constitutional and Statutory Voting Rights for People with Disabilities,” 14 STAN. L. & POL’Y REV. 353, 362 (2003) (“Various commentators have noted that existing federal law does not protect the ability to vote secretly and independently, and does not require absolute access to polling places. Some have lamented these statutes’ ineffectiveness in creating social change with regard to the right to vote”)(footnotes omitted).

Whether the problem is inadequate technology, bureaucratic inertia, or the severity of impairments affecting persons still capable of voting, it appears the option of voting by mail is, and will likely continue to be, at least for the foreseeable future, critical to making the right to vote a reality for people with disabilities. That is, “[o]ne might ask ... how a disabled person unable to arrive at a polling place on election day, for example due to hospitalization or inability to travel, could participate in the voting process without absentee provisions. ... [A]bsentee voting provisions must be implemented in order to ensure access to all disabled electors.” Fay, *supra*, 13 ELDER L. J. at 469. Daniel Tokaji and Ruth Colker agree, that “there is strong evidence that people with disabilities rely heavily on mail-in absentee ballots. In fact one study found that people with disabilities were ‘the only group that are less likely to vote in person but are more likely to vote absentee as compared with other groups.’”<sup>17</sup>

Unimpeded access to a mail-in voting option, under Texas law, is all the more important in light of the absence of affirmative protection, under federal statutes or the U.S. Constitution, of such access for older or disabled voters. For

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<sup>17</sup> 38 MCGEORGE LAW REVIEW\_\_\_ (forthcoming) (Draft at 13 n.41) (*quoting* Jeffrey A. Karp & Susan A. Banducci, “Going Postal: How All-Mail Elections Influence Turnout,” 22 POL. BEHAVIOR 223, 234 (2000) (discussing Oregon’s all-mail voting system)). Tokaji is an Associate Professor of Law, and Colker is Heck Faust Memorial Professor of Constitutional Law, both at the Moritz College of Law, Ohio State University.

example, existing precedent recognizes neither a federal constitutional right to vote absentee, *Whalen v. Heimann*, 373 F. Supp. 353, 357 (D. Conn. 1974), nor such a right to vote in person if a right to vote absentee exists, *Selph v. Council of L.A.*, 390 F. Supp. 58, 61 (C.D. Cal. 1975). Also, the Voting Accessibility for Elderly and Handicapped Act of 1984, 42 U.S.C. § 1973ee, requires that polling places and registration facilities used in federal elections be accessible, but has no impact on absentee voting. Likewise, the Help America Vote Act of 2002, 42 U.S.C. §§ 15301, *et seq.*, which addresses voting “access and participation” for people with disabilities, principally requires accessible technology to be introduced into polling places. *See* 42 USC § 15481(a)(3).<sup>18</sup>

Nor can there be a serious question whether many mail-in voters – especially older and disabled persons voting absentee – require personal assistance in casting a ballot, other than the sort of assistance presumptively exempted from the strictures of Section 86.006(f) by the district court’s ruling. No less than twenty-three states (not including Texas) have laws affording voting assistance to persons in nursing homes and “other similar health care facilities for older persons and

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<sup>18</sup> Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2002), and Title II of the Americans with Disabilities Act of 1990 42 USC §§ 12131- 12134 (2002), both generally prohibit disability-based discrimination in public programs, but do not specifically address voting and never have been applied, to the knowledge of *amici*, to state or local mail-in voting “programs.”

persons with disabilities,” including (in most of the states) assisted living facilities, senior citizen housing, mental health facilities, U.S. Veteran’s Administration facilities and hospitals.<sup>19</sup> Policies for assisting voters in facilities in a majority of these twenty-three states also include provision “for assisting the residents with voting,” and are triggered by a resident’s absentee ballot request or “a threshold number of absentee ballot applications.” Notwithstanding the praise they reserve for the near-majority of states that place a priority on affording some form of aid to older and disabled voters, the authors of this nationwide study of state voting policies deem such affirmative efforts inadequate in assuring access to the franchise. They note that states generally “reli[ed] on residents to initiate the process” and often employed “cumbersome” procedures.<sup>20</sup> In states such as Texas, where robust public policies do not exist to facilitate voting by older and

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<sup>19</sup> Amy Smith and Charles P. Sabatino, “Voting by Residents of Nursing Homes and Assisted Living Facilities,” 26 BIFOCAL (Bar Associations in Focus on Aging and the Law, publication of the American Bar Association Commission on Law and Aging) No.1, 1-2, 8 (Fall 2004).

<sup>20</sup> *Id.* at 4, 8. U.S. Census data indicate about 1.6 million persons age 65 and older live in nursing homes “on any given day.” Meanwhile, the Centers for Medicare and Medicaid Services estimate the nursing home population at approximately 3 million persons of whom nearly 90 percent are age 65 or older. *Id.* at 1. Meanwhile, another one million or so persons nationwide reside in assisted living facilities. Nina A. Kohn, “Preserving Rights in Long-Term Care Institutions, Facilitating Resident Voting While Maintaining Election Integrity,” 38 MCGEORGE LAW REVIEW \_\_\_ n.2 (forthcoming) (Draft at 3) (reviewing various data sources). Kohn is an Assistant Professor of Law at Syracuse University College of Law.

disabled voters in nursing homes and other health care-related facilities, it is all the more important for the state to avoid restrictions such as those created by §§ 86.006(f) and (h) in order to permit mail-in voters meaningful access to informal aid – *e.g.*, from friends or the staff of institutions in which they reside – in casting a ballot.<sup>21</sup>

Just three states in the U.S. provide “ballot assistance ... to all voters or all absentee voters.”<sup>22</sup> In all others, including Texas, voters such as plaintiff Parthenia McDonald, who lives in her own home, “requires the assistance of another person to vote, and depends on trusted friends to assist her in ... casting her ballot,” would be grievously injured by legal requirements such as those set forth in Sections 86.006(f) and (h), which would deny them the assistance they need, in the form they choose – in good faith – to secure it. *See* 42 U.S.C. 1973aa-6 (Voting Rights Act of 1965, as amended in 1982, guaranteeing any voter with a disability the right to “assistance [in voting] by a person of the voter’s choice”).

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<sup>21</sup> *See* Kohn, *supra*, 38 MCGEORGE LAW REVIEW \_\_\_\_ (forthcoming) (Draft at 43) (“Where state officials are not readily available, ..., facility staff should be available to assist residents who specifically request assistance with ballot completion .... To decline assistance in such situations would be to effectively condition residents’ ability to vote on their physical condition”).

<sup>22</sup> *Id.* at 8.

**2. The Sanction Of Vote Disqualification Imposed By Section 86.006(h) Is Draconian And Imposes A Heavy Burden Of Justification On The State.**

The vote disqualification sanction contained in Section 86.006(h) is a harsh penalty imposed directly against the voter. Nowhere in its brief, however does the State acknowledge this fact.

In discussing the impact of Section 86.006 on plaintiff McDonald and other actual voters, the State maintains a chorus characterizing this case as purely the exploit of "Partisans." But the State does not seriously address the plight of older and disabled voters of all parties forced to seek alternative means of assistance in light of the *in terrorem* effect of the 2003 amendments on persons who previously assisted such voters. Rather, Appellants seek to take advantage of plaintiff McDonald's sheer determination to find a way, some way, to exercise her right to vote, *see* State Br. 56 n.160 (quoting *McDonald* as bravely declaring "I don't care what they say. If I have to get the ambulance and go, I'm going [to vote]"), to suggest no serious practical injury exists, even if, as a matter of law, the State is correct that there is no fundamental constitutional right to vote absentee, much less via mail with adequate assistance.

In the end, the State's position on the issue of harm attributable to Section 86.006 amounts to little more than a patronizing reminder that any voter – no

matter how seriously disabled or infirm – can vote “prior to election day by personal appearance or on election day at their designated polling place.” State Br. 58. This is essentially an admission that the “character and magnitude of the asserted injury” to the rights of such voters, *see Anderson supra*, as a result of §§ 86.006(f) and (h) is absolute. Whether the State acknowledges it or not, this grave potential injury to voters needing to vote by mail creates a heavy burden of justification.

**B. The State Has Failed to Identify a “Precise” Interest in Sections 86.006 (f) and (h) as Means to Deter and Prevent Vote Fraud.**

The State’s explanation of its interest in the specific remedies established by the challenged statutory provisions is highly superficial. For instance, the State’s account of the legislative history of Section 86.006 is remarkable for its lack of direct evidence of vote fraud and the absence of linkage between the goal of deterring and preventing fraud and the means employed – sanctioning mere possession of a voter’s ballot with consent, and disqualification of that ballot if such possession occurs.

The State cites several speeches by legislators employing the term “vote-harvesting” and including ominous references to “vote fraud rings” and mail-in ballots “illegally collected by campaign operatives.” *See, e.g.,* State Br. 16-17, 19. But none of these terms is self-explanatory and none are placed in context,

quantified, corroborated or otherwise illuminated. Such statements may well reflect the good faith beliefs of elected state representatives, but they hardly qualify as an explication of the “precise interests” of the State in wielding the powerful tools established in Sections 86.006(f) and (h).

Likewise, the “bill analysis” reported by the State is strikingly conclusory. Rather than a systematic accounting of evidence of a problem and its solution, or a more nuanced defense of the new legislative scheme, the State highlights rather vague assertions (the law “needed to be tightened ... to be stricter”) and circular reasoning (oversight under state election law had to be enhanced because “[b]y its nature, mail-in voting from home is out of the public view”). State Br. 18.

Similarly, the State cites concern about “fraud that *can* occur in nursing homes and assisted living facilities,” State Br. 19 (emphasis supplied), not reports of actual fraud that *has* occurred.

As if to excuse the serious and specific harms asserted by plaintiffs, the State also advances testimony from the legislative record that the challenged law was not intended to have “a chilling effect on the ability of some of our senior citizens to vote,” but rather, was intended to provide clarity by adopting a strict “definition for assistance in voting.” *Id.* 23-24. Once again, *amici* do not, and indeed need not, contest the good faith underlying the various assertions in the legislative record



supporting what became Section 86.006. But *amici* submit that this retelling of the genesis of the challenged law offers no material support for the proposition that the State has carried its burden to articulate with “precision” the interests pursued and served by the provisions of Section 86.006 that i) criminalize mere possession of a voter’s ballot by a person other than the voter, even with the voter’s consent, and ii) disqualify any vote so possessed.

**C. Since Various Means Exist to Secure Both Ballot Integrity and Access for Older and Disabled Voters, the State’s Crude Anti-Fraud Approach in Section 86.006 Is Far from Necessary.**

In states that afford assistance to older voters and/or voters with disabilities, a variety of means are employed to make voting easier without sacrificing ballot security. This belies the State’s assertion that the onerous sanctions in §§ 806.006(f) and (h) are needed to deter and prevent vote fraud.

For instance, Amy Smith and Charles Sabatino report that “[a] significant number of the state procedures [for assisting voting by residents of nursing homes and other healthcare facilities] require, or suggest, that ballots be delivered by bipartisan teams of election officials.” They conclude that this approach seems “a fairly simple practice that goes a long way in avoiding the appearance of abuse by a political group, as well as in discouraging fraud.” 26 BIFOCAL No. 1, 8. Further, “[o]f the 23 states that address nursing home voting, eight ... include in their

provisions rules or guidance for assisting residents with voting [while] [m]ost of the other states ... have ballot assistance rules ... applicable to all voters or to all absentee voters.” Meanwhile, in three of the twenty-three states, voters in nursing homes and other covered facilities “may receive assistance by election officials only” and “[e]ight states provide for election officials or a person of the voter’s choice.” “[E]leven states simply permit voters to be assisted by any persons the voter selects.” *Id.* 4. Although some of these forms of assistance would appear not to be permitted by Section 86.006 (*i.e.*, assistance by “any persons the voter selects”), in the context of state efforts to “bring the ballot to the voters,” such assistance would seem to be consistent with Texas’ asserted concerns about ballot security.<sup>23</sup>

Another popular approach, adopted in about one-third of the states (sixteen, as of 2006), is “permanent absentee ballot registration.” A principal attraction of this method is an individualized certification process that limits the likelihood of

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<sup>23</sup> See *id.* 6-7 (chart describing procedures in twenty three states affording assistance to voters in nursing homes and other facilities, including Minnesota, where a “Ballot must be delivered by two election judges, each affiliated with different political parties, who must be present when the voter completes the ballot,” and Nebraska, where “Absentee ballots shall be administered by registered voters who are not affiliated with the same political party”); Fay, *supra*, 13 ELDER L. J. at 482 (“Many states allow family members or a person of the voter’s choice to provide assistance, while in some states only the visiting election official may provide assistance”). See also GAO Study 84-85 (describing special voting procedures at nursing homes and other facilities).

fraud. Jessica Fay recommends limiting eligibility to “individuals who are elderly or permanently disabled”:

electors who wish to apply for permanent absentee voter status should submit a doctor’s certification of their disability or need for permanent status with their initial [voter] registration form. That single, simple step would then ensure many homebound electors would be able to cast a ballot in each and every election. By instituting such a limitation, the risk of absentee ballot fraud is decreased, as fewer people are permitted to register as absentee voters while simultaneously limiting the risk of voter fraud among the elderly.

13 ELDER L.J. at 484 (citation omitted). *Amici* do not presume to say that this device or any other is right for Texas. Rather, they simply urge this Court to consider the myriad options available yet untried in that state. Doing so leads to the conclusion the district court was correct in concluding the draconian sanctions set out in §§ 86.006(f) and (h) were *not* necessary to achieve the State’s interest in preventing mail-in ballot fraud.

**II. SECTION 86.006 CLASHES WITH AN EMERGING CONSENSUS THAT IMPEDIMENTS TO VOTING FOR PEOPLE WITH DISABILITIES ARE SERIOUS AND WIDESPREAD, AND THUS, THAT CONCERN FOR BALLOT ACCESS MUST BALANCE CONCERN FOR BALLOT INTEGRITY.**

In March 2007 the American Bar Association's Commission on Law and Aging<sup>24</sup> convened a Conference on voting, aging and disability.<sup>25</sup> The Conference addressed a variety of issues including at least two directly related to the subject matter of this case: "issues in absentee balloting" and "voting in long term care settings." The Conference resulted in a report and a recommended resolution that have been submitted by the Commission on Law and Aging to the ABA for action at its annual meeting in August 2007. While no definitive actions have been taken as yet based on the participants' efforts, the key findings and recommendations are highly relevant to this case.

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<sup>24</sup> The Commission's mission is "to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of elders. It carries out this mission through research, policy development, technical assistance, advocacy, education, and training." Further: "The Commission consists of a 15-member interdisciplinary body of experts in aging and law, including lawyers, judges, health and social services professionals, academics, and advocates." See "American Bar Association Commission on Law and Aging," <http://www.abanet.org/aging>.

<sup>25</sup> Entitled "Facilitating Voting as People Age: Implications of Cognitive Impairment," and jointly convened with the Borchard Foundation Center on Law and Aging and the Capital Government Center on Law and Policy of the McGeorge Law School, Sacramento, CA, the symposium gathered experts in "law and aging, medicine, long term care, voting technology, and elections administration." See American Bar Association Commission on Law and Aging, RECOMMENDATION, REPORT and APPENDIX (Exhibit A hereto) Report 1-3 (2007).

The Conference recommendations represent the consensus position of a majority of some of the foremost national experts on the following related questions posed by the parties: protecting voting rights of people with disabilities; providing necessary assistance in voting for such persons; and doing so while protecting the integrity of the voting process. Specifically, three sub-parts of the resolution recommended by the Commission on Law and Aging to the ABA<sup>26</sup> include the following actions:

•“That the [ABA] urges federal, state [and] local ... governments to permit citizens to opt freely for absentee (“vote at home”) balloting  
....

•“That the [ABA] urges state [and] local ... governments to improve access to voting by residents of long-term care facilities ... includ[ing] (1) Mobile polling; (2) Where mobile polling is not provided, the provision of teams of election officials at the local level to conduct absentee voting in long-term care facilities; and (3) Training of residents, staff, and others involved in the care of residents about the rights of persons with disabilities in relation to voting and the community resources available to provide assistance.”

•“That the [ABA] urges federal, state [and] local ... governments to recruit and train election workers to address the needs of voters with disabilities, including physical, sensory, cognitive, intellectual, or mental disabilities.”

*Amici* submit that each of these recommendations demonstrates an emerging consensus that many older and disabled voters need reliable assistance in casting a

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<sup>26</sup> *Id.* (Exhibit A hereto) RECOMMENDATION 1-2.

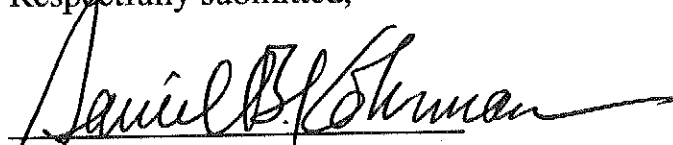
ballot, and further, that potential assistors, public and private, require training in order to undertake effectively and responsibly such interactions with these voters. This approach, balancing ballot integrity and ballot access, is consistent with the analysis of the district court in this case, yet inconsistent with the State's determination to pursue a narrow understanding of ballot integrity regardless of adverse consequences for the voting rights of older and disabled Texans.

### CONCLUSION

For the reasons set forth above, the district court's order should be affirmed.

Dated: May 25, 2007

Respectfully submitted,

  
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**EXHIBIT A**

to Brief of *Amici Curiae*  
AARP and League of Women Voters of Texas

*Ray v. Abbott*, No. 06-41573 (5th Cir.)

Dated: May 25, 2007

**AMERICAN BAR ASSOCIATION**  
**COMMISSION ON LAW AND AGING**

**RECOMMENDATION**

1 RESOLVED, That the American Bar Association urges federal, state, local, and territorial  
2 governments to improve the administration of elections to facilitate voting by all individuals with  
3 disabilities, including people with cognitive impairments, by:

- 4 (1) Studying and developing best practice guidelines for ballot design to maximize access;  
5 (2) Adapting their laws, practices and technologies to permit "mobile polling," the process by  
6 which two or more election officials visit long-term care facilities or other outreach sites to  
7 provide citizens the appropriate ballot and to conduct and assist in voting;  
8 (3) Ensuring that instructions, signage, and other communications regarding elections are  
9 accessible; and  
10 (4) Permitting sufficient alternative forms of identification verification to facilitate registering  
11 and voting.

12  
13 FURTHER RESOLVED, That the American Bar Association urges the federal government to  
14 ensure a private right of action under the Help America Vote Act (HAVA) for persons who have  
15 been denied access to vote privately and independently.

16  
17 FURTHER RESOLVED, That the American Bar Association urges federal, state, local, and  
18 territorial governments to ensure that no governmental entity exclude any otherwise qualified  
19 person from voting on the basis of medical diagnosis, disability status, or type of residence.  
20 State constitutions and statutes, including guardianship and election laws, should explicitly state  
21 that the right to vote is retained, except by court order where the following criteria must be met:

- 22 (1) The exclusion is based on a determination by a court of competent jurisdiction;  
23 (2) Appropriate due process protections have been afforded;  
24 (3) The court finds that the person cannot communicate, with or without accommodations, a  
25 specific desire to participate in the voting process; and  
26 (4) The findings are established by clear and convincing evidence.

27  
28 FURTHER RESOLVED, That the American Bar Association urges federal, state, local, and  
29 territorial governments to permit citizens to opt freely for absentee ("vote at home") balloting,  
30 permanently or temporarily. At the time of registration, registration forms should provide voters  
31 with this option, and voters should be allowed to change their choice.

32  
33 FURTHER RESOLVED, That the American Bar Association urges state, local, and territorial  
34 governments to improve access to voting by residents of long-term care facilities, defined here as  
35 facilities that provide room, board, and any level of personal care to persons in need of  
36 assistance. Such efforts should include the following:

- 37 (1) Mobile polling;



- 38 (2) Where mobile polling in long-term care facilities is not provided, the provision of teams of  
39 election officials at the local level to conduct absentee voting in long-term care facilities; and  
40 (3) Training of residents, staff, and others involved in the care of residents about the rights of  
41 persons with disabilities in relation to voting and the community resources available to  
42 provide assistance.

43  
44 FURTHER RESOLVED, That the American Bar Association urges federal, state, local, and  
45 territorial governments to require and fund the development of voting systems that achieve  
46 universal design, such that all voters can cast ballots on the same adaptable system. The system  
47 should be universally accessible so that persons with any impairment, including physical,  
48 sensory, cognitive, intellectual, or mental, can vote privately, independently, and with ease.

49  
50 FURTHER RESOLVED, That the American Bar Association urges federal, state, local, and  
51 territorial governments to recruit and train election workers to address the needs of voters with  
52 disabilities, including physical, sensory, cognitive, intellectual, or mental disabilities.

# Report

## I. INTRODUCTION

These recommendations are based on the March 2007 working symposium of experts, entitled *Facilitating Voting as People Age: Implications of Cognitive Impairment*. The symposium concluded a year long effort on the topic, described below. The need to address voting by aging citizens who face some level of cognitive or other brain impairment has emerged from the relative shadows and into the light of day because of four salient, intersecting trends.

First, we know, especially from the 2000 presidential election dispute, that very important elections are often won by perilously small numbers of votes. In 2000, George W. Bush officially won the Florida vote over Al Gore by a margin of 930 votes (out of six million), a virtual statistical tie. Because the counting of millions of ballots by any method is liable to error, a razor-thin margin of victory such occurred in the 2000 election continues to foment concern about the accuracy and legitimacy of every vote cast.<sup>1</sup>

Second, we know that older Americans vote in larger numbers than other age groups. In the 2004 presidential election, 71.8 percent of citizens age 55 and older reported voting. The next highest voting group were those age 45 to 54 years old (68.7 percent reported voting). Even in the oldest age category tracked (age 75 and older), 68.5 percent reported voting.<sup>2</sup>

Third, the numbers of people whom we call older Americans is growing at a rate unprecedented in history. Between years 2000 and 2030, the over age 65 population in the United States is projected to more than double from 35 million to 71.5 million, with the cohort of person age 85 and over increasing at the highest percentage rate.<sup>3</sup>

Finally, we know that there are increasingly larger numbers of Americans with dementia and other cognitive impairments that may diminish their capacity to vote, and the frequency of these conditions increases with age. In the case of Alzheimer's disease and other dementias, the time between the onset of the disease and serious incapacity may be years. The total number of people with dementia in the United States is not known with certainty, but in 2000 researchers estimated 4.5 million people age 65 and over had Alzheimer's disease.<sup>4</sup> A more recent statistical report of the Alzheimer's Association estimates that number to be 4.9 million as of 2007, with another 200,000 individuals younger than 65 with early onset Alzheimer's.<sup>5</sup> By 2030, those numbers are expected to increase by more than 50 percent.<sup>6</sup> Alzheimer's disease comprises 50

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<sup>1</sup> See Richard A. Posner *The 2000 Presidential Election: A Statistical And Legal Analysis*, 12 SUP. CT. ECON. REV. 1 (2004).

<sup>2</sup> U.S. Census Bureau, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004: POPULATION CHARACTERISTICS (March 2006), <http://www.census.gov/prod/2006pubs/p20-556.pdf>.

<sup>3</sup> Administration on Aging, U.S. Department of Health and Human Services, A PROFILE OF OLDER AMERICANS: 2005, 3 (2006), <http://www.aoa.gov/prof/Statistics/profile/2006/profiles2006.asp>.

<sup>4</sup> Liesi E. Hebert et al., *Alzheimer's Disease in the U.S. Population: Prevalence Estimates Using the 2000 Census*, 60 ARCH. NEUROL. 1119-1122 (2003).

<sup>5</sup> Alzheimer's Association, ALZHEIMER'S DISEASE FACTS AND FIGURES: 2007, 5 (2007)

<sup>6</sup> *Id.*

percent to 70 percent of all cases of dementia, so estimates of the total population with dementia of any type could be as much as double the above figures.<sup>7</sup>

Beyond dementias, there are many diseases and conditions that result in impairment of brain function, including amyotrophic lateral sclerosis (ALS), brain tumor, epilepsy, HIV (AIDS), Huntington's disease, multiple sclerosis, and traumatic brain injury. The Family Caregiving Alliance estimates that the total prevalence of brain impairment of all types, including dementias, ranges from 13 million to 16 million Americans.<sup>8</sup>

The convergence of these numbers brings into focus a variety of questions about whether we are disenfranchising persons with brain impairments who have a fundamental right and the threshold ability to vote, although they may need assistance. What kind of assistance may be needed and what kind is appropriate? Can technology help? And who makes decisions about capacity to vote, and by what criteria? Conversely, concerns abound about the potential for fraudulent exercise of the franchise by unscrupulous persons or political organizations taking advantage of groups within this population, especially those living in group settings such as nursing homes.<sup>9</sup>

Both failure to ensure proper access to the polls and failure to protect against the fraudulent manipulation of the vote of vulnerable populations compromises the integrity of elections. And as the above demographic trends continue, so the danger increases.

To address these issues, the ABA Commission on Law and Aging joined together with the Borchard Foundation Center on Law and Aging and the Capital Government Center on Law and Policy at the Pacific McGeorge School of Law in Sacramento to host a working symposium of invited national experts in law and aging, medicine, long term care, voting technology, and elections administration on the topic *Facilitating Voting As People Age: Implications of Cognitive Impairment*. The impetus for the symposium began with the work of Dr. Jason Karlawish and others who took the first steps in raising the questions posed above.<sup>10</sup> The Symposium convened from March 21-24, 2007, at the Pacific McGeorge School of Law to address five key facets of these issues: (1) how aging and cognitive impairments fit into broader issues of access to voting; (2) issues in absentee balloting; (3) voting in long term care settings; (4) defining and assessing capacity to vote; and (5) the implications of voter technology for those with cognitive impairments. Prior to the symposium, the sponsors had commissioned six

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<sup>7</sup> Other classifications of dementia besides Alzheimer's include vascular dementia, mixed dementia, Parkinson's disease, dementia with Lewy bodies, frontotemporal dementia, Creutzfeldt-Jakob disease, normal pressure hydrocephalus, and mild cognitive impairment (MCI). *Id.* at 2-3.

<sup>8</sup> Family Caregiver Alliance, FACT SHEET: INCIDENCE AND PREVALENCE OF THE MAJOR CAUSES OF BRAIN IMPAIRMENT (March, 2001), at [http://www.caregiver.org/caregiver/jsp/content\\_node.jsp?nodeid=438](http://www.caregiver.org/caregiver/jsp/content_node.jsp?nodeid=438).

<sup>9</sup> *See, e.g.,* Glover v. South Carolina Democratic Party, No. C/A 4-04-CV-2171-25, 2004 WL 3262756 (D.S.C. 2004), *aff'd by* Reaves v. S. Carolina Democratic Party, 122 Fed. Appx. 83 (4th Cir. 2005) (allowing an unsuccessful candidate for the South Carolina state senate to successfully challenge the results of a democratic primary race by alleging voting irregularities including voting fraud with regards to the absentee ballots of nursing home residents); State v. Jackson, 102 Ohio St.3d 380 (Ohio 2004) (considering an evidentiary issue in a criminal case of an Ohio election board employee who allegedly marked nursing home residents ballots contrary to residents' wishes). *Also see*, David Josar & Lisa M. Collins, *State Targets Detroit Ballots*, DETROIT NEWS, Nov. 1, 2005 (reporting on a Detroit City Council candidate who initiated a lawsuit against the Detroit City Council clerk alleging that election officials assisted legally incapacitated persons to vote at a Detroit nursing home).

<sup>10</sup> Jason H. Karlawish *et al.*, *Addressing the Ethical, Legal and Social Issues Raised by Voting By Persons with Dementia*, 292 J.A.M.A 1345 (2004).

background papers that provided the starting points for discourse and analysis of each of the key facets.

The symposium culminated with the adoption of a number of recommendations intended to protect voting rights of people with legal capacity and provide necessary assistance in voting, while protecting the integrity of the voting process. Only those recommendations that received a majority vote of all present were adopted as recommendations of the symposium. The recommendations do not necessarily represent the views of any individual participant in the symposium, nor the views or policy of any symposium sponsor or organization with which any participant is affiliated.

The conference recommendations, which are over 2600 words in length, along with the working papers that formed the basis of the group's deliberations and the keynote address of Vermont Secretary of State and head of the National Association of Secretaries of State, Deborah Markowitz Esq., are being published in a forthcoming issue of the McGeorge Law Review.

The recommendations herein represent a careful distillation of the full set of symposium recommendations, and are fashioned to convey the essential, priority principles of the symposium in a form that expands and does not duplicate existing ABA policy.<sup>11</sup>

## II. CONTENT OF THE RECOMMENDATION

The first resolved clause states four broad cross-cutting actions needed to be taken to benefit not only voters with cognitive or other impairments but all voters: (1) the study and development of best practices for ballot design; (2) the use of "mobile polling"; (3) the use of communications accessible to those with disabilities; and (4) the acceptance of alternative forms of identification.

Mobile polling -- the process by which two or more election officials visit long-term care facilities or other outreach sites to provide citizens the appropriate ballot and to conduct and assist in voting -- is based on the ideal of bringing the polls to the voters wherever they are. It is preferable to reliance on mail-in, paper absentee ballots, because the latter can be hard for anyone with diminished reading ability to understand as well as much more susceptible to abuse. Most states do not yet have the technology to bring accessible portable electronic balloting capability to long-term care settings, but that technology is on the horizon. In the meantime, some twenty-three states currently prescribe responsibilities for absentee voting by nursing home or assisted living residents under some circumstances, and all place responsibilities on election officials to assist.<sup>12</sup>

Acceptance of alternative forms of identification is critical for voters with disabilities, especially those in long-term care settings, who are less likely to have driver's licenses or other standard forms of identification.

The second resolved clause calls for a private right of action under the Help America Vote Act (HAVA). Under HAVA, states receiving HAVA funds must provide voting systems at polling

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<sup>11</sup> The full set of principles are included as an Appendix to this Report.

<sup>12</sup> Amy Smith & Charles P. Sabatino, *Voting by Residents of Nursing Home and Assisted Living Facilities: State Law Accommodations*, 26 BIFOCAL 1 (2004), at <http://www.abanet.org/aging/publications/bifocal/261.pdf>.

places that are “accessible for individuals with disabilities, including non-visual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.”<sup>13</sup> Access to the courts under HAVA is a critically important avenue of redress for persons with disabilities, but courts have been split on whether Congress intended to create a private right of action under HAVA.<sup>14</sup>

The third resolved clause addresses the issue of mental capacity to vote and due process protections necessary to ensure that the right is never arbitrarily or prematurely forfeited. A premise of this recommendation is that, because voting is a fundamental constitutional right and a hallmark of democracy, the emphasis should be on expanding the franchise and enhancing access to and assistance with the ballot for persons who are capable of voting. Any limitations should be narrowly circumscribed in terms of specific functional abilities, rather than on categorical exclusions.

In contrast to that principle, co-authors Hurme and Appelbaum found that state constitutions and election laws often fall far short. The constitutions in all but 12 states bar people with various kinds of mental impairment from voting – for example, those who are *non compos mentis*, admitted to a mental institution, under guardianship, incapacitated, or mentally ill. The categories are sweeping and imprecise.<sup>15</sup> State statutes addressing voter eligibility on cognitive grounds do not necessarily track state constitutional provisions, using different terminology in all but 14 states. Additionally, the vagueness of many of the provisions creates uncertainty concerning capacity. At the same time, election laws in some 29 states do not address voter eligibility due to mental status at all.<sup>16</sup>

In the context of guardianship law, only 19 states have specific statutory provisions that persons under full or limited guardianship *retain* all legal and civil rights not explicitly removed – which would include the right to vote. Along with additional provisions that favor limited guardianship, a total of 32 states do appear to allow a judicial determination that a person under guardianship may retain the right to vote.<sup>17</sup> Only a few statutes and cases specifically articulate a *requirement* for the court to determine capacity to vote.<sup>18</sup>

This third resolved clause supports expansion of the approach that requires an individualized determination of capacity to vote in a judicial setting with strict due process protections. As to a legal standard for assessing capacity to vote, scant existing case law and statutes provide some

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<sup>13</sup> See 42 U.S.C. § 15481(a)(3)(A).

<sup>14</sup> Compare *e.g.*, *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir.2004) (finding that HAVA creates a private right of action under 42 U.S.C. § 1983), versus *Paralyzed Veterans of America v. McPherson*, WL 3462780, \*6 -7 (N.D.Cal., 2006), and *Taylor v. Onorato*, 428 F.Supp.2d 384 (W.D.Pa.2006) (both rejecting a private right of action).

<sup>15</sup> Sally Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, in SYMPOSIUM, FACILITATING VOTING AS PEOPLE AGE: IMPLICATIONS OF COGNITIVE IMPAIRMENT, 38 MCGEORGE L. REV. (forthcoming 2007).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See *e.g.*, Wash. Rev. Code § 11.88.010(5) (the imposition of a guardianship does not result in the loss of the right to vote unless the court determines that the person lacks the capacity to exercise the franchise, and the court’s order must specify whether the ward retains voting rights); also see, *Doe v. Rowe*, 156 F. Supp. 35 (D. Me. 2001) (striking down Maine’s constitutional provision that automatically excluded from the polls persons under guardianship by reason of mental illness).

guidance,<sup>19</sup> but as a legislative policy principle, this recommendation calls for a standard that can be applied universally with little potential for discrimination – specifically, whether the person indicates that he or she has a specific desire to participate in the voting process. This provides a low threshold that is most inclusive and most protective of the right. The objective is to *not* treat people any differently in voting rights based on any perceived impairment or other personal characteristic.

The fourth resolved clause urges government to expand the option for absentee balloting and suggests the use of a more normal characterization of it as “vote-at-home” balloting. In recent decades, absentee balloting has become a central feature of our electoral landscape. All states now allow at least some categories of voters to cast their votes before election day, most commonly by mail. And, most states now permit “no excuse” absentee voting. However, as of 2004, only 17 states provided for *permanent* absentee status.<sup>20</sup> This recommendation advocates for no-excuse temporary or permanent absentee status, available as an option to choose at the time of registration or at a later time.

The fifth resolved clause focuses on voting in long-term care settings, broadly defined. The prevalence of dementia in the nursing home population is estimated to range from a quarter to more than two-thirds of the population.<sup>21</sup> The prevalence of dementia in assisted living facilities is even less certain, although one survey of assisted living facilities reported that over one-third of residents had moderate to severe dementia.<sup>22</sup> A diagnosis of dementia, in itself, does not mean that the individual lacks capacity to vote. Some still retain the capability and some do not. However, little is known about how many of these nursing home and assisted living facility residents actually have the capacity to vote. Even less is known about the voting capacity of persons residing in other long-term care settings such as adult homes, community care facilities, and group homes for persons with a variety of disabilities.

This recommendation applies principles articulated in the first resolved clause to long-term care settings by urging governments to make mobile polling a reality for long-term care residents; and in the interim, to utilize election officials proactively in the role of overseeing absentee balloting in these settings. It also calls for training of residents, staff, and others involved in the care of residents regarding the voting rights of persons with disabilities and the resources available to assist in the exercise of those rights.

The sixth resolved clause addresses balloting technology, currently undergoing a major transformation in the direction of electronic systems, such as direct-recording electronic (DRE) voting systems. Electronic systems are still very much in their infancy. Most currently deployed

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<sup>19</sup> *E.g.*, Washington’s statute characterizes incompetence to vote as “lacking the capacity to understand the nature and effect of voting, such that she or he cannot make an individual choice” Wash. Rev. Code § 11.88.010(5).<sup>19</sup> Wisconsin similarly looks to whether the person is “incapable of understanding the objective of the elective process.” Wis. Stat. § 54.25(2)(c)1.g. The federal District Court in *Doe v. Rowe*, 156 F. Supp. 35 (D. Me. 2001) adopted a functional standard identical to that found in the Washington statute.

<sup>20</sup> *See*, the survey of absentee balloting law and alternatives in Daniel P. Tokaji & Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, in SYMPOSIUM, FACILITATING VOTING AS PEOPLE AGE: IMPLICATIONS OF COGNITIVE IMPAIRMENT, 38 MCGEORGE L. REV. (forthcoming 2007).

<sup>21</sup> Jay Magaziner, *et. al.*, *The Prevalence of Dementia in a Statewide Sample of New Nursing Home Admissions Aged 65 and Older*, 40 GERONTOLOGIST 663, 663 (2000).

<sup>22</sup> Catherine Hawes, Charles D. Phillips, Miriam Rose, Scott Holan, & Michael Sherman, *A National Survey of Assisted Living Facilities*, 43 GERONTOLOGIST 875, 875 (2003).

voting systems do not meet current HAVA and ADA disability accommodation requirements, and they are far from compliant with the U.S. Election Assistance Commission's Voluntary Voting System Guidelines.<sup>23</sup> The premise of this recommendation is that technology's goal is to create *access*, which is different from *assistance*. The more access is facilitated and barriers removed, the less need there is to depend on assistance by another person in the voting booth or with paper absentee ballots, and thus, the less danger there is of fraud or undue influence by persons assisting with balloting.

In his review of evolving voting technology and its implications for voters with cognitive impairments, Prof. Ted Selker identified several design approaches that have shown promise but are still under trial and development. Evolving design characteristics with particular promise include: electronic interfaces that focus on one task at a time; simplified navigation through the steps of the voting process with an ability to refer back to instructions; redundancy of information; feedback (audio as well as visual) on selections made with the opportunity to change selections.<sup>24</sup> The ultimate goal embodied in this recommendation is to design effective optional capabilities into all voting stations so that accessibility is truly universal and segregation of voting by disability accommodation is unnecessary.

The seventh and final resolved clause addresses the need for sufficient numbers of election workers, appropriately trained to meet the needs of voters with disabilities of any kind. If poll workers and other election officials do not understand how to accommodate the increasingly broad range of disabilities voters present at the polls, or they do not understand how to operate the new technologies being introduced in polling sites, then even the best technologies will fall short. Many poll workers serve as volunteers, and training may be brief and informal. This recommendation recognizes that recruitment and training is an essential component to ensuring access to the polls and urges governments to place a greater emphasis on that task.

### III. RELATED ABA POLICY

This recommendation builds upon a line of ABA policy that goes back several years, all supporting increased access to the polls and fairness and reliability in procedures. Greatly paraphrased, current ABA policy supports:

- "enactment of federal legislation facilitating the ability of all citizens to vote in federal elections" (Annual meeting, 1974);
- "efforts to increased voter registration" (Annual meeting, 1990);
- "efforts to insure the participation of homeless persons in the electoral process" (Annual meeting, 1993);
- "the availability and reliability of political information and discourse on the Internet" (Annual meeting, 2000);
- "changes designed to improve and simplify the presidential election process and ensure that it accurately reflects the will and intentions of the voters" (Midyear meeting, 2001);

<sup>23</sup> Noel H. Runyan, IMPROVING ACCESS TO VOTING: A REPORT ON THE TECHNOLOGY FOR ACCESSIBLE VOTING SYSTEMS, A REPORT BY VOTER ACTION AND DEMOS (February 2007), at <http://www.demos.org/page504.cfm>. See the Election Assistance Commission's voluntary guidelines at [http://www.eac.gov/vvsg\\_intro.htm](http://www.eac.gov/vvsg_intro.htm).

<sup>24</sup> Ted Selker, *The Technology of Access: Allowing People of Age to Vote for Themselves*, in SYMPOSIUM, FACILITATING VOTING AS PEOPLE AGE: IMPLICATIONS OF COGNITIVE IMPAIRMENT, 38 MCGEORGE L. REV. (forthcoming 2007).

- The 2003 *Model Statutory Language on Provisional Balloting and Commentary* (Annual meeting, 2003);
- “ensuring the fairness and reliability of the procedures prescribed for voting” (Annual meeting, 2004); and
- The 2005 *Election Administration Guidelines and Commentary* (Annual meeting, 2005).

#### IV. NEED FOR ABA ACTION

The present recommendation focuses with particularity on the needs of voters with disabilities, particularly the special needs that accompany any kind of brain impairments. It is consistent with the highest values of the ABA in preserving fundamental civil rights for all citizens.

While there is no proposed legislation that this recommendation immediately addresses, there are many critical activities underway at the federal, state, territorial, and local government level to modify voting procedures that this recommendation impacts. For example, at the federal level the 2002 Help America Vote Act has gave the National Institute of Standards and Technology (NIST) a key role in helping to realize nationwide improvements in voting systems. To assist the Election Assistance Commission with the development of voluntary voting system guidelines, HAVA established the Technical Guidelines Development Committee and directed NIST to chair the Committee. NIST research activities have included:

- security of computers and computer data storage used in voting systems;
- methods to detect and prevent fraud;
- protection of voter privacy; and
- the role of human factors in the design and application of voting systems, including assistive technologies for individuals with disabilities and varying levels of literacy

However, NIST has not had a focus on cognitive impairments or other brain impairments, a focus that this recommendation would encourage.

At the state level, in addition to election improvements, the ABA has had a long history of supporting guardianship reform and long-term care quality regulation, especially through its Commission on Law and Aging. This recommendation has immediate implications for key aspects of guardianship law and long-term care regulation relevant to cognitively impaired elders and other adults. Access to and integrity of the voting process has never been a more important issue in America than it is today. The recommendation furthers the ABA’s role and responsibility in providing leadership in addressing emerging issues affecting the franchise.

Respectfully submitted,

Joseph D. O’Connor, Chair  
 Commission on Law and Aging  
 August 2007



## APPENDIX

# RECOMMENDATIONS OF THE SYMPOSIUM Facilitating Voting as People Age: Implications of Cognitive Impairment

## 1. Basic Principles and Goals

Although the symposium focused on disability caused by cognitive impairments, the principles underlying these recommendations apply to all disabilities, whatever the cause, including physical, sensory, cognitive, intellectual, and mental. Therefore, "disability" as used in these recommendations is intended to be as broad and inclusive as possible. Where the recommendations expressly focus on "cognitive impairment," the intention is for emphasis and is not intended to exclude other disabilities. The term "cognitive impairment," as used here, includes not only conditions resulting from Alzheimer's disease and other causes of dementia, but also impaired cognition caused by other diseases, disorders, and conditions that impair cognition.

### Basic Principles:

1. A democratic society should facilitate access to the voting process while preserving the integrity of that process.
2. People with disabilities should not be held to a different or higher voting standard than people without disabilities.
3. Public and private entities must provide reasonable accommodations to ensure that people with disabilities have access to voting.

### Goal 1: Preventing unfair and/or unlawful exclusion from voting.

- A. In those states with voting eligibility limits based on lack of capacity, everyone should be presumed to have capacity to vote absent a constitutionally adequate adjudication that they lack capacity vote.
- B. It is inappropriate for any population to be screened for decisional capacity to vote based on age, disability, diagnosis, place of residence, guardianship status, or other characteristics.

### Goal 2: Maximizing access by providing adequate and appropriate assistance.

- A. People with disabilities are entitled to assistance from the person of their choice to help formulate, express, and record their vote.

- B. People providing voting assistance should not attempt to assess the decisional capacity of the person being assisted, but should decline to provide assistance if they are unable to ascertain the person's voting intent.
- C. Safeguards are needed to ensure that the ballot reflects the voter's intent, including an affirmation signed by the person providing assistance.

**Goal 3.** Improving the administration of elections to facilitate voting by all individuals, particularly people with cognitive impairments.

- (5) The Elections Assistance Commission (EAC) and other governmental and non-governmental organizations should study and establish best practice guidelines for ballot design to maximize access by people with cognitive impairments.
- (6) States and localities should adapt their laws, create practices and procedures, develop technologies, and invest resources to permit mobile polling. At minimum, mobile polling technology should provide access to the statewide voter checklists and the ballots of multiple jurisdictions, and assure ballot integrity.<sup>25</sup>
- (7) States and localities should ensure that instructions, signage, and other communications regarding elections are accessible to people with disabilities, including cognitive impairments.
- (8) States with voter identification requirements should allow sufficient alternative forms of verification to enable all persons, including persons with disabilities, to register and cast ballots.
- (9) Persons with disabilities who have been denied access to vote privately and independently should have a private right of action under HAVA.

**Goal 4:** Ensuring that individuals with cognitive impairments have the opportunity to register to vote.

- A. People registering voters should not attempt to assess a prospective registrant's decisional capacity to vote.
- B. States and localities should comply fully with the National Voter Registration Act and all other applicable federal laws and the federal government should vigorously enforce these laws.
- C. States should examine registration deadlines and consider innovative approaches to increase registration opportunities, such as Election Day registration or automatic registration.

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<sup>25</sup> While the ideal of mobile voting, defined below in Recommendation 4, is to bring the appropriate ballot to residents no matter where they may be registered, it is recognized that current realities limit that ability to in-state jurisdictions.

## 2. Capacity and Voting

- 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:
- (5) The exclusion is based on a determination by a court of competent jurisdiction;
  - (6) Appropriate due process protections have been afforded; and
  - (7) 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.

## 3. Absentee Voting

### A. Vote at Home.

- (1) Governments and other stakeholders in the election process should adopt the term "vote at home" as a substitute for terms such as "permanent absentee voting," "no excuse absentee voting," or "mail ballot voting."
- (2) All jurisdictions should permit voters to vote at home. At the time of registration, registration forms should provide voters with this option. Voters should be allowed at any time to change their choice. Jurisdictions should make it as easy as possible for voters to exercise their choice.

### B. Voting Jurisdiction.

Federal and state governments should develop a uniform standard for determining the jurisdiction in which people should register to vote. The default presumption for registration should be that individuals register to vote where they are physically located.<sup>26</sup>

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<sup>26</sup> This recommendation should be read in combination with Recommendation 4.E.2 which urges accommodation of a long-term care facility resident's desire to register to vote either in the location of the facility or in their previous place of residence.

**C. Privacy and Independence.**

All voters who vote at home should be enabled to cast a private and independent ballot. Federal and state law needs to be sensitive to potential tensions between the secrecy of the ballot and the request of some voters for assistance.

**D. Signature Verification**

Federal and state laws regarding signatures on absentee and vote-at-home ballot return envelopes should be amended to take into account the problems that will arise with signature verification for people with disabilities. This is important because signatures can change over time.

**E. Vote-at-Home Information.**

Federal and state election officials should provide simple and accurate information about the vote-at-home option to voters, individuals assisting voters, and facilities. Such information should be written in plain language and include:

- (1) Periodic information to all voters explaining the vote at home option. Each vote at home ballot packet should contain an explanation of the vote-at-home option and instructions on how to complete and submit the ballot. Packets should also indicate how to receive assistance in completing the ballot and how to contact election officials with additional questions.
- (2) Information to all voters explaining how other private individuals can assist them in casting their ballots. This information should set out clearly what actions are permissible and what actions are prohibited. Permissible actions would include reading the ballot to the voter, physically marking the ballot as directed by the voter. Impermissible actions include telling the individual how to vote or casting a vote without an express indication of the voter's preference.
- (3) Information to long-term care facilities explaining any affirmative legal obligations a facility may have to assist residents in voting, permissible assistance facilities can provide residents, and any actions that are prohibited by law.

#### **4. Voting in Long-Term Care Facilities**

For purposes of these recommendations, the following definitions apply:

*Mobile Voting* – A process by which two or more election officials visit a long-term care facility to provide residents the appropriate ballot, conduct voting at a common location, or in the case of residents who cannot come to the voting location, conduct voting in their room or another location convenient for the resident.

*Long-Term Care Facility* -- Institutions licensed to provide room, board, and any level of personal care to persons in need of assistance with activities of daily living (ADLs) or instrumental activities of daily living (IADLs).

**A. States' Responsibilities**

- (4) States and local election officials should play an active role in facilitating voting in long-term care facilities.
- (5) States should enact laws and regulations to provide for mobile voting for residents of long-term care facilities.
- (6) Where states do not provide for mobile voting in long-term care facilities, states should provide for teams of election officials at the local level to conduct vote-at-home or absentee voting in long-term care facilities.

**B. Long-Term Care Facilities' Responsibilities**

- (1) States should require all long-term care facilities to provide a resident with information about how to register to vote in the facility's locale and how to change their address for the purpose of voting, including necessary forms, within fourteen days (14) of the resident's admission to the long-term care facility.
- (2) States should require all long-term care facilities to ask each resident if he or she wishes to register to vote and should assist those who, when asked, indicate that they wish to do so. This assistance shall consist of providing proper forms within a reasonable period of time prior to the registration deadline for a statewide or national election, and assisting with their completion and submission. This can be done either by long-term care facility staff, in collaboration with non-partisan voter registration drives, or through election officials.
- (3) Where mobile voting is not available, states should require all long-term care facilities to actively assist residents in requesting absentee or vote-at-home ballots. Active assistance means asking each resident within a reasonable period of time prior to the absentee ballot request deadline for a statewide or national election if he or she wishes to vote and, if so, providing proper forms and assisting with their completion and submission. This can be done either by long-term care facility staff or by election officials.
- (4) States should require long-term care facility staff to assist a resident with ballot completion where: (a) the resident is unable to mark his or her ballot but is able to communicate how he or she wishes the ballot to be marked, (b) the resident requests assistance with marking the ballot, and (c) election officials are not available to provide such assistance.

**C. Providing Assistance**

State law should declare that, unless adjudicated as lacking capacity to vote, a resident of a long-term care facility is entitled to assistance with obtaining and completing a registration form and a ballot if the resident: (a) is unable to do so independently, (b) is able to communicate that he or she wants such assistance and, (c) in the case of ballot

completion, is able to communicate how he or she wishes the ballot to be marked and requests assistance with marking the ballot.

**D. Verification of Voter Identity**

States with voter identification requirements should allow a long-term care facility's identification of a resident to constitute a sufficient verification of voter identity. The federal government shall by law provide that a long-term care facility's identification of a resident shall constitute a sufficient verification of voter identity where required by federal statutes, including the Help America Vote Act.

**E. Residency Requirements**

(1) States should accommodate, to the extent possible, residents' desire to register to vote either in the location of the long-term care facility or their previous residence.<sup>27</sup>

(2) To the extent that a state otherwise limits eligibility to cast an absentee ballot or vote-at-home ballot, states should make all residents eligible to vote by absentee ballot based on their residency in a long-term care facility.

**F. CMS Implementation**

The Centers for Medicare and Medicaid Services should amend its Interpretive Guidelines for 42 CFR 483.10(A) to implement the above facility requirements pertaining to voting in long-term care facilities, as appropriate and to the extent possible, given state-to-state variations in voting law.

## 5. Voting Technology

Congress, State Legislatures and Election Administrators should authorize the following:

**A. Election Materials.**

Voting and election materials, including ballots, should be in plain language and accessible to people with all disabilities, including those with cognitive impairments, even if this requires providing multiple formats.

**B. Voting Systems.**

Voting systems should be developed with the goal of achieving universal design, such that all voters in a given polling place, including voters with disabilities, can cast ballots on the same type of system, adaptable to multiple needs. The system should be universally accessible so that persons with any disability -- physical, sensory, cognitive, intellectual, or mental -- can vote privately and independently. The system design should be clear, redundant, and multi-modal. If computers are used, they should display one race per screen. Voting systems should incorporate memory aids, include the full names of all

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<sup>27</sup> This recommendation should be read in conjunction with Absentee Balloting Recommendation 2-C which calls for a uniform standard for determining the jurisdiction in which people should register to vote and a default presumption that individuals register to vote where they are physically located. The default presumption is consistent with giving long-term care facility residents a choice of venue to the extent practicable.

candidates, include icons, produce the same type of ballot for all voters, and record voter selections anonymously. The efficiency, effectiveness, and satisfaction of the voter experience should not be degraded by the system used.

**C. Quality Development.**

Federal funding should be provided for a coordinated and competitive process of prototype development. Voting systems proposed for deployment in federal elections must undergo an independent and transparent testing process that includes both usability and accessibility testing, in coordination with accuracy testing. An independent national clearinghouse should collect and make public data on the use of voting technologies.

**D. Online Voter Registration.**

State law should authorize online voter registration as one possible registration method.

**E. Polling Places.**

Polling places should be universally accessible, safeguard privacy, and ensure that all equipment – including any system used for accessibility if different from the primary voting system – be accessible, prominent, and ready to use.

## **6. Research**

Government and private funders should support research on voting and disability, including but not limited to the following matters:

- A.** Determining what ballot form(s) and technologies would maximize the ability of voters to cast effective, private, and independent votes. In particular the research should consider the specific needs of voters with disabilities, including those with cognitive impairments. The feasibility and cost effectiveness of the following types of programs should be explored: on-site voting assistance, mobile voting assistance (group and individual), HTML and other computer assisted ballot formats, portable voting machines, and ballots with pictures and/or icons.
- B.** The impact of current laws on the exclusion of persons from voting.
- C.** The extent of barriers to registration and voting for people with cognitive impairments, wherever they reside.
- D.** Effective communication strategies to overcome impediments to voting by individuals with cognitive impairments.
- E.** Voting practices in long-term care facilities and other residential settings, including staff determinations of capacity.
- F.** Voting practices concerning persons with cognitive impairments living in the community, including de facto determinations of capacity and proxy voting.

- G. The relationship between the standard used to determine residence for voting and standards used to determine residence for other purposes, such as Medicaid, the census, and other state and federal programs.
- H. In connection with problems that may arise with signature verification for people with disabilities, research on signature verification procedures, in particular how election officials currently determine what constitutes a signature "match" and whether other, less exclusionary, forms of voter ballot verification are possible, such as signature stamps.
- I. Discrepancies between the symposium recommendations and current standards and procedures to determine voting capacity.
- J. Evaluation of the outcome and impact of the symposium recommendations

## 7. Education & Training

- A. **Legal Obligations.** Public and private entities should provide guidance and training to ensure that people providing assistance with voting understand their obligations and limitations.
- B. **Voter Assistance Training.** All people providing voting assistance should be trained to assist voters to successfully express their intent.
- C. **Long-Term Care Training.** State and local election officials should promote the education of residents and staff in long-term care facilities and other residential settings, community service providers, guardians, others involved in the care of persons with disabilities, and such persons themselves about the rights of persons with disabilities in relation to voting and the community resources available to provide assistance and otherwise facilitate voting.
- D. **Poll Worker Training**
  - (1) States and localities should create poll worker recruitment and training programs that specifically address the needs of voters with cognitive impairments.
  - (2) Poll worker training should include practice setting up a polling site. This can be supported by interactive simulation, via DVD and/or online materials. Poll workers should be required to demonstrate in advance of their election duties that they can perform their assigned tasks. Poll worker recruitment should include persons with disabilities.



## EXECUTIVE SUMMARY

### 1. Summary of the Recommendation.

This resolution consists of seven resolved clauses, all of which focus on protecting and facilitating voting by persons with disability, with a special focus on cognitive impairments and other brain impairments that increase in frequency with age. The seven clauses urge federal, state, local, and territorial governments to:

- Improve the administration of elections through four enumerated strategies;
- Ensure a private right of action under the Help America Vote Act;
- Ensure retention of the legal right to vote in the event of disability unless four enumerated judicial criteria are met;
- Expand the availability of absentee or “vote at home” balloting;
- Improve access to voting by residents of long-term care facilities through three enumerated strategies;
- Require and fund the development of universal design in voting systems so that persons with any impairment, including physical, sensory, cognitive, intellectual, or mental, can vote privately, independently, and with ease;
- Recruit and train election workers to address the needs of voters with disabilities.

### 2. Summary of the issue that the recommendation addresses.

The need to address voting by aging citizens who face some level of cognitive or other brain impairment has emerged from the relative shadows and into the light of day because of four advancing, intersecting trends: (1) the highly controversial occurrences of razor thin margins of victory and defeat in major elections; (2) the high rate of voting by older Americans; (3) the growth of the older population at a rate unprecedented in history; and (4) the continuing increase in the number of Americans with dementia and other chronic cognitive impairments that eventually make them incapable of voting but at a date uncertain.

The convergence of these numbers brings into focus a variety of questions about whether we are disenfranchising persons with brain impairments who have a fundamental right and the threshold ability to vote, although they may need assistance? The number of voters to whom this question applies is substantial and growing. What kind of assistance may be needed and what kind is appropriate? Who makes decisions about capacity to vote and by what criteria? Conversely, concerns abound about the potential for fraudulent exercise of the franchise by unscrupulous persons or political organizations taking advantage of groups within this population, especially those living in group settings such as nursing homes.

Both failure to ensure proper access to the polls and failure to protect against the fraudulent manipulation of the vote of vulnerable populations compromises the integrity of elections. And as the above demographic trends continue, so the danger increases.

**3. Please explain how the proposed policy position will address the issue.**

The policy is based upon the joint effort of the ABA Commission on Law and Aging, the Borchard Foundation Center on Law and Aging, and the Capital Government Center on Law and Policy at the Pacific McGeorge School of Law in Sacramento. The groups hosted a working symposium of national experts in law and aging, medicine, long term care, voting technology, and elections administration on the topic *Facilitating Voting As People Age: Implications of Cognitive Impairment*, which convened from March 21-24, 2007, at the Pacific McGeorge School of Law to address five key facets of these issues: (1) how aging and cognitive impairments fit into broader issues of access to voting; (2) issues in absentee balloting; (3) voting in long term care settings; (4) defining and assessing capacity to vote; and (5) the implications of voter technology for those with cognitive impairments. The recommendations represent a careful distillation of the full set of symposium recommendations. They convey the essential, priority principles of the symposium in a form that urges specific strategies by federal, state, territorial, and local governments to address the identified issues above.

**4. Summary of any minority views or opposition that have been identified.**

None to date.

## GENERAL INFORMATION FORM

Submitting Entity: Commission on Law and Aging.

Submitted By: Joseph D. O'Connor, Chair.

1. Summary of Recommendation(s).

This resolution consists of seven clauses, all of which focus on the obligation of federal, state, local, and territorial governments to protect and facilitate voting by persons with disability, with a special focus on cognitive impairments and other brain impairments that increase in frequency with age.

2. Approval by Submitting Entity.

The resolution was approved at the regular spring meeting of the Commission on Law and Aging on April 27, 2007.

3. Has this or a similar recommendation been submitted to the House or Board previously?  
No

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

This recommendation builds upon and is consistent with current ABA policy, which supports:

- “enactment of federal legislation facilitating the ability of all citizens to vote in federal elections” (Annual meeting, 1974);
- “efforts to increased voter registration” (Annual meeting, 1990);
- “efforts to insure the participation of homeless persons in the electoral process” (Annual meeting, 1993);
- “the availability and reliability of political information and discourse on the Internet” (Annual meeting, 2000);
- “changes designed to improve and simplify the presidential election process and ensure that it accurately reflects the will and intentions of the voters” (Midyear meeting, 2001);
- the 2003 *Model Statutory Language on Provisional Balloting and Commentary* (Annual meeting, 2003);
- “ensuring the fairness and reliability of the procedures prescribed for voting” (Annual meeting, 2004); and
- the 2005 *Election Administration Guidelines and Commentary* (Annual meeting, 2005).

5. What urgency exists which requires action at this meeting of the House?

While there is no proposed legislation specifically addressed by this recommendation, there are many critical activities underway at the federal, state, territorial, and local government level to modify voting procedures that this recommendation impacts. For example, at the federal level the 2002 Help America Vote Act has gave the National Institute of Standards and Technology (NIST) a key role in helping to realize nationwide

improvements in voting systems. Among the issues NIST has examined is the role of human factors in the design and application of voting systems, including assistive technologies for individuals with disabilities and varying levels of literacy. However, NIST has not had a focus on cognitive impairments or other brain impairments, a focus that this recommendation would encourage.

At the state level, the recommendation has immediate implications for key aspects of guardianship law and long-term care regulation relevant to voting by cognitively impaired elders and other adults. Access to and integrity of the voting process has never been a more visible issue in America than it is today. The recommendation furthers the ABA's role and responsibility in providing leadership in addressing emerging issues affecting the franchise.

6. Status of Legislation. (If applicable.)  
None pending at this time.
7. Cost to the Association. (Both direct and indirect costs.)  
None.
8. Disclosure of Interest. (If applicable.)  
Not applicable.
9. Referrals.  
Standing Committee on Election Law  
Advisory Commission on Election Law  
Standing Committee on Government Affairs  
Commission on Homelessness and Poverty  
Commission on Mental and Physical Disability Law  
Center for Human Rights  
Senior Lawyers Division  
Young Lawyers Division  
Special Committee on Bioethics and the Law  
Section of Family Law  
Section of General Practice, Solo and Small Firm  
Section of Health Law  
Section of Individual Rights and Responsibilities  
Section of Real Property, Probate, and Trust Law  
Section of Administrative Law and Regulatory Practice  
Section of Science and Technology Law  
Section of State and Local Government Law  
Section of Tort, Trial and Insurance Practice  
Government and Public Sector Lawyers Division
10. Contact Person. (Prior to the meeting.)  
Charles Sabatino, Director, Commission on Law and Aging  
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Phone: 202-662-8686.

E-mail : SabatinoC@staff.abanet.org

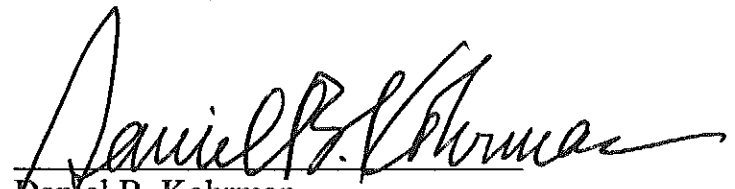
11. Contact Person. (Who will present the report to the House.)  
Joseph D. O'Connor, Chair, Commission on Law and Aging  
E-mail: joc@lawbr.com

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a) (7)(C) and 5th Cir. R. 32, I hereby certify that the brief of *Amici Curiae AARP, et al.*, in *Willie Ray, et al. v. Greg Abbott, et al.*, Case No. 06-41573, was prepared in a proportionally spaced, New Times Roman typeface using Corel WordPerfect 12 and a font size of 14 points (13 points for footnotes).

I further certify that exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 5th Cir. R. 32.2 the above referenced brief contains 5016 words.

I understand that a material misrepresentation in completing this Certificate of Compliance, or circumvention of the type-volume limits in Federal Rule of Appellate Procedure 32(a)(7) and 5th Cir. R. 32.2 may result in the Court's striking the brief and imposing sanctions against the undersigned.

  
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