



April 26, 2023

Testimony of John Brautigam, Esq., Legal Services for the Elderly, in support of L.D. 1653.

Senator Hickman, Representative Supica, and members of the Joint Standing Committee on Veterans and Legal Affairs:

On behalf of Legal Services for the Elderly I would like to testify in support of LD 1653, RESOLUTION, Proposing an Amendment to the Constitution of Maine to Allow Persons Under Guardianship for Mental Illness to Be Electors and to Protect All Electors from Harassment and Intimidation.

Legal Services for the Elderly (LSE) is a nonprofit legal services organization with the mission of providing free legal assistance to Maine's older adults when their basic human needs are threatened. Next year LSE will mark 50 years of service to older Mainers.

This Committee needs no reminder of the importance of the right to vote. It is the cornerstone of our democracy. We entrust all of our public decisions, directly or indirectly, to those who hold the right to vote and exercise that right. The right to vote is not only a functional necessity for an operational government. It is a statement of who we are as a community and a society.

Today, few would question these principles. But there is a sad history in the state and in the country of restricting the right to vote based on perceptions about the voter's attributes. In Maine, that history includes amending our Constitution to exclude mentally ill persons under guardianship from the right to vote.

We do not question the fact that some citizens who have the *right* to vote no longer have the *capacity* to vote. Sadly, for physiological reasons some people have lost the cognitive ability to make decisions. But Article II, Section 1 of the Maine Constitution categorically excludes all persons in guardianship for mental illness from this fundamental right. This is indefensible.

It is worth reviewing the history of Article II, Section 1. For many years that provision denied "paupers and persons under guardianship" the right to vote. In 1965 it was

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amended to delete the reference to “paupers” but language disenfranchising all persons under guardianship due to mental illness remained. At that time the state election code – the implementing statute--mirrored the objectionable constitutional provision. 21-A M.R.S.A. § 115(1).

This constitutional provision was far too broad and was not applied consistently. More important, it perpetuated harmful stereotypes by basing disenfranchisement on *mental illness* rather than on a person’s *ability to exercise their power to choose*. It is important to remember that most forms of mental illness do not eliminate a person’s ability to choose, even among many people who are under a form of guardianship.

In 2000 the legislature recognized that Article II, Section 1 unfairly disenfranchised persons who may be ill but who are still capable of making choices. The legislature proposed a constitutional amendment much like that in LD 1653. Voters considered the amendment in November 2000 but did not approve it.

The following year advocates of the right to vote challenged Article II, Section 1 in federal court. In the landmark case of *Doe v. Rowe*, 156 F.Supp.2d 35 (2001), United States District Court Judge George Z. Singal struck down the prohibition in Article II, Section I as a violation of the United States Constitution:

The Court finds that Article II, Section 1 of the Maine Constitution, along with its implementing statute found in 21-A M.R.S.A. § 115(1), violate both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Thus, the State's disenfranchisement of those persons under guardianship by reason of mental illness is unconstitutional. Additionally, the Court finds that in implementing its voting restriction, State Defendants have violated Title II of the ADA and Section 504 of the Rehabilitation Act.

*Id.*

Judge Singal ruled that the state may not deny the right to vote on the basis of an arbitrary term such as “mental illness.” That ruling remains binding to this day.

It is more than ironic that one year before the 2001 lawsuit, plaintiff Jane Doe had been denied the right to vote on the constitutional amendment that could have given her and others the protection they sought.

Soon after the ruling in *Doe v. Rowe*, the objectionable language was removed from the Election Code—Title 21-A. Separately, language was added to the adult guardianship section of the Probate Code that conforms with Judge Singal’s opinion. 18-C M.R.S.A. § 5-310 (“An adult subject to guardianship retains the following rights: A. The right to vote, unless the court orders otherwise.”) The legislature also added language to guide the probate court when deciding whether to terminate voting rights of a person under guardianship. *Id.* (“A court order removing the right to vote must include a finding that the adult cannot communicate, with or without support, a specific desire to participate in the voting process.”) We approve of this Probate Code language and suggest also adding similar language to 21-A M.R.S.A. § 115(1) as soon as possible.

Although the standard in the probate code now complies with the Equal Protection Clause and Due Process Clause of the federal constitution, Article II, Section 1 of the Constitution was never amended. It is plainly invalid and unenforceable pursuant to the ruling in *Doe v. Rowe*. **Removing this invalid language from the Maine Constitution should be a top priority.** That is why we support LD 1653.

LD 1653 includes language that would appear on the actual ballot when voters decide whether to adopt this constitutional amendment in November 2023. We suggest a clarification in the ballot wording to inform people as they vote why this amendment is necessary to bring the Maine Constitution into conformity with the binding decision in *Doe v. Rowe*:

"Do you favor amending the Constitution of Maine to remove a provision found unconstitutional by the Maine Federal District Court and to allow a person under guardianship for reasons of mental illness to be an elector for Governor, Senators and Representatives and to exempt all electors from harassment or intimidation on the days of election during their attendance at, going to and returning from voting?"

Without the important information underlined above, voters might not fully appreciate an important aspect of the question before them.

We have denied voting rights to women, non-whites, convicted felons, and "paupers." We have denied rights to those who do not own property, and who cannot pass a literacy test or answer questions about our government. We denied not just the right to vote, but the dignity, autonomy, and humanity of the affected population.

In each case we eventually recognized that denying the right to vote only serves to marginalize these populations and prevent their full integration into society. It is now time to make sure that our founding document recognizes this principle for those who are mentally ill and under guardianship. This is not just about mental illness and not just about voting. It is about the kind of society and community we want to be.

Thank you for considering our comments. We ask that you send this constitutional amendment to the voters for their approval.