

No. 62711-2-1

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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In the Matter of the  
GUARDIANSHIP OF SANDRA LAMB

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**BRIEF OF AMICUS CURIAE  
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON**

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Laura J. Beveridge  
WSBA #33324  
133 Lexington Ave. #2  
Cambridge, MA 02138  
(206) 550-5676

Sarah Dunne, WSBA #34869  
Nancy L. Talner, WSBA #11196  
ACLU of Washington Foundation  
705 Second Avenue, Suite 300  
Seattle, WA 98104  
(206) 624-2184

Attorneys for Amicus Curiae

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## I. INTRODUCTION

This case presents an important issue of first impression. The Court must determine whether the rights guaranteed by the First Amendment and the Washington State Constitution – freedom of speech and the right to petition the government for redress of grievances – may be exercised by a court-appointed guardian on behalf of an incapacitated ward.

The trial court has ruled that the “political and lobbying activities undertaken” by the guardians in this case “are outside the scope of their guardianship.” The Department of Social and Health Services (“DSHS”) and *amicus curiae* Disability Rights Washington (“DRW”) maintain this ruling should be affirmed on the ground that political advocacy can *never* fall within the scope of a guardian’s duties. If adopted on appeal, this interpretation of Washington’s guardianship statute would establish a troubling and far-reaching precedent that interferes with the constitutional right of the incapacitated to be heard on matters of public policy directly affecting their care and well-being. Moreover, neither DSHS, DRW, nor the trial court has supplied a compelling, let alone legitimate, state interest to justify restricting the free speech rights of the incapacitated.

The American Civil Liberties Union of Washington (“ACLU-WA”) submits this *amicus curiae* brief to underscore the importance of this issue and urge the Court to overturn the trial court’s ruling.

## II. IDENTITY AND INTEREST OF AMICUS CURIAE

ACLU-WA is a state-wide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to protecting and advancing civil rights and civil liberties throughout Washington. ACLU-WA has a long history of working to safeguard free speech rights, including the right to petition the government for redress of grievances and the right to express dissenting opinions. ACLU-WA is also committed to protecting the civil liberties of the disabled, including those declared legally incapacitated. To that end, ACLU-WA has participated in numerous cases involving free speech rights guaranteed by the federal and state constitutions and the rights of the disabled.<sup>1</sup>

## III. STATEMENT OF THE CASE

Sandra Lamb and Rebecca Robins are severely disabled individuals. Guardians' Opening Br. ("G. Br.") at 2; DSHS Resp. Br. ("DSHS Br.") at 4-5. Both Ms. Lamb and Ms. Robins have a medical diagnosis of profound mental retardation and have multiple disabilities which affect their ability to express themselves. G. Br. at 2 (describing Ms. Lamb as a person of limited speech and articulation); *id.* (describing Ms. Robins as a person of no speech); *id.* at 8 (stating Ms. Lamb and Ms. Robins are "unable to verbally articulate" for themselves). In the mid-1980s, the King County Superior Court declared Ms. Lamb and Ms. Robins "incapacitated." DSHS Br. at 4-5; RCW 11.88.010(1) (defining "incapacitated");

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<sup>1</sup> See ACLU-WA's Motion for Leave to File an *Amicus Curiae* Brief, filed herewith.

*see also* RCW 11.88.010(1) (“incompetent” should be interpreted to mean “incapacitated” for purposes of RCW ch. 11.92).

In the 1990s, the court appointed Alice and James Hardman (collectively “the Hardmans”), two certified professional guardians, to serve as Ms. Lamb’s and Ms. Robins’ co-guardians. DSHS Br. at 2, 4-5. Due to the severity of Ms. Lamb’s and Ms. Robins’ disabilities, the Hardmans are the “full guardians of the person and full guardians of the estate.” Guardians’ Reply to DSHS’s Resp. Br. (“G. Reply”) at 5-6.

Ms. Lamb and Ms. Robins currently reside at Fircrest School (“Fircrest”), a “residential habilitation center” (“RHC”) in Shoreline, Washington. Ms. Lamb has lived at Fircrest since 1964; Ms. Robins was first admitted in 1984. G. Br. at 2-3. In January 2004, a proposal was introduced in the Washington State Legislature to close Fircrest. Having determined that residence at Fircrest was in the best interests of both Ms. Lamb and Ms. Robins, the Hardmans lobbied the legislature to keep the center open. *See* G. Br. at 3; DSHS Br. at 5-9 (describing political activities undertaken by Hardmans with references to record).

The Hardmans acknowledge that a debate exists regarding the benefits of institutionalized care at RHCs like Fircrest versus community living. They are likewise aware that their belief that institutionalized care at Fircrest is in the best interests of Ms. Lamb and Ms. Robins is contrary to what they call the “anti-RHC” movement. DSHS Br. at 8-9 (citing Advocacy Report). DRW’s assertion that closing Fircrest is consistent with

the “trend toward deinstitutionalization” further confirms the existence of differing points of view among disability rights advocates. *See* DRW’s Amicus Curiae Brief (“DRW’s Br.”) at 4-11.

In May 2008, the Hardmans petitioned the court to add compensation for political advocacy opposing the closure of Fircrest to their annual guardianship fees. G. Br. at 3; DSHS Br. at 5-6. On June 6, 2008, a court commissioner approved the Hardmans’ petition, subject to additional reporting. G. Br. at 4; DSHS Br. at 9. Upon DSHS’s motion, the King County Superior Court revised the commissioner’s order to exclude fees for the Hardmans’ political work, stating that “the political and lobbying activities undertaken by Guardians are outside the scope of their guardianship.” DSHS Br. at 10 (quoting Order on Mot. to Rev. at 2). After unsuccessfully moving for reconsideration, the Hardmans appealed.

#### IV. ARGUMENT

All parties and *amicus curiae* in this case acknowledge the importance of free speech rights protected by the First Amendment and the Washington State Constitution, including the right to petition the government for redress of grievances and the right to dissent.<sup>2</sup> In addition, all parties and *amicus curiae* recognize that the disabled and incapacitated retain their constitutional rights, including the right to free speech.

Nonetheless, DSHS and DRW advance an argument, apparently

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<sup>2</sup> *See* U.S. Const., amend. I; Wash. Const. art. 1, §§ 4, 5.

accepted by the trial court,<sup>3</sup> that effectively deprives some of the state's most vulnerable residents of an individual political voice. Indeed, DRW goes one step farther, asserting that representation of the incapacitated should be left to professional organizations like itself, even when, as here, the guardians have determined that DRW's official position is not in the best interests of their wards. Moreover, DSHS and DRW ask the Court to accept their unconstitutional interpretation of Washington's guardianship statute without identifying any compelling state interest. Accordingly, for the reasons stated below, ACLU-WA respectfully requests that the Court reject the blanket rule proposed by DSHS and DRW.

**A. The Incapacitated Retain Fundamental Speech Rights**

It is undisputed that free speech rights protected by the First Amendment and the Washington State Constitution are "fundamental personal rights." *See Lovell v. Griffin*, 303 U.S. 444, 450, 58 S. Ct. 666, 669, 82 L. Ed. 949 (1938); *Nelson v. McClatchy Newspaper, Inc.*, 121 Wn.2d 523, 535-36, 936 P.2d 1123, 1129 (1997). It is equally well-established that the right to petition the government for redress of grievances and the right to express dissenting opinions are cornerstones of a representative democracy. *See Cal. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508,

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<sup>3</sup> It is not clear from the language of the trial court's order whether it found that political advocacy can never fall within the scope of a guardians' duties or whether its holding is limited to the facts of this case. *See* DSHS Br. at 10 (quoting Order) ("[t]he political and lobbying activities undertaken by Guardians are outside the scope of *their* guardianship") (emphasis added). Regardless, it is clear that DSHS and DRW are arguing for a blanket rule that would exclude political advocacy from the scope of guardianship in all cases.

510, 92 S. Ct. 609, 611, 30 L. Ed. 2d 642 (1972) (democracy depends upon ability of people to “freely inform the government of their wishes”); *Texas v. Johnson*, 491 U.S. 397, 408, 109 S. Ct. 2533, 2542, 105 L. Ed. 2d 342 (1989) (principal function of free speech is to “invite dispute”).

The United States Supreme Court has expressly recognized the connection between free speech and individual dignity:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

*Cohen v. Cal.*, 403 U.S. 15, 24, 91 S. Ct. 1780, 1787-88, 29 L. Ed. 2d 284 (1971).

It is similarly undisputed that a judicial finding of incapacity does not deprive an individual of his or her civil rights, *Matter of the Guardianship of Ingram*, 102 Wn.2d 827, 836, 689 P.2d 1363, 1368 (1984), including free speech rights. As both DSHS and DRW acknowledge, courts have repeatedly held that the free speech rights of the disabled are guaranteed by both the federal and state constitutions. DSHS Br. at 39-40; DRW Br. at 12-13; *see also Thomas S. v. Flaherty*, 699 F. Supp. 1178, 1203-04 (W.D.N.C. 1988), *aff'd.*, 902 F.2d 250 (4th Cir. 1990) (courts have “expli-

citly held” First Amendment guarantees mentally disabled right to freedom of association); *Martyr v. Bachik*, 770 F. Supp. 1406, 1411 (D. Or. 1992) (recognizing First Amendment rights of mental hospital patients, including right to petition government); *Martyr v. Mazur-Hart*, 789 F. Supp. 1081, 1088-89 (D. Or. 1992) (same); *Wyatt v. Stickney*, 344 F. Supp. 373, 379 (M.D. Ala. 1972) (recognizing right of mental institution patients to send and receive mail from public officials); *aff’d in relevant part by Wyatt v. Alderholt*, 503 F.3d 1305, 1307, 1312 (5th Cir. 1974).

In sum, the “existence and viability of a long-established personal right,” like freedom of speech, “does not hinge upon its prescient exercise, nor is it extinguished when one is adjudged incompetent.” *In re Guardianship of L.W.*, 167 Wis. 2d 53, 74, 482 N.W.2d 60 (1992).<sup>4</sup>

**B. Washington Law Explicitly Protects the Civil Liberties of the Incapacitated Through the Guardianship System**

The state legislature has expressly declared that “[t]he existence of developmental disabilities does not affect the civil rights of the person with the developmental disability except as otherwise provided by law.” RCW 71A.10.030(1). Moreover, the state has acknowledged its obligation

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<sup>4</sup> Legal recognition of the incapacitated’s free speech rights is analogously supported by case law addressing other constitutional rights of the disabled. See *Ingram*, 102 Wn.2d at 836, 689 P.2d at 1368 (recognizing constitutional right to chose medical treatment); *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261, 308, 110 S. Ct. 2841, 2867, 111 L. Ed. 2d 224 (1990) (fact of incompetency does not deprive individual of fundamental right to refuse medical treatment); *In re Colyer*, 99 Wn.2d 114, 124, 660 P.2d 738, 744 (incompetent’s right to chose medical treatment is equal to competent’s); *Youngberg v. Romeo*, 457 U.S. 307, 315, 102 S. Ct. 2452, 2457-58, 73 L. Ed. 2d 28 (1982) (recognizing substantive constitutional rights of disabled persons in state custody).

to ensure that the developmentally disabled “enjoy all rights and privileges under the Constitution and laws of the United States and the state of Washington.” RCW 71A.10.015; RCW 11.88.005 (“it is the intent of the legislature” to enable “all” people “to exercise their rights under the law to the maximum extent ...”).<sup>5</sup>

Simultaneously, the legislature recognizes that “some people with incapacities *cannot exercise their rights* or provide for their basic needs *without the help of a guardian.*” RCW 11.88.005 (statement of legislative intent ) (emphasis added); RCW 11.92.043(4) (“It shall be the duty of the guardian . . . [to] *assert* the incapacitated person’s rights and best interests.”) (emphasis added). To this end, the Washington Supreme Court in interpreting the guardianship statute has held that a “finding of incompetency *merely means that the ward’s rights will be exercised by the guardian on the ward’s behalf.*” *Ingram*, 102 Wn.2d at 836, 689 P.2d at 1368 (emphasis added); *In re Colyer*, 99 Wn.2d at 129, 660 P.2d at 746-47.

Washington’s approach is consistent with that taken by other states. *See, e.g., In re A.B.*, 196 Misc. 2d 940, 950, 768 N.Y.S.2d 256 (Sup. Ct. 2003) (“the constitutional right of privacy would be an empty right if one who is incompetent were not granted the right of a competent counterpart to exercise his rights”) (quotation omitted); *In re Estate of*

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<sup>5</sup> *See also* Certified Professional Guardian Standards of Practice (“CPG Standards”) developed by the State of Washington. CPG Standard § 401 (“civil rights and liberties of the incapacitated person shall be protected”); § 403.8 (“guardian shall protect the incapacitated person’s rights and best interests against infringement by third parties”).

*D.W.*, 134 Ill. App. 3d 788, 791, 481 N.E.2d 355, 89 Ill. Dec. 804 (App. Ct. 1985) (state law “vests guardian with broad authority to act in the best interests of the ward”); *L.W.*, 167 Wis. 2d at 74. It has also been endorsed by the United States Supreme Court:

The law must adjust the manner in which it affords rights to those whose status renders them unable to exercise choice freely and rationally. Children, the insane, and those who are irreversibly ill with loss of brain function, for instance, all retain ‘rights,’ to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind.

*Thompson v. Okla.*, 487 U.S. 815, 825 n.23, 108 S. Ct. 2687, 2693 n.23, 101 L. Ed. 2d 701 (1988) (emphasis added); *Cruzan*, 497 U.S. at 309, 110 S. Ct. at 2867 (same).

Consequently, as in other constitutional contexts, “the law must adjust the manner in which it affords” the incapacitated their free speech rights by allowing court-appointed guardians to petition the government on matters important to their wards’ care and well being. Any other rule would deprive the incapacitated of an individual political voice, thereby rendering their free speech rights meaningless and hampering the ability of their guardians to protect their best interests as required by law.

**C. DSHS’s and DRW’s Assertion that Political Advocacy Falls Outside the Scope of the Guardianship Is Contrary to Law**

Despite clear legislative intent to preserve and protect the civil rights of incapacitated individuals by appointing guardians to “*exercise*” those rights when necessary, RCW 11.88.005, and the supporting case law endorsing this principle, *see* § IV.B *supra*, DSHS and DRW argue that guardians can *never* exercise their wards’ right to petition the government—even, when, as here, the guardians in question are the full guardians of severely disabled individuals with no ability to speak for themselves and the political activities at issue are a logical extension of the guardians’ statutory obligation to secure the most appropriate placement for their wards. RCW 11.92.043(4). DSHS and DRW offer various legal arguments to support their position, all of which are without merit.

**1. Rights Retained By the Ward Can Be Exercised by the Guardian, Absent Specific Limitation**

While admitting the incapacitated retain their free speech rights, DSHS and DRW erroneously argue that there is no statutory basis for allowing guardians to exercise those rights. DSHS and DRW maintain that permitting guardians to exercise their wards’ free speech rights somehow constitutes a “loss” or “waiver” of that right, which they believe requires a specific court order or an affirmative statutory denial. *See, e.g.*, DSHS Br. at 19-20; DRW Br. at 13-14. However, the exact opposite is true. A fair

reading of guardianship law reveals that rights retained by the ward can be exercised by the guardian *unless* those rights or the guardianship have been expressly limited by the court or statute.

Under Washington law, full guardians are appointed by the Superior Court only after a notice and opportunity to be heard. *See* RCW ch. 11.88 (setting forth due process requirements for appointment of guardian). Once appointed, a full guardian literally stands-in-the-shoes of the ward and exercises the ward's rights on his or her behalf. *See* RCW11.88.005 (incapacitated often need guardian's help to exercise their rights); RCW 11.92.043(4) (guardian must "assert" incapacitated person's rights); §IV.B, *supra* (summarizing case law on point).

Any limits on the scope of the guardianship are either explicitly stated in the appointing court's order or expressly set forth by the guardianship statute. *See, e.g.*, RCW 11.88.010(2) (court can limit scope of guardianship where incapacitated retains ability to manage some affairs), 11.92.043(5) (limiting guardian's ability to fully exercise ward's right to consent to certain medical procedures); *Ingram*, 102 Wn.2d at 836, 689 P.2d at 1368-69 (finding RCW 11.92.040(3), now RCW 11.92.043(5), restricts guardians' ability to exercise ward's right to choose enumerated medical treatments). As the Washington Supreme Court notes, when a statute contains express exceptions, those exceptions must be read narrowly. *See Colyer*, 99 Wn.2d at 129, 660 P.2d at 747 (express exclusions in guardianship statute must be read narrowly). Consequently, contrary to DSHS

and DRW, unless the appointing court or guardianship statute explicitly takes away or limits a ward's rights, that right is assumed to remain with the ward and can be exercised by the guardian.<sup>6</sup>

DSHS's and DRW's attempt to infer an affirmative limitation on free speech rights from the legislative history of the guardianship statute is equally unavailing. DSHS and DRW both acknowledge that Washington has "modernized" its guardianship statute to protect the rights of the incapacitated as well as their estate, as was historically the case. DSHS Br. at 22; DRW Br. at 11. Yet, DSHS asserts that the legislative history of the recent revisions does not reveal any overt intent to create a "new, political role for guardians." DSHS Br. at 22. DRW, meanwhile, obfuscates the essential function guardians perform by selectively quoting from the legislature's statement of intent. *See* DRW Br. at 11 (block quoting RCW 11.88.005, while omitting key provision on role of guardians in safeguarding incapacitated's rights).

However, RCW 11.88.005, which was enacted in 1990 as part of the effort to update Washington guardianship law, explicitly states that "some people with incapacities cannot exercise their rights . . . without the help of a guardian." Significantly, RCW 11.88.005 does not differentiate between rights or otherwise indicate that some constitutional rights can be

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<sup>6</sup> DSHS's reliance on RCW 11.88.010(5), providing that voting rights can only be taken away from an incompetent through specific court order, is similarly premised on its mistaken assumption that allowing a guardian to exercise the ward's free speech rights is tantamount to a removal, rather than a preservation, of those rights.

exercised by the guardian while others cannot. Thus, a more accurate interpretation of Washington's revised guardianship statute is that the legislature intended for guardians to exercise their wards' "rights under the law to the maximum extent," RCW 11.88.005, unless that right has been reserved to the ward by the appointing court's order, as in the case of a limited guardianship under RCW 11.88.010(2), or taken away altogether by statute. *See, e.g., Ingram*, 102 Wn.2d at 836, 689 P.2d at 1368.

## **2. Free Speech Rights are Not "Too Personal" To Be Exercised By Court-Appointed Guardians**

DSHS's second argument, that a ward's free speech rights are too "peculiarly personal" to be exercised by a guardian, is also unpersuasive. *See* DSHS at 20. DSHS relies primarily on *State v. Jones*, 57 Wn.2d 701, 359 P.2d 311 (1961), and *Quesnell v. State*, 83 Wn.2d 224, 517 P.2d 568 (1973), suggesting each case presents an example of a right that is too personal "to waive." DSHS Br. at 20. However, neither case actually supports DSHS's argument.

For starters, DSHS has cited the dissent in *Jones*. In actuality, the majority holding in that case unequivocally affirms the authority of a guardian to exercise a ward's constitutional rights: "The election to proceed with the determination of the appeal should rest with those designated by the appropriate court to protect and safeguard the interests of the insane appellant." *Jones*, 57 Wn.2d at 704, 359 P.2d at 313. *Quesnell* is

equally inapposite. The issue before the court in *Quesnell* was whether the *guardian ad litem* in a civil commitment case could waive the right trial to by jury over the objection of the defendant and her attorney, *before* that defendant had been declared legally incompetent. Moreover, it is apparent from the facts that the *guardian ad litem* in *Quesnell* was derelict in his duties. 83 Wn.2d at 227, 233-34, 517 P.2d at 571, 575.

Indeed, courts in and out of Washington have repeatedly found that guardians are empowered to exercise what is arguably a ward's most personal and most consequential constitutional right: the right to suspend life-sustaining medical treatment. In *Colyer*, for example, the Washington Supreme Court explained that a guardian has the power to exercise such a right *precisely because* "refusal of life sustaining support is an individual's *personal* right." 99 Wn.2d at 129, 660 P.2d at 746-47 (emphasis added). In *In re Guardianship of Hamlin*, the Court again "emphasized" the personal nature of the right to refuse life-sustaining treatment, stating that such decisions "must be made on a case-by-case basis with *particularized* consideration of the best interests and rights of the *specific individual*." 102 Wn.2d 810, 815, 689 P.2d 1372, 1375 (1984) (emphasis added); *see also* *L.W.*, 167 Wis. 2d 53 at 67-69; *A.B.*, 196 Misc. 2d at 960-61.

Given the uniform string of cases upholding a guardian's authority to exercise a ward's constitutional right to suspend life-sustaining treatment, the Court should reject DSHS's curious contention that the right to petition the government for redress of grievances is too personal for a

guardian to exercise.

**3. A Blanket Rule Excluding Political Advocacy from the Scope of the Guardianship Would Violate the Federal and State Constitutions**

DSHS and DRW attempt to convince this Court that their restrictive reading of the guardianship statute would not impermissibly interfere with the free speech rights of the incapacitated. According to DSHS, Ms. Lamb's and Ms. Robins' constitutional right to petition the government would not be infringed upon because (1) the Hardmans themselves can still engage in political action and (2) Ms. Lamb and Ms. Robins are not "barred" from "being involved personally in political advocacy, to the extent they are capable." DSHS Br. at 41. DRW goes one step further, arguing that advocating on behalf of the incapacitated should be left to organizations like itself. DRW Br. at 4, 18-20. These assertions simply serve to highlight the constitutional infirmity of DSHS's and DRW's position.

For starters, the Hardmans' own personal politicking is not an adequate substitute for individualized expression of their ward's political voice. When the Hardmans engage in political activities as part of their guardianship duty, they are under a legal obligation to advocate the position that advances their wards' best interests or, where determinable, reflects their wards' personal preferences. CPG Standard § 403 (summarizing guardians ethical and legal obligation to ward); *id.* at § 402 (describing applicable decision standards); RCW 11.92.010(4). In contrast, when the

Hardmans petition the government on their own behalf, they are under no such obligation. While the best interests and/or discernable preferences of a ward may coincide with the personal political views of a guardian, that may not always be so.

DSHS's corollary argument, that Ms. Lamb and Ms. Robins are not themselves "barred" from political advocacy ignores the undisputed severity of Ms. Lamb's and Ms. Robins' disabilities. *See* G. Br. at 2, 8. As persons with no speech, they are literally incapable of "being involved personally in political advocacy," as DSHS suggests they should be. Consequently, under Washington law, Ms. Lamb and Ms. Robins are entitled to the appointment of full guardians to "help" them exercise "their rights." RCW 11.88.005; *Thompson*, 487 U.S. at 825 n.23, 108 S. Ct. 2687, 2693 n.23 ("law must adjust the manner in which affords rights to those whose status renders them unable to exercise choice freely and rationally"); §§ IV.A-B, *supra*. If their guardians are prohibited from petitioning the government on issues of importance to their care and well-being, then Ms. Lamb's and Ms. Robins' retained free speech rights would be meaningless. *See A.B.*, 768 N.Y.S.2d at 264 (constitutional right would be "empty" if incompetent were not granted a competent counterpart to exercise that right).

Finally, DRW's intimation that it should be the exclusive voice of the "disability community" on matters of public policy disregards fundamental tenets of free speech jurisprudence. DRW Br. at 4, 18-20.

DRW appears to believe that it should be the sole representative of the disabled community because it has been “authorized” by state and federal law to advocate on behalf of the disabled generally and because its “public policy education efforts reflect the prevailing trends” on these issues. DRW Br. at 18-20. However, DRW makes this argument in disregard of the United States Supreme Court’s declaration that a representative democracy depends upon the ability of the people to make their *individual* wishes known to the government, *Cal. Motor.*, 404 U.S. at 510, 92 S. Ct. at 611-12, especially when, as here, there is a difference of opinion on an issue of societal concern. *Meyer v. Grant*, 486 U.S. 414, 421, 108 S. Ct. 1886, 1891, 100 L. Ed. 2d 425 (1988) (“First Amendment was ‘fashioned to assure unfettered interchange of ideas’”) (quotation omitted); *Texas v. Johnson*, 491 U.S. at 408, 109 S. Ct. at 1542.<sup>7</sup>

Thus, DRW’s contention that “the Hardmans’ political efforts *are not aligned* with the disability community” is not a valid reason for suppressing the free speech rights of the incapacitated. DRW Br. at 5 (emphasis added). Just as DRW has the right to lobby on behalf of its constituents, Ms. Lamb and Ms. Robins have a right to petition the government through duly-appointed guardians.

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<sup>7</sup> DRW devotes the bulk of its brief to championing its position that “community living” is generally preferable to institutional care. DRW Br. at 4. However, the issue before this Court is not whether community living is preferable to institutional care, but rather whether the free speech rights of the incapacitated should be protected in order to ensure that the legislature has the benefit of all opinions on the subject.

#### **4. Public Policy Favors Protecting the Free Speech Rights of the Incapacitated**

While advancing an interpretation of Washington's guardianship statute that, if accepted, would effectively negate the First Amendment rights of the incapacitated, neither DSHS nor DRW identify any governmental interest that would justify such a restriction. *Wash. Initiatives Now v. Rippie*, 213 F.3d 1132, 1138 (9th Cir. 2000) (laws that burden political speech are inherently suspect and subject to "exacting scrutiny"). Instead, DSHS and DRW present a parade of alleged horrors, none of which rise to the level of a compelling state interest and all of which are adequately addressed by the present guardianship system.

DSHS, for example, worries about the potential for "guardianship estates to pay for endless hours of duty-bound guardian politicking" without tangible benefit to the ward. DSHS Br. at 23. Meanwhile, DRW, raises the specter of self-dealing by guardians to increase compensation or advance a political agenda that is not in the ward's best interests. DRW Br. at 16-18. However, political advocacy, like any action undertaken on behalf of a ward, is subject to review by the guardian court to prevent the very abuses identified by DSHS and DRW. RCW 11.92.010; *see also* RCW ch. 11.88. In addition, there are monetary limits on the amount guardians can collect over a given period of time, WAC 388-79-030, and fee petitions are subject to judicial review to ensure they are just and reasonable. RCW 11.92.180; WAC 388-79-050; *see also* G. Reply at 6-7.

Consequently, there is no need for a blanket rule denying guardians the authority to exercise their ward's right to petition the government. Instead, this Court should reject DSHS's and DRW's unconstitutional interpretation of Washington's guardianship law. *State ex rel. Morgan v. Kinnear*, 80 Wn.2d 400, 402, 494 P.2d 1362, 1363 (1972) (“[W]here a statute is susceptible of several interpretations, some of which may render it unconstitutional, the court, without doing violence to the legislative purpose, will adopt a construction which will sustain its constitutionality if at all possible to do so.”). Doing so will ensure that a full array of opinion, including dissenting viewpoints, on subjects pertaining to the disabled will be presented to the legislature. *Cal. Motor*, 404 U.S. at 510, 92 S. Ct. at 611-12; *Texas*, 491 U.S. at 408, 109 S. Ct. at 2542; *Meyer*, 486 U.S. at 421, 108 S. Ct. 1886, 1891.

**V. CONCLUSION**

For the reasons set forth above, ACLU-WA respectfully requests that the Court reverse the lower court ruling.

Respectfully submitted this 2nd day of October, 2009.

**AMERICAN CIVIL LIBERTIES UNION  
OF WASHINGTON FOUNDATION**

By: 

Laura J. Beveridge, WSBA #33324  
133 Lexington Ave. #2  
Cambridge, MA 02138  
(206) 550-5676

Sarah Dunne, WSBA #34869  
Nancy L. Talner, WSBA #11196  
ACLU of Washington Foundation  
705 Second Avenue, Suite 300  
Seattle, WA 98104  
(206) 624-2184

Attorneys for Amicus Curiae  
American Civil Liberties Union of Washington

**CERTIFICATE OF SERVICE**

I, Nina Jenkins, hereby certify and declare that on the 2nd day of October, 2009, I sent a copy of the foregoing document via regular U.S. mail to the following:

Michael L. Johnson  
Hardman & Johnson  
703 Columbia Street, Suite 400  
Seattle, W A 98104

Jonathon Bashford  
7141 Cleanwater Drive S W  
Olympia, WA 98504-0124

Emily Pura,  
Disability Rights Washington  
315 - 5th Avenue So., Ste 850,  
Seattle, WA 98104



Nina Jenkins  
Legal Program Assistant

American Civil Liberties Union  
of Washington Foundation

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