UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MISSOURI PROTECTION AND ADVOCACY SERVICES, INC., and BOB SCALETTY,

Plaintiffs-Appellants, No. 06-3014

v.

ROBIN CARNAHAN, in her official capacity as Secretary of State of the State of Missouri, and JEREMIAH NIXON, in his official capacity as Attorney General of the State of Missouri,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
THE HONORABLE ORTRIE D. SMITH

OPENING BRIEF OF THE PLAINTIFFS-APPELLANTS

James M. Kirkland
Sonnenschein, Nath & Rosenthal LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111

Anthony E. Rothert
American Civil Liberties Union
of Eastern Missouri
4557 Laclede Avenue
St. Louis, MO 63108

Samuel R. Bagenstos
One Brookings Dr., Box 1120
St. Louis, MO 63130

Ira A. Burnim
Jennifer Mathis
Alison N. Barkoff
Judge David L. Bazelon Center
for Mental Health Law
1101 15th St., NW, Suite 1212
Washington, DC 20005

(additional counsel on signature page)
ATTORNEYS FOR PLAINTIFFS-APPELLANTS

SUMMARY OF THE CASE

This case involves a challenge to the Missouri constitutional and statutory provisions that disenfranchise individuals who are under full guardianship, even if they have the capacity to vote. In Missouri, individuals are placed under guardianship if they lack the capacity to care for themselves. Although the lack of self-care skills does not imply the inability to understand the nature and effect of voting, Missouri categorically prohibits all individuals under guardianship from voting, without any individualized inquiry into their competence to vote. Plaintiffs contend that Missouri's voting ban violates the Americans with Disabilities Act (ADA), the Rehabilitation Act, and the Fourteenth Amendment. The district court granted summary judgment to the defendant state officials on the basis of a conclusion that Missouri law does *not* categorically disenfranchise individuals under full guardianship. That determination directly conflicts with the plain text of the state's constitution and statutes. But even under the district court's reading, Missouri law would still violate federal law.

Because this case raises complex issues of federal and state law, and implicates rights of exceptional importance, appellants respectfully suggest that oral argument is appropriate and that at least twenty minutes should be allocated to each side.

CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1 and Rule 26.1A of the Local Rules of the United States Court of Appeals for the Eighth Circuit, Missouri Protection and Advocacy Services discloses the following corporate interests:

1. The parent companies of the corporation: **NONE**

2. Subsidiaries not wholly owned by the corporation: **NONE**

3. Any publicly held company that owns ten percent (10%) or more of the corporation: **NONE**

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JURISDICTIONAL STATEMENT

Plaintiffs brought this case pursuant to Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.*, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the Fourteenth Amendment of the United States Constitution, and 42 U.S.C. § 1983. R. 1.[1] The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4).

The district court entered its final judgment on July 7, 2006. R. 152. Plaintiffs timely filed their notice of appeal on August 3, 2006. R. 153. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the Missouri constitutional and statutory provisions that disenfranchise persons under guardianship without an individualized determination of voting competence violate the ADA and the Rehabilitation Act.

School Bd. v. Arline, 480 U.S. 273 (1987)

PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001)

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999)

Doe v. Rowe, 156 F. Supp.2d 35 (D. Me. 2001)

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[1] "R. __" refers to entries on the district court's docket sheet. "Add. __" refers to pages in the addendum attached to this brief. "App. __" refers to pages in the joint appendix.

Mo. Const., Art. 8, § 2

Mo. Rev. Stat. § 115.133

42 U.S.C. § 12132

29 U.S.C. § 794

2. Whether the Missouri constitutional and statutory provisions that disenfranchise persons under guardianship without an individualized determination of voting competence violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Dunn v. Blumstein, 405 U.S. 330 (1972)

Burdick v. Takushi, 504 U.S. 428 (1992)

Doe v. Rowe, 156 F. Supp.2d 35 (D. Me. 2001)

Mo. Const., Art. 8, § 2

Mo. Rev. Stat. § 115.133

U.S. Const., Amdt. 14

STATEMENT OF THE CASE

This case presents a challenge to the Missouri constitutional and statutory provisions that disenfranchise individuals under full guardianship, including those who have the capacity to vote. Individuals under full guardianship, such as plaintiff-appellant Robert Scaletty and many of the constituents of plaintiff-appellant Missouri Protection and Advocacy

Services (MOPAS), are precluded from voting by both the Missouri Constitution and state statutes. Plaintiffs-appellants contend that the voting ban violates Title II of the ADA, Section 504 of the Rehabilitation Act, and the Fourteenth Amendment of the United States Constitution.

A. Procedural History

Plaintiffs filed their complaint in the United States District Court for the Western District of Missouri on October 8, 2004. R. 1. Defendants are Robin Carnahan, Missouri's Secretary of State, and Jeremiah (Jay) Nixon, Missouri's Attorney General, both of whom are sued in their official capacity for prospective relief. See Add. 5. At the same time they filed their complaint, plaintiffs sought a preliminary injunction, R. 3, but the district court denied their motion on October 26, 2004. R. 37. The parties filed cross-motions for summary judgment in March 2006. R. 132, 136. On July 7, 2006, the district court denied plaintiffs' motion for summary judgment and granted defendants' motion for summary judgment on all claims. Add. 1-13.

B. Statement of Facts

1. Missouri's Voting Ban

The Missouri Constitution provides that "[n]o person who has a guardian of his or her estate or person by reason of mental incapacity,

appointed by a court of competent jurisdiction . . . shall be entitled to vote." Mo. Const. Art. 8, § 2. The state has implemented that constitutional prohibition by passing a statute that provides that "[n]o person who is adjudged incapacitated shall be entitled to register or vote." Mo. Rev. Stat. § 115.133. In their filings below, defendants interpreted these provisions as establishing "the absence of adjudicated full mental incapacity" as a "qualification for voting." App. 24, 95.

Missouri law provides that a probate court shall place an individual under guardianship if it finds the individual "incapacitated." Mo. Rev. Stat. § 475.079.1. An individual is "incapacitated" for purposes of that law when he is "unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that he lacks capacity to meet essential requirements for food, clothing, shelter, safety or other care." Mo. Rev. Stat. § 475.010(9). A person may be placed under guardianship, for example, because of his inability to manage money or attend to his physical needs. App. 704. These impairments do not necessarily have any relation to the ability or capacity to vote. *Id*. Nonetheless, a finding that an individual is "incapacitated" under the statutory definition (which the parties to this case have referred to as a finding of "total" or "full" incapacity) triggers the voting ban in Article 8,

Section 2 of Missouri's Constitution and in Section 115.133 of Missouri's Revised Statutes.[2]

2. The Disenfranchisement of Plaintiff Scaletty

Robert Scaletty has been diagnosed with schizophrenia. App. 801, 804, 807. Carol Bahmueller, director of the community support program for people with serious and persistent mental illness at Truman Medical Center Behavioral Health, testified to a number of significant limitations Scaletty's disability has imposed on his life: "Without medications he has not taken care of his basic daily needs, such as nutrition or appropriate clothing"; "[w]ithout daily oversight he would not attend doctor appointments or take his medications"; he "is easily angered when confronted with any issue he does not agree with"; and he his currently "unable" to work "because of his disability." App. 807; see also *id.* at 804 ("He worked for many years but eventually became unable to work because of his disability.").

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[2] See also Mo. Rev. Stat. § 475.078.2 (finding of total incapacity "operate[s] to impose upon the ward . . . all legal disabilities provided by law, except to the extent specified in the order of adjudication"). An individual may also be found "partially incapacitated" if he "lacks capacity to meet, *in part*, essential requirements for food, clothing, shelter, safety, or other care without court-ordered assistance." Mo. Rev. Stat. § 475.010(14). Unlike a finding of total incapacity, a finding of partial incapacity "does not operate to impose on the ward . . . any legal disability provided by law except to the extent specified in the order of adjudication." Mo. Rev. Stat. § 475.078.1. This case does not involve individuals found only partially incapacitated.

In 1999, Scaletty was placed under full guardianship because of his mental illness. App. 804. Although his guardianship order specifically purported to reserve his right to vote, *id.* at 801, he in fact "was not allowed to vote after he was placed under guardianship," *id.* at 803. Shortly before the 2004 election, Scaletty "received a letter from the Kansas City Board of Elections telling [him] that [he] was not eligible to vote because Missouri law does not allow people under guardianship to vote." App. 801. Board staff, when contacted directly, confirmed "that [he] was not allowed to vote." *Id*. Although he showed up at his polling place anyway, poll workers would not permit him to cast a ballot. *Id*. It was only *after* he had filed this action "that the Board of elections sent [him] a voter registration card." *Id*.

Dr. Paul Appelbaum, former president of the American Psychiatric Association and one of the leading national experts on decisional competence,[3] evaluated Scaletty's competence to vote. App. 708-09. He

[3] App. 697. Along with one colleague, Dr. Appelbaum "led the MacArthur Treatment Competence Study, the largest study ever undertaken of the decisionmaking competence of persons with mental disorders." *Id.* at 699-700. He has "published many papers, in both medical and legal journals, and several books that address this issue," and he has "lectured on competence assessment in both medical schools and law schools." *Id.* at 700. In recent years he has also "been part of a research project funded by the Greenwall Foundation and based at the University of Pennsylvania that is exploring issues related to voting by persons with cognitive impairments."

reviewed Scaletty's medical records, interviewed Scaletty, and obtained "a general history of [his] psychiatric treatment, education and employment, social functioning, general medical problems, and voting." *Id.* at 704-05, 708. He also "performed a basic mental status examination." *Id.* at 705. The type of assessment performed by Dr. Appelbaum is standard for determining competence. *Id.* at 796-99. Indeed, though the defendants' expert disagreed that any standard could properly measure competence to vote, *id.* at 737, even he acknowledged that Dr. Appelbaum did a competent job of assessing Scaletty and the other individuals he evaluated for purposes of this case. *Id.* at 734.

Using the standard applied in *Doe v. Rowe*, 156 F. Supp.2d 35, 52-58 (D. Me. 2001)—whether the individuals understand the nature and effect of voting[4]—Dr. Appelbaum determined that Scaletty "has a good grasp of the

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Id. One of the tasks of that project has been the development of a standardized instrument to evaluate voting competence. *Id.*

[4] As Dr. Appelbaum noted, this standard may in fact represent a higher standard than non-mentally ill persons are required to meet in order to vote. App. 703. The American Bar Association's Commission on the Mentally Disabled has proposed a lower standard that would permit voting by any person who is able to provide the information reasonably required of all people seeking to register to vote. *Id.* at 702; see BRUCE D. SALES *ET AL.*, DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES 111 (1982) ("Any person who is able to provide the information, whether orally, in writing, through an interpreter or interpretive device or otherwise, which is

electoral process, including the nature and effect of voting, and according to [the *Rowe*] standard would be considered competent to vote." App. 709. According to Dr. Appelbaum, Scaletty believes "that voters should look at issues and compare candidates' positions," "reads the Kansas City Star and USA Today thoroughly every day," "occasionally reads the Wall Street Journal," and "listens to news on the radio." *Id.* According to Scaletty's father, he "has strong opinions about political matters" and "has a very good understanding of how elections work." *Id.* at 804. Scaletty's treating social worker concurred with these views. *Id.* at 808.

Scaletty himself testified that he wants "to be able to vote so that [he] can show that [he] disagree[s] with some policies and agree[s] with others." *Id.* at 801. In particular, he "believe[s] in less taxation, less regulation" and is "very concerned that we are moving away from the values on which this country was founded." *Id.* Scaletty routinely voted in local, state and federal elections for many years until he was stopped from voting due to his guardianship status. *Id.* at 801, 804.

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reasonably required of all persons seeking to register to vote, shall be considered a qualified voter.").

3. The Disenfranchisement of the Constituents of Plaintiff MOPAS

MOPAS, a private, nonprofit entity, is the designated protection and advocacy system for Missouri pursuant to the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801 *et seq.* (PAIMI Act), and the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001 *et seq*. See App. 790. As such, it is charged by federal law with advocating on behalf of the rights of individuals with psychiatric and developmental disabilities. *Id.* at 791.

a. The Disenfranchisement of Competent Voters—Pursuant to that mandate, MOPAS has numerous constituents who, like plaintiff Scaletty, are under full guardianship and are disenfranchised due to their guardianship status. The record contains particular discussions of seven of these individuals. App. 705-06 (C.S.);[5] *id.* at 706-08 (D.C.); *id.* at 709-10 (T.P.); *id.* at 710-11 (C.W.); *id.* at 786 (T.M.); *id.* at 828 (L.O.); *id.* at 744 ("Jane Doe"). These individuals lost the right to vote upon being placed under full guardianship, without an individualized assessment of their voting capacity

[5] Appellants use initials to refer to individuals whose identities are disclosed only in confidential documents covered by a protective order entered by the parties and filed under seal in a separate appendix.

or even any discussion of voting capacity. *Id.* at 810, 813 (C.S.); *id.* at 746 (D.C.); *id.* at 825 (T.P.)[6]; *id.* at 743 (C.W.); *id.* at 834 (T.M., L.O.).

Dr. Appelbaum evaluated four of these individuals and concluded that they had the capacity to vote despite being under full guardianship. App. 705-11. Dr. Appelbaum based his conclusions on, *inter alia*, his observations that these individuals were interested in political issues, were involved in political advocacy, kept up with current events, expressed opinions on how they would choose a candidate, understood the voting process, and, in some cases, had voted in the past.[7] These individuals'

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[6] T.P. continued to vote after he had been placed under guardianship. His guardianship file was lost, neither he nor the guardian was aware of the guardianship until his file was found decades later, and even then, no one informed him that he was ineligible to vote. App. 820, 825.

[7] See, *e.g.*, App. 706 (C.S. "follows current events and has strong opinions about the performance of the governor and the president on issues of concern to him"; "two years ago he went to Jefferson City to lobby his state representative and senator against cuts in Medicaid"; and he "has participated actively in political affairs in People First, an organization of persons with developmental disabilities" by serving as a local and statewide officer); *id.* at 707 (D.C. voted in 2000 elections prior to being placed under guardianship; he reads the newspaper and follows television and radio news; he "has lobbied his state senator in Jefferson City about threatened Medicaid cuts"; and he gave a speech to fellow members of People First in a successful effort to be elected to the group's statewide steering committee); *id.* at 710 (T.P. "has been voting for many years", see n.6; he "looks at the newspaper every day" and "listens to television and radio news"; and he is "particularly concerned about cuts to Medicaid"); *id.* at 711 (C.W. understands the voting process and "gets her news from the radio daily").

treating professionals and/or guardians agreed with Dr. Appelbaum's conclusion that they had the capacity to vote. See, *e.g.*, App. 813 (C.S.'s guardian); *id.* at 748 (D.C.'s guardian); *id.* at 820-21, 741 (T.P.'s treating social worker and director of his community program); *id.* at 757 (C.W.'s treating psychiatrist).

A fifth individual, T.M., was not evaluated by Dr. Appelbaum but was evaluated by a treating professional, Dr. Karen MacDonald, who concluded that she "has the capacity to vote. She understands how the voting process works and what the effect of an election is. She is capable of making choices about candidates and issues." *Id.* at 786.[8] And People First's statewide adviser testified that "Jane Doe" "clearly has the capacity to vote, and her treating psychiatrist has confirmed that she has that capacity." *Id.* at 744.

These individuals are not isolated examples—Dr. Appelbaum found them to be "typical of a substantial group of persons under guardianship in every state, who whatever their other functional limitations remain competent to vote." App. 712. Other knowledgeable witnesses—including

[8] T.M.'s guardian did not permit her to travel to Kansas City to be evaluated by Dr. Appelbaum. App. 712. The same guardian refused permission for L.O. to be evaluated by Dr. Appelbaum. *Id*. at 829-33.

Missouri service providers, Public Administrators, and advocates—confirmed that many individuals who are under full guardianship in Missouri have the capacity to vote.[9] Even defendants' expert acknowledged that some people under full guardianship have a good understanding of how the voting process works. *Id.* at 736-37.

b. The Lack of Advance Notice or Subsequent Opportunity to Restore Voting Rights—For many of the individuals discussed in the record, the "subject of voting never came up at the guardianship hearing," App. 813 (C.S.), and they received no notice that a guardianship order would result in disenfranchisement, *id.* See also *id.* at 825 (T.P.); *id.* at 743 (C.W.); *id.* at 746 (D.C.); *id.* at 834 (T.M. and L.O.). In that way, as well, those individuals are typical; the Public Administrators of four separate counties

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[9] For example, Mary Frances Broderick, a service provider with over thirty years of experience working with individuals with mental disabilities in Missouri, stated that "the vast majority of individuals" she has observed who are under guardianship have the capacity to vote. App. 740. Laura Walker, who "worked with hundreds of people with disabilities" across Missouri in her capacity as a statewide advisor for People First, observed that a large number of People First members under guardianship (including full guardianship) "clearly have the ability to understand the voting process," and that many "have voted in the past, understand how voting works, and have a good understanding of issues that are at stake in the elections"—and that "many of them have come to the State Capitol to lobby their state representatives." *Id.* at 743. Public Administrators in three counties also confirmed that many of their wards who are under full guardianship have the capacity to vote. *Id.* at 747, 750, 754.

testified that the subject of voting rarely, if ever, is raised in guardianship hearings, even though a guardianship order results in disenfranchisement. See *id.* at 746 (Boone County); *id.* at 834 (Camden County); *id.* at 750 (Lincoln County). See also *id.* at 753 (prior to the initiation of this lawsuit, voting was not raised in guardianship proceedings in Jefferson County). Even the attorneys appointed to represent individuals subject to guardianship do not discuss voting issues with their clients. *Id.* at 753. The defendant state officials do not provide information to probate courts, public administrators, private guardians or wards concerning the effect of guardianship on voting rights. *Id.* at 839-44, 848-51, 813.

Even if Missouri law would permit them to seek to have their right to vote restored despite being under full guardianship, the individuals who were the subject of testimony in the district court were unable to obtain such a restoration; their guardians either forbade them to do so or failed to take any steps to do so. App. 743 (guardian did not permit C.W. to seek to vote); *id.* at 744 (Jane Doe's guardian did not believe individuals under guardianship should be permitted to vote); *id.* at 828, 831-35 (guardian did not take any action after learning that L.O. and T.M. expressed interest in getting their right to vote); *id.* at 813 (guardian had no time or resources to try to get C.S.'s voting rights restored); *id.* at 747, 748 (guardian has

resources to seek to obtain voting rights only for wards who specifically communicate a desire to vote and was unaware that D.C. wished to vote). Again, those individuals were typical: Connie Hendren, Public Administrator for Boone County, testified to extensive barriers that stand in the way of wards seeking restoration of their voting rights even in the rare instances where probate judges consider restoring voting rights to individuals under full guardianship. *Id.* at 746-47.

4. Proceedings Below

On October 8, 2004, Plaintiff Steven Prye filed this action. R. 1. Prye had lost his right to vote as a result of his having been placed under full guardianship by the state of Illinois, where he had lived before moving to Missouri. *Id.* ¶ 17. Prye asserted claims under: Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.*; Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; and the Equal Protection and Due Process Clauses of the U.S. Constitution, as enforced through 42 U.S.C. § 1983. *Id.* ¶¶ 18-46. The Complaint sought a declaration that the voting ban violated federal law and an injunction permitting Prye to register and vote. *Id.* at 13. On December 6, 2004, plaintiffs filed a First Amended Complaint that added MOPAS and two individual plaintiffs, Scaletty and Patrick Sharp. R. 54. All claims of Prye and Sharp, and all claims against local Board of

Elections officials, were subsequently dismissed by stipulation of the parties. R. 85, 86, 97, 98.[10] Thus, as the case went to judgment, the two plaintiffs were Scaletty and MOPAS, and the two defendants were Carnahan and Nixon. Add. 5.

On March 15, 2006, the parties filed cross-motions for summary judgment. App. 376, 380. On June 7, the district court granted summary judgment to the defendants. Add. 1-13. The court first addressed the issue of standing. It had "no doubt that at the time Scaletty joined the suit as a plaintiff he was suffering an injury in fact because he was denied the right to vote." Add. 3. Although local elections officials had voluntarily permitted Scaletty to vote *after* he joined the suit, the court concluded that the defendants could not sustain the "heavy burden" of showing that it is "absolutely clear" that their wrongful behavior could not reasonably be expected to recur. *Id.* at 4 (quoting *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 609 (2001); *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Accordingly, the court had jurisdiction to consider his claims under the "voluntary cessation" exception to mootness. Add. 3-4.

[10] Prye moved out of Missouri and is now deceased.

The court also held that MOPAS met the requirements for organizational standing. *Id.* at 4-5.

Reaching the merits, the district court held that an election is "undeniably an activity of a public entity" covered by Title II of the ADA. Add. 8. But it nonetheless ruled that Missouri's voting ban did not violate the ADA (or the Rehabilitation Act, which applies the same standards). *Id.* at 9-10. Although the court acknowledged the "constitutional and statutory language indicating that a person under a full order of protection is presumed incompetent and cannot vote," it determined that "the totality of Missouri law" requires "an individualized determination of the individual's mental capacity and the entry of an order that is no more limiting than necessary to protect the individual." *Id.* at 9. Without explaining how its reading was consistent with the broad and unqualified constitutional and statutory ban on voting by individuals under guardianship, the district court concluded that individuals under full guardianship in Missouri can retain the right to vote if they "persuade[] a probate court" that they are "not incapacitated with respect to [their] ability to vote." *Id.* It noted that its conclusion might be different if Missouri law dictated that any person with a

guardian could not vote, "regardless of the person's abilities and limitations." *Id.* at 10. "Such a situation might violate the ADA." *Id.*[11]

Based on the same reading of Missouri law, the district court also ruled that Missouri's voting ban did not violate the Constitution. Add. 12. The fact that plaintiff Scaletty was able to have his right to vote preserved in his guardianship order, even though that right was not honored until this suit was filed, demonstrated to the court that that Missouri law permits probate courts to make individualized determinations of voting capacity. *Id.*

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *E.g.*, *Acton v. City of Columbia*, 436 F.3d 969, 975 (8th Cir. 2006). The district court's interpretations of state and federal law are also reviewed *de novo*. *E.g.*, *Salve Regina College v. Russell*, 499 U.S. 225, 239-240 (1991) ("The obligation of responsible appellate review and the principles of

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[11] The district court also noted that plaintiffs presented evidence about individuals who were denied the right to vote based on guardianship proceedings even though they had the capacity to vote. Add. 10. The court stated that those individuals were not "irrevocably branded" as unable to vote, because they "have recourse in the probate proceedings." *Id.* To the extent that plaintiffs intended to contest the correctness of probate courts' determinations in those cases, the court ruled, such an endeavor would violate preclusion principles and the *Rooker-Feldman* doctrine. *Id.* at 11 (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)).

a cooperative judicial federalism underlying *Erie* require that courts of appeals review the state-law determinations of district courts *de novo*."); *In re Derailment Cases*, 416 F.3d 787, 795 (8th Cir. 2005) (same); *Jessep v. Jacobson Transp. Co., Inc.*, 350 F.3d 739, 741 (8th Cir. 2003) (interpretation of federal statute is reviewed *de novo*).

SUMMARY OF ARGUMENT

I. Missouri's voting ban violates the ADA and the Rehabilitation Act. By prohibiting people under guardianship from voting, that ban singles out a group of people with disabilities and excludes them from participation in an important activity of state government. It therefore discriminates against individuals with disabilities "by reason of" their disabilities. 42 U.S.C. § 12132; accord 29 U.S.C. § 794(a).

Moreover, as the record in this case shows, the Missouri voting ban discriminates against "qualified" individuals with disabilities. 42 U.S.C. § 12132; accord 29 U.S.C. § 794(a). Under Missouri law, individuals are placed under guardianship because of limitations in their ability to care for themselves. There is no connection between self-care skills and the ability to understand the nature and effect of voting, yet Missouri's voting ban disenfranchises persons under guardianship without any inquiry into whether they are competent to vote. That broad, categorical disenfranchisement

violates the core requirement of the ADA and the Rehabilitation Act—that the state must make an individualized inquiry before it determines that a person with a disability is not "qualified."

The district court determined that Missouri law does not categorically disenfranchise all individuals under guardianship. But that reading flies in the face of the plain text of the constitutional and statutory provisions that impose Missouri's voting ban. Missouri's constitution states that "*no person* who has a guardian of his or her estate by reason of mental incapacity . . . shall be entitled to vote." Mo. Const. Art. 8, § 2 (emphasis added). And the implementing Missouri statute similarly states that "*[n]o person* who has been adjudged incapacitated shall be entitled to register or vote." Mo. Rev. Stat. 115.133.2 (emphasis added). Those provisions, which specifically govern the effect of guardianship adjudications on the right to vote, are unqualified and categorical. None of the statutory provisions on which the district court relied—general provisions about the guardianship process that make no reference to voting—undermines the plain import of the constitutional and statutory voting ban. And indeed, defendants themselves recognized that very point until their motion for summary judgment in this case, when "[i]n a last ditch effort to save" the ban, *Rowe*, 156 F. Supp.2d at

45, they changed their mind and took the position that the voting ban is not categorical.

Even under the unduly generous reading adopted by the district court, Missouri law would still fail to provide the individualized inquiry required by the ADA and Rehabilitation Act. Under the district court's reading, an individual placed under full guardianship would still be disenfranchised unless the probate court made a specific determination to the contrary. If the respondent in a guardianship proceeding did not know to ask for an order to preserve voting rights—and the record shows that the issue of voting is rarely, if ever, raised in guardianship hearings—he would be disenfranchised even in the absence of any inquiry into his competence to vote. And even if a respondent did seek an order preserving voting rights, under the district court's reading, he would have to overcome the presumption that he is incompetent. But the ADA and Rehabilitation Act prohibit the state from excluding individuals with disabilities from voting based on presumptions about what a class of persons with disabilities can or cannot do.

II. Missouri's voting ban also violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. By completely and indefinitely disenfranchising individuals under guardianship, that ban imposes a "severe" restriction on the right to vote and accordingly triggers

strict scrutiny. Whether read according to its plain terms or according to the district court's inventive interpretation, the voting ban cannot survive that scrutiny. By the plain terms of the Missouri Constitution and laws, an adjudication of incapacity automatically and inevitably results in disenfranchisement—but strict scrutiny prohibits the state from disenfranchising an entire group of people based on such a broad prophylactic rule. Even under the district court's interpretation, Missouri law still disenfranchises persons under guardianship without the required individualized determination of voting competence. And if the district court's interpretation is correct, the voting ban violates due process; state law fails to provide respondents in guardianship hearings notice that voting rights are at stake and a meaningful opportunity to assert their competency to vote.

ARGUMENT

I. MISSOURI'S VOTING BAN VIOLATES THE ADA AND THE REHABILITATION ACT

Missouri prohibits anyone "who has a guardian of his or her estate or person by reason of mental incapacity" from voting. Mo. Const., Art. 8, § 2. That voting ban, as implemented by Missouri statutes, violates both Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. It applies

exclusively to a group of people who have a "disability" as defined in those statutes, and it excludes them from voting "by reason of such disability." 42 U.S.C. § 12132; accord 29 U.S.C. § 794(a). It does so, moreover, even in the absence of any individualized inquiry into a person's actual competence to vote.

Contrary to the view of the district court, Missouri's voting ban categorically disenfranchises all individuals who are under full guardianship due to "mental incapacity." That is true even though the criteria for "incapacity" under Missouri law have nothing to do with the capacity to vote. Even under the district court's unduly generous reading, Missouri law *still* disenfranchises people with mental impairments in cases where the state has not proven that they are incompetent to vote. As the evidence shows, see p. 7-12, *supra*, the voting ban has disenfranchised many otherwise qualified Missouri residents with disabilities who are competent to vote. The district court therefore erred in granting summary judgment to the defendants on the ADA and Rehabilitation Act claims. To the contrary, it should have granted summary judgment to the plaintiffs.

A. The Voting Ban Discriminates Against Individuals with Disabilities "By Reason of" Their Disabilities

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation

in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. To establish a violation of Title II, a plaintiff must show that:

> (1) he is a qualified individual with a disability; (2) he was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the entity; and (3) that such exclusion, denial of benefits, or other discrimination, was by reason of his disability.

Layton v. Elder, 143 F.3d 469, 472 (8th Cir. 1998). Section 504 of the Rehabilitation Act[12] applies the same standards to entities that receive federal financial assistance. See *Allison v. Department of Corrections*, 94 F.3d 494, 497 (8th Cir. 1996). See also *Barnes v. Gorman*, 536 U.S. 181, 184-85 (2002) (Title II provides same rights, procedures, and enforcement remedies as the Rehabilitation Act); *Bragdon v. Abbott*, 524 U.S. 624, 631-632 (1998) (ADA incorporates substantive requirements of the Rehabilitation Act and its regulations).

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[12] Section 504 provides, in relevant part:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a).

There is no doubt that the defendants are subject to the requirements of the ADA and the Rehabilitation Act. Defendants Carnahan and Nixon, sued in their official capacities, are responsible for the operation of state agencies—the Secretary of State's office and the Office of the Attorney General. These agencies are "public entities" covered by Title II of the ADA. 42 U.S.C. § 12131(1) ("public entities" include any state government or department or agency of state government). They also receive federal funds and are therefore covered by Section 504 of the Rehabilitation Act. R. 64 ¶ 21. This Court has approved suits against state officials under *Ex parte Young*, 209 U.S. 123 (1908), to enforce both the ADA and the Rehabilitation Act. See *Randolph v. Rodgers*, 253 F.3d 342, 348-349 (8th Cir. 2001).

Nor is there any doubt that plaintiff Scaletty and the other constituents of plaintiff MOPAS who are under full guardianship are "individuals with disabilities" protected by the ADA and Rehabilitation Act. Those statutes provide that an individual has a "disability" if: (1) he has "a physical or mental impairment that substantially limits one or more of the major life activities"; (2) he has "a record of such an impairment"; or (3) he is "regarded as having such an impairment." 42 U.S.C. § 12102(2); accord 29 U.S.C. § 705(20)(B).

Individuals under full guardianship satisfy each of these three prongs. By definition, they have been adjudicated to be substantially limited in the major life activity of self-care. See 28 C.F.R. § 35.104 ("caring for one's self" is a major life activity); *Bragdon*, 524 U.S. at 638-639 (same). Under Missouri law, an individual cannot be placed under full guardianship unless he is found to be "unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that he lacks capacity to meet essential requirements for food, clothing, shelter, safety or other care such that serious physical injury, illness, or disease is likely to occur." Mo. Rev. Stat. § 475.010. If that adjudication is correct, the individual is actually substantially limited in the major life activity of caring for himself. Even if the adjudication is incorrect, it is itself a "record" of a substantially limiting impairment, and it demonstrates that the individual is "regarded as having" such an impairment.[13]

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[13] The testimony on the summary judgment record confirms that plaintiff Scaletty and other constituents of plaintiff MOPAS are substantially limited in self-care. Plaintiff Scaletty has schizophrenia and requires daily oversight to ensure that his basic needs, such as nutrition and appropriate clothing, are met. App. 804, 807. C.S. is substantially limited in the ability to meet basic food, clothing and shelter needs due to bipolar disorder and mild mental retardation. *Id.* at 813. D.C. is substantially limited in his ability to manage financial resources and engage in daily activities due to bipolar disorder,

Finally, it is clear that Missouri's voting ban excludes individuals from participation in voting, and therefore discriminates against them, "by reason of their disabilities." 42 U.S.C. § 12132. The discrimination is apparent on the face of both the state constitutional and statutory provisions. The Missouri Constitution prohibits voting by any person who has been appointed a guardian "by reason of mental incapacity," Mo. Const., Art. 8, § 2, and Missouri's election code prohibits voting by any person "who has been adjudged incapacitated," Mo. Rev. Stat. § 115.133(2).[14] As plaintiffs have shown, under Missouri law an adjudication of incapacity necessarily rests on a determination that the individual is substantially limited in self-care. The very reason that defendants have barred these individuals from voting is that they have been determined to have a condition that is a "disability" under the ADA and the Rehabilitation Act. Disenfranchisement

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pervasive developmental disorder and mild retardation. *Id.* at 747. T.P. is substantially limited in financial management and daily activities due to organic brain syndrome and mild mental retardation. *Id.* at 819-20. C.W. is substantially limited in walking, speaking, and caring for herself due to cerebral palsy and bipolar disorder. *Id.* at 757. And T.M. is substantially limited in self-care due to a depressive disorder, oppositional defiant disorder, mood disorder, and borderline intellectual functioning. *Id.* at 786.

[14] While Scaletty's guardianship order apparently indicated that he retained the right to vote despite an adjudication of "total incapacity," he is still barred from voting by the plain language of the voting ban and was, in fact, repeatedly prohibited from voting by poll workers and election officials since being placed under guardianship. See p. 6, *supra*.

on the basis of that determination is, as a logical and legal matter, disenfranchisement "by reason of" disability. See *Hargrave v. Vermont*, 340 F.3d 27, 36 (2d Cir. 2003) (state law that applied only to individuals civilly committed due to their mental illness discriminated based on disability).

B. The Voting Ban Discriminates Against "Qualified" Individuals with Disabilities

1. The ADA and the Rehabilitation Act Require an Individualized Inquiry Into Competence to Vote

Neither the ADA nor the Rehabilitation Act prohibits all disability-based discrimination; those statutes prohibit discrimination only when it affects "qualified" individuals with disabilities. 42 U.S.C. § 12132; accord 29 U.S.C. § 794(a). A "qualified individual with a disability" is a person who, "with or without reasonable modification to rules, policies, or practices," meets "the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2); see also *School Bd. v. Arline*, 480 U.S. 273, 287 n.17 (1987) (detailing "otherwise qualified" element under the Rehabilitation Act); *Pottgen v. Missouri St. High Sch. Activities Ass'n*, 40 F.3d 926, 929 (8th Cir. 1994) (under Rehabilitation Act, "individuals with disabilities need only meet a program's necessary or essential requirements").

A state cannot simply define the "essential eligibility requirements" by fiat as including the requirement that participants have no disability. See *Alexander v. Choate*, 469 U.S. 287, 301 & n.21 (1985) ("Antidiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is 'collapsed' into one's definition of the relevant benefit.") (internal quotation marks omitted). The ADA and the Rehabilitation Act instead demand an independent assessment of whether criteria that exclude people with disabilities are truly "essential." 42 U.S.C. § 12131(2). See also 28 C.F.R. § 35.130(b)(8) (eligibility criteria that screen out individuals with disabilities are unlawful unless they are "necessary for the provision of the service, program, or activity").

And that determination cannot be made on a blanket basis. Rather, the law requires an "individualized inquiry," *Arline*, 480 U.S. at 287, into the qualifications of the particular person who seeks access to the state's programs or activities. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001) (applying "the ADA's basic requirement that the need of a disabled person be evaluated on an individual basis"); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 601-602 (1999) (conducting individualized inquiry into whether plaintiffs were "qualified individuals" under Title II of the ADA). "Such an individualized inquiry is essential if the law is to achieve

its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear." *Stillwell v. Kansas City Bd. of Police Comm'rs*, 872 F. Supp 682, 686 (W.D. Mo. 1995) (quoting *Arline*, 480 U.S. at 287).

The requirement of an individualized inquiry is fundamental to the disability discrimination laws. As the Supreme Court observed in a different context, "a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals," is "contrary to both the letter and the spirit of the ADA." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483-484 (1999); see *Kapche v. City of San Antonio*, 304 F.3d 493, 499 (5th Cir. 2002) (holding that cases like *Sutton* and *PGA Tour* "consistently point to an individualized assessment mandated by the ADA under various sections of the Act"). Even though an individualized inquiry may in some circumstances "consume more resources and involve less logistical ease, such an inquiry is precisely what the ADA requires," because Congress "explicitly warned that 'overprotective rules and policies' erect discriminatory barriers to people with disabilities." *Dudley v. Hannaford Bros. Co.*, 333 F.3d. 299, 310 (1st Cir. 2003) (quoting 42 U.S.C. § 12101(a)(5)). The preamble to the Department of Justice's ADA Title II regulations underscores the point: "public entities are required

to ensure that their actions are based on facts applicable to individuals and not on presumptions about what a class of individuals with disabilities can or cannot do." 28 C.F.R. Pt. 35, App. Accordingly, an individual cannot be rejected from participating in a program automatically based on disability "without considering the individual's abilities." *Theriault v. Flynn*, 162 F.3d 46, 50 (1st Cir. 1998). See also *Thompson v. Davis*, 295 F.3d 890, 898 n.4 (9th Cir. 2002) (ADA Title II requires "an individualized assessment"), cert. denied, 538 U.S. 921 (2003).

The testimony presented to the district court highlights the importance of individualized assessments in the voting context. As Dr. Appelbaum explained, "many persons with cognitive limitations can make some decisions but not others, because some tasks are intrinsically more difficult for them." App. 700. Even people with significant mental disabilities nonetheless have the capacity to vote. *Id.* at 703-04. To the extent that the capacity to vote is an essential eligibility requirement for voting,[15] the ADA

[15] Plaintiffs do not challenge Missouri's decision to make the capacity to vote an eligibility requirement. The capacity to vote may not be an *essential* eligibility requirement for voting, but even if it is, plaintiffs meet that requirement. The National Voter Registration Act permits, but does not require, states to remove voters from the rolls based on mental incapacity. 42 U.S.C. § 1973gg-6(a)(3)(B). The capacity to vote is far from a universal eligibility requirement. A number of states do not have any voter qualification standard concerning capacity. *See, e.g.,* Kyle Sammin & Sally

and Rehabilitation Act prohibit the state from disenfranchising a person who is under guardianship without making an individualized determination that he lacks the competence to vote.

2. Missouri Law Categorically Disenfranchises Individuals Adjudicated Totally Incapacitated

a. Missouri Law Unnecessarily Disenfranchises People Under Guardianship Without Evaluating Competence to Vote—By the plain terms of the Missouri Constitution and laws, an individual who is "incapacitated" is categorically barred from voting. Mo Const., Art. 8, § 2; Mo. Rev. Stat. § 115.133.2. In determining whether an individual is "incapacitated," a probate court looks only to whether he can "meet essential requirements for food, clothing, shelter, safety, or other care." Mo. Rev. Stat. § 475.010(9). But there is simply no reason why those self-care skills are "essential eligibility requirements" for voting, 42 U.S.C. § 12131(2), or are "necessary for the provision of the service, program, or activity" of voting, 28 C.F.R. § 35.130(b)(8). As the record demonstrates, many individuals whose

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Balch Hurme, *Guardianship and Voting Rights*, *in* BIFOCAL, Vol. 26, No. 1, at 13 (Fall 2004), http://www.abanet.org/aging/261.pdf. The American Bar Association's Commission on the Mentally Disabled recommended repeal of all disability-based restrictions on voting rights, and for states that insisted on some type of competence standard, the ABA recommended a minimal standard allowing voting by anyone able to provide the basic information needed to register. SALES *ET AL.*, *supra*, at 111.

cognitive limitations make them unable to care for themselves nonetheless retain the ability to understand the nature and effect of voting. See App. 703-04; p. 6-12, *supra*. See also *Rowe*, *supra* (applying this standard for competence to vote). By failing to make an individualized assessment of *voting* competence, the Missouri scheme violates the ADA and Rehabilitation Act.

Indeed, experience in other states makes it particularly difficult to say that disenfranchisement of people under full guardianship implements an "essential eligibility requirement" or is "necessary" for voting. Many states do not have any bar on voting by people under guardianship.[16] Many other states bar voting by people under guardianship only upon a specific determination that they lack the competence to *vote*.[17] The examples of

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[16] *See, e.g.*, Sammin & Hurme, *supra*, at 13 (describing ten states with no constitutional or statutory prohibitions on voting by people under guardianship).

[17] *See ,e.g.*, Wash. Rev. Code § 11.88.010; Conn. Gen. Stat. § 17a-541; Del. Code Ann. Tit. 15, § 1701, Cal. Prob. Code § 1910; Haw. Rev. Stat. § 11-23(a); Okla. Stat. Ann. Tit. 30 § 3-113(B)(1); N.D. Cent. Code § 30.1-28-04(3); Ark. Code Ann. §28-65-302(a)(2)(E); Idaho Code § 66-346(a)(6); Ohio Rev. Code Ann. § 3503.18; Or. Const. Art. II § 3; *Opinion of the [Massachusetts] Elections Division* concluding that limitations imposed on those "'under guardianship' must be interpreted for voting purposes to refer only to guardianships that contain specific findings prohibiting voting." (reprinted in JOHN H. CROSS ET AL., GUARDIANSHIP AND CONSERVATORSHIP IN MASSACHUSETTS 149 (2000)). This list is not an exhaustive one.

these other statutory schemes, which defendants' own expert acknowledged to be "reasonable," App. 738, demonstrate that a categorical ban on voting by *all* people under full guardianship is not "essential" or "necessary" to the activity of voting. Just as in *Rowe*, 156 F. Supp.2d at 58, the district court should have concluded that Missouri's voting ban violates the ADA and the Rehabilitation Act.

b. The District Court's Reading of Missouri Law Conflicts With the Plain Text of Missouri's Constitution and Statutes—The district court did not deny that the ADA and Rehabilitation Act demand an individualized inquiry. But it read the Missouri statutory scheme as permitting probate courts to reserve the voting rights even of individuals whom those courts deem to be "totally incapacitated." Add. 7. Based on that reading, the court held that state law provided a sufficiently individualized determination of voting competence to pass muster under the ADA and Rehabilitation Act. That reading fundamentally misconstrues Missouri law.

The relevant provision of the Missouri Constitution is clear and admits of no exceptions: "*[N]o person* who has a guardian of his or her estate or person by reason of mental incapacity, appointed by a court of competent jurisdiction . . . shall be entitled to vote." Mo. Const. Art. 8, § 2

(emphasis added).[18] Although the district court sought to show that Missouri *statutes* allow some people who have been adjudicated "totally incapacitated" to vote, it never explained how that interpretation could comport with the plain constitutional text. But in Missouri as in federal law, a statute that conflicts with the Constitution cannot stand. *Asbury v. Lombardi*, 846 S.W.2d 196, 202 (Mo. 1993). By reading the state guardianship statutes in a manner that invites a conflict with the plain text of the state constitution, the district court contravened that bedrock principle.

In any event, the district court's interpretation conflicts with the plain text of the Missouri statutes themselves. The state's election code specifically provides that "*[n]o person who has been adjudged incapacitated shall be entitled to register or vote*." Mo. Rev. Stat. § 115.133.2 (emphasis added). That provision contains no exceptions. Nor does it contain any language that permits probate courts to override its prohibitions in particular cases. It stands, like the state constitutional provision it implements, as an absolute ban on voting by individuals under guardianship due to mental incapacity.

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[18] That absolute disenfranchisement of individuals under guardianship contrasts starkly with the language in the same section that merely states that "persons convicted of felony, or crime connected with the exercise of the right of suffrage *may be excluded* by law from voting." Mo. Const., Art. 8, § 2 (emphasis added).

That reading is confirmed by a review of other Missouri statutes that address the effects of a guardianship adjudication. In contrast to Section 115.133.2, which categorically disqualifies people adjudged incapacitated from voting, the statutes governing marriage and driving create only a rebuttable *presumption* of incompetence for those adjudged incapacitated. See Mo. Rev. Stat. § 451.020 ("It shall be *presumed* that marriages between persons who lack capacity to enter into a marriage contract are prohibited unless the court having jurisdiction over such persons approves the marriage.") (emphasis added); *id.* §§ 302.010(7), 302.291.1, .2 (a person who has been adjudged incapacitated is presumed "incompetent to drive a motor vehicle" but the presumption may be rebutted after an individualized examination). The marriage and driving statutes show that when the Missouri legislature intended to allow people under guardianship to seek individualized relief from the legal disabilities imposed on them, it made that intent clear in the statutory text. The absolute, unqualified nature of the statute prohibiting voting by people under guardianship demonstrates that the legislature did not intend to permit individuals to seek relief from *that* legal disability. Cf. *Russello v. United States*, 464 U.S. 16, 23 (1983) (when Congress includes language of one section of a statute and omits it in another section, that omission is generally presumed to be intentional).

In determining that Missouri law permits people adjudicated incapacitated to retain their voting rights, the district court relied on a general guardianship statute that makes no reference to voting rights. That general provision states that a finding of full incapacity operates to impose "all legal disabilities provided by law, except to the extent specified in the order of adjudication." Mo. Rev. Stat. § 475.078.2. The provision further states that "[a] person who has been adjudged incapacitated . . . shall be presumed to be incompetent," and that a probate court may determine that an incapacitated person is "incompetent for some purposes" and "competent for other purposes." *Id.* § 475.078.3.

But that general language cannot overcome the specific statutory bar on voting by people who have been adjudicated incapacitated. See *State ex rel. Jackson County v. Public Service Comm'n*, 532 S.W.2d 20, 27 (Mo. 1975) (applying the rule of statutory construction that the specific controls the general), cert. denied, 429 U.S. 822 (1976); see also *HSCS-Laundry v. United States*, 450 U.S. 1, 6 (1981) (same); *Servewell Plumbing, LLC. v. Federal Ins. Co.*, 439 F.3d 786, 791 (8th Cir. 2006) (same). Rather, the plain import of Section 475.078 is to establish a procedure for probate courts to dispense with those "legal disabilities"—like the prohibitions on marriage and driving—that state law makes only optional. Nothing in that section

purports to authorize probate courts to disregard the clear and unqualified voting ban.[19]

c. The District Court's Reading of Missouri Law Conflicts with Positions Taken By the Defendants Themselves—Indeed, until their motion for summary judgment in this case, the defendants consistently took the position that "[i]f an individual is declared incompetent, he is not otherwise eligible to vote in Missouri because he fails to meet Missouri's qualification for voting: the absence of adjudicated full mental incapacity." App. 95.[20]

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[19] The record in this case demonstrates that most probate courts have interpreted the law similarly and have not reserved the right to vote for individuals under full guardianship or even raised the issue in full guardianship proceedings. See p. 12-13, *supra*. While the district court pointed to the fact that plaintiff Scaletty's right to vote was reserved as evidence that Missouri law does permit individuals under full guardianship to have their right to vote reserved, the reservation of Scaletty's right to vote proved ineffective, and he was still denied the right to vote based on his guardianship status. See p. 6, *supra*. Plaintiffs do not point out this evidence of most probate courts' practices, as the district court thought (Add. 11), to challenge the decisions made by those courts in individual cases. To the contrary, plaintiffs point this out to underscore that those probate courts were applying Missouri law according to its plain terms.

[20] *See also id.* at 95 [*id*. at 25] ("[A]n inability to make appropriate choices in these basic areas [of food, clothing, medical care, housing, safety, and property] precludes a person subject to full guardianship from participation in Missouri's electoral process . . . ."); *id.* at 96 [*id.* at 26] ("An individual who has been adjudicated fully incapacitated due to profound mental illness lacks the ability to make very basic decisions and therefore, Missouri's voter qualification criteria that prohibits adjudicated incapacitated individuals from voting, is a necessary component of Missouri's election process.").

Defendants drew a firm line between individuals under full guardianship and those under partial guardianship, with only the latter being permitted to vote. *Id.* at 101 (Missouri's voting prohibition "does not apply to the mentally ill generally, or those who have been adjudicated partially incapacitated."). Defendants specifically rejected the notion that individuals under full guardianship in Missouri could somehow retain their capacity to vote; they asserted that "Missouri's Constitution steers clear of this morass [of how to determine capacity to vote] precisely because it avoids defining capable voters from incapable voters. Instead, Missouri law qualifies its voters by a content neutral standard of general mental incompetence . . . ." *Id.* at 107. In fact, defendants characterized plaintiffs' argument that the ADA and Constitution require an individualized assessment of capacity to vote "as an attempt by plaintiffs to secure judicial substitution of Missouri's elector qualification for one more to plaintiffs' liking." *Id.* at 109.[21]

Even in their Motion for Summary Judgment, defendants reiterated their prior unqualified contentions that individuals who have been

[21] Defendants took the same position in challenging Dr. Appelbaum's evaluation of individual wards' capacity to vote. Defendants asserted that no standard exists to determine the specific capacity to vote; they argued instead that Missouri's statutory standard for determining incapacity generally (*i.e.*, lack of capacity to meet essential requirements for food, clothing, shelter, safety or other care) was the appropriate standard. *See, e.g.*, App. 646, 902-03.

adjudicated fully incapacitated cannot vote, *see, e.g.*, App. 403 ("If an individual is declared incompetent, . . . he fails to meet Missouri's qualification for voting: absence of adjudicated full mental incapacity"), and that the statutory standard for competence (*i.e.*, lack of capacity to meet essential requirements for food, clothing, shelter, safety or other care) is "the closest approximation [of competence to vote] that is legally practicable." *Id.* at 418.

However, "[i]n a last ditch effort to save the provision[s]" at issue, *Rowe*, 156 F. Supp.2d at 45, defendants also for the first time claimed that "wards who have the competence to vote will not be subject to the Missouri prohibition on voting by persons adjudged fully incapacitated." App. 417. Just as in *Rowe*, 156 F. Supp.2d at 49-50, the district court should have rejected defendants' eleventh-hour "radical change in interpretation," which conflicts with the plain text of Missouri's constitution and statutes. See *Ways v. City of Lincoln*, 274 F.3d 514, 519 (8th Cir. 2001) (federal court cannot supply limiting construction unless state law is "'readily susceptible' to such an interpretation," because "federal courts 'lack jurisdiction authoritatively to construe state legislation'") (citations omitted).[22] By its

[22] In *Rowe*, 156 F. Supp.2d at 46 n.15, the court rejected defendants' changed interpretation of a similar voting ban to assure that individuals

plain terms, Missouri law disenfranchises people with disabilities without providing the individualized inquiry into voting competence that the ADA and Rehabilitation Act require. Accordingly, the district court erred in granting summary judgment to the defendants.

3. Even Under the District Court's Erroneous Reading, Missouri Law Still Fails to Provide the Individualized Assessment of Voting Competence Federal Law Demands

Even if the district court were correct that Missouri's scheme permits probate courts to reserve the voting rights of individuals under full guardianship, that scheme still would not provide the individualized assessment of voting competence the ADA and Rehabilitation Act demand. As the district court read Missouri law, an individual who is adjudicated incapacitated—a determination based entirely on the lack of self-care skills—will still be deprived of the right to vote "unless the [probate] court specifies otherwise." Add. 7. And in seeking to have his voting rights preserved, an individual placed under guardianship must overcome the

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would not lose the right to vote without an individualized assessment of voting capacity. The court noted that "a federal court may not slice and dice a state law to 'save' it; [the court] must apply the Constitution to the law the state enacted and not attribute to the state a law [the court] could have written to avoid the problem." *Id.* (quoting *K-S Pharmacies, Inc. v. Am. Home Prods. Corp.*, 962 F.2d 728, 730 (7th Cir.1992))

"presum[ption]" that he is "incompetent." *Id.* (quoting Mo. Rev. Stat. § 475.078.3).

Under the district court's reading, if the respondent in a guardianship proceeding does not know to ask for an order preserving voting rights, he will be disenfranchised even in the absence of *any* inquiry into his competence to vote. As the record in this case reflects, respondents are rarely, if ever, informed that voting capacity is at stake in guardianship proceedings. See p. 12-13, *supra*. And even if he does know enough to request it, the respondent's lack of self-care skills has the legal effect of forcing him to bear the burden of proving his voting competence. Under such a scheme, individuals with disabilities will often be denied the right to vote, not on the basis of evidence of their individual voting competence, but on the basis of "presumptions as to what a class of individuals with disabilities can and cannot do," 28 C.F.R. Pt. 35, App. A—precisely what the ADA forbids. See p. 28-29, *supra*.

In short, even the district court's rewriting of the Missouri guardianship laws cannot save those laws from invalidation under the ADA and Rehabilitation Act. Whether applied according to its plain terms or according to the district court's inventive reading, Missouri law disenfranchises people based on assumptions about what people with

disabilities can do rather than an individualized inquiry into voting competence.

II. MISSOURI'S VOTING BAN VIOLATES THE FOURTEENTH AMENDMENT

Missouri's voting ban also violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The ban completely and indefinitely disenfranchises all those who are subject to it. It accordingly imposes the kind of severe restriction on the right to vote that triggers strict scrutiny. Given the alternative of requiring an individualized determination of voting competence, the voting ban cannot survive that scrutiny. This is true regardless of whether one reads the voting ban according to the plain terms of Missouri law or instead adopts the district court's unduly generous construction of that law.

A. Missouri's Voting Ban Imposes Severe Restrictions on the Right to Vote and Therefore Triggers Strict Scrutiny

The right to vote is a fundamental right. See *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). As the *Reynolds* Court explained:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Id. at 560 (internal quotation marks omitted). For MOPAS's constituents, many of whom depend on state Medicaid and other benefits, voting is a right on which their life and health turns to a far greater extent than for most people. As the record reflects, a number of those constituents have participated in lobbying efforts to explain to their representatives in the state legislature the impact that recently adopted Medicaid cuts would have on their lives—efforts that would be more effective if they could vote for the legislators who have power over state Medicaid budgets. App. 811, 817, 825. The right to vote therefore takes on particular urgency for these individuals.

Under the Equal Protection Clause, classifications that might interfere with the right to vote must be "closely scrutinized and carefully confined." *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966). When a state subjects individuals' voting rights to "severe" restrictions rather than "reasonable, nondiscriminatory" ones, the state must prove that its election laws are "narrowly drawn to advance a state interest of compelling importance." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). See also *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (where the state grants the right to vote to some citizens and denies the franchise to others, the exclusions must be narrowly tailored to promote a compelling state interest); cf. *Bush v.*

Gore, 531 U.S. 98, 104-105 (2000) (once state grants the franchise, it may not draw arbitrary lines).

The Missouri voting ban is a paradigm case of a "severe" restriction on the right to vote. Indeed, it is even more severe than the durational residency requirement that triggered strict scrutiny in *Dunn*, 405 U.S. at 342-343. That restriction effected only a temporary disenfranchisement, while Missouri's voting ban entirely and indefinitely disenfranchises individuals under guardianship who are subject to it. It is decisively unlike the "reasonable, nondiscriminatory restrictions" that merely regulate *how* voters express their views at the polls and that therefore trigger less stringent review. See *Burdick*, 504 U.S. at 434 (ban on write-in voting not subject to strict scrutiny); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) ("anti-fusion" law that banned candidates from appearing on more than one party's line on general election ballot not subject to strict scrutiny). Under *Burdick* and *Dunn*, therefore, Missouri's voting ban must be narrowly tailored to a compelling state interest.

B. Read According to its Plain Terms, Missouri's Voting Ban Violates the Equal Protection and Due Process Clauses

As plaintiffs have shown, Missouri law categorically prohibits voting by people under guardianship—and guardianship determinations are made based on an evaluation of self-care skills, without consideration of the

ward's competence to vote. That categorical ban fails the strict scrutiny to which such severe voting restrictions are subjected.

Defendants assert that the ban serves the interest in assuring that participants in elections be able to understand the electoral choices they make. App. 408. As the Supreme Court has noted, "the criterion of 'intelligent' voting is an elusive one, and susceptible of abuse." *Dunn*, 405 U.S. at 356. Even if "intelligent" voting is a compelling state interest, however, Missouri's voting ban is not narrowly tailored to that interest, because it is both over- and under-inclusive. Banning all individuals under full guardianship from voting, regardless of their capacity to vote, is over-inclusive because it has the result of disenfranchising many individuals (including plaintiff Scaletty and many of plaintiff MOPAS's constituents) who have the capacity to understand the electoral choices they make. See p. 6-12, *supra*. The voting ban relies not on a specific determination about an individual's competence to vote, but instead presumes that individuals lack the competence to vote based on factors that are entirely distinct from the ability to vote. See p. 31-32, *supra*. The ban is also under-inclusive and arbitrary, as many individuals who are not under full guardianship—and thus retain their right to vote—have similar cognitive impairments to people who are under full guardianship. App. 740, 751.

As with the durational residence requirement invalidated in *Dunn*—a requirement also justified as assuring intelligent exercise of the right to vote—the "conclusive presumptions" of the Missouri voting ban "are much too crude. They represent a requirement of knowledge unfairly imposed on only some citizens." *Dunn*, 405 U.S. at 360. If the state were truly interested in assuring that only people with the capacity to vote have the franchise, it could achieve that interest by requiring a specific determination (after notice and an opportunity to be heard) that a given individual specifically lacks that capacity. See n. 17, *supra* (noting that a number of states do just that). By failing to take that more narrowly tailored course, Missouri has failed to employ "the exacting standard of precision" strict scrutiny demands. *Dunn*, 405 U.S. at 360. Accordingly, its voting ban violates both the Equal Protection Clause, *see id.*, and the Due Process Clause, *see Reno v. Flores*, 507 U.S. 292, 302 (1993) (substantive component of the Due Process Clause "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest") (emphasis in original).

Indeed, the Supreme Court itself has made clear that it considers a voting ban like Missouri's to be unconstitutional. In *Tennessee v. Lane*, 541

U.S. 509 (2004), the Court examined the history of constitutional violations to which Title II of the ADA responds. Detailing "pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights," *id.* at 524, the Court specifically cited the decision in *Rowe*, *supra*, as documenting part of "a pattern of unequal treatment in," *inter alia*, "voting." *Lane*, 541 U.S. at 525 & n.13. *Rowe* invalidated a voting ban that (like Missouri's) disenfranchised individuals based on guardianship status without regard to whether they had the capacity to vote. The court held that the ban violated the Equal Protection Clause because it was not narrowly tailored to achieve the goal of ensuring the integrity of elections. *Rowe*, 156 F. Supp.2d at 51-56. The court observed that "there is little to no correlation between the State's interest and the disenfranchisement of Jill Doe and June Doe, two women who suffer from mental illness but, according to their physicians, understand the nature and effect of the act of voting." *Id*. at 52. The state had "disenfranchised a subset of mentally ill citizens based on a stereotype rather than any actual relevant incapacity." *Id.* The same conclusion should follow here.

The ABA's Commission on the Mentally Disabled has also concluded that voting bans such as Missouri's are not narrowly tailored. People may

have motivations for seeking a guardianship that "have little or no bearing on factors relevant to the state's interest in an intelligent electorate," and "persons who remain under the watchful eye of their families or friends but who do not have a formal guardian will be allowed to vote, even if they are less capable than those with a guardian." Sales *et al.*, *supra*, at 106; accord App. 740. According to the ABA Commission, in "the context of the voting rights of mentally disabled persons the facts and circumstances behind the law are, for the most part, archaic stereotypes, and the state's interest is meager when compared to the real impact that voting restrictions have on the unquestionably fundamental right to participate in the political process." *Id.* at 107.[23] The same points apply to Missouri's voting ban. The district

[23] See also SAMUEL JAN BRAKEL *ET AL.*, THE MENTALLY DISABLED AND THE LAW 446 (3d ed. 1985) (laws that restrict voting by individuals adjudicated incompetent or placed under guardianship may be over-inclusive, since the incapacity at issue in those adjudications may have little to do with the capacity to vote); Note, *Mental Disability and the Right to Vote*, 88 YALE L. J. 1644, 1647-60 (1979) (arguing that state laws barring individuals under guardianship from voting violate equal protection because they are both over-inclusive and under-inclusive as a means to ensure that voters can make rational voting choices, and noting that the presumption that incapacity in one area suggests incapacity in all areas has been widely rejected); *accord* Kay Schriner *et al.*, *The Last Suffrage Movement: Voting Rights for Persons with Cognitive and Emotional Disabilities*, 27 PUBLIUS 3 (1997) (describing poor "fit" between laws disenfranchising individuals based on competence determinations and states' interests in ensuring election integrity).

court therefore erred in holding that the Missouri voting ban complied with the Fourteenth Amendment.

C. Even on the District Court's Reading, the Voting Ban Violates the Equal Protection and Due Process Clauses

The district court rejected plaintiffs' constitutional challenge only because it read Missouri law as permitting an individualized inquiry into voting competence. Add. 12. As plaintiffs have shown, see p. 32-39, *supra*, Missouri's voting ban permits no such individualized assessment. But even if the district court's interpretation of state law were correct, the law still would disenfranchise individuals under guardianship without any inquiry into voting competence in many cases. As the record indicates, numerous Missouri residents—including plaintiff Scaletty and the constituents of plaintiff MOPAS—have lost their right to vote, without any determination of voting competence, upon being placed under full guardianship. See p. 6-13, *supra*. Even in cases where an inquiry into voting competence *was* performed, the district court's reading would require individuals under guardianship to overcome a presumption of incompetence. See p. 40-41, *supra*. A narrowly tailored regime would require a showing that an individual in fact lacked voting competence before disenfranchising him. Other states adopt such a requirement. See n.17, *supra*. But even under the

district court's interpretation Missouri law would not impose such a requirement.

Under the district court's reading, the Missouri scheme would also deny due process to individuals placed under guardianship. Nothing in Missouri law—whether in the statutory provisions cited by the district court or elsewhere—requires that individuals be given notice that their right to vote may be lost upon being placed under guardianship and that they have a right to present evidence concerning their capacity to vote. And indeed, the record demonstrates that many individuals who are haled into guardianship proceedings are unaware that they stand to lose their right to vote, and many prospective guardians are unaware that an individual stands to lose his or her right to vote. See p. 12-13, *supra*. Defendants do not provide any information to probate courts, public administrators, or private guardians or wards concerning the voting rights of individuals under guardianship, much less require that such individuals be informed and given an opportunity to challenge the presumptive loss of their voting rights. See *id.* The failure to provide such notice violates an individual's right to procedural due process under the well settled principles of *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (internal

quotation marks omitted), and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (due process requires notice and an opportunity to be heard). See *Rowe*, 156 F. Supp.2d at 48-49 (lack of notice that voting was at stake in guardianship proceedings denied due process).

CONCLUSION

The judgment of the district court should be reversed and the case remanded for entry of summary judgment for the plaintiffs.

Respectfully submitted,

James M. Kirkland #50794
Sonnenschein, Nath & Rosenthal LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
(816) 460-2400

Samuel R. Bagenstos
One Brookings Dr., Box 1120
St. Louis, MO 63130
(314) 935-9097

Anthony E. Rothert
American Civil Liberties Union
of Eastern Missouri
4557 Laclede Avenue
St. Louis, MO 63108
(314) 361-3635

Ira A. Burnim
Jennifer Mathis
Alison N. Barkoff
Judge David L. Bazelon Center
for Mental Health Law
1101 15th St., NW, Suite 1212
Washington, DC 20005
(202) 467-5730

Neil Bradley
ACLU National Voting Rights Project
2600 Marquis One Tower
245 Peachtree Center Ave
Atlanta, GA 30303
(404) 523-2721

Michael H. Finkelstein
David Hale
Missouri Protection and
Advocacy Services
925 South County Club Drive
Jefferson City, MO 65109
(573) 893-3333

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), Appellants, by their undersigned counsel, hereby certify that the Brief of Appellant complies with the type-volume limitation of FRAP 32(a)(7)(B) in that it contains 11,856 words. Pursuant to Eighth Circuit Rule 28A(c), Appellants state that the brief was prepared with Microsoft Office Word 2003.

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James M. Kirkland

CERTIFICATE OF FILING AND SERVICE

I hereby certify that a copy of Appellants' Brief was filed on September 28, 2006 by Federal Express addressed to the Clerk and was served by depositing the same in the United States Mail, postage prepaid, on September 28, 2006, addressed to the following counsel:

Michael Pritchett
MISSOURI ATTORNEY GENERAL'S OFFICE
Broadway State Office Building
P.O. Box 899
Jefferson City, MO 65102

Wan J. Kim
David K. Flynn
Sarah E. Harrington
Department of Justice
Civil Rights Division, Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403

Charles M. Thomas
Assistant United States Attorney
Office of the United States Attorney
United States Courthouse
400 E. 9th Street, Room 5510
Kansas City, MO 64106

_____

James M. Kirkland