Case No. 06-3014

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

Plaintiffs-Appellants,

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

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This case involves Missouri's disenfranchisement of individuals with mental disabilities who lack the ability to care for themselves but who nonetheless understand the nature and effect of voting. Both Plaintiff Scaletty and numerous constituents of Plaintiff MOPAS follow politics, read the newspaper or listen to television and radio news daily, and are particularly concerned about Missouri's recent cuts in Medicaid. See Opening Br. 7-8, 10-11 & n.7. Dr. Paul Appelbaum—the former President of the American Psychiatric Association and the nation's leading expert on mental competency determinations—determined that each of these individuals is competent to vote. App. 699-712. Yet because they have been placed under guardianship—based on a determination that they "lack[ed] capacity to meet essential requirements for food, clothing, shelter, safety, or other care," Mo. Rev. Stat. § 475.010(9)—Missouri law categorically disenfranchises them, without any individualized examination of their voting competence. See Opening Br. 5-14, 31-33.

In our opening brief (at 21-51), we demonstrated that such a categorical ban violates the Americans with Disabilities Act (ADA), the Rehabilitation Act, and the Fourteenth Amendment. Although a state may deny the franchise to individuals deemed mentally incapacitated, federal law requires that it make an individualized determination that a person lacks the

competence *to vote*—not to make other decisions—before it does so. We also showed (at 31-37) that the district court was wrong to conclude that Missouri law permits an individualized examination of voting competence in proceedings for full guardianship. In their brief, Appellees do not defend the theory on which they prevailed below. Instead, they make a series of arguments the district court properly rejected. Those arguments provide no basis for affirming the district court's judgment.

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

In our opening brief, we showed (at 24-25) that Plaintiff Scaletty and the constituents of Plaintiff MOPAS are "individuals with disabilities" under the ADA and the Rehabilitation Act. We also showed (at 26-27) that Missouri's voting ban excludes those individuals from participation in voting "by reason of their disabilities." And we showed (at 27-31) that the ADA and the Rehabilitation Act require states to make an individualized inquiry into whether an individual with a disability is "qualified"—*i.e.*, meets, "with or without reasonable modification," the "essential" eligibility requirements for participation, 42 U.S.C. § 12132—before excluding that individual based on disability from "services, programs, or activities," *id.*

Appellees make no effort to contest any of these points. Instead, they make two arguments. First, they contend (at 33-37) that the ADA and the

Rehabilitation Act do not even apply to state decisions to exclude individuals with disabilities from voting. Second, they contend (at 37-40) that "the absence of adjudicated full mental incapacity" is an essential eligibility requirement for voting, and that guardianship proceedings provide a sufficiently individualized inquiry into that requirement. Those arguments lack merit.

A. The ADA and the Rehabilitation Act Unambiguously Apply to State Actions that Exclude Individuals with Disabilities from Participating in the Voting Process

Invoking the principle that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotation marks omitted), Appellees argue (at 33-37) that neither the ADA nor the Rehabilitation Act "demonstrate[s] clear congressional intent to federalize the states' voter qualification requirements."[1] That argument is inconsistent

[1] Appellees have now abandoned their argument, made in the district court, that Congress lacked power to apply the ADA and Rehabilitation Act to voting. For reasons we explained in the district court, App. 534-540, that argument was meritless in any event. The Rehabilitation Act validly conditions states' receipt of federal funds on compliance with its requirements. See *Jim C. v. United States*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (*en banc*). And Title II validly enforces the Fourteenth

with the statutory text, as well as with precedent from this Court and the Supreme Court. The district court properly rejected it. Opening Br. Add. 8.

The *Gregory* "plain-statement rule" applies only where the statutory text is ambiguous. But, as the Supreme Court held in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 209-212 (1998), there is no ambiguity in the ADA's text. Title II of the statute 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.[2] The state entities that administer elections, like the state prisons that were the subject of *Yeskey*, "fall squarely within the statutory definition of 'public entity,' which includes 'any department, agency, special purpose district, or other instrumentality of a State or States or local government.'" *Yeskey*, 524 U.S. at 210 (quoting 42 U.S.C. § 12131(1)(B)). And the Missouri voting ban plainly "subject[s]"

Amendment insofar as it applies to cases implicating the fundamental right to vote, in the same way it is valid insofar "as it applies to the class of cases implicating the fundamental right of access to courts." *Tennessee v. Lane*, 541 U.S. 509, 533-534 (2004).

[2] As we noted in our opening brief, at 23, the Rehabilitation Act uses essentially the same language, and has been interpreted to be consistent with the ADA.

people with disabilities "to discrimination" and "exclude[s]" them "from participation in" elections, which are state "activities" under the plain meaning of the term. 42 U.S.C. § 12132; see *Black's Law Dictionary* (8th ed. 2004) (defining "activity" as "[t]he collective acts of one person or of two or more people engaged in a common enterprise").[3]

Appellees suggest (at 34) that the ADA cannot be applied to voting unless Congress specifically enumerated "elections" as among the activities the statute covers. But as the Supreme Court explained in *Yeskey*, Congress's decision to eschew such enumeration and instead use the general "services, programs, or activities" language "does not demonstrate ambiguity. It demonstrates breadth." *Yeskey*, 524 U.S. at 212 (internal quotation marks omitted). This Court reaffirmed that principle in *Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998). As *Gorman* emphasized, the ADA's coverage "must be interpreted broadly to include the ordinary operations of a public entity in order to carry out the purpose of prohibiting

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[3] Appellees attempt (at 36) to distinguish *Yeskey* on the ground that "unlike the operation of a prison, which is very directly a state 'program,' which provides 'benefits' and 'services,' the regulation of voting qualifications is not a state program, benefit, or service." But the statute covers more than just "programs, benefits, or services"; it also covers "exclu[sion] from participation in . . . activities," 42 U.S.C. § 12132—language that plainly reaches the Missouri voting ban.

discrimination." *Id.* at 913. In support of that conclusion, this Court cited *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997), *overruled in part on other grounds, Zervos v. Verizon New York, Inc.*, 252 F.3d 163 (2d Cir. 2001), which held that the ADA "prohibits all discrimination by a public entity, regardless of the context." See *Gorman*, 152 F.3d at 913.

Indeed, unlike in the prison context of *Yeskey*, 524 U.S. at 211-212, or the law enforcement context of *Gorman*, Congress made clear in the text of the ADA that it was concerned with discrimination in the voting context. See 42 U.S.C. § 12101(a)(3) (finding that "discrimination against individuals with disabilities persists in such critical areas as . . . voting"). If the ADA applies to those areas of state government, it applies *a fortiori* to voting.[4]

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[4] As the district court recognized (Opening Br. Add. 8), the pre-*Yeskey* decision in *Lightbourn v. County of El Paso*, 118 F.3d 421 (5th Cir. 1997), *cert. denied*, 522 U.S. 1052 (1998), is not to the contrary. *Lightbourn* held that, *for purposes of the Texas Election Code*, the ADA is not an "election law," because it does not specifically refer to elections. *Id.* at 429-430. But the Fifth Circuit did not deny that the ADA applies to elections. To the contrary, it expressly declared that "the ADA involves *every* area of law," and it specifically analogized the statute in this regard to 42 U.S.C. § 1983, a general civil rights law that plainly applies to voting. *Lightbourn*, 118 F.3d at 430.

Contrary to Appellees' argument (at 35), the National Voter Registration Act of 1993 (NVRA) casts no doubt on this conclusion. That statute provides procedures by which states may, *inter alia*, remove individuals from voting rolls "as provided by State law, by reason of criminal conviction or mental incapacity." 42 U.S.C. § 1973gg-6(a)(3)(B). But it does not purport to authorize states to adopt whatever standard of "mental incapacity" they choose. To the contrary, the NVRA addresses only the *procedures* governing voter registration, not the *substance* of voter qualifications. See 42 U.S.C. § 1973gg(b); *Association of Community Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995). And the statute makes clear that its rights and remedies "are in addition to all other rights and remedies provided by law." 42 U.S.C. § 1973gg-9(d)(1). As we explained in our opening brief (at 27-40), the ADA does not prohibit states from adopting a mental incapacity rule that denies the franchise to individuals who have been shown to be incompetent to vote; the ADA does, by contrast, prohibit categorical rules like Missouri's that disenfranchise people under guardianship without an individualized inquiry into voting competence. Nothing in the NVRA purports to permit states to adopt such a rule of categorical disenfranchisement.

B. The "Absence of Adjudicated Full Mental Incapacity" is not an "Essential Eligibility Requirement" for Voting

Appellees assert (at 39-40) that "the absence of adjudicated full mental incapacity" is an "essential eligibility requirement" for voting in Missouri. But as we showed in our opening brief (at 27-31), the ADA does not permit a state simply to define "essential eligibility requirements" by fiat. Rather, the statute requires an independent inquiry into whether the asserted requirement is truly "essential," and it requires an "individualized inquiry," *School Bd. v. Arline*, 480 U.S. 273, 287 (1987), into whether the particular individual with a disability satisfies the essential requirements. Even if the competence *to vote* is an essential eligibility requirement for participating in elections, we showed in our opening brief (at 30-33) that the competence "to meet essential requirements for food, clothing, shelter, safety, or other care," Mo. Rev. Stat. § 475.010(9)—the Missouri standard for guardianship—is not. Appellees now respond (at 62-64) that the Missouri guardianship procedure does provide an individualized determination of voting competence, and (at 40) that even if it does not, self-care skills are a good proxy for voting competence. Neither of these arguments is availing.

1. Missouri's Voting Ban Does Not Permit an Individualized Determination of Competence to Vote

In granting summary judgment to Appellees, the district court determined that Missouri law permits probate courts to preserve the voting rights of individuals placed under full guardianship; as such, the court concluded, Missouri law provides for an individualized inquiry into voting competence. Opening Br. Add. 9-10. As we showed in our opening brief (at 31-40), the district court's reading of Missouri law conflicted with the plain text of the relevant state constitutional and statutory provisions. Those provisions state, in clear and unqualified terms, that "[n]o person who has a guardian of his or her estate or person by reason of mental incapacity . . . shall be entitled to vote," Mo. Const. Art. 8, § 2, and that "[n]o person who is adjudged incapacitated shall be entitled to register or vote," Mo. Rev. Stat. § 115.133. Once an individual is adjudicated "incapacitated," Missouri law flatly prohibits him from voting.

Appellees make no effort to defend the theory on which the district court ruled for them. Instead, they contend (somewhat half-heartedly) that *if* "voting capacity may be directly assessed" (a point they vigorously deny), that capacity will be considered as one of the self-care skills that are assessed in determining whether an individual is eligible for guardianship. App'e Br. 62. Even if an individual's "only capacity i[s] the capacity to

vote," Appellees contend, a probate court can make a finding only of *partial* incapacity, and place that individual only under *partial* guardianship that preserves the right to vote (*id.*):

> A person who can establish the capacity to vote, and only that capacity, has established that he or she maintains the ability to meet, in part, the essential requirements for 'other care,' because voting is one means, albeit indirect, to meet a person's need for care. After all, the purpose of voting is generally to establish a government that meets what the voter believes to be the needs of the populace, including the needs of the voter him or herself.

That argument is absurd. Appellees cite no authority for the assertion that Missouri law treats voting as an "essential requirement[] for food, clothing, shelter, safety, or other care." Mo. Rev. Stat. § 475.010(9). Nor do they cite any dictionary definition that, contrary to the ordinary meaning of the term, treats voting as any kind of "care." Applying the principle of *ejusdem generis*, see *Standard Operations, Inc. v. Montague*, 758 S.W.2d 442, 444-445 (Mo. 1988) (applying that principle), "other care" in Section 475.010(9) must refer to care that meets one's basic human needs (like those for food, clothing, shelter, and safety). Efforts to participate in a process that aims eventually to make good policy for "the populace" do not fit that definition.

It is understandable that Appellees seek to interpret their guardianship statutes as authorizing an individualized inquiry into voting competence, for an individualized inquiry is what the ADA and the Rehabilitation Act

require. But as we showed in our opening brief (at 39-40), federal courts have no power to save a state statute by adopting a construction that is in conflict with the statute's plain text. Because Missouri law, by its plain terms, disenfranchises all persons under full guardianship without an individualized inquiry into voting competence, that law violates the ADA and the Rehabilitation Act.

2. Limitations on Self-Care Skills Do Not Imply Incompetence to Vote

Appellees contend (at 40) that an "inability to make appropriate choices" regarding "food, clothing, medical care, housing, safety, and property" necessarily implies that one is incompetent to vote, because voting is "a process whose very foundation is citizens' ability to make important and purposeful choices on candidates and issues that impact the lives of all Missouri citizens." But the record belies any suggestion that there is any connection between limitations on self-care skills and incompetence to vote. As Dr. Appelbaum explained (App. 704):

> [P]ersons [who meet the Missouri standard for "incapacity"] often lack the ability to manage money, such that their well-being is endangered by the actual or threatened lack of resources to pay for the necessities of life. Money management, however, requires skills involving arithmetical abilities and future planning that are quite distinct from the abilities required to vote. Another common reason for the imposition of guardianship is an inability or unwillingness to attend to medical needs, perhaps because of pathologic denial of illness, delusions about the nature and consequence of medications, or odd beliefs about personal health practices. None of these

> impairments, however, relate to competence to vote, which may be retained despite difficulties with medical decisions that may be life-threatening.

Dr. Appelbaum illustrated this point by describing the cases of Plaintiff Scaletty and four other constituents of Plaintiff MOPAS. App. 705-712. Each of these individuals had been placed under guardianship because of limitations in their ability to care for themselves, yet each continued to follow politics, read and listen to the news, and understand the nature and effect of voting. *Id.*

Appellees assert (at 57 n.6) that Dr. Appelbaum applied a test of voting competency that "[t]he majority of children age 5 would be able to pass." Appellees can point to no evidence in support of that assertion, and Dr. Appelbaum's own discussion of the individuals he evaluated belies Appellees' suggestion (*id.*) that he looked only to "understand[ing] the elementary mechanical aspects of voting." See App. 705-706 (C.S. is a "regular listener to radio news and watcher of TV news," he "follows current events and has strong opinions about the performance of the governor and the president on issues of concern to him (e.g., Medicaid, the war in Iraq)," and "two years ago he went to Jefferson City to lobby his state representative and senator against cuts in Medicaid"); *id.* at 707 (D.C. "reads the Columbia Daily Tribune and the Fayette newspaper at the library 5 days

per week, and watches the NBC Nightly News and listens to radio news every day," he "participates in a weekly current events group at his day program," he has lobbied his legislators about Medicaid cuts, and he has been elected to office in the self-advocacy organization People First); *id.* at 708-709 (similar information about Plaintiff Scaletty); *id.* at 710 (similar information about T.P.); *id.* at 711 (similar information about C.W.).

Dr. Appelbaum's testimony at the very least creates a "genuine issue" of "material fact," Fed. R. Civ. P. 56(c), that should have defeated Appellees' motion for summary judgment. Indeed, based on that testimony, the district court should have granted summary judgment to Appellants. Appellees offered no meaningful rebuttal to Dr. Appelbaum's conclusion that limitations on self-care skills do not imply incompetence to vote. Appellees' expert, Dr. Bruce Harry, said that the ability to make decisions regarding self-care involves "reasoning analogues to what one would do to participate in the voting process," App. 883 (Dep. p. 37); see Appellees' Br. 58, but he also denied that self care abilities were "a better measure of a person's capacity to vote than understanding how the voting process works," App. 883 (Dep. p. 40). As Dr. Appelbaum testified (App. 703), and we described in our opening brief (at 32-33), many states require a specific determination of incompetence to *vote* before disenfranchising individuals

placed under guardianship. Dr. Harry acknowledged that those schemes are "reasonable." App. 883 (Dep p. 40). Taken as a whole, Dr. Harry's testimony simply did not contradict Dr. Appelbaum's statement that a person can lack self-care skills and still be competent to vote.

Appellees contend (at 56-57) that Dr. Appelbaum's testimony was inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). That contention is not properly before this Court. Appellees objected to Dr. Appelbaum's testimony on *Daubert* grounds in the district court, but that court never ruled on the objection; by granting summary judgment to Appellees, the district court rendered the *Daubert* issue moot. In exactly the same circumstances, this Court has "decline[d] to address the *Daubert* issue in the first instance," because "*Daubert* makes it plain that the *trial court* is to act as a gatekeeper." *Tenbarge v. Ames Taping Tool Systems, Inc.*, 128 F.3d 656, 659 (8th Cir. 1997) (internal quotation marks omitted; emphasis added); see also *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152-153 (1999) (describing district court's "broad latitude" to determine reliability of expert evidence and to choose the procedures by which reliability will be determined in particular cases); *Wagner v. Hesston Corp.*, 450 F.3d 756, 758 (8th Cir. 2006) (stating that "[t]rial courts are given broad discretion in fulfilling [*Daubert*'s] gatekeeping role").

In any event, Dr. Appelbaum's testimony readily satisfies the *Daubert* standard. "'A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.'" *Robinson v. GEICO General Ins. Co.*, 447 F.3d 1096, 1100 (8th Cir. 2006) (quoting advisory committee note to Fed. R. Evid. 702). There is no basis for making an exception to the rule here. Dr. Appelbaum is one of America's leading experts on the assessment of decisional competence; he has "published many papers, in both medical and legal journals, and several books that address this issue," and he was one of the two lead researchers in "the MacArthur Treatment Competence Study, the largest study ever undertaken of the decisionmaking competence of persons with mental disorders." App. 700; see also *id.* at 712-727 (listing his publications within the previous ten years).

Dr. Appelbaum has also worked specifically on issues relating to voting competence, and those efforts have resulted in at least two peer-reviewed articles that formed part of the basis for his testimony in this case. *Id.* at 700.[5] Dr. Appelbaum used the "standard approach to evaluation" of

[5] See Paul S. Appelbaum *et al.*, *The Capacity to Vote of Persons with Alzheimer's Disease*, 162 AM. J. PSYCHIATRY 2094 (2005); Jason H. Karlawish, Richard J. Bonnie, Paul S. Appelbaum, *et al.*, *Addressing the*

decisional competence and tailored the assessment to measure competence to make the decision at issue here (voting). App. 796-799.[6] His testimony is clearly reliable under *Daubert*. *See Kumho Tire*, 526 U.S. at 149-151 (noting that the *Daubert* inquiry is "a flexible one" with no "definitive checklist or test" but stating that peer review and publication, as well as general acceptance within a scientific community, are factors supporting admissibility) (internal quotation marks omitted).

Ethical, Legal and Social Issues Raised by Voting by Persons with Dementia, 292 JAMA 1345 (2004).

[6] Appellees misstate Dr. Appelbaum's testimony when they say (at 56) that he acknowledged a lack of agreement on the assessment of competency to vote. Dr. Appelbaum suggested that a *voting-specific* method to assess competency had not yet been "crystallized," which is why he used the standard techniques for assessing competency across decisional areas. App. 488. (He used those general assessment techniques instead of the "CAT-V"—a voting-specific competency assessment tool he is developing for use to be administered by people who have *not* been generally trained to do competency evaluations—precisely because he wished to avoid using a tool that had not yet "been validated with a sample of people with mental illness." Supp. App. A-3. Despite Appellees' suggestions to the contrary (at 56-57), it is hard to see how Dr. Appelbaum's refusal to use an unproven technique made his testimony *less* reliable.) He stated that there was "not general agreement on where the line [of voting competence] should be drawn" as a *legal* or *policy* matter, not as a scientific matter. App. 509. (To respond to that problem, he treated the voting competency standard articulated by the court in *Doe v. Rowe*, 156 F. Supp.2d 35 (D. Me. 2001), as setting forth the relevant legal standard. App. 509-510.)

II. MISSOURI'S VOTING BAN VIOLATES THE FOURTEENTH AMENDMENT

As we showed in our opening brief (at 42-44), Missouri's voting ban is subject to strict scrutiny under the Fourteenth Amendment. As we also showed (at 44-51), the voting ban fails that scrutiny. Appellees disagree on both counts, but their arguments are unavailing.

A. Under Burdick, the Voting Ban is a "Severe" Restriction That Must Satisfy Strict Scrutiny

Appellees suggest (at 42-45), that *Burdick v. Takushi*, 504 U.S. 428 (1992), dictates that the Missouri voting ban must be judged by a balancing test and not strict scrutiny. But *Burdick* itself recognizes that "severe" restrictions on the right to vote must satisfy strict scrutiny. *Burdick*, 504 U.S. at 434. *Burdick*'s lesser "important regulatory interests" standard applies only to "reasonable, nondiscriminatory" restrictions. *Id.* As we explained in our opening brief (at 44), Missouri's voting ban is even more severe than restrictions (like the durational residency requirement invalidated in *Dunn v. Blumstein*, 405 U.S. 330 (1972)) to which the Supreme Court has applied strict scrutiny. Unlike restrictions that have been held to be reasonable and nondiscriminatory—which merely regulate *how*, and not *whether*, voters can express their views at the polls—Missouri's voting ban entirely and indefinitely disenfranchises individuals under full

guardianship. It is a paradigm case of a "severe" restriction, and it cannot be upheld unless it satisfies strict scrutiny.

B. The Voting Ban is Not "Narrowly Drawn to Advance a State Interest of Compelling Importance"

To satisfy strict scrutiny, the state must prove that the voting ban is "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. Appellees suggest three state interests that might be served by the ban: the interest in assuring "rational" or "understanding" voting (Appellees' Br. 45-48); the interest in preventing "double voting" (*id.* at 48-49); and the interest in preserving public perceptions of the electoral process (*id.* at 49-50). None of these asserted interests can justify Missouri's categorical ban on voting by individuals under full guardianship.

1. The Voting Ban is Not Narrowly Tailored to Any State Interest in Assuring "Rational" or "Understanding" Voting

Appellees contend (at 45-46) that the voting ban serves Missouri's interest in "assuring its citizenry that participants in [its] elections be able to understand the electoral choices they make by voting on a particular candidate or issue." They rely on dicta from a 1981 district court decision, which asserted that, under New York's guardianship procedure at the time, an incompetency adjudication "[p]resumably" included a determination that the individual lacks "the ability to cast a rational vote." *Manhattan State*

Citizens Group, Inc. v. Bass, 524 F. Supp. 1270, 1274 (S.D.N.Y. 1981). Whatever was true of New York law in 1981, the record in this case demonstrates that Missouri's voting ban is not narrowly tailored to serve any asserted state interest in "understanding" or "rational" voting. Cf. *Dunn*, 405 U.S. at 356 (noting that "the criterion of 'intelligent' voting is an elusive one, and susceptible to abuse").

As we have shown (see pp. 1, 9-10, *supra*), Missouri guardianship determinations are made on the basis of an evaluation of self-care skills only. But a lack of self-care skills does not imply incompetence to vote. By disenfranchising all individuals who are under full guardianship, Missouri law denies the franchise to individuals who are fully competent to vote. In at least a dozen other states, the law requires an individualized inquiry into voting competence before disenfranchising a person who is under guardianship. See Opening Br. 32 & n.17. Missouri's failure to follow that more narrowly tailored approach—an approach Appellees' own expert agrees is "reasonable," App. 738—reflects a failure to employ "the exacting standard of precision" strict scrutiny requires. *Dunn*, 405 U.S. at 360.

Appellees argue (at 47-48) that various laws deprive people under guardianship of other rights, such as the right to possess a firearm, enter into a contract, receive a driver's license, or serve on a jury. But those laws are

very different from Missouri's voting ban. The voting ban is categorical and provides no individualized inquiry into voting competence. By contrast, the jury-service laws Appellees cite (at 48) impose no categorical prohibition on service by persons under guardianship; to the contrary, they require an individualized determination that a given person is "incapable . . . to render satisfactory jury service," 28 U.S.C. § 1865(b)(4); *see also* Mo. Rev. Stat. § 494.425 (similar). Missouri's driver's license law, which Appellees also cite (at 47), similarly provides for an individualized inquiry. See Opening Br. 35.

The federal prohibition on gun possession by individuals who "have been adjudicated a mental defective," 18 U.S.C. § 922(g)(4), is much more directly related to the self-care determination that is made in a guardianship proceeding than is Missouri's voting ban. *See* Mo. Rev. Stat. § 475.010(9) (self-care determination includes "safety"). And the right to vote receives far more constitutional protection in any event than does any right to possess a gun. See *United States v. Pfeifer*, 371 F.3d 430, 438 (8th Cir. 2004) ("[T]he Second Amendment does not guarantee the right to possess a firearm unless the firearm has some reasonable relationship to the

maintenance of a militia.").[7] A ruling invalidating Missouri's voting ban would not imply that Section 922(g)(4)'s ban on gun possession is unconstitutional.

2. The State's Asserted Interests in Avoiding "Double Voting" and Preserving the Public's Perception of the Electoral Process Rest on Mere Speculation

Appellees assert (at 48-49) that Missouri's voting ban prevents "double voting," because individuals under full guardianship "would be particularly susceptible to influence by their guardians or any others with whom they have contact." They also assert (at 49-50) that permitting individuals under guardianship to vote "would adversely impact the public's perception of the dignity and efficacy of the democratic process." Even if these were compelling interests, Appellees have cited absolutely *no evidence* to support the contention that the voting ban is necessary to serve them.

Post hoc rationalizations cannot overcome strict scrutiny. "To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose,'" and that the legislature "had a strong basis in evidence to support [the asserted] justification *before* it implement[ed]" the

[7] To the extent that the provision of the Restatement of Contracts cited by Appellees (at 47) is the law, it too is far more closely related than is a voting ban to the self-care decision made in guardianship proceedings—which often turn on the inability to manage money, App. 704—and involves a far less constitutionally protected right than the right to vote.

challenged law. *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996). See also *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002) ("[W]e have generally only sustained statutes on the basis of hypothesized justifications when reviewing statutes merely to determine whether they are rational."). Far from "a strong basis in evidence," Appellees present no evidence whatsoever in support of their double-voting and public-perception interests. Accordingly, they cannot carry their burden of proof.

As for the double-voting interest, Appellees make no effort to show that double voting is a problem in the many states that permit people under guardianship to vote. Nor do they make an effort to show that people under guardianship are any more vulnerable to coercion than elderly people who have moved in with their adult children or any other class of voters. Nor do they offer any evidence to suggest that the general federal and state prohibitions on voter intimidation and coercion, *e.g.*, 42 U.S.C. § 1971(b), are inadequate to prevent double voting in this context.

As for the public-perception interest, Appellees again can point to no evidence regarding public perceptions of the electoral process in Missouri or in any of the states that permit people under guardianship to vote. Nor do Appellees make any effort to show that public opinion will view the electoral process as lacking "dignity and efficacy" if people under

guardianship are permitted to vote after an individualized determination of their voting competence. And to the extent that members of the public believe, based on unsubstantiated "negative attitudes, or fear," that allowing people with mental disabilities to vote will always deprive the electoral process of dignity, catering to that belief is not a compelling interest; to the contrary, it is an impermissible one. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985); see also *id.* ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.") (internal quotation marks omitted).

III. APPELLEES' PROCEDURAL ARGUMENTS ARE MERITLESS

Appellees contend (at 24-30) that they are not the proper defendants, that Plaintiff Scaletty's claims are moot, and that Plaintiff MOPAS lacks standing. The district court correctly rejected each of these arguments.

A. Missouri's Secretary of State and Attorney General Are Proper Defendants

In what they characterize as an Eleventh Amendment argument, Appellees contend (at 24) that they are not proper parties because they "are not the public officers responsible for the registration of voters and the operation of elections." As the district court recognized, that argument "improperly blends two distinct defenses." Opening Br. Add. 5. Because Plaintiffs sued state officials in their official capacities and seek only

prospective relief for what is alleged to be an ongoing violation of federal law, the Eleventh Amendment is no bar to this suit. See *Verizon Maryland, Inc. v. Public Service Comm'n*, 535 U.S. 635, 645 (2002) ("In determining whether the doctrine of *Ex parte Young*[, 209 U.S. 123 (1908),] avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'") (citation omitted).[8] If the Secretary of State and the Attorney General are not proper defendants, that is a matter going to the merits, not Eleventh Amendment immunity. *See id.* at 646 ("[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim.").

On the merits, Appellees are proper defendants. Appellee Carnahan, Missouri's Secretary of State, is the "chief state election official." Mo. Rev. Stat. §§ 28.035, 115.136. She has a key role in implementing the state's voting ban: She is responsible for sending local election authorities a list of individuals who have been adjudged incapacitated so that the local authorities may remove those individuals from voting rolls. See Mo. Rev.

[8] The ADA and Rehabilitation Act validly override state sovereign immunity in any event. See n. 1, *supra*.

Stat. § 115.195.3. Indeed, the Secretary of State's inclusion of Plaintiff Scaletty's name on such a list was the trigger for the refusal of local election authorities to permit him to vote in 2004. O'Neal Dep. 47. There is simply no doubt that the Secretary of State is a proper defendant in this statewide action to enjoin Missouri's voting ban.

Appellee Nixon, Missouri's Attorney General, is also a proper party. State law charges him with instituting civil proceedings to enforce, *inter alia*, the statutory and constitutional provisions barring voting by individuals under guardianship. Mo. Rev. Stat. § 27.060. This case is therefore decisively unlike *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1145 (8th Cir. 2005), where the plaintiffs challenged a law that could be enforced only through misdemeanor prosecutions and licensing proceedings. The Missouri Attorney General has "no power to take adverse licensing actions, a task left to professional licensing boards," and he can participate in misdemeanor proceedings only when so instructed by the Governor or a trial court—instructions he had not received at the time of the *Reproductive Health Services* case. *Id.*

This case is also decisively unlike the two out-of-circuit cases on which Appellees rely. In *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001),

plaintiffs sued the Attorney General to challenge a statute that authorized private parties to initiate tort suits against abortion providers. The Fifth Circuit held that the Attorney General was not a proper defendant, because he had taken "no act" under the statute, he had made "no threat to act" under the statute, and indeed he had "no ability to act" under the statute. *Id.* at 421. And *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1417 (6th Cir. 1996), *cert. denied*, 519 U.S. 1149 (1997), is similarly a case where the Attorney General had no power to enforce the challenged law. But the Attorney General clearly has power to act to enforce the statute Plaintiffs challenge here.

B. Plaintiff Scaletty's Claims Are Not Moot

At the time Plaintiff Scaletty joined this action, election officials would not permit him to vote, because the Secretary of State had placed him on a list of ineligible voters due to his guardianship. At that point, Scaletty plainly had standing. As the district court properly held, "standing is to be evaluated at the time the lawsuit is initiated, and there is 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." Opening Br. Add. 3 (citing *Friends of the Earth, Inc. v. Laidlaw Envt'l Services (TOC), Inc.*, 528 U.S.

167, 189 (2000); *McCarthy v. Ozark Sch. Dist.*, 359 F.3d 1029, 1035 (8th Cir. 2004)).

Because local election officials gave Scaletty a voter registration card *after* he joined this action, Appellees contend (at 26-28) that his claims are now moot. But voluntary cessation of a challenged practice cannot create mootness unless defendants bear the "heavy burden" of demonstrating that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189 (internal quotation marks omitted). The district court correctly concluded that Appellees could not satisfy that burden. Opening Br. Add. 4.

Appellees present no evidence to suggest that it is "absolutely clear" that Scaletty will not be denied the right to vote again. Instead, they contend that they need not carry the voluntary cessation doctrine's heavy burden, because "it is not the acts of defendant state officials" (Appellees' Br. 28) that either deprived Scaletty of the right to vote in the first place or restored that right to him once he joined this suit. As we have shown, however, it *was* an act of the defendant Secretary of State—placing Scaletty on a list of ineligible voters—that led the local election officials to prohibit him from voting. See p. 24, *supra*. As the "chief state election official," Mo. Rev. Stat. §§ 28.035, 115.136, Appellee Carnahan can hardly evade responsibility

either for the initial disenfranchisement or for local election officials' decision, under the cloud of this lawsuit, to permit Scaletty to vote. This Court cannot declare Scaletty's suit moot unless it is "absolutely clear" that he "no longer ha[s] any need of the judicial protection [he] sought" when he joined this suit. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (*per curiam*). Appellees cannot satisfy that standard.

C. Plaintiff MOPAS Has Associational Standing

The district court concluded (Opening Br. Add. 4-5) that Plaintiff MOPAS has associational standing to sue on behalf of its constituents. Appellees contest that conclusion, but they do not deny that the evidence shows that MOPAS satisfies the three requirements for associational standing: its constituents would have standing to sue in their own right (Opening Br. 9-12); it is seeking to protect interests that are germane to its purpose as an organization (Opening Br. 9); and participation by its individual constituents is not necessary to this lawsuit. See *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Arkansas Medical Soc., Inc. v. Reynolds*, 6 F.3d 519, 528 (8th Cir. 1993).

Instead, Appellees rest their argument on a formalism. Although the summary judgment record contains discussions of seven individual MOPAS constituents who lost their right to vote without an individualized assessment

of voting competence (Opening Br. 9-10), Appellees contend (at 29-30) that those constituents cannot provide the basis for associational standing because they were not named specifically *in the complaint*.

That contention makes no sense. The amended complaint specifically alleged that "[t]he MOPAS constituents on whose behalf this action is brought have each suffered, or will suffer, such injuries that would allow them to individually bring suit against defendants." App. 168 (¶ 15). That allegation was perfectly adequate under "the liberal system of 'notice pleading' set up by the Federal Rules." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). "Rule 8(a)(2) requires that a complaint include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). And the Federal Rules bar courts from imposing any requirement (outside of contexts specifically addressed by Rule 9(b) or federal statutes) that plaintiffs plead the factual basis for their claims with particularity. See *Leatherman*, 507 U.S. at 168.

The "simplified notice pleading standard" of the Federal Rules "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). At summary judgment, "the

plaintiff can no longer rest on [the complaint's] 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,'" which, taken as true, would establish standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting Fed. R. Civ. P. 56(e)). And that is exactly how the facts relating to associational standing were developed here. Evidence in the summary judgment record—which was provided to Appellees in discovery—contains specific facts establishing that at least seven MOPAS constituents would have standing to sue in their own right. Opening Br. 9-10. That evidence is more than sufficient to establish associational standing at this stage of litigation.

CONCLUSION

For the foregoing reasons and the reasons set forth in our opening brief, the judgment of the district court should be reversed and the case remanded for entry of summary judgment for the plaintiffs.

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 6,772 words. Pursuant to Eighth Circuit Rule 28A(c), Appellants state that the brief was prepared with Microsoft Office Word 2002.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that a copy of Appellants' Reply Brief was filed on November 27, 2006 by Federal Express addressed to the Clerk and was served by depositing the same in the United States Mail, postage prepaid, on November 27, 2006, addressed to the following counsel:

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