**No. 06-3014**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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**MISSOURI PROTECTION AND ADVOCACY SERVICES, INC., et al.,**

***Plaintiffs-Appellant*s,**

**v.**

**ROBIN CARNAHAN, et al.,**

***Defendants-Appellees*.**

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**Appeal from the United States District Court,**
**Western District of Missouri, Central Division**
**The Honorable Ortrie D. Smith, U.S. District Judge**

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# APPELLEES' BRIEF

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## Summary and Request for Oral Argument

Plaintiffs-Appellants Robert Scaletty and Missouri Protection and Advocacy Services, Inc. (MOPAS), challenge the provisions in Missouri's Constitution and statutes that bar from voting persons who have been adjudged fully incapacitated. They assert that these provisions violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act.

Missouri's ban on voting by persons adjudged fully incapacitated, however, is consistent with the Fourteenth Amendment and federal statutes because the authority the Constitution grants the States to establish voting qualifications is broad enough to permit States to protect the integrity of their electoral systems by assuring that participants in elections are able to understand their electoral choices. Further, Missouri's guardianship law provides that a person is to be found fully incapacitated only as a last resort and, before doing so, requires individual assessment of the person's capacity. Missouri does not bar anyone from voting simply because he or she may be disabled in some, or many, respects. Each person is adjudged fully or partially incapacitated, or not incapacitated at all, by the probate court based on his or her own individual circumstances. Moreover, even if there were a valid claim here, Scaletty's claim is moot and MOPAS lacks standing.

The defendant-appellee state officials request fifteen minutes for oral argument.

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*Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., v. Nixon*, 428 F.3d 1139 (8th Cir. 2005);

*Ex Parte Young*, 28 S. Ct. 441 (1908);

*Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc);

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### II.

**Whether plaintiff Scaletty's claims are moot and should be dismissed when the local election authority acknowledges his right to vote and there is no reasonable basis to believe that there is any likelihood that any public official will attempt to interfere with his voting rights.**

*Preiser v. Newkirk*, 95 S. Ct. 2330 (1975);

*Forest Park II v. Hadley*, 408 F.3d 1052 (8th Cir. 2005);

*City of Los Angeles v. Lyons*, 103 S. Ct. 1660 (1983);

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**III.**

**Whether plaintiff MOPAS lacks associational standing to purse the claims raised in this action when associational standing requires the complaint to identify an individual constituent of the organization who has individual standing to bring the claims raised and the complaint in this case does not identify any individual MOPAS constituent who has viable individual claims.**

*United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 116 S. Ct. 1529 (1996);

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*Oregon v. Mitchell*, 91 S. Ct. 260 (1970);

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**Whether Missouri's prohibition on voting by persons adjudged fully incapacitated is consistent with the equal protection and due process clauses of the United States Constitution when the prohibition advances to a high degree Missouri's important interest in assuring an electorate composed of persons who retain at least some minimal capacity to function on their own in society.**

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**Whether Missouri law assures that persons who have the capacity to vote, however that assessment may appropriately be made, may vote by providing a procedure compliant with procedural due process through which individualized**

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§ 475.010, RSMo;

§ 475.075, RSMo;

§ 475.078, RSMo;

*Reaves v. Missouri Dep't of Elem. & Sec. Educ.*, 422 F.3d 675 (8th Cir. 2005).

## Statement of the Case

**Procedural History**. This case was initially filed by Steven M. Prye on October 8, 2004. App. 24. He claimed that Missouri's constitutional and statutory prohibition on voting by persons who have been adjudged fully incapacitated violated the due process and equal protection clauses of the United States Constitution and also the Americans with Disabilities Act and the Rehabilitation Act. App. 30-36. Mr. Prye named as defendants then-Missouri Secretary of State Matt Blunt, Missouri Attorney General Jeremiah W. (Jay) Nixon, the Board of Election Commissioners for the City of St. Louis, and members of that Board. App. 24, 26. He sued the defendants in their official capacities. App. 24. As relief, Mr. Prye requested a declaration that Missouri's prohibition on voting by persons adjudged fully incapacitated violated the United States Constitution, the Americans with Disabilities Act, and the Rehabilitation Act, and also requested injunctive relief requiring defendants to permit him to register to vote and to vote. App. 36.

On December 6, 2004, Mr. Prye, joined by Bob Scaletty, Patrick W. Sharp, and Missouri Protection and Advocacy Services, Inc. (MOPAS), filed an amended complaint making the same claims as initially made by Mr. Prye and adding a claim of violation of the full faith and credit clause of the United States Constitution. App. 164-182. The plaintiffs to the amended complaint named the same defendants and

added the Board of Election Commissioners for Kansas City and its members as additional defendants. App. 164, 168-69. All defendants were sued in their official capacities. App. 164. The plaintiffs requested a declaration that Missouri's prohibition on voting by persons adjudged fully incapacitated violated the United States Constitution, the Americans with Disabilities Act, and the Rehabilitation Act, and an injunction requiring defendants to permit them and persons similarly situated to register to vote and to vote, to provide notice to persons adjudged fully incapacitated that they can register to vote, and to provide notice and opportunity to be heard before the right to vote may be lost in future guardianship proceedings. App. 181.

With the inauguration of Robin Carnahan as Missouri's Secretary of State in January 2005, she took Matt Blunt's place as defendant by operation of Fed. R. Civ. P. 25(d).

On July 21, 2005, based on the stipulation of the parties, the district court dismissed without prejudice all claims of plaintiff Patrick W. Sharp and also dismissed without prejudice all claims against the Board of Election Commissioners of Kansas City, the Board of Election Commissioners of the City of St. Louis, and the members of both these boards. App. 247. On September 22, 2005, based on the stipulation of the parties, the district court dismissed without prejudice all claims of plaintiff Steven M. Prye. App. 250.

In March 2006, the remaining parties (plaintiffs Scaletty and MOPAS and the defendant state officials) filed cross motions for summary judgment. App. 376, 380. Because the defendants' motion raised a question as to the constitutionality of the Americans with Disabilities Act, the district court, on March 30, 2006, provided notice to the United States Attorney General and to the local United States Attorney. App. 513.

Following responses and replies, including a response to defendants' motion filed by the United States, on July 7, 2006, the district court granted defendants' motion for summary judgment and denied plaintiffs' motion for summary judgment. App. 622-634. This appeal, filed on August 3, 2006, followed.

**Statement of Facts and Applicable Law.** Article VIII, § 2, of the Missouri Constitution provides in relevant part: [N]o person who has a guardian of his or her estate or person by reason of mental incapacity . . . shall be entitled to vote." Missouri law implements this Constitutional provision using the following language: "No person who is adjudicated incapacitated shall be entitled to register or vote." § 115.133.2, RSMo Supp. 2005.[1]

Missouri law provides that an incapacitated person is "one who is unable by reason of any physical or mental condition to receive and evaluate information or to

[1] All Missouri statutory citations are to RSMo 2000, unless otherwise indicated.

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." § 475.010(9), RSMo.

A partially incapacitated person is "one who is unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to the extent that he lacks capacity to meet, in part, essential requirements for food, clothing, shelter, safety, or other care without court-ordered assistance." § 475.010(14), RSMo.

When a court finds that an individual who is the subject of a competency hearing is:

> in some degree incapacitated or disabled, or both, the court, in determining the degree of supervision necessary, shall apply the least restrictive environment principle as [set out in § 475.010(10), RSMo] and shall not restrict his personal liberty or his freedom to manage his financial resources to any greater extent than is necessary to protect his person and his financial resources. The court shall consider whether or not the respondent may be fully protected by the rendition of temporary protective services provided by a private or public agency or agencies; or by the appointment of a guardian or conservator ad litem; or by the appointment of a limited guardian or conservator; or, as a last resort, by the appointment of a guardian or conservator.

§ 475.075.10, RSMo.

An adjudication of incapacity operates "to impose upon the ward or protectee all legal disabilities provided by law, except to the extent specified in the order of adjudication . . . ." § 475.078.2, RSMo. In contrast, an adjudication of partial

incapacity "does not operate to impose upon the ward or protectee any legal disability provided by law except to the extent specified in the order of adjudication, provided that the court shall not impose upon the ward or protectee any legal disability other than those which are consistent with the condition of the ward or protectee." § 475.078.1, RSMo.

"A person who has been adjudicated incapacitated or disabled or both shall be presumed to be incompetent. A person who has been adjudicated partially incapacitated or partially disabled or both shall be presumed to be competent." § 475.078.3, RSMo.

Missouri probate courts are to notify the Missouri Secretary of State's Office of persons who have been adjudged incapacitated. App. 427 (Dep. p. 11); § 115.195.3, RSMo Supp. 2005. The Secretary of State's Office is then to provide this information to local election authorities. App. 427 (Dep. p. 11); § 115.195.3, RSMo Supp. 2005. The Missouri Secretary of State's Office does not make the determination as to whether a particular adjudication of incapacity results in the removal of the ward's right to vote. App. 429-30 (Dep. pp. 20-21).

When the Secretary of State's Office sends out notices to local election authorities of persons who have been reported to that Office as having been adjudicated incapacitated, it provides a cover letter informing the recipients that

"Because all adjudications are not the same, you should check with your probate clerk to see if the adjudged had their voting rights removed." App. 430 (Dep. pp. 21-22).

On August 17, 1999, a jury in the Jackson County, Missouri Probate Division found Plaintiff Robert Scaletty "incapacitated (with the exception of the right to vote)." App. 455-56. On January 7, 2005, the Kansas City Board of Election Commissioners mailed Mr. Scaletty's voter identification card to his guardian and advised that Mr. Scaletty was eligible to vote. App. 458-60. Mr. Scaletty is listed as a registered voter in Missouri's voter database. App. 462-65 (Printouts from Missouri's Central Voter Registration).

Plaintiffs' expert, Dr. Paul S. Appelbaum, admits that there is a line beyond which persons are sufficiently mentally impaired that they are not competent to vote. App. 480 (Dep. p. 48). Dr. Appelbaum admits that "there is not general agreement on where the line [between those competent to vote and those incompetent to vote] should be drawn." App. 509. Dr. Appelbaum also admits that no standard for assessing capacity to vote has been "crystallized" yet. App. 488 (Dep. p. 85).

## Summary of the Argument

The judgment in favor of the state official defendants should be affirmed based on several jurisdictional grounds.

Plaintiffs here seek an order requiring that they be allowed to register as voters and to be allowed to vote. But the defendants, the Secretary of State and the Attorney General of Missouri, are not the public officers responsible for registration of voters and the operation of elections. Because neither defendant has authority to provide the relief sought (right to register as voters and right to cast ballots in elections), this case should be dismissed due to defendants' immunity from suit under the Eleventh Amendment.

Plaintiff Scaletty's claims are moot. His local election authority now acknowledges his right to vote. It has issued him a voter identification card and notified him that he may now vote. There is no reasonable basis to believe that there is any likelihood that any public official will attempt to interfere with his ability to vote. His claims in this case should thus have been dismissed as moot.

Plaintiff MOPAS asserts associational standing. To have associational standing, the entity asserting it must identify at least one of its individual constituents who has standing to bring the claims asserted. The current complaint in this case does not identify any individual MOPAS constituent who retains standing to pursue the claims

on his or her own behalf. Thus, MOPAS lacks standing and should have been dismissed from this case.

Even if this Court were to reach the merits of this case, the judgment in favor of the state official defendants should also be affirmed because Missouri's prohibition on voting by persons adjudged fully incapacitated is consistent with both the United States Constitution and federal law.

States have broad authority to establish their own voter qualifications in our federal system. In order to override this State authority, federal statutes must state, with unmistakable clarity, a Congressional intent to change the normal constitutional balance between the states and the federal government. Neither the Americans with Disabilities Act nor the Rehabilitation Act demonstrate an unmistakable Congressional intent that they were meant to impact a State's regulation of voting qualifications.

Missouri's prohibition on voting by persons adjudged fully incapacitated is also consistent with the equal protection and due process clauses of the United States Constitution. This prohibition passes the *Burdick* balancing test (established in *Burdick v. Takushi*, 112 S. Ct. 2059, 2063 (1992)), applicable to assessments of state voting regulations, because it advances Missouri's important interest in assuring an electorate composed of persons who retain at least some minimal capacity to function

on their own in society without striking from the voting rolls persons who do retain the capacity to vote.

Missouri law does not prohibit persons who have the capacity to vote from voting. Missouri provides a procedure for determining capacity that complies with procedural due process and that requires individualized determinations of the capacity of the persons going through the proceedings. To whatever extent this procedure may not be appropriately implemented in particular cases, the remedy is an appeal of the capacity determination, not the striking of the prohibition on voting by persons adjudged fully incapacitated.

## Standard of Review

The plaintiffs-appellants have appealed to obtain review of the grant of summary judgment in favor of defendants-appellees. The grant of summary judgment is reviewed de novo. *Tindle v. Caudell*, 56 F.3d 966, 969 (8th Cir. 1995). A grant of summary judgment is proper only if there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. *Id.*; see also Fed. R. Civ. P. 56(c). While a defendant who moves for summary judgment has the burden of showing that there is no genuine issue of fact for trial, *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2514 (1986), a nonmoving party may not rest upon mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. *Tindle*, 56 F.3d at 969 (citing *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986)).

## Argument

### I.

**Missouri's Secretary of State and Attorney General should have been dismissed as parties because neither state official has a role in the enforcement of the constitutional and statutory provisions at issue here.**

Plaintiffs complain that Missouri's Secretary of State and Attorney General prevent persons adjudged fully incapacitated from voting. These Officers, however, are not the public officers responsible for registration of voters and the operation of elections. Those responsibilities are vested in the local election authorities. § 115.023, RSMo (local election authorities to conduct all public elections within their jurisdictions); § 115.141, RSMo (local election authorities to supervise registration of voters within their jurisdictions). Because neither defendant has authority to provide the relief sought (right to register as voters and right to cast ballots in elections), this case should be dismissed due to defendants' immunity from suit under the Eleventh Amendment. *See Ex Parte Young*, 28 S. Ct. 441, 453 (1908) ("In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making [the officer] a party as a representative of the state, and thereby attempting to make the

state a party"); *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., v. Nixon*, 428 F.3d 1139, 1145 (8th Cir. 2005).

That a state official has "the general authority and responsibility to see that all of the laws of the state be faithfully executed" is not enough for a valid claim for injunctive relief to be made against him or her; the state official must have a "particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001) (en banc); *accord Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416-17 (6th Cir. 1996) (holding that a claim against Attorney General with no enforcement responsibility was barred by Eleventh Amendment, *Ex Parte Young* notwithstanding), *cert. denied*, 117 S. Ct. 1082 (1997). Further, the general authority of Missouri's Attorney General to appear and be heard in cases in which the state's interests are involved, § 27.060, RSMo, including appearances to defend the constitutionality of state statutes, does not constitute enforcement of any statute in question. *Deters*, 92 F.3d at 1416; *Mendez v. Heller*, 530 F.2d 457, 460 (2d Cir.1976).

Because neither state official defendant has a connection to the enforcement of the constitutional and statutory provisions at issue here, they are not proper parties to the suit and should have been dismissed as parties.

## II.

**Plaintiff Scaletty's claims are moot and should be dismissed because the local election authority acknowledges his right to vote and there is no reasonable basis to believe that there is any likelihood that any public official will attempt to interfere with his voting rights.**

As the district court concluded, plaintiff Scaletty's claims in this case were moot. App. 624. Regardless of whether at some time Mr. Scaletty was prevented from voting, he is now registered to vote and has been notified that he may now vote. App. 454-65. Because no controversy remains regarding whether Mr. Scaletty may vote, his claims here, which are only for declaratory and injunctive relief, are moot. *Preiser v. Newkirk*, 95 S. Ct. 2330, 2334 (1975) (claim for declaratory relief becomes moot when challenged deprivation is over and there is no reasonable expectation that it will be repeated); *Forest Park II v. Hadley*, 408 F.3d 1052, 1060 (8th Cir. 2005) (claim for injunctive relief becomes moot when issues presented are no longer alive).

Mr. Scaletty cannot overcome the mootness of his claims with an assertion that he has a reasonable concern that he will in the future be deprived of the right to vote. In order to make such a showing sufficient to maintain his claims here, he would have to show not only a reasonable likelihood that proceedings to modify his guardianship will be instituted, but that such proceedings would result in a judgment of full

incapacity and that, as a result, defendants would bar him from voting. It is impossible to predict whether and when any individual or agency might in the future seek to obtain a modification of Mr. Scaletty's guardianship. Moreover, if such proceedings were to be instituted, Mr. Scaletty would have an attorney or guardian ad litem and would have the opportunity to present evidence and arguments on the issue of his voting competency. In fact, his voting rights were retained when he was adjudicated incapacitated years before this suit was filed. App. 454-56. There simply is no evidence of a real or immediate threat of injury to Mr. Scaletty and any claim of future injury is speculative in nature. Such an injury is too remote to satisfy the requirements of standing. *See City of Los Angeles v. Lyons*, 103 S. Ct. 1660, 1667 (1983).

Although concluding that Mr. Scaletty's claims were moot here, the district court further concluded that it retained jurisdiction to consider the merits of his claims because the cause of the mootness was that the "Defendants have voluntarily ceased the challenged conduct." App. 624-25. Focusing on the possibility that the decision to issue him a voter identification card and acknowledgment of his right to vote could be reversed rather than on the process of the a probate court reevaluating its decision explicitly preserving his right to vote, the court (App. 624-25) relied on *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 121 S. Ct. 1835, 1842-43 (2001), in which the Supreme Court stated: "It is well settled

that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice unless it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." (Quotations omitted and emphasis supplied by the district court.)

*Buckhannon*, however, is inapplicable here because it is not the acts of the defendant state officials that have, first, informed Mr. Scaletty that he could not vote and, second, allowed him to register and permitted him to vote. Rather, these actions were taken by the local election authority. App. 454-60. The state defendants have never interfered with Mr. Scaletty's attempts to vote. Moreover, there is no indication that the local election authority's action was the result of anything other than a failure to realize that Mr. Scaletty's order of incapacity reserved his right to vote. Its actions do not bear any hallmarks of a change in legal interpretation that might possibly change again as the election authority's membership changes.

Because Mr. Scaletty may now vote and there is no reasonable basis to believe that there is any likelihood that any public official will attempt to interfere with his voting rights, his claims have become moot and should be dismissed. *See Murphy v. Hunt*, 102 S. Ct. 1181, 1183 (1982) (claims become moot when parties no longer have a legally cognizable interest in the outcome).

## III.

**Plaintiff MOPAS lacks associational standing to purse the claims raised in this action because associational standing requires the complaint to identify an individual constituent of the organization who has individual standing to bring the claims raised and the complaint in this case does not identify any individual MOPAS constituent who has viable individual claims.**

MOPAS admits that it does not bring this case to remedy any injury to itself and thereby disclaims direct standing to pursue the claims directly for itself. App. 520. Rather MOPAS asserts associational standing. App. 520. But MOPAS cannot establish associational standing in this case because the claims of the only individual plaintiff remaining in this suit are, as discussed in Point II, moot and should be dismissed.

In order to have associational standing, MOPAS must, among other requirements, "include at least one member with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association." *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 116 S. Ct. 1529, 1535 (1996). And not only must the organization include a member with individual standing, the allegations of its complaint must identify such a member. *Pennsylvania Protection & Advocacy, Inc. v. Houston*, 1136 F. Supp. 2d 353, 365-66 (E.D. Pa.

2001); *Tennessee Protection & Advocacy, Inc. v. Board of Educ.*, 24 F. Supp. 2d 808, 816 (M.D. Tenn. 1998).

The amended complaint here does identify three individuals allegedly subject to improper interference with their right to vote App. 170-73. But the claims of two of these individuals, Steven M. Prye and Patrick W. Sharp, were voluntarily dismissed. App. 247, 250. The claims of the third individual are moot and should have been dismissed. *See* Point II. Lacking any individual constituent of MOPAS with individually cognizable claims, MOPAS lacks any standing to proceed on the claims in this case. For this reason, these claims should be dismissed.

## IV.

**Missouri's prohibition on voting by persons adjudged fully incapacitated is consistent with the Americans with Disabilities Act and the Rehabilitation Act because Congress, in these Acts, did not make unmistakably clear its intent that they were meant to restrict the broad constitutional power of the States to determine voter qualifications. Even if these Acts are construed to constrain this state power, Missouri's prohibition complies with the Acts by providing an individualized assessment of the capacity of persons undergoing guardianship proceedings.**

**The States have broad authority to determine voter qualifications.** The States are authorized to create qualifications for electors in federal elections based on the clear language of: Article I, § 2, cl. 1, ("the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature"); Article II, § 1, cl. 2, ("[e]ach state shall appoint, in such manner as the legislature thereof may direct, a number of electors"); and Amend. XVII, cl. 1, ("[t]he electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures."). Congress may, however, enact legislation to control the qualifications of electors in federal elections. *Oregon v. Mitchell*, 91 S. Ct. 260, 267-68 (1970); Article I, § 4, cl. 1 ("[t]he times, places and

manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations . . . ."). But, unless Congress has enacted such legislation, or specific Constitutional provisions are violated, state laws control elector qualifications for federal offices and govern the time, place, and manner of conducting federal elections.

In contrast to Congress's authority to enact legislation governing federal offices, Congress' authority to enact legislation governing the qualifications for electors for state offices is much more limited. *Mitchell*, 91 S. Ct. at 265 ("It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections except to the limited extent that the people through constitutional amendments have *specifically* narrowed the powers of the states.") (emphasis added). *See also Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400 (1991) (noting that establishing qualifications for state judges "is a decision of the most fundamental sort for a sovereign entity"); *Sugarman v. Dougall*, 93 S. Ct. 2842, 2850-51 (1973) (observing that states retain the power and responsibility to regulate their elections, including determining the qualifications of voters).

Congress's limited authority to regulate state elections is derived from the Civil War Amendments and their various enforcement sections. Congress's power is limited, however, and is not intended to "strip the states of their power, carefully

preserved in the original Constitution, to govern themselves." *Mitchell*, 91 S. Ct. at 266. The Court has upheld various examples of voting requirement and qualification legislation, enacted by Congress, that validly established requirements applicable to state elections. In *Katzenbach v. Morgan*, 86 S. Ct. 1717 (1966), a federal statute outlawed New York's requirement of literacy in English as a prerequisite to voting. The statute applied to all elections, both state and federal. The statute was upheld by the Supreme Court. *See also South Carolina v. Katzenbach*, 86 S. Ct. 803 (1966) (upholding a statutory ban on literacy tests). The rationale for upholding Congressional action in these cases was succinctly expressed by Justice Black in *Mitchell*: "Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth and Fifteenth Amendments." *Mitchell*, 91 S. Ct. at 267. That situation is not replicated here.

**The ADA and the Rehabilitation Act do not impact the authority of the States to determine voter qualifications.** Before the Courts will find that a federal statute overrides with the constitutional authority of the states to determine their voters' qualifications, the statute must make "unmistakably clear" that Congress intended to "upset the usual constitutional balance of federal and state powers." *See*

*Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400-01 (1991). Neither the Americans with Disabilities Act (ADA) nor the Rehabilitation Act meet this standard.

The ADA, enacted in 1990, is not legislation establishing or even addressing the issue of competency requirements for electors voting in federal, state, or local elections. The ADA does not include "even a single provision specifically governing elections." *Lightbourn v. City of El Paso*, 118 F.3d 421, 430 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 700 (1998). To the contrary, the ADA never refers to elections. *Id*. The Act only mentions voting once, and that reference is in the "findings and purpose" section. *Id.* This section, 42 U.S.C. § 12101(a)(3), notes that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communications, education, institutionalization, health services, voting, and access to public services . . . . " *Id.*

Similarly, the Rehabilitation Act, first enacted in 1973, does not refer to elections or voting. *See* 29 U.S.C. § 794; *see also* Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 Stan. L. & Pol'y Rev. 353, 359 (2003) (noting that the ADA and section 504 of the Rehabilitation Act "are broad antidiscrimination statutes that do not specifically address voting.").

By referring to elections only in passing or not at all, the ADA and the Rehabilitation Act cannot be said to demonstrate clear congressional intent to

federalize the states' voter qualification requirements for either federal or state elections.

By contrast, elsewhere Congress has expressly declined such a step. Under its authority to enact legislation to regulate the qualifications of voters in federal elections, Congress enacted the National Voter Registration Act in 1993 (after its enactment of the ADA and the Rehabilitation Act). One substantive goal of this Act is "to protect the integrity of the electoral process." 42 U.S.C. § 1973gg(b)(3). The Act explicitly provides that a state may remove a voter's name from the official list of eligible voters "as provided by State law, by reason of criminal conviction or *mental incapacity*." 42 U.S.C. § 1973gg-6(a)(3)(B) (emphasis added). Thus, in federal legislation relating specifically to elector qualifications and voter registration, Congress made its intent clear: Congress reserved to the states the power to establish voter qualification provisions related to mental incapacity for voters in federal elections.

**Neither the ADA nor the Rehabilitation Act makes unmistakably clear any Congressional intent to restrict the authority of athority of the States to regulate voting qualifications.** The reliance by the district court and the plaintiffs on *Pennsylvania Dept. of Corrections v. Yeskey*, 118 S. Ct. 1952 (1998), in support of their argument that the ADA applies to state regulation of voting qualifications (App.

528-30, 629) is misplaced. In *Yeskey*, a state argued that the ADA did not apply to its prisons because that statute did not make "unmistakably clear" a Congressional intent to "alter the usual constitutional balance between the States and the Federal Government" as required by *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400-01 (1991). 118 S. Ct. at 1954. The Supreme Court disagreed, ruling that the broad application of the ADA under 42 U.S.C. § 12132, to "the benefits of the services, programs, or activities of a public entity [defined to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government," 42 U.S.C. § 12131(1)(B)] did in fact render "unmistakably clear" a Congressional intent to cover prisons. 118 S. Ct. at 1954-55.

But, 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. The regulation of voting qualifications is instead similar in nature to the qualifications of judges upheld in *Gregory*, against an Age Discrimination in Employment Act challenge. The regulation of voting qualifications, as is the regulation of qualifications of judges, is an element fundamentally related to a state's sovereign powers. The operation of prisons, while an important and historical function of the states, is not a function that goes to the heart of representative government. The regulation of voter qualifications, in contrast, does go to this heart of a republic. Before Congress may alter the usual

balance between state and federal government in such an area, it must make its intent to do so unmistakably clear. *Gregory*, 111 S. Ct. at 2401. The ADA does not demonstrate an unmistakable intent that it is meant to impact a state's regulation of voting qualifications. Neither is the Rehabilitation Act.

Plaintiffs have also cited a handful of cases (App. 529-30) in which various district courts have applied the ADA or the Rehabilitation Act in circumstances somehow involving voting. Only in *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001), however, did the court examine state regulation of voting qualifications. But, as discussed in this Point, the state official defendants directly challenge the correctness of the holding in *Doe* that the ADA and the Rehabilitation Act apply to voter qualifications. The other cases cited by plaintiffs are inapplicable because they relate to access to voting equipment or to polling places and not to the basic sovereign power of states to regulate the qualifications of voters.

**Even if the ADA and the Rehabilitation Act are construed to apply to the qualifications of voters, neither affords the relief requested here.** Title II of the ADA provides that "[n]o 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. Similarly, the Rehabilitation Act provides that

"[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, 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). "The rights, procedures, and enforcement remedies under Title II are the same as under [§ 794]." *Layton v. Elder*, 143 F.3d 469, 472 (8th Cir. 1998). Therefore, to prevail on a violation of Title II or under § 794 of the Rehabilitation Act, plaintiffs must demonstrate that (1) they are qualified individuals with a disability; (2) they are being excluded from participation in, or being denied benefits of, services, programs, or activities provided by defendants or that they are otherwise discriminated against by defendants; and (3) such exclusion, denial of benefits, or discrimination is by reason of their disability. *Id.* Plaintiffs do not meet at least the first of these criteria.

The term "qualified individual with a disability" is defined by 42 U.S.C. § 12131(2) as "an individual with a disability who, with or without *reasonable* modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, *meets the essential eligibility requirements* for the receipt of services or the participation in programs or activities provided by a public entity." (Emphasis added.) Under the Rehabilitation Act, an "otherwise qualified individual" is one who is able to meet a program's necessary or essential requirements in spite of his disability.

*Pottgen v. Missouri State High Sch. Activities Ass'n.*, 40 F.3d 926, 929 (8th Cir. 1994); *see also Alexander v. Margolis*, 921 F. Supp. 482, 488, 489 (W.D. Mich. 1995) (holding that a doctor who suffered from bipolar illness was not a "qualified individual" with a disability under the ADA because the state board of medicine was required to "discriminate on the basis of . . . a mental condition harmful to the public's safety" and the board did not violate the ADA by refusing to reinstate the plaintiff's medical license); *Southeastern Community College v. Davis*, 93 S. Ct. 2361, 2367 (1979) (upholding a college's decision to deny admission to the school's nursing program of an individual with a serious hearing disability because an "otherwise qualified person is one who is able to meet all of a program's requirements in spite of [the person's] handicap.").

Turning to the present case, individuals will be adjudicated fully incapacitated and in need of a full guardian only in those cases where the individual meets the definition of an incapacitated person under § 475.010(9), RSMo. Before persons may be adjudged fully incapacitated, and thereby unqualified to vote, they are provided an individualized hearing to determine whether they lack all capacity to meet "essential requirements for food, clothing, shelter, safety and other care" § 475.075.9 and .10, RSMo.[2] A person adjudged fully incapacitated following such a hearing is

[2]A more detailed discussion of the individualized nature of Missouri's guardianship proceedings is provided in Point VI of this brief.

not a "qualified individual with a disability" under the ADA or an "otherwise qualified individual" under the Rehabilitation Act because this adjudicated full mental incapacity renders the person unable to meet the "essential eligibility requirements" or the "necessary or essential requirements" that are part of Missouri's electoral processes. If an individual is declared incompetent, he or she is not otherwise eligible to vote in Missouri because of failure to meet Missouri's qualification for voting: the absence of adjudicated full mental incapacity.

Persons adjudged fully incapacitated lack this qualification because they have been adjudicated in need of a plenary guardian – meaning they cannot make decisions about the essentials of life (food, clothing, medical care, housing, safety, and property). An inability to make appropriate choices in these basic areas precludes a person subject to full guardianship from participation in Missouri's electoral process – 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. Therefore, individuals who have been adjudicated fully incapacitated, due to mental incapacity, are not able to meet Missouri's essential requirements for voting in spite of their disability. Thus, Missouri's prohibition on voting by persons adjudged fully incapacitated is consistent with the ADA and the Rehabilitation Act.

## V.

**Missouri's prohibition on voting by persons adjudged fully incapacitated is consistent with the equal protection and due process clauses of the United States Constitution because the prohibition advances to a high degree Missouri's important interest in assuring an electorate composed of persons who retain at least some minimal capacity to function on their own in society.**

**States have great authority in determining voter qualifications.** According to the Supreme Court, the equal protection clause does not stand as a barrier to states' authority to establish their own voter qualification requirements except in certain narrow circumstances. As Justice Black explained in a review of amendments to the Voting Rights Act, "[t]he establishment of voter age qualifications is a matter of legislative judgment which cannot be properly decided under the Equal Protection Clause." *Oregon v. Mitchell*, 91 S. Ct. 260, 266 n.10 (1970) (Opinion of Black, J.) Further, the key question is "not who is denied equal protection, but, rather, which political body, state or federal, is empowered to fix the minimum age of voters." *Id.* Justice Black's opinion, announcing the judgment of the Court, stated that "[t]he generalities of the Equal Protection Clause of the Fourteenth Amendment were not designed or adopted to render the States impotent to set voter qualifications in

elections for their own local officials and agents in the absence of some specific constitutional limitations." 91 S. Ct. at 270.

Just as with age qualifications prior to the adoption of the 26th Amendment, the establishment of voter mental capacity qualifications for state elections is a matter for each state legislature to determine and, for federal elections, a matter for Congress pursuant to its power under the Elections Clause.

Furthermore, as the Supreme Court has recently recognized, "[w]hen the state legislature vests the right to vote for President in its people, the right to vote *as the legislature has prescribed* is fundamental[.]" *Bush v. Gore*, 121 S. Ct. 525, 529 (2000) (per curiam) (emphasis added). This statement further demonstrates the Court's recognition of each state legislature's critical role as it relates to the voting process, presumably including elector qualifications.

**The *Burdick* balancing test.** The Supreme Court in *Burdick v. Takushi*, 112 S. Ct. 2059, 2063 (1992), established a balancing test for determining the level of scrutiny to apply in assessing a challenge to state voter regulations. The Court recognized that election laws, including those that govern the qualifications of voters, invariably impose a burden on individual voters. *Burdick*, 112 S. Ct. at 2063. Thus, under this standard, when a court considers a challenge to a state election law, it should weigh:

> the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.

112 S. Ct. at 2063 (internal citation and quotation omitted). When regulations impose "severe" restrictions on rights, the regulations must be "narrowly drawn to advance a state interest of compelling importance." 112 S. Ct. at 2063, *quoting Norman v. Reed*, 112 S. Ct. 698, 705 (1992). If, however, the regulations impose only "'reasonable, nondiscriminatory restrictions' on the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 112 S. Ct. at 2063, *quoting Anderson v. Celebrezze*, 103 S. Ct. 1564, 1569-70 (1983). Indeed, in *Burdick*, the Court concluded that the state's "*legitimate* interests . . . [were] sufficient to outweigh the limited burden that the write-in voting ban impose[d] upon Hawaii's voters." *Burdick*, 112 S. Ct. at 2067 (emphasis added).

The balancing test established in *Burdick* with regard to election and voter regulations has been found to apply to challenges under both the equal protection and the due process clauses. *See Wit v. Berman*, 306 F.3d 1256, 1259 (2d Cir. 2002) (applied to equal protection challenge), *cert. denied*, 123 S. Ct. 1574 (2003);

*Rockefeller v. Powers*, 74 F.3d 1367, 1377 n.16 (2d Cir. 1995) (applies in both equal protection and due process cases), *cert. denied*, 116 S. Ct. 1703 (1996).

Here, the right plaintiffs seek to establish is a right by persons adjudged fully incapacitated to vote in the same manner as other individuals that have not been adjudged fully incapacitated. But an individual's right to participate in the election process is not unfettered, as evidenced by the United States Supreme Court's decisions upholding numerous restrictions on voting as a means of effectuating the state's interest in its electoral processes. *See Lassiter v. Northampton County Bd. of Elections*, 79 S. Ct. 985, 990 (1959) (noting that "[r]esidence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters") (internal citation omitted); *Richardson v. Ramirez*, 94 S. Ct. 2655 (1974) (upholding against an equal protection challenge California's constitutional provision and related statutes disenfranchising felons); *Marston v. Lewis*, 93 S. Ct. 1211 (1973) (per curiam) (upholding a state's 50-day durational voter residency requirement). The Court has noted that "preservation of the integrity of the electoral process is a legitimate and valid state goal." *Rosario v. Rockefeller*, 93 S. Ct. 1245, 1251 (1973). *See also Eu v. San Francisco County Democratic Cent. Committee*, 109 S. Ct. 1013, 1024 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process").

In addition to the Supreme Court, other federal courts have upheld restrictions on voting when those restrictions supported the state's interest in its electoral processes. *See e.g.*, *Nader v. Schaffer*, 417 F. Supp. 837, 849 (D. Conn. 1976) (upholding, against an Equal Protection challenge, Connecticut's requirement that only those voters who are members of a political party may vote in the party's primary as "reasonably related to the accomplishment of legitimate state goals"), *aff'd w/o op.*, 97 S. Ct. 516 (1976); *Gaunt v. Brown*, 341 F. Supp. 1187 (S.D. Ohio 1972) (upholding state's prohibition against allowing 17 year- olds, who would be 18 years old by the time of the general election, from voting in primary election), *aff'd w/o op.*, 93 S. Ct. 69 (1972). The character and magnitude of Missouri's qualifications are not so injurious to plaintiffs' rights as to be unreasonable and discriminatory when compared to other restrictions on voting that the courts have previously upheld. *Cf. Burdick*, 112 S. Ct. at 2063 (noting that reasonable and nondiscriminatory restrictions on voting can be upheld in light of important state interests).

**Missouri's important interests justify its prohibition on voting by persons adjudged fully incapacitated.** Like these state interests that have previously been upheld, Missouri has an important, and indeed compelling, state interest in the administration of its elections, and assuring its citizenry that participants in those elections be able to understand the electoral choices they make by voting on a

particular candidate or issue. *Cf. Manhattan State Citizens Group, Inc. v. Bass*, 524 F. Supp. 1270, 1274 (S.D.N.Y. 1981) (assuming, without deciding, that the state has a compelling interest in "assuring that electoral choices will be made by intelligent and interested voters."). In *Bass*, the court noted that "[w]hen one is declared incompetent, the court has found that person unable to conduct any of his personal or business affairs. Presumably, this includes the ability to cast a rational vote." *Id.*

Furthermore, Missouri's constitutional requirement that a person be adjudicated fully incapacitated and under full guardianship before being excluded from voting "give[s] polling officials something tangible on which to decide whether a person [is] disqualified by reason of his mental condition." *New v. Corrough*, 370 S.W.2d 323, 327 (Mo. 1963). Thus, Missouri provides an objective measure by which to judge whether an individual possesses the capacity required to vote in Missouri.

Missouri's constitutional voter qualification provision is justified by Missouri's important interest in limiting participation in elections to persons who have not been found by a court to need a guardian for every significant aspect of their life by reason of mental incapacity. It is significant to note the narrow nature of this restriction: it does not apply to the mentally ill generally, or to those who have been adjudicated partially incapacitated. It is also not necessarily permanent. Guardianships may be terminated, § 475.083, RSMo Supp. 2005, and individuals under guardianship are

subject to annual review "for the purpose of determining whether the incapacity or disability may have ceased . . . ." § 475.082.1, RSMo.

The Missouri disqualification is not an aberrational consequence of adjudicated incapacity.[3] Indeed, when a person is adjudicated in need of a guardianship or involuntarily committed to a mental institution, numerous collateral consequences flow from this determination. For example, federal law prohibits anyone who has been "adjudicated as a mental defective or who has been committed to a mental institution" from possessing a firearm. 18 U.S.C. § 922(g)(4); *see also United States v. Dorsch*, 363 F.3d 784 (8th Cir. 2004). A person whose property is under guardianship because of an adjudication of mental illness has "no capacity to incur contractual duties." Restatement (Second) of Contracts § 13 (1981). In Missouri, individuals who have been "adjudicated to be incapacitated and who at the time of application have not been restored to partial capacity" are not eligible to receive drivers' licences. § 302.060(5), RSMo.

The implications of plaintiffs' argument are breathtaking. Take, for example, a citizen's right to serve as a juror. *See, e.g.*, *Thompson v. Oklahoma*, 108 S. Ct. 2687,

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[3]In a recent study, it was determined that over forty other states have constitutional or statutory provisions establishing a voter qualification related to mental capacity. *Doe v. Rowe*, 156 F. Supp. 2d 35, 38 n.2 (2001), *citing* Schriner, et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 Berkeley J. of Emp. & Lab. L. 437, 439, 456 tbl. 2 (2000).

2701-02 (1988) (listing those states where the "[r]ight to serve on a jury" is limited based on age). Numerous states and the federal courts condition the right to serve as a juror on some degree of mental capacity. *See, e.g.*, 28 U.S.C. § 1865(b)(4) (stating that individuals who are "incapable by reason of mental . . . infirmity, to render satisfactory jury service" or who cannot read, write, or understand English with a sufficient degree of proficiency are not qualified to serve as jurors in the district court"); § 494.425, RSMo Supp. 2005 (disqualifying from jury service those individuals "incapable of performing the duties of a juror because of a mental . . . illness or infirmity"). The logical implication of plaintiffs' argument would require an individualized determination by federal and state courts of an individual's capacity to serve as a juror – to fully comprehend the civil trial process – despite a previous adjudication of incapacity. This is unnecessary to satisfy the equal protection clause.

Similar to the collateral consequences that flow from a determination of incapacity, it is appropriate for Missouri to restrict qualified voters to those individuals who possess at least some abilities to make choices about their own affairs. It is more than merely reasonable for Missouri to presume that an individual who is under full guardianship lacks the mental capacity to make choices about how the affairs of government should be managed.

Furthermore, the state has important interests in preventing vote dilution and in preventing double voting. As the court recognized in *Johnson v. Hood*, 430 F.2d 610,

613 (5th Cir. 1970), a state "has not only an interest in but also an obligation to provide orderly, honest elections. Measures reasonably calculated to this end, such as the prevention of double voting, are solely within the ambit of State control." *Id.* at 613. Allowing individuals adjudicated fully incapacitated to vote could lead to double voting because these individuals would be particularly susceptible to influence by their guardians or any others with whom they have contact and it is these other individuals who realistically could be voting their own and the ward's ballot.

Additionally, permitting persons who have been adjudicated fully mentally incompetent to vote would adversely impact the public's perception of the dignity and efficacy of the democratic process. In *Burson v. Freeman,* 112 S. Ct. 1846, 1852 (1992), the Court explained that the State "indisputably has a compelling interest in preserving the integrity of its election process." *See also Eu*, 109 S. Ct. at 1024. In fact, the lead opinion in *Colorado Republican Fed. Campaign Comm. v. FEC,* 116 S. Ct. 2309, 2313 (1996), unquestioned by the other opinions, characterized as "compelling" the government's "interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption." In various campaign finance cases the courts have opined that it is not merely those actions that actually threaten the legitimacy of the system that can be regulated; rather, in addition to the actual threat posed to the system by large campaign contributions, the "the impact of the appearance of corruption" was "[o]f almost equal concern." *Buckley v. Valeo,* 96

S. Ct. 612, 638 (1975) (per curiam). Indeed, "the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" 96 S. Ct. at 639, *quoting United States Civil Serv. Comm'n v. National Assoc. of Letter Carriers*, 93 S. Ct. 2880, 2890 (1973). To permit voting by persons who do not have the capacity to vote, as demonstrated by a judgment of full incapacity arrived at after an individualized review, would undermine both the actual and the perceived integrity of the electoral process.

Plaintiffs' reliance, at pp. 46-47 of their brief, on *Tennessee v. Lane*, 124 S. Ct. 1978 (2004), as a Supreme Court rejection of voting prohibition applying to persons under full guardianships is misplaced. *Lane* concerned access to courts by the disabled and had nothing to do with an analysis of the validity of voting qualifications. The Court did make the isolated remark that Congress enacted the Americans with Disabilities Act against a back drop of unequal treatment in state services and programs and noted as an example states "categorically disqualifi[ng] 'idiots' from voting, without regard to individual capacity." *Id.* at 1989 (quoting *Cleburne v. Cleburne Living Center, Inc.*, 105 S. Ct. 3249, 3267 (1985) (Marshall, J., concurring in judgment in part and dissenting in part)). Not only did the Court not conduct any analysis on this point in *Lane*, but the reference is inapplicable given

that, as shown in Point VI of this Brief, Missouri does give "regard to individual capacity" in its guardianship proceedings.

Plaintiffs also argue, at p. 45 of their brief (*see also* App. 686-87), that Missouri's prohibition is underinclusive because some persons may be under full guardianships, while others with comparable mental impairments are not, due to family decisions to care for mentally impaired relatives within the confines of the family and not to seek formal appointment of guardians. Any underinclusiveness here, however, is not due to the state or its laws, but to the individual decisions of families. The fallacy of plaintiffs' argument is evident from examining its logical consequences. If there is constitutional infirmity here, then, by extension, statutes creating criminal liability for murder (or other crimes) are also unconstitutional because they apply to persons arrested and prosecuted but not to persons who manage to avoid identification and arrest with the assistance of family members.

Adjudications of full mental incapacity demonstrate that the persons so adjudged do not possess the ability to function generally. Permitting someone who lacks such abilities to vote degrades the solemnity and integrity of the democratic process and will continue the erosion of the public's confidence in the process. In light of current public dissatisfaction with the perceived integrity of the electoral system, our nation can little afford to allow those adjudicated fully incapacitated to vote.

## VI.

**Missouri law assures that persons who have the capacity to vote, however that assessment may appropriately be made, can vote by providing a procedure compliant with procedural due process through which individualized determinations are made with regard to the persons subject to competency proceedings.**

Even if voting prohibitions based on judgments of mental incapacity can be, in some circumstances, a violation of federal constitutional or statutory law, Missouri's prohibition is not. Missouri law includes the key, required element: a forum for individualized determinations of capacity that provides appropriate procedural protections, including notice and full opportunity to be heard and present evidence on the relevant issues.

**Statutory provisions regarding capacity adjudications.** Applications for appointment of a guardian may be filed under § 475.060, RSMo. The respondent is provided with a copy of the petition, notice of the time and place of the hearing, name and address of appointed counsel, and names and addresses of potential witnesses. § 475.075.2, RSMo. The respondent is also provided with a copy of his rights at the guardianship proceeding. *Id.* A lawyer is appointed to represent the interests of the respondent. § 475.075.3. The petitioner has the burden of proving incapacity or

partial incapacity by clear and convincing evidence. § 475.075.7. The respondent has several rights specifically set out in § 475.075.8, including the rights to be present at the hearing, to present evidence, and to cross-examine adverse witnesses.

Following the hearing, courts are directed to find a person fully incapacitated, and to order full guardianship, only as a last resort. § 475.075.10. An adjudication of partial incapacity is preferred, if feasible. *Id.*

An adjudication of incapacity operates "to impose upon the ward . . . all legal disabilities provided by law, except to the extent specified in the order of adjudication . . . ." § 475.078.2, RSMo. Persons adjudicated incapacitated are presumed to be incompetent. § 475.078.3. In contrast, an adjudication of partial incapacity "does not operate to impose upon the ward . . . any legal disability provided by law except to the extent specified in the order of adjudication, provided that the court shall not impose upon the ward . . . any legal disability other than those which are consistent with the condition of the ward . . . ." § 475.078.1. "A person who has been adjudicated partially incapacitated . . . shall be presumed to be competent." *Id.* Thus, a person adjudicated partially incapacitated may register and vote.

In addition to the proceeding in which a respondent may be found to be incapacitated, the court is to review the status of every ward under its jurisdiction at least once a year "for the purpose of determining whether the incapacity . . . may have ceased. § 475.082.1, RSMo. Moreover, the ward, his or her guardian, or any person

acting on behalf of the ward may at any time petition the court to determine the ward restored to full or partial capacity. § 475.083.4, RSMo Supp. 2005. If the ward is not already represented by a lawyer, the court is required to appoint a lawyer to represent the ward in the proceedings. § 475.083.6.

**Missouri statutes governing capacity proceedings provide due process.** Contrary to plaintiffs' charges, Missouri's statutory procedures governing capacity determinations provide ample procedural protections to respondents.

Plaintiffs specifically contend that Missouri law does not provide notice to respondents in capacity hearings that a consequence of a judgment of full incapacity is the loss of the right to vote. Aplts' Brf., at p. 50. But it is a settled legal principle that everyone is presumed to know the law, *see Atkins v. Parker*, 105 S. Ct. 2520, 2529 (1985), and Missouri law explicitly states that a person determined to be mentally incapacitated is disqualified from voting. Mo. Const. Art. VIII, § 2; § 115.133.2, RSMo Supp. 2005. Thus, respondents in capacity hearings, as well as the lawyers who are always appointed to act on their behalf, have notice that a judgment of full incapacity will result in the respondent losing his or her right to vote.

In a related assertion, plaintiffs argue that respondents in capacity proceedings do not receive notice of their right to present evidence concerning their capacity to vote. Aplts' Brf., at p. 50. But these respondents plainly receive notice of their right

to present evidence. § 475.075.2 and .8(3). And there is no right to notice of the right to present evidence as to specific issues – like the capacity to vote. *Cf. Reaves v. Missouri Dep't of Elem. & Sec. Educ.*, 422 F.3d 675, 682 (8th Cir. 2005) (applicant for funding not entitled to notice that hearing officer might review information not contained in denial letter in assessing propriety of the denial; statute governing the review process did not limit review to information or evidence contained in denial letter; applicant's assumption that record was so restricted was unreasonable). Under plaintiffs' logic, defendants would have a due process right to receive formal and explicit notice that they may present evidence at trial of affirmative defenses. But there is no such notice requirement. The availability of affirmative defenses is an option that defendants and their lawyers are on notice of based on existing law.

Even assuming due process did require provision of notice of the right to present evidence as to the capacity to vote, such notice is provided in Missouri from the combination of the plain constitutional and statutory statement of the consequence of adjudications of full incapacity with the express requirement that respondents in capacity proceedings receive notice of their right to present evidence.

Plaintiffs also contend that the statutory presumption established in § 475.078.3 that a person adjudged fully incapacitated is incompetent denies due process. Aplts' Brf., at pp. 40-41, 49. But this presumption is made only after a person is adjudged

fully incapacitated in a competence proceeding. The person receives his or her due process at that proceeding.

**Assessment of capacity to vote in Missouri capacity proceedings.** Plaintiffs also argue that Missouri capacity proceedings are inadequate because they do not permit a direct assessment of a person's capacity to vote. Aplts' Brf., at p. 41-42.[4] Plaintiffs assert that competence to vote can be determined independently. They support this with the report and testimony of an expert, Dr. Paul S. Appelbaum. But Dr. Appelbaum' testimony is not reliable under a *Daubert* analysis. App. 350-51, 643-46. He admits that no standard for assessing capacity to vote has been "crystallized" yet. App. 488 (Dep. p. 85). While the doctor has done valuable initial work in this area, he admits "there is no general agreement on where the line [between persons competent to vote and those not competent to vote] should be drawn." App. 509. Dr. Appelbaum did not even use the voting competence assessment tool he developed in his research to make the assessments he provided in

[4]Plaintiffs do not, however, dispute that there are some persons who lack the capacity to vote. This is evident from their own expert's testimony that there is a line beyond which persons are sufficiently mentally impaired that they are not competent to vote. App. 480 (Dep. p. 48). Thus, it cannot be plaintiffs' position that all persons adjudged fully incapacitated have a right to vote. Given the admission that there are some individuals who are not competent to vote, it cannot be said that Missouri's ban on voting by the fully incapacitated is, *per se*, constitutionally (or statutorily) infirm.

this case. Supp. App. 3 (Dep. pp. 61-62).[5] Dr. Appelbaum used a "modified version of the standard approach" that is used in the assessment of general competency to assess particularly the competence to vote of the persons he examined for this case.[6] App. 487 (Dep. pp. 81-82). The doctor's use of this "modified version of the standard approach" does not establish that his evaluations of the competence to vote are reliable, either in general or as to the particular individuals he has assessed for purposes of this case. He did not identify anyone else has evaluated competence to vote in this manner. App. 488 (Dep. p. 85). The doctor admitted he is aware of no one else who has ever undertaken the task of assessing the capacity to vote as a separate capacity. App. 488 (Dep. p. 85). Where no one else has engaged in work

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[5]The Supplemental Appendix provided by the state official defendants along with this brief contains a page of Dr. Appelbaum's deposition testimony inadvertently left out of the Joint Appendix. References to the identities and particular assessments of the individuals assessed have been redacted.

[6]As a part of his assessment under this "modified version of the standard approach," Dr. Appelbaum considered whether the persons he evaluated had "the capacity to understand the nature and effect of voting, such that they [could] make an individual choice." Supp. App. 3 (Dep. pp. 62-63). But a voting competency standard that would qualify anyone who could understand the elementary mechanical aspects of voting, and who had some understanding that the votes would be tabulated to determine the winner, would fail to screen out all but persons who have almost a complete inability to perceive reality at the most basic levels. The majority of children age 5 would be able to pass this test. Surely every middle school student voting in a student council election would pass. If this is what plaintiffs have in mind, they are really seeking a near complete elimination of mental capacity – and ultimately age – voter qualifications.

relating to determining competence to vote, there is little or no basis for accepting Dr. Appelbaum's voting competence assessments as reliable. *See United States v. Mitchell*, 365 F.3d 215, 235 (3d Cir. 2004) (setting out factors to consider in assessing reliability of expert testimony), *cert. denied*, 125 S. Ct. 446 (2004).

In lieu of the ability to assess competence to vote independently, the Missouri statutory standard for determining when a guardianship should be full and when it should be partial, must serve as the closest approximation that is legally practicable. The standard for partial incapacity is "inability by reason of any physical or mental condition to receive and evaluate information or to communicate decisions *to the extent* that he lacks capacity to meet, *in part*, essential requirements for food, clothing, shelter, safety, or other care without court-ordered assistance. § 475.010(14), RSMo (emphasis added). These personal care abilities are abilities that can be assessed, and regularly are assessed, within the current state of the science of psychology. *See* App. 485 (Dep. pp. 74-75). Abilities related to self-care and day-to-day functioning are "reasoning analogues to what one would do to participate in the voting process. That is taking in information, receiving it, evaluating it and communicating the decision back to those outside." App. 882-83 (Dep. pp. 36-37); *see also* App. 902-04.[7] Given this analogy between reasoning directed toward self-

[7]Plaintiffs' assertion in the court below, App. 683, that defendants' expert, Dr. Harry, acknowledges that use of full guardianship as an eligibility requirement on

care and the reasoning directed toward voting, a person with competence to vote will also be able to show that he or she has an ability, in part, to meet some essential requirement for food, clothing, shelter, safety, or other care. Such a showing (or the inability of an applicant for guardianship to establish the contrary in an initial guardianship proceeding) would result in modification of a full guardianship to a partial guardianship (or the initial establishment of a partial guardianship instead of a full guardianship) which would result in the ward maintaining the right to vote under Missouri law. § 475.078.1, RSMo.

Although there is disagreement in this case about whether there is a valid test to determine competence to vote as an independent matter, any dispute on this issue is immaterial. The determination of whether a person has the competence to vote, either by some test to determine that competence directly, or by proxy through an assessment of general personal care abilities, is an issue for local probate courts in determining individual guardianship cases. If plaintiffs are correct that there is a valid scientific method to determine competence to vote, then that is the standard

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voting is unnecessary misconstrues his testimony. Dr. Harry was asked: "Do you think they [the individuals evaluated by Dr. Appelbaum] lack the capacity to vote because they are under guardianship?" Dr. Harry responded, "No." App. 882 (Dep. pp. 35-36). This response is simply an acknowledgment that some persons under full guardianships may be able to establish some retained capacity in review proceedings, obtain a modification of their guardianships to limited guardianships, and thereby be able to return to the voting rolls.

individuals going through initial guardianship proceedings or seeking review of existing guardianships should present to the probate court hearing the case. The probate court can then determine whether the standard is met and, if so, create or modify the guardianship accordingly. If the probate court declines to determine competence to vote as a separate matter, then that judgment can be appealed. While the standard for determining competence to vote is a proper issue for consideration in these individual probate proceedings, it has no impact on whether Missouri's prohibition on voting by the fully incapacitated is consistent with federal law.

The point here is that, if plaintiffs are correct about the ability to assess competence to vote independently, this can be shown in probate courts in guardianship proceedings or review proceedings. If the probate court determines that the person does have competence to vote, that right will be reserved in its judgment. Even if that judgment makes the person subject to a guardian for all other purposes, the judgment is still, by definition, one of partial incapacity (due to its reservation of the right to vote), thereby taking the person outside the coverage of Missouri's voting ban on the fully incapacitated. The record here shows that local probate courts have in fact assessed the competence to vote as a separate capacity. App. 455-56. If other probate courts have not, the remedy is not a challenge to Missouri's Constitution and statutes, but appeals of those determinations.

And, if the state official defendants are correct that competence to vote can, at best, only be determined by a general assessment of a person's ability to care for his or her own personal care needs, the establishment of even some minimal level of independence in regard to such personal care needs will also result in a judgment of partial incapacity only, which also takes the person outside the voting ban.

Either way, the voting ban only applies to persons who, under whichever standard is appropriate, are determined not to have *any* ability to function independently. Because persons in Missouri have a forum in which their competence to vote can be assessed, the state's voting ban applicable to the fully incapacitated (which plaintiffs must admit is appropriate for those persons who actually are fully incapacitated given their expert's agreement that some persons do lack competence to vote) does not violate any constitutional or statutory rights of plaintiffs.

Plaintiffs' lawsuit asks the question of whether Missouri's ban on voting by the fully incapacitated is valid under federal law, when it should instead be asking the question of whether voting competence is being correctly evaluated in local probate courts. And the defendants named in this suit are not the correct parties in a suit asking that question because the defendants do not make the determination as to the impact on voting rights of judgments of incapacity. App. 429-30 (Dep. pp. 20-22).

**Missouri capacity standard allows assessment of capacity to vote.** Plaintiffs argue that the Missouri standards relating to capacity do not permit a probate court to evaluate the capacity to vote directly because the standard is framed to address self-care needs, not the capacity to vote as an independent capacity. Aplts' Brf., at pp. 22, 40, 44-45. The Missouri standard for partial capacity, which, if met, would permit the ward to vote, is "inability by reason of any physical or mental condition to receive and evaluate information or to communicate decisions *to the extent* that he lacks capacity to meet, *in part*, essential requirements for food, clothing, shelter, safety, or other care without court-ordered assistance." § 475.010(14), RSMo (emphasis added).

If defendants are correct that the capacity to vote cannot be validly assessed as an independent capacity, then this standard does expressly permit the assessment of those capacities that defendants contend provide as close an approximation of voting capacity as is legally practicable. But if plaintiffs are correct that voting capacity may be directly assessed, this Missouri standard will also permit such an individual assessment of voting capacity, and, in addition, permit a judgment of incapacity that finds the ward's only capacity it the capacity to vote. 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. Therefore, Missouri's standards for incapacity and partial incapacity are drawn in a manner that permits individual assessment of voting capacity, and maintenance of the right to vote, regardless of whether voting capacity can be assessed separately, or must be assessed indirectly.

Mr. Scaletty's circumstances are a good illustration. In his case, it appears from the record that the probate court did assess the capacity to vote independently (without any objection noted in the order). *See* App. 455-56. Thus, Mr. Scaletty maintained his right to vote as shown by his receipt of his voter identification card from his election authority together with its determination that he may vote. App. 458-60. The earlier refusal to permit him to vote, also the decision of the local election authority, was apparently based on a misunderstanding as to the nature of his judgment of incapacity.

The evidence presented by plaintiffs that the capacity to vote was not raised in the guardianship proceedings of other individuals adjudged fully incapacitated does not demonstrate any deficiency in Missouri law, but only a failure of these wards to raise this issue or an understanding by the persons involved in the proceedings that, as defendants argue, voting capacity cannot be evaluated by itself.

The ability of persons going through capacity proceedings to address their capacity to vote in those proceedings (or, if already subject to a judgment of full incapacity, to address the issue in review proceedings), contradicts plaintiffs' position in this case. By providing a means to establish capacity to vote, either directly or by reference to self-care and personal safety abilities, Missouri law does not permit the removal of the right to vote of incapacitated persons without an individual assessment of their abilities. If persons subject to guardianship proceedings wish to retain the capacity to vote, they have a forum for review of that capacity.

**Summary.** Because neither the Missouri Constitution nor Missouri law prevents persons with the competence to vote from voting, the state official defendants were entitled to judgment as a matter of law and the district court correctly granted summary judgment in their favor.

## Conclusion

As shown above, plaintiffs-appellants Scaletty and MOPAS presented no evidence that raised any genuine issue of material fact that would overcome the defendant-appellee state officials' entitlement to judgment as a matter of law. Therefore, the state officials urge this Court to affirm the district court's grant of summary judgment in their favor.

Respectfully submitted,

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I hereby certify that this brief was prepared using Word Perfect 9.0, in 14-point proportionally spaced typeface print size, and that the diskette submitted with the instant brief has been scanned for viruses and is virus-free. I further certify that the brief contains 12,334 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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