

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

STEVEN M. PRYE, et al.,)	
)	
Plaintiffs,)	
)	Case No. 2:04-cv-04248-ODS
v.)	
)	FILED UNDER SEAL
ROBIN CARNAHAN, et. al.,)	
)	
Defendants.)	

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT**

Plaintiffs hereby move, pursuant to Fed. R. Civ. P. 56(b), for summary judgment on Counts I and II (violation of the Equal Protection and Due Process Clauses), IV (violation of the Americans with Disabilities Act), and V (violation of Section 504 of the Rehabilitation Act of 1973) of Plaintiffs’ First Amended Complaint for Declaratory and Injunctive Relief.¹

¹ Count III, which pertained only to Plaintiff Steven Prye, was voluntarily dismissed by plaintiffs. *See* Order of Sept. 22, 2005 dismissing all claims of Steven Prye upon stipulation of the parties.

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I. INTRODUCTION

Plaintiffs Scaletty and Missouri Protection and Advocacy Services (MOPAS)² seek summary judgment on their claims that defendants violate the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment by banning voting by all individuals under full guardianship,³ without a specific determination that they lack the capacity to vote. The voting ban disenfranchises many individuals, including plaintiff Scaletty and plaintiff MOPAS's five representative constituents, who have the capacity to vote. Statement of Uncontroverted Material Facts ("SOUF") at ¶ 11, 19, 92. Plaintiffs' expert's conclusions that these individuals have the capacity to vote are uncontested. *Id.* at ¶ 20.

The Missouri Constitution provides that "[n]o person who has a guardian of his or her estate or person by reason of mental incapacity, appointed by a court of competent jurisdiction . . . shall be entitled to vote." Mo. Const. Art. 8, § 2. Missouri statutes provide that "[n]o person who is adjudged incapacitated shall be entitled to register or vote." V.A.M.S. § 115.133(2).⁴ Missouri law also criminalizes registering and voting by persons adjudged incapacitated. *Id.*

² Plaintiff MOPAS, the designated protection and advocacy system in Missouri, brings this action on behalf of individuals with disabilities who have lost the right to vote because they are under guardianship, but are nonetheless competent to vote. Statement of Uncontroverted Materials Facts ("SOUF") at ¶¶ 14, 15, 21. Plaintiffs present evidence illustrating five representative MOPAS constituents who have lost their right to vote based on their guardianship status but have the capacity to vote: S.C., C.D., W.C., P.T., and M.T..

³ In this motion, plaintiffs address only the effect of the voting ban on individuals adjudged totally incapacitated. Plaintiffs will address at a later time, if appropriate, the effect of Mo. Const. Art. 8, § 2 and V.A.M.S. § 115.133(2) on individuals adjudged partially incapacitated. In this motion, plaintiffs use the terms "adjudged totally incapacitated" and "under full guardianship" interchangeably.

⁴ A full guardian is appointed when a person is adjudged "totally incapacitated" (where the person lacks the capacity to meet food, clothing, shelter and safety needs). V.A.M.S. §§ 475.010(9), 475.075(10). An adjudication of "partial incapacity" (where a person has partial capacity to meet food, clothing, shelter and safety needs) results in the appointment of a partial guardian. *Id.* §§ 475.010(14), 475.080(1).

§ 115.631(2),(17), and providing voting assistance to a person adjudged incapacitated. *Id.* § 115.631(24).

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Reynolds v. Sims*, 377 U.S. 533, 560 (1964).

Plaintiff Scaletty and plaintiff MOPAS’s representative constituents not only have the capacity to vote, but are vitally concerned with, or actively involved in, public affairs. Robert Scaletty reads two newspapers thoroughly each day. S.C. has campaigned for and held local and statewide offices with a disability advocacy organization. C.D. has lobbied his state representatives concerning proposed Medicaid cuts. P.T. writes to public officials to lobby them on issues of concern to him. W.C. follows current events by listening daily to radio news. SOUF at ¶¶ 31, 41-42, 54, 66, 76. Yet these individuals are deprived of the right to vote based on their guardianship status, which reflects their capacity to meet food, clothing and shelter needs, not their capacity to vote.

II. STATEMENT OF UNCONTROVERTED MATERIAL FACTS

Pursuant to Local Rule 56.1(a), the following are the uncontroverted material facts supporting plaintiffs’ motion for summary judgment:

Missouri’s Election and Guardianship Laws

1. Missouri law provides that “[n]o person who is adjudged incapacitated shall be entitled to register or vote.” V.A.M.S. § 115.133.
2. The Missouri constitution provides that “[n]o person who has a guardian of his or her estate or person by reason of mental incapacity, appointed by a court of competent jurisdiction . . . shall be entitled to vote.” Mo. Const. Art. 8, § 2.

3. Missouri criminalizes registering and voting by persons adjudicated incapacitated. V.A.M.S. § 115.631 (2),(17). Missouri also criminalizes providing assistance in voting to a person adjudged incapacitated. *Id.* § 115.631 (24).

4. An individual is placed under a full guardianship upon a finding of total incapacity—that he is “unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that he lacks capacity to meet essential requirements for food, clothing, shelter, safety or other care” *Id.* § 475.010 (9). Such a finding “operate[s] to impose upon the ward [] all legal disabilities provided by law,” including loss of the right to vote. *Id.* §§ 115.133; 475.078.

Voting Competence

5. Our legal system generally presumes competence. Expert report of Paul S. Appelbaum, M.D.,⁵ (Ex. 1) at 2.

6. Since the 1960s, competence has been increasingly conceptualized as a specific—rather than general—attribute of a person. It has been recognized that many persons with mental impairments can make some decisions but not others. When doubt exists about a person’s capacity to perform a particular task, a functional assessment is required of the specific decision at issue. *Id.* at 2-3.

⁵ Dr. Appelbaum is the Elizabeth Dollard Professor of Psychiatry, Medicine and Law at the College of Physicians and Surgeons of Columbia University and Director of the Division of Psychiatry, Law and Ethics at the New York State Psychiatric Institute. Ex. 1 at 1. He is the former president of the American Psychiatric Association and of the American Academy of Psychiatry and the Law. Dr. Appelbaum is considered one of the leading experts on decisional competence. *Id.*; Dep. Tr. of Bruce Harry, M.D. (excerpts attached as Ex. 2) at 23. He is one of the leaders of the largest study ever undertaken of the decision-making competence of persons with mental disorders, has published many papers, in both medical and legal journals, as well as several books concerning decisional competence, and has lectured on competence assessment in both medical schools and law schools. Ex. 1 at 2. He has also been part of a research project based at the University of Pennsylvania that is exploring issues related to voting by persons with cognitive impairments and developing a standardized instrument to evaluate voting competence, and has several articles published or in press in major, peer-reviewed medical journals concerning this work. *Id.*

7. As a matter of policy, disqualifications of voters on the basis of their functional capacities are severely disfavored. *Id.* at 4.

8. In our society, the threshold for competence to vote should be a low one. *Id.*

9. The only court to address a law prohibiting voting by individuals under guardianship held that it would be discriminatory, at a minimum, to disenfranchise voters who have the capacity to understand the nature and effect of voting such that they can make an individual choice. *Id.* at 4-5 (citing *Doe v. Rowe*, 156 F. Supp.2d 35 (D. Me. 2001)).

10. Bruce Harry, M.D., defendants' expert, admits that the factors that are considered in determining whether a person should be placed under full guardianship—the ability to make decisions to ensure basic food, clothing and shelter needs—are not necessarily more pertinent to determining voting capacity than the person's ability to understand the voting process. Dep. Tr. of Bruce Harry, M.D. (excerpts attached as Ex. 2) at 33.

11. Many people who meet Missouri's standard for full guardianship retain their competence to vote. Ex. 1 at 6, 14. A number of Missouri service providers, public administrators, and advocates confirm, based on their experience, that many individuals under full guardianship in Missouri have the capacity to vote. For example, Mary Frances Broderick, a service provider with over thirty years of experience working with individuals with mental disabilities in Missouri, states that the vast majority of individuals she has observed who are under guardianship have the capacity to vote. Dec. of Mary Frances Broderick (Ex. 3) at ¶ 10. Laura Walker, who worked with hundreds of people with disabilities across the state of Missouri in her capacity as a statewide advisor for People First, a disability advocacy organization, observes that a large number of People First members under guardianship (including full guardianship) clearly have the ability to understand the voting process, and that many have voted in the past, understand how voting works, have a good understanding of issues that are at stake in

the elections, and in many cases have come to the state capitol to lobby their representatives. Dec. of Laura Walker (Ex. 4) at ¶ 3. Several public administrators also confirm that many of their wards who are under full guardianship have the capacity to vote. Dec. of Connie Hendren (Ex. 5) at ¶ 10; Dec. of Sarah Burkemper (Ex. 6) at ¶ 7; Dec. of Bruce King (Ex. 7) at ¶ 7. Defendants' expert, Dr. Harry, acknowledges that some people under full guardianship have a good understanding of how the voting process works. Ex. 2 at 35-36.

12. A person may be placed under guardianship because of his or her inability to manage money or attend to his or her medical needs. These impairments do not relate to the ability to or impact that individual's capacity to vote. Ex. 1 at 6; Ex. 7 at ¶ 7; Dec. of Ekkehard Othmer, M.D., Ph.D. (Ex. 8) at ¶ 10; Dec. of Karen A. MacDonald, Psy.D. (Ex. 9) at 1.

13. The limited number of relevant functions and low threshold for competence to vote indicates that its presence or absence must be determined specifically and cannot be presumed on the basis of determinations regarding distinct, often more complex, functions. Ex. 1 at 6.

MOPAS

14. The Missouri Protection and Advocacy Services, Inc. ("MOPAS") is a not-for-profit corporation. MOPAS has been designated as the statewide protection and advocacy agency to protect and advocate for the legal and civil rights of Missouri citizens who have mental illness and developmental disabilities pursuant to the Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act, 42 U.S.C. § 10801, *et seq.*, and the Developmental Disabilities Assistant and Bill of Rights Act (DD Act), 42 U.S.C. § 15001, *et seq.*, respectively. Dec. of Shawn T. de Loyola (Ex. 10) at ¶¶ 3-4.

15. Pursuant to its authority under the PAIMI and DD Acts, MOPAS is a plaintiff in this action to protect and advocate for the rights and interests of Missouri citizens who are under

full guardianship and are individuals with mental illness or developmental disabilities as defined by the PAIMI and DD Acts. These individuals are constituents of MOPAS. *Id.* at ¶ 7.

16. Plaintiffs' expert, Paul S. Appelbaum, M.D., evaluated the voting capacity of a number of MOPAS constituents who are under full guardianship and are interested in voting, including plaintiff Scaletty, S.C., C.D., P.T., and W.C.. Ex. 1 at 6-13. He reviewed these individuals' medical records and conducted an assessment where he obtained from them a general history of their psychiatric treatment, education and employment, social functioning, general medical problems, and voting and performed a basic mental status examination. *Id.*

17. The type of assessment performed by Dr. Appelbaum is standard for determining competence. Dep. Tr. of Paul Appelbaum, M.D. (excerpts attached as Ex. 11) at 74-75, 81-82; Ex. 2 at 14-15. Defendants' expert, Bruce Harry, M.D., stated that Dr. Appelbaum did a competent job of assessing these individuals. Ex. 2 at 28.

18. In assessing these individuals' voting capacity, Dr. Appelbaum used the standard set forth in *Doe v. Rowe*—whether the individuals understand the nature and effect of voting. Ex. 1 at 14. This standard may in fact represent a higher standard than non-mentally ill persons are required to meet in order to vote. *Id.* at 5. The American Bar Association's Commission on the Mentally Disabled has proposed a lower standard that would permit voting by any person who is able to provide the information reasonably required of all people seeking to register to vote. *Id.* at 6.

19. Based on his assessments, Dr. Appelbaum found that each of the MOPAS constituents he examined has the capacity to vote despite being under full guardianship. Ex. 1 at 7-14.

20. Defendants' expert, Dr. Bruce Harry, does not contest this conclusion. Dr. Harry formed no opinion about the voting capacity of the individuals evaluated by Dr. Appelbaum. Ex.

2 at 35. Dr. Harry does not believe that these individuals' guardianship status indicates that they lack the capacity to vote. *Id.* at 35-36.

21. MOPAS is a plaintiff to advocate for the rights of its constituents who, like those evaluated by Dr. Appelbaum, are under full guardianship and have the capacity to vote, but cannot do so because of the Missouri law and constitutional provisions at issue in this case. Ex. 10 at ¶ 9.

Robert Scaletty

22. Robert Scaletty has been diagnosed with schizophrenia and was placed under full guardianship because of his mental illness in 1999. Dec. of Robert Scaletty (Ex. 12) at ¶ 3; Dec. of Bill Scaletty (Ex. 13) at ¶¶ 2-3; Dec. of Carol Bahmueller, M.S.W. (Ex. 14) at 1-2. The public administrator of Jackson County is Mr. Scaletty's guardian. Ex. 12 at ¶ 4.

23. As a result of schizophrenia, Mr. Scaletty is substantially limited in the major life activities of engaging in daily activities and interacting with others. Ex. 13 at ¶ 2; Ex. 14 at 1. His treatment provider has opined that he requires daily oversight to ensure that his daily needs, such as nutrition and appropriate clothing, are met. Ex. 14 at 1.

24. When Mr. Scaletty was placed under guardianship, his right to vote was reserved in his guardianship order. Ex. 12 at ¶ 5. Despite having his right to vote reserved, Mr. Scaletty has been denied the right to vote since being placed under guardianship in 1999. Ex. 12 at ¶¶ 5-6; Ex. 13 at ¶ 3. In fact, Mr. Scaletty received a letter from the Kansas City Board of Elections in 2003 stating that he was not eligible to vote because Missouri law does not allow people under guardianship to vote. Ex. 12 at ¶ 7; Ex. 13 at ¶ 3.

25. Mr. Scaletty went to the Kansas City Board of Elections to ask about the letter, and the Board of Elections staff told Mr. Scaletty that he was not permitted to vote. Ex. 12 at ¶ 8; Ex. 13 at ¶ 3.

26. Mr. Scaletty went to his usual polling place for the 2004 presidential election. His name had been removed from the voter rolls, and he was not permitted to vote. Ex. 12 at ¶ 9; Ex. 13 at ¶ 3.

27. Mr. Scaletty meets all of the qualifications for voting in Missouri. Ex. 13 at ¶ 5; Ex. 12 at ¶ 5.

28. It was only after Mr. Scaletty filed this lawsuit that the Board of Elections sent him a voter registration card. Ex. 12 at ¶ 10.

29. Mr. Scaletty routinely voted in local, state and federal elections until he was stopped from voting due to his guardianship status. Ex. 12 at ¶ 6; Ex. 13 at ¶ 4; Ex. 1 at 10.

30. Mr. Scaletty is interested in a variety of political issues, including social morals, job opportunities, and the direction in which his county is going. He believes in less taxation and regulation. Ex. 12 at ¶ 13.

31. Mr. Scaletty has a strong interest in current events. He keeps up with current events by reading newspapers, including the Kansas City Star and the USA Today cover to cover every day (and occasionally the Wall Street Journal), and by listening to the radio. *Id.* at ¶ 14.

32. Mr. Scaletty votes for someone based on the character of the person, not their party affiliation. He looks at the candidate's philosophy, position on issues important to him, and the candidate's plan to achieve his or her goals. *Id.* at ¶ 15.

33. Mr. Scaletty has the capacity to vote. Ex. 1 at 11; Ex. 14 at 2; Ex. 13 at ¶ 4.

34. Dr. Appelbaum noted Mr. Scaletty's long history of voting, and his practice of following current events. Ex. 1 at 11. In opining that Mr. Scaletty understands the nature and effect of voting, Dr. Appelbaum considered that Mr. Scaletty said he would decide on a candidate by looking at issues and comparing candidates' positions and that Mr. Scaletty said the person with the most votes wins. *Id.*

35. Mr. Scaletty's treating social worker, Carol Bahmueller, M.S.W.,⁶ stated that he understands the process of an election, keeps up with and has strong views on political issues, is familiar with current elected officials, and has a history of voting in past elections. She believes he is capable of making informed choices. Ex. 14 at 2. Ms. Bahmueller also stated that Mr. Scaletty has the necessary judgment and skills to vote, and that the limitations that give rise to his need for guardianship do not make him incapable of voting. *Id.*

36. Mr. Scaletty's father noted his son's history of voting, his habit of keeping up with current affairs, and his strong political opinions. Mr. Scaletty's father also stated that his son has a good understanding of how elections work, including elections involving choices between candidates and those such as ballot referenda involving choices between issues. Ex. 13 at ¶ 4.

S.C.

37. S.C. has been diagnosed with bipolar disorder and mild mental retardation and was placed under full guardianship due to his disability in 1987. Dec. of S.C. (Ex. 15) at ¶ 4-5; Dec. of S.K. (Ex. 16) at ¶ 4. Mr. C. also has diabetes mellitus. Ex. 1 at 7. His sister-in-law, S.K., has been his guardian for the last eleven years. Ex. 15 at ¶ 6; Ex. 16 at ¶ 2

38. As a result of his disabilities, Mr. C. is substantially limited in the major life activity of caring for himself. Ex. 16 at ¶ 4.

39. Mr. C. is interested in a variety of political issues, including Social Security, Medicaid cuts, accessible transportation, and social issues such as gun control and minimizing violence in our society. Ex. 15 at ¶ 13.

⁶ Ms. Bahmueller is the director of the program that provides community support services to Mr. Scaletty and is charged with assessing Mr. Scaletty on an annual basis. Ex. 14 at 1.

40. Mr. C. stays well informed of current events by watching the news, listening to the radio and reading the newspaper. Ex. 15 at ¶ 15; Ex. 16 at ¶ 5. He also regularly reviews e-mails sent from People First, a disability advocacy organization in which he is involved. Ex. 15 at ¶ 21.

41. Mr. C. has participated in political affairs for the last nine years through People First. Ex. 15 at ¶ 16. Every year, Mr. C. participates in People First's Lobby Day, where he and other People First members lobby state representatives about issues of importance to people with disabilities. Mr. C. spends several months before the Lobby Day learning as much as possible about issues. Last year Mr. C. spoke to State Representatives Randy Anst and John T. Russell about Medicaid cuts. *Id.*

42. Mr. C.'s work with People First has familiarized him with how elections work. He has successfully run as a candidate for office several times, including as local chapter president and sergeant-at-arms. He has voted about sixteen times in People First statewide elections. *Id.* at 17-19.

43. When Mr. C. votes, he pays attention to a person's character, their job performance, and their campaign promises. *Id.* at ¶ 20.

44. Mr. C. has the capacity to vote. Ex. 1 at 8; Ex. 16 at ¶ 6.

45. Dr. Appelbaum noted Mr. C.'s practice of following current events and his political advocacy work through People First. Ex. 1 at 8. In opining that Mr. C. understands the nature and effect of voting, Dr. Appelbaum considered that Mr. C. said he would decide on a candidate by examining the candidates' position on issues (particularly those affecting people with disabilities) and that Mr. C. said that voting involves casting a ballot and the person with the most votes win. *Id.*

46. Mr. C.'s guardian, Ms. S.K., confirmed that Mr. C. understands how voting works and what it means to cast a ballot. She noted that Mr. C. keeps up on current events, has a good grasp of issues that are at stake in elections (including those that effect him, like Medicaid cuts), makes up his own mind, and has extensive experience with voting through People First. Ex. 16 at ¶¶ 5-7.

47. Ms. K. fully supports Mr. C.'s right to vote. *Id.* at ¶ 7. When she obtained guardianship over Mr. C., she did not know that he would lose the right to vote. The subject of voting never came up at the guardianship hearing. *Id.* at ¶ 8; Ex. 15 at ¶ 9.

C.D.

48. C. D. has been diagnosed with mild mental retardation and bipolar disorder and was placed under full guardianship due to his disability in 2001. Dec. of C.D. (Ex. 17) at ¶¶ 2-3; Ex. 5 at ¶¶ 14-15. His guardian is the public administrator of Boone County, Connie Hendren. Ex. 17 at ¶ 4; Ex. 5 at ¶ 14.

49. As a result of his disabilities, Mr. D. is substantially limited in major life activities such as taking care of his daily needs and interacting with others. Mr. D. is also limited in his ability to manage his financial resources. Ex. 5 at ¶¶ 15-16.

50. Mr. D. meets all of the qualifications for voting in Missouri except the requirement that voters not be under full guardianship. Ex. 5 at ¶ 24.

51. Mr. D. voted in the election of 2000, prior to his being placed under guardianship. Ex. 17 at ¶ 10.

52. Mr. D. is interested in a variety of political issues, including state affairs, court cases, and Medicare and Medicaid issues. Ex. 17 at ¶ 12. He is a registered Republican. Ex. 1 at 9.

53. Mr. D. stays well informed of current events by reading the newspaper, watching political debates on C-SPAN, and participating in a current events class. Ex. 17 at ¶ 13; Ex. 5 at ¶ 18. He often discusses current events with his public administrator. Ex. 5 at ¶ 18.

54. Mr. D. has participated in political affairs through People First. Ex. 17 at ¶¶ 14, 16; Ex. 5 at ¶¶ 19-20. In 2005, Mr. D. participated in People First's Lobby Day, where he and other People First members lobbied State Senator Bill Stouffer about issues of importance to people with disabilities, including funding cuts to programs for people with disabilities. Ex. 17 at ¶ 14; Ex. 5 at ¶ 20.

55. Mr. D.'s work with People First has familiarized him with how elections work. He participates in People First elections and has been elected to be a public representative for his local People First chapter. Ex. 17 at ¶ 16; Ex. 5 at ¶ 19.

56. When Mr. D. thinks about voting, he would want to know about the candidates' background, whether they served in the military, and whether they have a good education. Mr. D. thinks it is important to learn about both sides of an issue. Ex. 17 at ¶ 13.

57. Mr. D. has the capacity to vote. Ex. 1 at 9-10; Ex. 5 at ¶ 17.

58. Dr. Appelbaum noted Mr. D.'s practice of following current events and his political advocacy work through People First. Ex. 1 at 9. In opining that Mr. D. understands the nature and effect of voting, Dr. Appelbaum considered that Mr. D. said he would decide on a candidate, including by looking at how the individual currently in the office is performing, and that Mr. D. said that voting involves selecting a candidate at the polls and the person with the most votes wins. *Id.*

59. Mr. D.'s guardian, Boone County Public Administrator Connie Hendren, confirmed that Mr. D. understands the voting process and political issues. She noted that Mr. D.

keeps up on current events, has been involved in political advocacy efforts through People First, and has experience with voting through People First. Ex. 5 at ¶¶ 17-20.

60. Ms. Hendren first became aware of Mr. D.'s interest in voting when an attorney connected with this lawsuit connected her. Ms. Hendren supports Mr. D.'s right to vote and his participation in this lawsuit. She and Mr. D. have agreed that this lawsuit is the most appropriate way to challenge the bar to his voting. *Id.* at ¶ 22.

P.T.

61. P.T. has been diagnosed with Mental Disorder Not Otherwise Specified (formerly termed Organic Brain Syndrome) due to encephalitis at the age of three. Dec. of Karen Slaven-Reynolds, M.S.W. (Ex. 18) at ¶ 4.

62. As a result of his disabilities, Mr. T. is substantially limited in major life activities such as making health care decisions, financial management, and daily living. Ex. 18 at ¶ 5. Mr. T. has a history of significant problems with impulse control and verbally and physically aggressive behavioral, although behavioral interventions have diminished these problems over time. Mr. T. continues to have difficulties with hoarding behaviors. *Id.* at ¶ 4.

63. Mr. T. was adjudicated incompetent in 1972 following the death of his foster parents. This court determination remained unknown to Mr. T. or his service providers until 2000, at which point the office of the newly elected public administrator of the City of St. Louis contacted Mr. T.'s service provider to advise them that Mr. T.'s file had been discovered behind a filing cabinet. The public administrator of the City of St. Louis, Gerald Nester, became Mr. T.'s guardian on September 19, 2000. Ex. 18 at ¶ 6; Dec. of P.T. (Ex. 19) at ¶ 2; Ex. 3 at ¶ 13. Mr. T. has never met his guardian. Ex. 1 at 12.

64. Mr. T. meets all of the qualifications for voting in Missouri except the requirement that voters not be under full guardianship. Ex. 19 at ¶ 5.

65. Mr. T. has always voted in the past without interference. Ex. 18 at ¶ 8; Ex. 19 at ¶ 8; Ex. 1 at 12.

66. Mr. T. is interested in a variety of political issues, including Social Security, Medicare, Medicaid, and housing funding. He writes to public officials to lobby for himself on issues he feels are important. Ex. 19 at ¶¶ 4, 7; Ex. 18 at ¶ 7. Mr. T. has usually voted for Democratic candidates because he agrees with them on the issues important to him. Ex. 19 at ¶ 7.

67. Mr. T. stays well informed of current events by reading the St. Louis Post-Dispatch daily and listening to television and radio news. Ex. 19 at ¶ 9. He also learns of political issues which directly impact his life through his service provider's advocacy efforts. Ex. 18 at ¶ 4.

68. Mr. T. decides whom to vote for by looking at candidate's positions on issues that are important to him. Ex. 19 at ¶ 7.

69. Mr. T. has the capacity to vote. Ex. 1 at 12; Ex. 18 at ¶ 7.

70. Dr. Appelbaum noted Mr. T.'s history of voting and his practice of following current events. Ex. 1 at 12. In opining that Mr. T. understands the nature and effect of voting, Dr. Appelbaum considered that Mr. T. said he would decide on a candidate based on party affiliation and that Mr. T. described the process of going to the polls, using the voting machine, and casting his vote and that the candidate with the most votes wins. *Id.*

71. Mr. T.'s treating social worker, Karen Slaven-Reynolds, M.S.W.,⁷ confirmed that Mr. T. understands that voting is the process by which officials are selected and that the person receiving the most votes wins. Ex. 18 at ¶ 8. She noted that Mr. T. has voted in the past, keeps

⁷ Ms. Slaven-Reynolds is a treatment team leader at Places for People, Inc., and has worked with Mr. T. for the last sixteen years. Ex. 18 at ¶ 3.

up on current events, and writes to public officials to lobby for himself. *Id.* at ¶ 7. She stated that he possessed the necessary skills and judgment to vote. *Id.* at ¶ 9.

72. The executive director of Places for People, Mary Frances Broderick, stated that, based on her experience with him, there is no difference in Mr. T.'s cognitive abilities during the period of twenty years when he functioned without a guardian and the subsequent period when his guardian resumed his duties, and that he had an equally good understanding of the voting process in both periods. Ex. 3 at ¶ 14. She noted that Mr. T. keeps up with and has an interest in current events, writes to officials on issues of importance to him, is capable of making informed decisions, and holds strong opinions on issues. *Id.* at ¶¶ 16-18. She believes he has a good understanding of the political process and knows how the political system works. *Id.* at ¶ 18.

W.C.

73. W.C. has had long-term difficulties with depression, although her diagnosis has recently changed to bipolar disorder. Ex. 1 at 13; Ex. 8 at ¶ 4. Ms. C. also has cerebral palsy. Ex. 8 at ¶ 4. Ms. C. has been under full guardianship since she turned 18 in 1997, and her father is her guardian. Ex. 8 at ¶ 6; Ex. 1 at 13; Ex. 4 at ¶ 5.

74. As a result of her disabilities, Ms. C. is substantially limited in the major life activities of speaking, walking, and caring for herself. Ex. 8 at ¶ 5. Due to her cerebral palsy, Ms. C. has difficulty walking and is unable to speak; she communicates using assistive technology. *Id.*

75. Ms. C. meets all of the qualifications for voting in Missouri except the requirement that voters not be under full guardianship. Ex. 4 at ¶ 7.

76. Ms. C. follows current events by listening daily to news from the radio. Ex. 1 at 13. Ms. C. is also a member of People First. Ex. 4 at ¶ 5.

77. Ms. C. has the capacity to vote. Ex. 1 at 13; Ex. 8 at 7; Ex. 4 at ¶ 5.

78. Dr. Appelbaum noted that Ms. C. follows current events. In opining that Ms. C. understands the nature and effect of voting, Dr. Appelbaum considered that Ms. C. said she would choose candidates by making a list of the people running and of their positions on issues and would compare the candidates and decide which issues are important to her. He also noted that she understands the process of voting and selecting among candidates and that at the conclusion of an election, the votes are counted and the candidate with the most votes wins. Ex. 1 at 13. Dr. Appelbaum stated that Ms. C. characterizes the purpose of voting as to make your opinion heard. *Id.*

79. Ms. C.'s treating psychiatrist, Ekkehard Othmer, M.D., Ph.D.,⁸ opined that Ms. C. is capable of understanding the voting process and knows the purpose of elections and how they work. Ex. 8 at ¶ 7. He also noted that she is capable of making choices and informed decisions about issues and candidates. *Id.* at ¶ 8. He stated that Ms. C. possesses the necessary skills and judgment to vote and that the reasons for her guardianship are unrelated to and do not impact her capacity to vote. *Id.* at ¶¶ 9-10.

80. Ms. C.'s advisor at People First also believes Ms. C. has a clear understanding of the nature and effect of voting. Ex. 4 at ¶ 5.

M.T.

81. M.T. has been diagnosed with depressive disorder, oppositional defiant disorder, mood disorder, and borderline intellectual functioning. Ex. 9 at 1. Ms. T. is under full guardianship, and her guardian is the public administrator for Camden County, Elaine Gilley. *Id.*; Dep. Tr. of Elaine Gilley (excerpts attached as Ex. 20) at 15.

⁸ Dr. Othmer is a licensed psychiatrist who has been treating Ms. C. on a weekly basis since early 2003. Ex. 8 at ¶¶ 1, 3.

82. Ms. T. is substantially limited in major life activities, including interpersonal interactions, learning and self care. Ex. 9 at 1.

83. Karen MacDonald, Psy.D.,⁹ Ms. T.'s treating psychologist, reported that Ms. T. has the capacity to vote. Ex. 9 at 1. Dr. MacDonald stated that Ms. T. understands how the voting process works and what the effect of an election is. Dr. MacDonald believes Ms. T. is capable of making choices about candidates and issues. She also states that Ms. T. possesses the necessary skills and judgment to vote and that the limitations giving rise to the need for Ms. T.'s guardianship do not make her incapable of voting. *Id.*

84. Dr. Appelbaum was scheduled to evaluate Ms. T. to determine whether she has the capacity to vote. Ms. T.'s guardian, Ms. Gilley, refused to consent to the evaluation. Ex. 1 at 14, n. 9. Ms. Gilley told attorneys in this case that Ms. T. needed a court order to be evaluated by Dr. Appelbaum, even though Ms. Gilley does not ordinarily require a court order for her wards to be evaluated by medical professionals. Ms. Gilley never obtained this court order. Ex. 20 at 18-22.

O.L.

85. O.L. is an individual under full guardianship. Her guardian is the public administrator of Camden County, Elaine Gilley. Ex. 20 at 15.

86. Dr. Appelbaum was scheduled to evaluate Ms. L. to determine whether she has the capacity to vote. Ms. L.'s guardian, Ms. Gilley, refused to consent to the evaluation. Ex. 1 at 14, n. 9. Ms. Gilley told attorneys in this case that Ms. L. needed a court order to be evaluated by Dr. Appelbaum, even though Ms. Gilley does not ordinarily require a court order for her wards to be evaluated by medical professionals. Ms. Gilley never obtained this court order. Ex. 20 at 18-22.

⁹ Dr. MacDonald has been treating Ms. T. since she was in junior high school. Ex. 9 at 1.

“Jane Doe”

87. “Jane Doe” is a member of People First who is under full guardianship and as a result, cannot vote. Ex. 4 at ¶ 8.

88. Ms. Doe’s treating psychiatrist has stated that she has the capacity to vote, as has Ms. Doe’s People First Advisor. *Id.*

89. Ms. Doe’s treating psychiatrist has confirmed that she has the capacity to vote. Ms. Doe’s guardian, who is a public administrator, has stated that she (the guardian) does not believe that individuals under guardianship should be permitted to vote. *Id.*

90. Ms. Doe is afraid to identify herself because she does not want to displease her guardian. *Id.*

Defendants’ Receipt of Federal Funding

91. Defendants receive federal financial assistance. Defendants Blunt and Nixon’s Answer at ¶ 21.

Over- and Under-Inclusive Scope of the Missouri Election Laws

92. V.A.M.S. § 115.133 and Mo. Const. Art. 8, § 2 disenfranchise many individuals who have the capacity to vote, including plaintiff Scaletty and the representative MOPAS constituents. Ex. 1 at 6; Ex. 5 at ¶ 10; Ex. 6 at ¶ 7; Ex. 7 at ¶ 7; Ex. 3 at ¶ 10; Ex. 4 at ¶ 2; Ex. 2 at 35-36. *See also* SOUF ¶ 11.

93. The individuals under guardianship who were evaluated by Dr. Appelbaum as functionally capable of voting but not legally permitted to do so are typical of a substantial group of persons under guardianship in every state. Ex. 1 at 14.

94. Bruce Harry, M.D., defendants’ expert, does not believe that the guardianship status of plaintiff Scaletty and the other MOPAS constituents evaluated by Dr. Appelbaum means that they lack the capacity to vote. Ex. 2 at 35-36.

95. Dr. Harry acknowledges that it is reasonable for other states to preserve the voting rights of individuals under guardianship or only to take away their rights upon a determination that they lack the competence to vote. Ex. 2 at 40.

96. Individuals' need for a guardian frequently reflects the unavailability of, or lack of awareness of, other supports and services rather than a higher degree of mental impairment than other similarly situated individuals. Ex. 3 at ¶ 7.

97. Many individuals who are under guardianship have the same degree of mental impairment as individuals who do not have guardians because they receive help from their families without a formal guardianship. Ex. 6 at ¶ 12; Ex. 3 at ¶ 8.

98. Despite the similar degree of impairment between individuals with mental disabilities under guardianship and those not under guardianship, the latter individuals retain the right to vote because they are not under guardianship, whereas wards automatically lose the right to vote. Ex. 6 at ¶ 12.

Lack of Notice Concerning Loss of the Right to Vote

99. The Secretary of State's Office does not provide information to probate courts, public administrators, private guardians or wards concerning the effect of guardianship on voting rights. Dep. Tr. of Betsy Byers (excerpts attached as Ex. 21) at 52-53, 57-60; Dep. Tr. of John Stegmann (excerpts attached as Ex. 22) at 42-45; Ex. 16 at ¶ 9.

100. Many individuals who are subject to guardianship proceedings are unaware that they stand to lose their right to vote. Ex. 7 at ¶¶ 3-5; Ex. 19 at ¶ 3. Many prospective guardians are unaware that an individual stands to lose his or her right to vote. Ex. 7 at ¶ 11; Ex. 16 at 8.

101. Individuals who are placed under full guardianship routinely lose their right to vote during initial guardianship proceedings without their knowledge and without a determination that they are incompetent to vote. Ex. 16 at ¶ 8 (S.C.); Ex. 19 at ¶ 3 (P.T.); Ex. 4

at ¶ 6 (W.C.); Ex. 5 at ¶ 6 (Boone County; C.D.); Ex. 20 at 25 (Camden County; M.T.; O.L.); Ex. 6 at ¶¶ 4-5 (Lincoln County); Ex. 7 at ¶ 5 (Jefferson County).

Restoration of the Right to Vote

102. In a few counties, individuals under full guardianship had had their right to vote restored by demonstrating their capacity to vote. Ex. 5 at ¶¶ 7-8. However, this has happened infrequently. *Id.* at ¶¶ 8-12.

III. ARGUMENT

A. Summary Judgment Standards

This Court must grant plaintiffs summary judgment if it finds that, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and plaintiffs are entitled to judgment as a matter of law. *Grey v. City of Oak Grove*, 396 F.3d 1031, 1034 (8th Cir. 2005). “The mere existence of a factual dispute is insufficient alone to bar summary judgment; rather the dispute must be outcome determinative under prevailing law.” *Id.* Plaintiffs meet this standard and thus are entitled to summary judgment.

B. Missouri’s Voting Ban Violates the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 (Counts IV and V)

Defendants’ application of Missouri’s ban on voting by people under full guardianship, despite the ability of many of these individuals to understand the nature and effect of an election and casting a ballot, constitutes disability-based discrimination in violation of Title II of the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act of 1973 (“Section 504”).

1. The ADA

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such

entity.” 42 U.S.C. § 12132. To establish a violation of Title II, a plaintiff must show that: (1) he is a qualified individual with a disability; (2) he was excluded from participation in or denied the benefits of a public entity’s services, programs, or activities, or was otherwise discriminated against by the entity; and (3) that such exclusion, denial of benefits, or other discrimination, was by reason of his disability. *Layton v. Elder*, 143 F.3d 469, 472 (8th Cir. 1998).

The regulations implementing Title II prohibit a public entity from using criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability. 28 C.F.R. § 35.130(b)(3). Additionally, a public entity may not apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity unless such criteria can be shown to be necessary for the provision of the service, program, or activity. 28 C.F.R. § 35.130(b)(8).

a. Defendants’ Programs, Services and Activities are Covered by Title II of the ADA

Defendants, state officials sued in their official capacity pursuant to *Ex parte Young*, are proper defendants under Title II of the ADA. *Randolph v. Rodgers*, 253 F.3d 342, 348 (8th Cir. 2001). Defendants Carnahan and Nixon are responsible for the operation of state agencies—the Secretary of State’s office and the Office of the Attorney General.¹⁰ These agencies are “public entities” covered by the requirements of Title II of the ADA. 42 U.S.C. § 12131(1) (“public entities” include any state government or department or agency of state government).

¹⁰ The claims against the remaining defendants named in the First Amended Complaint—local election authorities—have been voluntarily dismissed. Order of July 21, 2005 Dismissing Claims Without Prejudice; Sept. 22, 2005 Order of Dismissal Pursuant to Stipulation of the Parties.

b. Individuals Under Full Guardianship are Individuals with Disabilities Protected by the ADA

Plaintiff Scaletty and plaintiff MOPAS's constituents who are under full guardianship are individuals with disabilities protected by the ADA. The ADA defines a disability as a physical or mental impairment that substantially limits a person in one or more major life activities, being regarded as having such an impairment, or having a record of such an impairment. 42 U.S.C. § 12102(2)(A), (B), (C).

Individuals under full guardianship are individuals with disabilities under 42 U.S.C. § 12102(2)(A) by virtue of their guardianship status. These individuals have been adjudged totally incapacitated. An adjudication of "total incapacity" means that a court has determined that the person is "unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that he lacks capacity to meet essential requirements for food, clothing, shelter, safety or other care such that serious physical injury, illness, or disease is likely to occur." V.A.M.S. § 475.010. Thus, these individuals, who remain under adjudications of total incapacity, are substantially limited in meeting their basic needs for self care.

Additionally, these individuals are people with disabilities under 42 U.S.C. § 12102(2)(B) because they are regarded as being substantially limited in meeting their basic needs for self care by virtue of their adjudication of total incapacity. A person who is adjudged incapacitated has been found by a court to have a physical or mental condition that substantially limits him or her in the major life activity of self care, and has had a guardian appointed to make decisions about his or her basic needs.

Plaintiffs’¹¹ particular circumstances confirm that they are substantially limited in self care. Plaintiff Scaletty is substantially limited in the major life activity of self care due to schizophrenia. SOUF at ¶ 23. His treatment provider has opined that he requires daily oversight to ensure that his daily needs such as nutrition and appropriate clothing, are met. *Id.*¹² S.C. is substantially limited in self care—including meeting basic food, clothing and shelter needs—due to bipolar disorder, mild mental retardation, and diabetes mellitus. *Id.* at ¶¶ 37-38. C. D. is substantially limited in his ability to manage financial resources and engage in daily activities due to bipolar disorder, pervasive developmental disorder and mild retardation. *Id.* at ¶¶ 48-49. P.T. is substantially limited in financial management, and daily activities due to organic brain syndrome and mild mental retardation. *Id.* at ¶¶ 61-62. W.C. is substantially limited in walking, speaking, and caring for herself due to cerebral palsy and bipolar disorder. *Id.* at ¶¶ 73-74. M.T. is substantially limited in self care due to a depressive disorder, oppositional defiant disorder, mood disorder, and borderline intellectual functioning. *Id.* at ¶¶ 81-82

c. Plaintiffs are “Qualified” To Participate in Voting

1. Plaintiffs meet the essential eligibility requirements to vote

Plaintiff Scaletty and plaintiff MOPAS’s constituents are “qualified” to participate in the activities of voting and registration. A “qualified individual with a disability” is “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for . . . the participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131(2). Plaintiffs are qualified because they meet the essential requirements for voting and registration.

¹¹ For the sake of simplicity, this brief sometimes refers to plaintiff MOPAS’s constituents as “plaintiffs.”

¹² The nature of these individuals’ disabilities is set forth in greater detail in the Statement of Uncontroverted Material Facts (“SOUF”) and the attached exhibits it references.

To the extent that the capacity to vote can be considered an essential eligibility requirement for voting,¹³ plaintiffs meet that requirement. Plaintiff Scaletty and plaintiff MOPAS's representative constituents were evaluated by Dr. Appelbaum, one of the leading national experts on decisional competence,¹⁴ who concluded that they have the capacity to vote. In evaluating competence to vote, Dr. Appelbaum used the standard applied in *Doe v. Rowe*, 156 F. Supp.2d 35 (D. Me. 2001)—whether an individual understands the nature and effect of voting.¹⁵ Dr. Appelbaum's conclusion for each individual was buttressed by the concurring opinions of treatment providers, guardians, and/or family members.¹⁶

¹³ Plaintiffs do not challenge Missouri's decision to make the capacity to vote an eligibility requirement. The capacity to vote may not be an *essential* eligibility requirement for voting, but even if it is, plaintiffs meet that requirement. The National Voter Registration Act permits, but does not require, states to remove voters from the rolls based on mental incapacity. 42 U.S.C. § 1973gg-6(a)(3)(B). The capacity to vote is far from a universal eligibility requirement. A number of states do not have any voter qualification standard concerning capacity. *See, e.g.*, Kyle Sammin & Sally Balch Hurme, *Guardianship and Voting Rights*, in BIFOCAL, Vol. 26, No. 1, at 13 (Fall 2004), <http://www.abanet.org/aging/261.pdf>. The American Bar Association's Commission on the Mentally Disabled recommended repeal of all disability-based restrictions on voting rights, and for states that insisted on some type of competence standard, the ABA recommended a minimal standard allowing voting by anyone able to provide the basic information needed to register. Bruce Dennis Sales et al., Developmental Disabilities State Legislative Project of the American Bar Association's Commission on the Mentally Disabled, *DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES* 111 (1982).

¹⁴ SOUF at n.1. Dr. Appelbaum is one of the leaders of the largest study ever undertaken of the decision-making competence of persons with mental disorders, has published many papers, in both medical and legal journals, as well as several books concerning decisional competence, and has lectured on competence assessment in both medical schools and law schools. *Id.* He has also been part of a research project based at the University of Pennsylvania that is exploring issues related to voting by persons with cognitive impairments and developing a standardized instrument to evaluate voting competence, and has several articles published or in press in major, peer-reviewed medical journals concerning this work. *Id.*

¹⁵ Arguably, this standard sets a higher threshold than individuals without mental disabilities are required to meet. SOUF at ¶ 18. The American Bar Association Commission on the Mentally Disabled has recommended a lower standard: "Any person who is able to provide the information, whether orally, in writing, through an interpreter or interpretive device or otherwise, which is reasonably required of all persons seeking to register to vote, shall be considered a qualified voter." Bruce Dennis Sales et al., *supra* note 13, at 111. Out of an abundance of caution, Dr. Appelbaum used the standard applied by the *Doe* court, which determined that, at a minimum, it would be discriminatory to disenfranchise individuals who understand the nature and effect of voting.

¹⁶ Another MOPAS constituent, M.T., was not evaluated by Dr. Appelbaum but was evaluated by a treating professional, Dr. Karen MacDonald, who concluded that she has the capacity to vote. Ms. T.'s

Dr. Appelbaum's assessments are uncontested. Defendants' own expert, Dr. Bruce Harry, does not contradict Dr. Appelbaum's conclusions that plaintiff Scaletty and plaintiff MOPAS's constituents have the capacity to vote. Dr. Harry did not form an opinion about these individuals' capacity to vote. SOUF at ¶ 20. Furthermore, Dr. Harry opined that Dr. Appelbaum did a "competent job" with his evaluations. *Id.* at ¶ 17. Dr. Harry does not believe these individuals' guardianship status indicates that they lack the capacity to vote. *Id.* at ¶ 20.

Robert Scaletty manifests a clear understanding of the nature and effect of voting. He believes that voters should look at issues and compare candidates' positions, has voted many times in the past, reads the Kansas City Star and USA Today thoroughly every day and occasionally reads the Wall Street Journal, listens to radio news, is familiar with current elected officials, has strong views on political issues, is capable of making informed choices, and has the necessary judgment and skills to vote. Mr. Scaletty routinely voted in local, state and federal elections for many years until he was stopped from voting due to his guardianship status. *Id.* at ¶¶ 29-36.

S.C. is very familiar with voting and elections, having successfully campaigned for local and statewide office with the organization People First. Mr. C. has voted in numerous People First elections and was elected president of his local chapter and later, sergeant-at-arms for the statewide chapter. He is a regular follower of current events, and has strong opinions about the performance of the governor and the president on issues of concern to him, including Medicaid, Social Security and transportation. Every year, Mr. C. has traveled to Jefferson City to lobby his state representatives on issues such as Medicaid policy. He understands the nature and effect of voting. *Id.* at ¶¶ 39-46.

guardian did not permit her to travel to Kansas City to be evaluated by Dr. Appelbaum. SOUF at ¶¶ 83-84.

C.D. has a clear understanding of how elections work, has voted in the past, reads newspapers, watches debates on C-SPAN and takes a class on current events. He is interested in a variety of political issues, including state affairs and Medicaid and Medicare issues, and last year lobbied his state representatives on issues of concern to people with disabilities, including funding cuts. He serves as an elected representative for his local People First chapter. He believes in the value of exploring different sides of the issues and researching candidates' backgrounds before reaching a decision to vote. He understands the nature and effect of voting. *Id.* at ¶¶ 51-59.

P.T. has voted routinely in elections for years.¹⁷ He is interested in a variety of political issues, including Social Security, Medicare, Medicaid and housing funding. He writes to public officials to lobby on issues that he feels are important. SOUF at ¶ 84. He stays well informed of current events by reading the St. Louis Post-Dispatch daily and listening to television and radio news. He understands the nature and effect of voting. *Id.* at ¶¶ 65-72.

W.C. follows current events by listening daily to radio news. She understands how elections work, and would choose candidates by making a list of the people running and of their positions on issues and would compare the candidates. She is capable of making choices and informed decisions about issues and candidates, and possesses the necessary skills and judgment to vote. Ms. C. understands the nature and effect of voting. *Id.* at ¶¶ 76-80.

¹⁷ Mr. T. continued to vote after he had been placed under guardianship. Because his guardianship file was lost, neither he nor the guardian was aware of the guardianship until his file was found decades later. SOUF at ¶¶ 63, 65.

M.T. understands how the voting process works and what the effect of an election is. She is capable of making choices about candidates and issues, and possesses the skills and judgment to vote. *Id.* at ¶ 83.¹⁸

Regardless of the voting capacity of any one of these individuals, this evidence shows that Missouri disenfranchises people who are fully capable of voting. Indeed, defendants' use of a qualification standard (guardianship status) that is broader than voting capacity makes it inevitable that this qualification standard will disenfranchise people who are capable of voting.

2. *Many Other MOPAS Constituents Meet the Essential Requirements for Voting*

Dr. Appelbaum confirmed in his report that many individuals other than the plaintiffs are under full guardianship but have the capacity to vote. SOUF at ¶ 93 (noting that the individuals he evaluated are typical of a substantial group of individuals under guardianship in every state who have the capacity to vote despite other limitations). Even defendants' expert acknowledges that some people under full guardianship have a good understanding of how the voting process works. *Id.* at ¶ 11.

Other knowledgeable witnesses—including Missouri service providers, public administrators, and advocates—confirm that many individuals who are under full guardianship in Missouri have the capacity to vote. For example, Mary Frances Broderick, a service provider with over thirty years of experience working with individuals with mental disabilities in Missouri, states that the vast majority of individuals she has observed who are under guardianship have the capacity to vote. *Id.* at ¶ 11. Laura Walker, who worked with hundreds of

¹⁸ Plaintiff Scaletty and the representative MOPAS constituents also meet the other qualification standards for voting in Missouri. They are over the age of 18, are not confined under a sentence of imprisonment, are not on probation or parole for conviction of a felony, and have not been convicted of voting-related crimes. V.A.M.S. § 115.133. SOUF at ¶¶ 27, 50, 64, 75.

people with disabilities across the state of Missouri in her capacity as a statewide advisor for People First, observes that a large number of People First members under guardianship (including full guardianship) clearly have the ability to understand the voting process, and that many have voted in the past, understand how voting works, have a good understanding of issues that are at stake in the elections, and in many cases have come to the state capitol to lobby their representatives. *Id.* Several public administrators also confirm that many of their wards who are under full guardianship have the capacity to vote. *Id.*

d. Defendants Have Excluded Plaintiffs From Registering And Voting on the Basis of Their Disabilities

Defendants have excluded plaintiff Scaletty and plaintiff MOPAS's constituents from registration and voting on the basis of their disabilities.¹⁹ The very reason that defendants have barred these individuals from voting is that they have been determined to be unable by reason of a physical or mental condition to meet their basic needs for self care. Thus, defendants have denied plaintiffs the right to vote based on their disabilities. *Cf. Hargrave v. Vermont*, 340 F.3d 27, 36 (2d Cir. 2003) (state law singling out civilly committed individuals for differential treatment discriminated based on disability).

e. Defendants Have Also Discriminated by Imposing Eligibility Criteria that Screen Out People with Disabilities and are Not Necessary to Voting or Registration

Defendants use an eligibility criterion for voting and registration—not being under full guardianship—that screens out people with disabilities from voting and is not necessary to the

¹⁹ While Mr. Scaletty's guardianship order apparently indicated that he retained the right to vote despite an adjudication of "total incapacity," he is still barred from voting by the plain language of the voting ban and was, in fact, repeatedly prohibited from voting by poll workers and election officials since being placed under guardianship. SOUF at ¶¶ 24-26. He even received a letter from the Kansas City Board of Elections informing him that he was not eligible to vote in the 2004 presidential election because Missouri law bars voting by individuals under guardianship. *Id.* at 24. The Board of Elections sent Mr. Scaletty a voter card only after he instituted this litigation. *Id.* at 28. Moreover, voting by a person adjudged totally incapacitated is not permitted under the plain language of the law.

activities of voting or registration. This violates Title II of the ADA. Title II bars defendants from imposing “eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.” 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(8). As noted above, defendants’ use of this eligibility criterion screens out people with disabilities from voting. Thus, defendants may not use this criterion unless it is necessary.

Defendants’ exclusion of all people under full guardianship from registering and voting is not necessary to ensure that voters are competent to vote. This exclusion sweeps far more broadly than necessary and screens out many people who do have the capacity to vote. Rather than removing the right to vote based on a person’s understanding of the voting process, defendants remove the right to vote based on a person’s ability to receive information and communicate decisions about food, clothing and shelter needs. Many persons with cognitive limitations have the capacity to make some decisions but not others. Thus, when doubt exists about a person’s capacity to perform a particular task, an assessment of the specific capacity at issue is necessary. SOUF at ¶ 6. Plaintiff Scaletty, the representative MOPAS constituents, and many other individuals under full guardianship in Missouri have the capacity to vote. *Id.* at ¶¶ 19, 33-36, 44-46, 57-59, 69-72, 77-80.

Additionally, the requirement that voters be free of full guardianship cannot possibly be a necessary requirement for voting because it does not exist in the voting systems of numerous other states. Many states do not have any bar on voting by people under guardianship.²⁰ Additionally, many other states bar voting by people under guardianship only upon a

²⁰ See, e.g., Kyle Sammin & Sally Balch Hurme, *supra* note 13, at 13 (describing ten states with no constitutional or statutory prohibitions on voting by people under guardianship).

determination that they lack the competence to vote.²¹ Excluding individuals under full guardianship from voting is merely a policy choice.

Indeed, Defendants' own expert acknowledges that this eligibility requirement is not necessary to voting. He states that it is reasonable for other states to preserve the voting rights of individuals under guardianship, or to take away their voting rights only upon a determination that they lack the competence to vote. *Id.* at ¶ 94. If it is reasonable to permit some or all people under full guardianship to vote, then a ban on voting by all people under full guardianship is clearly not necessary to the activity of voting.

In sum, defendants' bar on voting by individuals under full guardianship screens out individuals who are qualified to vote, is not necessary to the activity of voting, and thus violates Title II of the ADA. *Accord Doe v. Rowe*, 156 F. Supp.2d at 58 (concluding that Maine's bar on voting by individuals who are under guardianship by reason of mental illness violates Title II).

2. Section 504

Defendants' exclusion of individuals under full guardianship from voting, regardless of their capacity to vote, also violates Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

Section 504 prohibits disability-based discrimination in programs and activities receiving federal assistance. 29 U.S.C. § 794(a). Section 504 contains the same standards and definitions as Title II, and cases interpreting either are applicable to the other. *Allison v. Department of Corrections*, 94 F.3d 494, 497 (8th Cir. 1996). *See also Barnes v. Gorman*, 536 U.S. 181, 184-85

²¹ *See, e.g.*, Wash. Rev. Code § 11.88.010; Conn. Gen. Stat. § 17a-541; Del. Code Ann. Tit. 15, § 1701, Cal. Prob. Code § 1910; Haw. Rev. Stat. § 11-23(a); Okla. Stat. Ann. Tit. 30 § 3-113(B)(1); N.D. Cent. Code § 30.1-28-04(3); Ark. Code Ann. §28-65-302(a)(2)(E); Idaho Code § 66-346(a)(6); Ohio Rev. Code Ann. § 3503.18; Or. Const. Art. II § 3; *Opinion of the [Massachusetts] Elections Division* concluding that limitations imposed on those “‘under guardianship’ must be interpreted for voting purposes to refer only to guardianships that contain specific findings prohibiting voting.” (reprinted in John H. Cross et al., *GUARDIANSHIP AND CONSERVATORSHIP IN MASSACHUSETTS* 149 (2000)). This list is not an exhaustive one.

(2002) (Section 504 provides same rights, procedures, and enforcement remedies as Title II of the ADA). Thus, conduct that violates Title II of the ADA also violates Section 504.

It is undisputed that defendants receive federal funds, and thus defendants are subject to Section 504. SOUF at ¶ 91. For the reasons described above that defendants' voting ban violates Title II of the ADA, that ban also violates Section 504.

C. Missouri's Voting Ban Violates the Equal Protection and Due Process Clauses (Counts I and II)

Missouri's prohibition on voting by people who have been adjudged mentally incapacitated violates the Equal Protection Clause of the Fourteenth Amendment. The right to vote is a fundamental right. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

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

Id. at 560 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).)²²

Under the Equal Protection Clause, classifications that might interfere with the right to vote must be “closely scrutinized and carefully confined.” *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1996). When a state subjects individuals' voting rights to “severe” restrictions—as is the case here where the state prohibits plaintiffs from even registering to vote—the state must prove that its election laws are “narrowly drawn to advance a state interest

²² Indeed, it is hard to imagine a right more fundamental to plaintiffs at this point in time than the ability to have a voice about issues that impact their basic well-being. The Medicaid cuts recently enacted and further cuts being considered by the state of Missouri may have an enormous impact on their lives, as many depend on Medicaid benefits to ensure that their basic health needs are met. Additionally, significant changes to Medicaid, Medicare and Social Security benefits have been the subject of recent policy debates on the federal level as well. Recognizing the importance of legislative decisions about these issues, a number of plaintiff MOPAS constituents have participated in lobbying efforts to explain to their representatives in the state legislature the impact that Medicaid cuts would have on their lives. SOUF at ¶¶ 41, 45, 66. Yet these individuals have no right to cast a vote that will help determine which side prevails.

of compelling importance.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). *See also Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (where the state grants the right to vote to some citizens and denies the franchise to others, the exclusions must be narrowly tailored to promote a compelling state interest); *accord* Oct. 26, 2004 Order Denying Plaintiffs’ Motion for Preliminary Injunction, at 7-8.

The Supreme Court recently scrutinized voting classifications barring voting by “idiots” and individuals under guardianship in *Tennessee v. Lane*, 541 U.S. 509, 524 (2004). The Court made abundantly clear that it considers depriving people with disabilities of the right to vote without regard to individual capacity to be a constitutional violation. The Court reviewed the history of unconstitutional state discrimination against people with disabilities and identified as part of this history states’ categorical deprivation of the right to vote for people with disabilities without regard to their individual capacity. 541 U.S. 509, 524 (2004).²³

The Supreme Court left no doubt that it considered the very type of voting ban that Missouri has enacted to be unconstitutional. The Court cited the *Doe v. Rowe* decision as a case involving “unconstitutional treatment.” *Id.* at 525 & n.13. The *Doe* case involved a voting ban that, like Missouri’s, disenfranchised individuals based on guardianship status without regard to whether they had the capacity to vote. The *Doe* court held that this ban violated the Equal Protection Clause because it was not narrowly tailored to achieve the goal of ensuring the integrity of elections. 156 F. Supp.2d at 51-56. The *Doe* court observed that “there is little to no correlation between the State’s interest and the disenfranchisement of Jill Doe and June Doe, two

²³ The Court considered the history of unconstitutional state discrimination against people with disabilities in the context of deciding that the Fourteenth Amendment authorized Congress to enact the part of Title II of the ADA at issue in *Lane*—its requirements concerning access to the courts. As part of its analysis, the Court concluded that Congress enacted Title II in response to a history of “pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights.” 541 U.S. at 524.

women who suffer from mental illness but, according to their physicians, understand the nature and effect of the act of voting.” *Id.* at 52. The State had “disenfranchised a subset of mentally ill citizens based on a stereotype rather than any actual relevant incapacity.” *Id.*

The Supreme Court’s conclusion that voting bans like those at issue in *Doe* and in this case are unconstitutional is not surprising, given that classifications that deny the right to vote must be narrowly tailored to a compelling government interest. Defendants’ ban on voting by individuals under full guardianship is not narrowly tailored to promote a compelling state interest because it is both overinclusive and underinclusive. Defendants’ asserted interest in this ban is assuring that participants in elections be able to understand the electoral choices they make by voting on a particular candidate or issue.²⁴ Banning all individuals under full guardianship from voting, regardless of their capacity to vote, is overinclusive because it has the result of disenfranchising many individuals (including plaintiff Scaletty and plaintiff MOPAS’s constituents) who have the capacity to understand the electoral choices they make. SOUF at ¶¶ 11, 19, 92. The voting ban relies not on a specific determination about an individual’s competence to vote, but instead presumes that individuals lack the competence to vote based on about factors that are distinct from, and more complex than, the ability to vote. *Id.* at ¶ 13.

The ban is also underinclusive and arbitrary, as many individuals who are not under full guardianship have similar cognitive impairments to people who are under full guardianship. *Id.* at ¶¶ 96-97. Despite their similar degree of impairment, the latter individuals retain the right to vote because they are not under guardianship, whereas wards automatically lose the right to vote. *Id.* at ¶ 98.

²⁴ Defendants Blunt and Nixon’s Suggestions in Opposition to Plaintiff’s Motion for Preliminary Injunction at 21.

The ABA's Commission on the Mentally Disabled has concluded that voting bans such as Missouri's violate equal protection. The Commission observed that provisions restricting voting by persons under guardianship are not narrowly tailored to a compelling state interest. People may have motivations for seeking a guardianship that "have little or no bearing on factors relevant to the state's interest in an intelligent electorate" and "persons who remain under the watchful eye of their families or friends but who do not have a formal guardian will be allowed to vote, even if they are less capable than those with a guardian." Bruce Dennis Sales et al., *supra* note 13, at 106. According to the ABA Commission, in "the context of the voting rights of mentally disabled persons the facts and circumstances behind the law are, for the most part, archaic stereotypes, and the state's interest is meager when compared to the real impact that voting restrictions have on the unquestionably fundamental right to participate in the political process." *Id.* at 107. *See also* Samuel Jan Brakel et al., American Bar Foundation, *The Mentally Disabled and the Law* 446 (3d ed. 1985) (laws that restrict voting by individuals adjudicated incompetent or placed under guardianship may be overinclusive, since the incapacity at issue in those adjudications may have little to do with the capacity to vote); *Note, Mental Disability and the Right to Vote*, 88 *Yale L. J.* 1644, 1647-60 (1979) (arguing that state laws barring individuals under guardianship from voting violate equal protection because they are both overinclusive and underinclusive as a means to ensure that voters can make rational voting choices, and noting that the presumption that incapacity in one area suggests incapacity in all areas has been widely rejected). *See also* Kay Schriener et al., *The Last Suffrage Movement: Voting Rights for Persons with Cognitive and Emotional Disabilities*, 27 *Publius* 3 (1997) (describing poor "fit" between laws disenfranchising individuals based on competence determinations and states' interests in ensuring election integrity).

There are more narrowly tailored ways in which defendants could achieve their interests than barring all individuals under full guardianship from voting. For example, defendants could remove the right to vote only after a specific determination has been made that an individual lacks the capacity to vote.²⁵ Like the durational residency requirement invalidated by the Supreme Court in *Dunn v. Blumstein*, the ban on voting by individuals under full guardianship is a crude, poorly tailored way to accomplish its stated goal:

[A]s devices to limit the franchise to knowledgeable residents, the conclusive presumptions of durational residence requirements are much too crude. They exclude too many people who should not, and need not, be excluded. They represent a requirement of knowledge unfairly imposed on only some citizens. . . . Given the exacting standard of precision we require of statutes affecting constitutional rights, we cannot say that durational residence requirements are necessary to further a compelling state interest.

Dunn, 405 U.S. at 360. *Dunn* rejected a state’s asserted justification that a yearlong state residence requirement would promote more intelligent voting, noting that this requirement barred voting by new state residents “who have become at least minimally, and often fully, informed about the issues,” and permitted voting by any longtime resident regardless of his knowledge of the issues. *Id.* at 358-59.²⁶

As discussed above, Defendants’ use of full guardianship status as the test for determining who is competent to understand electoral choices is far from the “exacting standard of precision” required by the Supreme Court. *Id.* It removes the right to vote from many individuals who have the capacity to understand their electoral choices, and it fails to consider that many individuals who are not under guardianship have the same degree of mental

²⁵ Before such a determination could be made, of course the individual would have to receive notice that the right may be lost and an opportunity to present evidence about his or her competence to vote.

²⁶ The Court also observed that “the criterion of ‘intelligent’ voting is an elusive one, and susceptible of abuse.” *Dunn*, 405 U.S. at 356.

impairment as individuals who are under guardianship. Thus, defendants' voting ban violates the Equal Protection Clause.

Missouri's prohibition on voting by people who are under full guardianship also violates the Due Process Clause of the Fourteenth Amendment. The substantive component of the Due Process Clause "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (emphasis in original). The right to vote is such a fundamental right. *Reynolds*, 377 U.S. at 562. For the reasons discussed above, Missouri's voting ban is not narrowly tailored to serve a compelling state interest.

D. The Statutory and Constitutional Infirmities of Missouri's Voting Ban Are Not Cured by the Possibility of Seeking Judicial Restoration of the Right to Vote

Defendants have suggested that individuals may return to probate court to seek restoration of their right to vote. However, the Missouri Constitution is clear that individuals under full guardianship are not eligible to vote. *See* Mo. Const. Art. 8, §2 ("No person who has a guardian of his or her estate or person by reason of mental incapacity, appointed by a court of competent jurisdiction . . . shall be entitled to vote."). *See also* Defendants Blunt and Nixon's Suggestions in Opposition to Plaintiffs' Motion for Preliminary Injunction at 1-2 ("Missouri makes the absence of adjudicated mental incapacity a voting qualification in both its constitution and its statutes;" this qualification does not involve an individualized determination of the person's capacity to understand the voting process). Defendants have not explained how an

individual under full guardianship could lawfully obtain the right to vote based on an individualized determination of voting capacity.²⁷

To the extent that a judicial remedy does exist to allow individuals who have lost their right to vote due to their guardianship status to petition for restoration of that right, such a remedy does not justify the initial deprivation of the right to vote when that deprivation was not narrowly tailored to a compelling government interest and was not necessary. If it did, then any unconstitutional or illegal deprivation of rights would be permissible as long as the victim of the illegal conduct could go to court to seek a remedy. Obviously that is not the law. For example, a state could not deny the right to vote based on the durational residence requirements invalidated in *Dunn v. Blumstein* unless and until individuals who do not meet these requirements go to court to produce additional evidence demonstrating that they have sufficient knowledge to vote.²⁸ See also *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

E. Conclusion

For these reasons, the Court should grant plaintiffs’ motion for summary judgment.

²⁷ In a few counties, individuals under full guardianship have had their right to vote restored based on their capacity to vote. SOUF at ¶ 102. As stated above, this procedure appears to conflict with the voting ban in the Missouri Constitution. Moreover, it has happened infrequently. *Id.*

²⁸ Plaintiffs also note that neither the ADA, Section 504, nor the Constitution requires them to exhaust any possible remedies in probate court before raising these claims in federal court. *Randolph v. Rodgers*, 253 F.3d at 347; *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982).

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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