

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

FILED

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CLERK, US DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

American Association of People with Disabilities,
Daniel W. O'Conner, Kent Bell, and Beth Bowen,

Plaintiffs,

v.

Case No.: 3:01-CV-1275-J-21 TJC

Katherine Harris, as Secretary of State for the State of Florida; L. Clayton Roberts, as Director, Division of Elections; John Stafford, as Supervisor of Elections, Duval County; Warren Alvarez; Elaine Brown; Matt Carlucci; Doyle D. Carter; Gwen Chandler-Thompson; Lad Daniels; Reggie Fullwood; Alberta Hipps; Jerry Holland; King Holzendorf; Suzanne Jenkins; Pat Lockett-Felder; Jim Overton; Lake Ray, III; Faye Rustin; Lynette Self; Ginger Soud; Mary A. Southwell; and Gwen Yates, as Members of the Jacksonville, Florida City Council.

Defendants.

_____ /

**MOTION TO DISMISS AND
MEMORANDUM OF LAW**

Pursuant to Rule 12(b), Federal Rules of Civil Procedure, Defendants, John Stafford, as Supervisor of Elections, and the members of the City Council, move to dismiss this action. Plaintiffs seek declaratory and injunctive relief, asserting violations of the Americans With Disabilities Act (ADA), the Rehabilitation Act (RA), and the Florida Constitution. Their Complaint fails to state claims for relief under each of these theories. In addition, the City Council Defendants should be dismissed because they are entitled to legislative immunity.

BACKGROUND

The Complaint alleges that Plaintiffs are individuals with either visual or manual impairments who, because of their disabilities, cannot cast a direct and secret ballot without the assistance of others on new optical scanning equipment to be used in Duval County in

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future elections.¹ Specifically, Plaintiffs, and the class they seek to represent, claim that the use of optical scanning technology is a per se violation of the ADA and RA. They also claim that touchscreen technology violates the ADA and RA unless accompanied by audio and puff stick/switch technology. Comp., ¶¶ 52-53. They assert that touchscreen equipment with these additional features is "available"² and mandatory at each of Duval County's 300 polling locations. Finally, Plaintiffs claim that sections 101.051, 101.5606, and 101.28, Florida Statutes, which provide for assistance to disabled voters and protect voter secrecy, violate article VI, section 1 of the Florida Constitution, which states that "[a]ll elections by the people shall be by direct and secret vote." Art. VI, § 1, Fla. Const. (2001).

*Florida Law Provides Assistance To Disabled Voters
And Protects The Secrecy Of Their Votes*

Under Florida law, disabled voters are entitled to assistance in casting their votes, either directly at the voting booth or via absentee ballot. In addition, they are entitled to register with the supervisor of elections for special assistance. Specifically, section 101.051(1), Florida Statutes, which provides for assistance at the polls to blind and other disabled voters, states that:

(1) Any elector applying to vote in any election who requires assistance to vote by reason of blindness, disability, or inability to read or write may request the assistance of two election officials or some other person of the elector's own choice, other than the elector's employer, an agent of the employer, or an officer or agent of his or her union, to assist the elector in casting his or her vote. Any such elector, before retiring to the voting booth, may have one of such persons read over to him or her, without suggestion or interference, the titles of the offices to be filled and the candidates therefor and the issues on the ballot. After the

¹ For purposes of this Motion, the "facts stated in [the] complaint and all reasonable inferences therefrom are taken as true." Stephens v. Dep't of Health & Human Servs., 901 F.2d 1571, 1573 (11th Cir. 1990); see Conley v. Gibson, 35 U.S. 41, 45-46 (1957).

² Plaintiffs do not assert that such is economically available, only that such technology exists in some unspecified form without consideration of affordability/expense, technological compatibility, or reliability. See Comp., ¶ 1 (one terse reference to "existing and readily available technology").

elector requests the aid of the two election officials or the person of the elector's choice, they shall retire to the voting booth for the purpose of casting the elector's vote according to the elector's choice.

§ 101.051(1), Fla. Stat. (2001). Further, section 101.051(3), which provides for assistance in casting an absentee ballot, states that:

(3) Any elector applying to cast an absentee ballot in the office of the supervisor, in any election, who requires assistance to vote by reason of blindness, disability, or inability to read or write may request the assistance of some person of his or her own choice, other than the elector's employer, an agent of the employer, or an officer or agent of his or her union, in casting his or her absentee ballot.

Id. § 101.051(3). As a safeguard, electors complete a "DECLARATION TO SECURE ASSISTANCE" attesting to their desire for assistance from persons they list in the form. Id.

In order to protect the right of secrecy, no person may be "in the voting booth with any elector except as provided in subsection (1)." Id. § 101.051(2). As a specific deterrent against violation of voting secrecy, Florida law provides that "[a]ny election official or person assisting any elector who willfully discloses how any elector voted, except upon trial in court, is guilty of a felony of the third degree" punishable under Florida law. Id. § 104.23. In furtherance of these purposes, poll inspectors and clerks are sworn to an oath requiring that they "perform [their] duties ... according to law and will endeavor to prevent all fraud, deceit, or abuse in conducting the election." Id. § 102.012.

Finally, any eligible voter who is unable to read or write, or needs assistance in voting due to some disability, is entitled to register with the supervisor of elections, who "shall note in that person's registration record that the person needs assistance in voting." Id. § 97.061(1)-(2). Registrants are "entitled to receive assistance at the polls" including:

the assistance of two election officials or some other person of his or her own choice, other than the person's employer, the agent of the person's employer, or an officer or agent of the person's union, without the necessity of executing the "Declaration to Secure Assistance" prescribed in s. 101.051. Such person shall

notify the supervisor of any change in his or her condition which makes it unnecessary for him or her to receive assistance in voting.

Id. § 97.061(3). Based upon these statutory provisions, disabled voters are entitled to assistance in voting, whether at the polls or via absentee ballot; in addition, they are entitled to such assistance by either registering with the supervisor of elections beforehand or by simply showing up at a polling place and requesting assistance. Throughout the voting process, inspectors and clerks who provide assistance are sworn to perform their duties according to Florida law, which provides for maintaining the secrecy of voters' ballots and criminal sanctions for disclosure of how any elector voted.

Florida Law: Purchases of Voting Machines

Supervisors of Election in Florida may purchase only voting equipment that the Division of Elections, Department of State, has certified for purchase, use and sale in the state. § 101.294(1), Fla. Stat. (2001) ("No governing body shall purchase or cause to be purchased any voting equipment unless such equipment has been certified for use in this state by the Department of State."). A "governing body" contemplating the purchase of voting equipment must "notify the Division of such considerations." Id. § 101.294(2). The Division has "adopt[ed] uniform rules for the purchase, use, and sale of voting equipment" in Florida, such rules relating to the technical and bid specifications for the procurement of such equipment. Id.; see Rules 1S-2.0004 & 2.007, Fla. Admin. Code (2001).

One of the many factors for approval of electronic or electromechanical voting equipment is that it be "so constructed that ... [i]t permits and requires voting in secrecy." § 101.5606, Fla. Stat. Likewise, a statutory requirement for the purchase of voting machines in Florida is that "[e]ach voting machine shall ... (a) Secure to the elector secrecy in the act of voting." Id. § 101.28.

Plaintiffs' Complaint alleges that the Division of Elections has certified six optical scan systems and one touchscreen system for purchase in Florida. Comp., ¶ 62. In addition, it is alleged that only the touchscreen system, if modified with audio and puff stick options, will be "accessible" to Plaintiffs and the class they seek to represent. *Id.* ¶ 63. Plaintiffs' Complaint also asserts that Plaintiffs have asked Defendants Harris and Roberts to certify only "accessible" systems, but that they have not done so thereby "authorizing counties to purchase inaccessible voting systems." *Id.* ¶ 65.

Voting Machines In Duval County

Duval County will have approximately 300 polling locations in future elections. Plaintiffs alleged that Defendants have "decided to purchase approximately 300 optical scan machines and may purchase no more than three or four touchscreen voting machines to be located only at voting headquarters." Comp., ¶ 55. They allege that such purchases, if made, will fail "to ensure that voters with visual and manual impairments may cast a direct and secret ballot or otherwise vote under the same conditions as non-disabled persons." *Id.* ¶ 56.

Plaintiffs desire to have touchscreen voting technology with audio and puff stick/switch technology at each of Duval County's approximately 300 polling locations. Plaintiffs explicitly state that "[b]y failing to provide an accessible touchscreen machine *in every precinct*, Defendants Stafford and City Council perpetuated a voting system inaccessible to voters with visual and manual impairments, denied Plaintiffs and others similarly situated their right to a direct and secret ballot, and discriminated against Plaintiffs and others similarly situated based on their disabilities." Comp. ¶ 73 (emphasis added).

Plaintiffs do not claim that voting locations and certified machines will be unavailable or physically inaccessible to Plaintiffs. In fact, Plaintiffs' Complaint acknowledges that both optical scanning and touchscreen technology will be made available, the former at every polling place with the latter at the office of the Supervisor of Elections. Comp., ¶ 55. Plaintiffs do not claim that either optical scanning or touchscreen technology deprives them

of the ability to vote with the assistance provided under Florida law; nor do they assert that Plaintiffs -- or any member of the class they seek to represent -- have ever been denied access to voting machines, made a complaint about their voting experience in the past (which necessarily involved third party assistance), or otherwise had any violation of their secrecy rights in their votes arising from unauthorized disclosure by those who assisted at the polls.

Instead, they claim that disabled voters have an absolute right to vote without third party assistance. They claim a potential deprivation of their asserted right to absolute secrecy of their votes if consensual third party assistance under Florida law is utilized. *See, e.g.*, Comp. §§ 85, 93, 95, 98, 104, 105, 115 & 116. As a remedy, they assert that touchscreen technology with audio and puff stick/switch devices is "available" and must be purchased and implemented at every polling location in future elections in Duval County to avoid "perpetuating" a voting system "inaccessible" to voters with visual and manual impairments. *Id.* §§ 1, 73. In essence, Plaintiffs assert that touchscreen systems with audio and puff stick/switch devices are compulsory under the ADA, RA, and Florida's Constitution, all other systems being per se illegal.

MEMORANDUM OF LAW

Count I of the Complaint, which alleges violations of the American with Disabilities Act (ADA), Count II, which alleges a violation of article VI, section 1 of the Florida Constitution, and Count III, which alleges a Rehabilitation Act (RA) violation, should each be dismissed based on the principles applied in Nelson v. Miller, 170 F.3d 641 (6th Cir. 1999), which is virtually on point both procedurally and substantively. As discussed below, the district court and the appellate court in Nelson v. Miller both concluded that neither the ADA nor the RA created a cause of action under the facts alleged. In addition, both concluded that a state law authorizing third-party assistance for disabled voters did not violate the state constitution's requirement that laws be enacted to "to preserve the secrecy of

the ballot." Section I discusses Nelson v. Miller, related caselaw, and pronouncements of the Office of Civil Rights, Department of Justice. Section II explains why all counts in this action should be dismissed based upon these precedents and policy statements.

I. CASELAW AND PRONOUNCEMENTS OF THE OFFICE OF CIVIL RIGHTS ESTABLISH NO RIGHT OF THE DISABLED TO VOTE WITHOUT THIRD PARTY ASSISTANCE OR WITH ABSOLUTE SECRECY.

A. The Decision in *Nelson v. Miller* Is Directly On Point, Substantively and Procedurally.

The decision in Nelson v. Miller is dispositive of this action. In Nelson, a statewide class of blind voters brought an action under the ADA claiming violations arising from the failure of the State of Michigan to implement methods by which the "Plaintiffs could cast their votes unassisted by another person." Id. at 644. Specifically, the plaintiffs alleged the existence of "inexpensive technologies that are currently in commercial use which [sic] permit persons who are blind to read and mark ballots without involving a third party, including braille ballot overlays or templates, taped text or phone-in voting systems." Id. at 644 n.1. Plaintiffs sought a permanent injunction to require that the State implement such methods in the future. Id. at 644.

The Defendants moved to dismiss the entire action for two reasons. First, the Defendants argued that the Michigan statute³ allowing blind voters to designate any person over the age of eighteen or a family member to assist in casting a ballot was in compliance with the Federal Voting Rights Act of 1965 and the Voting Accessibility for the Elderly and Handicapped Act of 1984, both of which specifically address the issues of assistance with

³ The Michigan Statute at issue, § 168.751, states:

When at an election an elector shall state that the elector cannot mark his or her ballot, the elector shall be assisted in the marking of his or her ballot by 2 inspectors of election. If an elector is so disabled on account of blindness, the elector may be assisted in the marking of his or her ballot by a member of his or her immediate family or by a person over 18 years of age designated by the blind person.

and accessibility to voting by handicapped individuals. 950 F. Supp. at 202. Second, the Defendants argued that the ADA and RA do not establish a right to privately cast a ballot without the assistance of a third party. Id.

The district court granted the Defendant's motion, holding that "Michigan's current voting law, which permits blind voters to have third-party assistance of their choosing in marking their ballots, complies with the ADA and RA and thus that the Plaintiffs had failed to allege facts upon which relief could be granted under either act." Id. at 644. The district court made two rulings.

First, the court found that the ADA and RA, statutes that apply generally to disability-based discrimination, needed to be read in conjunction with older, specific congressional acts dealing with voting rights for the disabled, namely the Voting Rights Act of 1965 (as amended in 1982), 42 U.S.C.A. § 1973aa-6 (West 1994) ("VRA"), and the Voting Accessibility for the Elderly & Handicapped Act of 1984, 42 U.S.C.A. § 1973ee-1 (West 1994) ("VAEH"), insofar as they involved the elections of federal officers.

Id. at 644. In doing so, the district "court stated that Congress did not intend for the ADA to displace the Federal Voting Rights Acts" and noted that "the VRA specifically required that a blind voter be provided assistance by a person of his or her choice when voting" (with certain immaterial exceptions). Id. Also, the Senate Report accompanying the VAEH (which requires polling places to be "accessible" to handicapped voters), specifically noted "that any minimal effect on the privacy of those who are elderly or handicapped is more than offset by the expanded opportunities for participation in the political process." Id. at 644-45 (citation omitted). Thus, to the extent these enactments were applicable, the district court "concluded that the Defendant could not be said to have violated them by providing the Plaintiffs with the same type of meaningful assistance prescribed by them." Id. at 645.

Second, the district court addressed whether, as to state and local elections that the VRA and VAEH did not cover, the ADA or RA created a private right of blind or visually impaired voters to cast a secret ballot. In rejecting this claim, the district court:

reasoned that nothing in the language of the ADA or RA indicated that voting *privacy* was a benefit Congress sought to protect under them ... and that Congress did not intend the ADA and RA to extend to blind voters in state and local elections anything more than it had already extended to them in federal elections through the VRA and VAEH.

Id. Stated differently, the ADA and RA were intended to ensure that disabled voters are not excluded from participation in, or denied the benefits of, the state's voting program;⁴ they were not intended to create a federal right of secrecy of the ballot independent of that established under state law. For these reasons, the district court dismissed the Plaintiffs' ADA and RA claims.

The Sixth Circuit affirmed dismissal of the ADA and RA claims. At the outset, the court noted the similarities between the ADA and RA, which both generally prohibit a disabled person's exclusion from participation in or denial of benefits for services, programs and other activities by reason of disability. The court also addressed the Michigan blind voter statute, section 168.751 (supra), and the Michigan Constitution, which provides that:

The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws to preserve the purity of elections, *to preserve the secrecy of the ballot*, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.

Id. at 649 (*citing* Mich. Const. art. 2, § 4 (emphasis added)). The Plaintiffs claimed that this provision created "a constitutional right to secrecy of the ballot, or a 'secret voting program,' for all of Michigan's voters." Id. The Plaintiffs alleged that the Secretary of State "denied Michigan's blind voters the benefit of complete secrecy of the ballot enjoyed by Michigan's

⁴ The Americans with Disabilities Act states in pertinent part, that "[s]ubject to the provisions of this title, 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 subject to discrimination by any such entity." 42 U.S.C. § 12132 (emphasis added).

sighted voters” due to her refusal “to implement a system by which blind voters could vote without third-party assistance of their choosing.” Id. In other words, the Plaintiffs claimed “that the State has violated the ADA and RA by ‘exclud[ing them] from participation in or ... den[ying them] the benefits of’ the State’s constitutionally mandated ‘secret voting program.’” Id. at 650 (quoting district court).

The Sixth Circuit phrased the issue as whether Michigan constitutional and statutory law mandated absolute secrecy in voting where blind or visually impaired voters are at issue.

For such a claim to be true, Appellants essentially must show that the Michigan legislature, by providing blind voters with third-party voting aid, rather than unassisted voting aid, has violated the Michigan Constitution’s mandate that it “enact laws to ... preserve the secrecy of the ballot,” Mich. Const. art. 2, § 4. The question, then, is whether the Michigan Constitution requires more secrecy than the Michigan legislature has provided for in Mich. Comp. Laws Ann. § 168.751.

Id. at 650. In determining how the Michigan Supreme Court, if faced with this issue, would decide the matter, the Sixth Circuit concluded that it would find that the statute fulfilled the requirements of the state constitution for three reasons, each applicable in the instant action.

First, the court noted that no Michigan court had found the voter assistance statute in violation of the constitutional requirement that the legislature “preserve the secrecy of the ballot.” Id. at 651. It noted that prior cases, which permitted blind voters to have someone aid them in voting, were “perfectly in keeping” with the purpose of the predecessor to article 2, section 4, whose purpose was to preserve the “purity of elections.”⁵ Id. It relied on Michigan caselaw that upheld third-party voter assistance to the blind, which indicated that such programs were seen as “complying with the requirements of the Michigan Constitution,

⁵ A prior version of Florida’s constitution also protected the “purity” of the ballot. *See* Article VI, section 9, Fla. Const. (1885) (“Legislature shall enact such laws as will preserve the purity of the ballot given under this Constitution.”).

rather than violating them." Id. Similarly, the court noted that the Michigan Supreme Court had upheld a third party assistance statute, which required those seeking assistance to take an oath, as not an "unreasonable restriction upon the right to vote." Id. In upholding the constitutionality of the statute, the state court stated that the "regulations are to preserve the purity of the election, and *we see no constitutional objections to them as prescribed by the act.*" Id. (citation omitted) (emphasis added by Sixth Circuit). The state court also stated:

The law aims to secure secrecy in the ballot, and does not attempt to disenfranchise any voter. *At the expense of this secrecy, and in order to enable voters who are physically incapacitated from marking their ballots, the law provides a method for such aid, as well as to those who cannot read the English language. The law does not deprive these voters of any right, but rather secures to them aid in voting intelligently;* it is plain and simple in its provisions. Every voter, however illiterate or however much incapacitated physically, has a method pointed out by which he may exercise his right of franchise. The law does not shut off any class of voters from the ballot, *and, we think, was designed by the legislature to accomplish the purpose specified in the constitution.*

Id. (citing Ellis ex rel. Reynolds v. May, 58 N.W. 483, 485-86 (1894)) (emphasis added by Sixth Circuit). In light of these precedents, the Sixth Circuit concluded that the phrase "secrecy of the ballot" in the Michigan Constitution had been understood to mean that "at least ... that third-party assistance to blind voters was within its ambit." Id.

Second, the court noted that a statute is clothed with a "presumption of constitutionality ... unless the conflict between the Constitution and the statute is *palpable and free from reasonable doubt.*" Id. at 651 (citing state caselaw) (emphasis added by Sixth Circuit). Further, an "act of the legislature must be *plainly at variance* with some provision of the constitution before a court will so declare it. *Doubtful questions will be resolved in favor of the validity of the legislative act.*" Id. (citations omitted) (emphasis added by Sixth Circuit). This rule of deference to the legislative body means that a "statute is to be treated with that deference due to the deliberate action of a co-ordinate branch of government and is to be set

aside only when it is apparent it was the result of action which the Legislature was prohibited by the Constitution from taking." Id. (citation omitted). For these reasons, the judicial branch must "respect any law" and "presume in favor of its validity, until its violation is proved *beyond all reasonable doubt.*" Id. (citation omitted) (emphasis added by Sixth Circuit). When an "issue could reasonably go either way" it was the federal court's duty to presume the constitutionality of the statute in question. Id.

Third, the Sixth Circuit noted that the Michigan legislature "has clearly interpreted" its constitutional provision "as not meaning 'absolute secrecy' in all instances." Id. at 652. It noted that the Michigan legislature "believed that the [challenged] statutory provision satisfies the mandate contained within Article 2, § 4 and its predecessors" such that the "phrase 'secrecy of the ballot'" was not meant to mean "'absolute secrecy from everyone in all instances.'" Id.⁶ The Sixth Circuit noted that "members of the state legislature 'are presumed to have acted within the scope of their authority [when enacting a statute]. We cannot suppose they intentionally spent their time enacting a measure which they knew or had reason to believe would be ineffective and useless because unconstitutional.'" Id. (citation omitted).

Based upon the substantial assistance that the Michigan statute provides for blind electors to cast their votes, the Sixth Circuit concluded that the refusal "to provide [Plaintiffs] with voting assistance other than that already extended to them under ... § 168.751, does not discriminate against them in violation of the ADA and/or the RA."⁷ Id. at 653. In addition,

⁶ The court noted that the legislature, since at least 1955, had enacted laws providing for the secrecy of voting, but had noted that exceptions for "cases of assisted electors" had been made statutorily. Id. (citing section 168.786).

⁷ The court also upheld dismissal of plaintiffs' RA claim due to the lack of sufficiently (Continued...)

the court concluded that "the [Plaintiffs] are not being denied their state constitutional right to 'secrecy of the ballot' as that right has, up to this point, been understood by those charged with interpreting Michigan's constitution." Id. As such, the court upheld in full the district court's dismissal of the ADA and RA claims. *See also* NAACP v. Philadelphia Bd. of Elections, 1998 WL 321253 at *4 (E.D. Pa. 1998) ("Defendants are not required to provide the specific procedures authorized under the VAEH, but the decision to do so is a reasonable modification to comply with the ADA.... The defendants' provision of the alternative ballot procedures [authorized by the VAEH] to qualified individuals with disabilities fulfills their obligation under the ADA....").⁸

pleaded federal financial assistance necessary for jurisdiction. The plaintiffs' complaint alleged that "Defendant is an official of the State of Michigan which receives federal financial assistance." Id. at 653 n.8. Plaintiffs only alleged that the *State of Michigan*, rather than the Secretary of State, received federal financial assistance. As the Sixth Circuit noted:

Appellants did not allege that the Secretary of State received federal financial assistance directly from the federal government, that she is the entity of the state who distributes such assistance, or that she has been extended such assistance from the state entity charged with its distribution; therefore, they have failed to state a claim under the RA. Remand to permit Appellants to amend their complaint to plead this jurisdictional prerequisite is not appropriate, since, even if they could plead facts establishing this jurisdictional prerequisite, Appellants cannot prevail on the substance of their claim.

Id.

⁸ Plaintiffs may attempt to rely on the district court decision in National Org. on Disability v. Tartaglione, 2001 WL 1231717 (E.D. Pa. Oct. 11, 2001), which denied a motion to dismiss the claims of visually and mobility disabled voters who asserted similar claims for relief. The decision in Tartaglione, however, is not binding on this Court; moreover, it is unpersuasive because it fails to even mention the Sixth Circuit's 1999 decision in Nelson v. Miller, a precedent directly on point. In addition, the plaintiffs in Tartaglione made broader allegations that "only three percent of polling locations in Philadelphia are accessible to persons using wheelchairs" and that the defendants "fail[ed] to select accessible polling places to make them accessible." Id. at *3. As such, Tartaglione is both legally and factually distinct.

B. The Office of Civil Rights Has Upheld Florida's Assistance Program Under The ADA.

Notably, the Office of Civil Rights, Department of Justice, has specifically held that Florida's statutory program of assistance for blind voters meets ADA standards. For instance, in a Letter of Findings dated August 25, 1993, the Department addressed whether the failure to provide blind voters in Pinellas County, Florida with an electronic method of voting violated the ADA.⁹ The complainant specifically asserted that blind voters were not provided a method of voting that allowed a secret ballot. The Department stated that the supervisor of elections, who followed section 97.061 by providing third party assistance to blind voters, was in compliance with the Act. The Department stated:

Although providing assistance to blind voters does not allow the individual to vote without assistance, it is an effective means of enabling an individual with a vision impairment to cast a ballot. Title II requires a public entity to provide equally effective communications to individuals with disabilities, but "equally effective" encompasses the concept of equivalent, as opposed to identical, services. *Poll workers who provide assistance to voters are required to respect the confidentiality of the voter's ballot*, and the voter has the option of selecting an individual of his or her choice to provide assistance in place of poll workers. *The Supervisor of Elections is not, therefore, required to provide Braille ballots or electronic voting in order to enable individuals with vision impairments to vote without assistance.*

Letter of Findings, Dep't of Justice (August 25, 1993) (to Supervisor of Elections, Pinellas County, Florida) <http://usdoj.gov/crt/foia/cltr099.txt> (emphasis added) (footnote omitted). As the highlighted language indicates, the Division viewed Florida's voter assistance statute as an "effective" method of enabling the visually impaired to vote while preserving the secrecy of their votes. Moreover, the Division recognized that, under both the ADA and RA, a public entity is not required to provide "identical services" in order to meet legal requirements.

⁹ The Division noted that electronic systems for voting *by telephone* that meet security requirements were not currently available. Id.

Instead, the longstanding interpretation of these acts is that a public entity must provide "equally effective communications to individuals with disabilities" that includes "equivalent, as opposed to identical, services." Id.¹⁰

II. PLAINTIFFS' ADA, RA AND STATE LAW CLAIMS SHOULD BE DISMISSED.

A. Counts I and III (ADA and RA Claims)

Based on the Nelson v. Miller decisions, as well as the plain language of the ADA/RA, the Plaintiffs fail to state claims under the ADA and RA. The gist of the Plaintiffs' Complaint is that disabled voters have an absolute right to vote without third party assistance to avoid possible impingement on the secrecy of their votes protected under Florida state law. As the courts in Nelson v. Miller recognized, however, their claim -- if any -- is a privacy claim under state law, not one arising from being excluded from participation in, or denied the benefits of, the state's voting program. The Plaintiffs' claim is not that they will be excluded from participation in, or denied the benefits of, federally secured voting rights due to inaccessible or unavailable polling locations or voting machines.¹¹ Nor is their claim that either optical scanning or touchscreen technology itself deprives them of the ability to vote, given the assistance provided to the disabled under Florida law. *See* §§ 97.061, 101.051, & 102.012, Fla. Stat (2001).

Rather, as in Nelson v. Miller, they claim a potential deprivation of a claimed right to absolute secrecy in their votes if consensual third party assistance is provided under Florida law. In essence, they claim an absolute right to cast their votes free from third party

¹⁰ Consistent with this equivalency concept, the Division has stated that certain "curbside voting policies" -- which permit disabled voters to vote curbside where existing polling places are inaccessible -- are "effective" "alternative methods" that enable disabled voters to cast a ballot on the day of the election." *See, e.g.*, Letter of Findings, Dep't of Justice, Civil Rights Division (August 19, 1993) (to County Elections Department, Las Vegas, Nevada) <http://usdoj.gov/crt/foia/lofc017.txt>; Letter to Senator Thurmond, Dep't of Justice, Civil Rights Division (Aug. 11, 1995) <http://usdoj.gov/crt/foia/lofc173.txt> (same).

¹¹ Throughout their Complaint, Plaintiffs assert and acknowledge that both optical scanning and touchscreen technology will be made available and will be physically accessible.

assistance, a right no court has recognized under federal or state law. In this regard, the disabled voter assistance statute upheld in Nelson v. Miller is substantially the same as Florida's statute. Both provide for the assistance of two inspectors if an elector needs assistance in casting his or her vote. Both also provide blind voters with the ability to designate a person (e.g., a family member) to assist in the casting of their votes. Additionally, Florida law specifically protects secrecy rights by penalizing any person who wrongfully discloses an elector's vote. § 104.23, Fla. Stat. (2001). As such, the analysis in Nelson v. Miller that such statutes provide legally adequate assistance, and do not discriminate in violation of the ADA or RA, is equally applicable here thereby justifying dismissal of Plaintiffs' claims.

Of note, Plaintiffs' Complaint actually demonstrates that the voting machines to be used in Duval County *exceed* the requirements of state law and the ADA/RA. Specifically, the allegations indicate that optical scan machines will be used at every polling location where assistance will be made available for disabled voters under Florida law. This deployment of voting machines and disabled voter assistance fully satisfies Florida law and, under Nelson v. Miller, satisfies both the ADA and RA. The Defendants, however, have gone beyond such requirements and provided for three/four touchscreen machines to be available at the main office of the Supervisor of Elections. These machines are not required under Florida law or mandated by either the ADA or RA. Instead, they reflect an additional accommodation to blind and disabled voters beyond the requirements of these laws. As such, Plaintiffs fail to state claims for relief, particularly given their allegations establish compliance beyond that required by law.¹²

¹² As an independent basis for dismissal, the Plaintiffs' RA claim fails to adequately plead the jurisdictional requirement that the Defendants receive federal funds. Plaintiffs merely state that "Defendants are an instrumentality [sic] of a local government that is a recipient of federal funds." Comp., ¶ 112. This bare allegation falls short of the pleading requirements under the RA. Nelson v. Miller, 170 F.3d at 653 n.8 (allegation that secretary of state is an official of a state that receives federal funds, held insufficient); *see also* Lightbourn v. (Continued...)

B. Count II (Art. VI, § 1, Fla. Constitution)

Likewise, Count II, which alleges a violation of article VI, section 1 of the Florida Constitution, should be dismissed because it fails to state a claim for relief. Article VI, section 1 provides that: "All elections by the people shall be by direct and secret vote." Art. VI, § 1, Fla. Const. (2000). Plaintiffs claim that section 101.051, which provides for third party assistance to disabled voters, violates the constitutional right to a "direct and secret vote." They also claim that sections 101.5606 and 101.28, which provide for voting systems that protect secrecy in voting, are unconstitutional because they do "not require a direct and secret vote." Comp., ¶¶ 107-08. Again, the Plaintiffs' claim is based on a claimed right to absolute secrecy in voting, a right that no state or federal court has recognized.

Of course, legislative enactments -- such as the challenged election statutes -- come to a court "with a presumption of validity -- *an extremely strong presumption in statutes regulating the conduct of elections.*" Bodner v. Gray, 129 So. 2d 419, 421 (Fla. 1961) (emphasis added). In this regard, no indication exists that the state constitutional right to a "direct and secret vote" was intended to be an absolute. Instead, much like constitutional rights such as free speech and press, the right of secrecy in one's vote is not an absolute and can be subject to reasonable regulations.¹³ Florida courts have held explicitly that reasonable

County of El Paso, Texas, 118 F.3d 421, 427 (5th Cir. 1997) (same) ("§ 504 claim must allege that the specific program or activity with which [plaintiff] is involved receives or directly benefits from federal financial assistance.").

¹³ Plaintiffs' claims, if couched in constitutional terms, would be analyzed under the "rational basis" test. For example, in Smith v. Dunn, 381 F. Supp. 822 (M.D. Tenn. 1974), which involved equal protection claims to a state's disabled voter assistance statute, the court stated:

(Continued...)

regulations on the exercise of constitutional rights and liberties are permitted, specifically in the context of voting and elections.¹⁴ Here, rather than impinging on the constitutional right to secrecy, the challenged statutes actually promote disabled voters' constitutional rights to exercise the franchise through assistance that also safeguards the voters' rights of confidentiality in their votes. Rather than a hindrance and burden, the challenged statutes safeguard the rights challenged in this litigation.

In this regard, federal courts addressing these circumstances have recognized that reasonable accommodations, such as third party assistance in voting, do not infringe upon the rights of the disabled; instead, they assist in protecting those rights. See Nelson v. Miller, *supra*. As stated in Smith v. Dunn, 381 F. Supp. 822 (M.D. Tenn. 1974), a case involving a challenge to a state law requiring blind voters without designated relatives to reveal their votes to two elections judges:

The statute under attack in this case does not impose state regulations which disenfranchise a segment of the citizenry, nor does it erect barriers which make exercise of suffrage more difficult for a particular group. *To the contrary, the challenged statute was designed to afford blind, otherwise physically disabled, or illiterate an opportunity to exercise the franchise while attempting to*

In choosing the appropriate standard in the instant case, we conclude that the statute under review must be upheld if it can be justified under the rational basis standard of equal protection review. *Certainly we do not find the classification of blind persons for voting purposes to be 'suspect,' and while the right to vote is clearly fundamental, in the circumstances of this case we view the interest of blind persons to do so secretly to be of lesser magnitude.*

Id. at 826 (emphasis added).

¹⁴ See, e.g., Bodner, 129 So. 2d at 421 ("The law places restraints upon all of its citizens in the exercise of their rights and liberties under a republican form of government. Such restraints have been found to be necessary in the development of our democratic process to preserve the very liberties which we exercise.") (upholding an \$875 qualifying fee for individual candidate for public office as constitutional).

minimize the incidence of fraudulent voting practices on the part of those lending assistance.

381 F. Supp. at 824 (emphasis added). Similarly, Florida's voter assistance statutes are designed to expand the ability of the disabled to vote while attempting to minimize the potential for impinging on the secrecy of their votes. Beyond the physical assistance provided, the right to a secret vote is specifically shielded by Florida criminal laws, which makes it a felony for any election official (or any person assisting a voter) to willfully disclose how the voter cast his or her ballot. § 104.23, Fla. Stat. (2001).

Finally, as mentioned above, the agency charged with enforcing federal civil rights has indicated that Florida's statutory assistance for blind voters is a reasonable accommodation that "is an effective means of enabling an individual with a vision impairment to cast a ballot." Letter of Findings, Dep't of Justice (August 25, 1993). For all these reasons, the Plaintiffs have failed to state a claim for relief in asserting that sections 101.051, 101.5606 and 101.28, Florida Statutes violate the provisions of article VI, section 1 requiring a "direct and secret vote."

III. CLAIMS AGAINST CITY COUNCIL MEMBERS SHOULD BE DISMISSED.

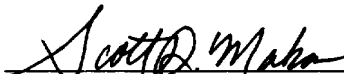
The claims against the Defendant City Council members, who merely voted to approve an ordinance for the appropriation of funds for voting machines, should be dismissed based on absolute legislative immunity. The ordinance at issue, Ordinance 2001-874-E (Exhibit A), provides that for fiscal year 2001-2002 the sum of \$1,005,000.00 is to be appropriated from state funds for the purchase of an optical scan voting system. In voting to approve the appropriation, each member's vote was a purely legislative function. *See* § 5.07, Charter, City of Jacksonville (2001) ("All legislative powers of the consolidated government ... are vested in the Council" which "shall review the budgets and appropriate money" based

on requests received). Under these circumstances, the Defendant City Council members are entitled to absolute legislative immunity and the action dismissed as to them. *See, e.g., Woods v. Gamel*, 132 F.3d 1417 (11th Cir. 1998) (county commissioners, who voted to approve county budget, entitled to dismissal based on absolute legislative immunity from lawsuit claiming inadequate facility conditions); *Ellis v. Coffee County Bd. of Registrars*, 981 F.2d 185 (11th Cir. 1993) (county commission members, who voted to remove plaintiffs' names from county voting list, entitled to dismissal based on absolute legislative immunity).

CONCLUSION

Based upon the foregoing, Defendants Stafford and members of the City Council, request that this Court dismiss each of the claims in the Plaintiffs' Complaint with prejudice.


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. Mail and facsimile to J. Douglas Baldrige, Esq., Howrey, Simon, Arnold & White, LLP, 1299 Pennsylvania Avenue, N.W., Washington, D.C. 20036; Lois G. Williams, Esq., Washington Lawyers' Committee for Civil Rights and Urban Affairs, 11 DuPont Circle, NW, Suite 400, Washington, D.C., 20036, and Charles A. Finkel, Assistant Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050, on this 21st day of December, 2001.



Attorney

1 Introduced by the Council President at the request of the Mayor:

2
3
4 **ORDINANCE 2001-874-E**

5 AN ORDINANCE APPROPRIATING \$1,005,000 FROM THE
6 STATE OF FLORIDA FOR AN OPTICAL SCAN VOTING
7 SYSTEM; PROVIDING AN EFFECTIVE DATE.

8
9 **BE IT ORDAINED** by the Council of the City of Jacksonville:

10 **Section 1.** For the 2001-2002 fiscal year, within the
11 City's budget, there are hereby appropriated the indicated sum(s)
12 from the account(s) listed in subsection (a) to the account(s)
13 listed in subsection (b):

14 (B.T. 10, attached hereto and made a part hereof.)

15 (a) Appropriated from:

16 See B.T. 10 \$1,005,000

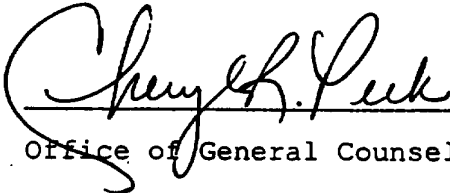
17 (b) Appropriated to:

18 See B.T. 10 \$1,005,000

19 (c) The purpose of this appropriation is to purchase an
20 optical scan voting system.

21 **Section 2.** This ordinance shall become effective upon
22 signature by the Mayor or upon becoming effective without the
23 Mayor's signature.

24
25 Form Approved:

26 
27 _____
28 Office of General Counsel

29 Legislation Prepared by: Cheryl R. Peek

30 9/4/01 G:\shared\LEGIS.CC\Peek\MBRC Legis\2001\BT#10.doc

OFFICE OF THE MAYOR

City of Jacksonville, Florida

BT # 10
REQUEST NUMBER _____

BUDGET ORDINANCE TRANSFER DIRECTIVE

To:	Date Rec'd.	Date Fwd.	Approved	Disapproved
Department Head	8/23	8/23	<i>[Signature]</i>	
Mayor's Office		8/28/01	<i>[Signature]</i>	
Accounting Division	8/24/01	8/24/01	<i>[Signature]</i>	
Budget Division	8/24/01	8/24/01	<i>[Signature]</i>	

DATE OF ACTION BY MAYOR AUG 27 2001 APPROVED *[Signature]*

Transfer From: Contribution from State Fund/Department/Division/Activity _____

Account Title	Contribution from State	Project/Pro. Det.	Amount
Account No.	SEEL1FC - 33491	Grant/Gr. Det. SEE001- 02	\$1,005,000.00
Account Title	_____	Project/Pro. Det. _____	
Account No.	_____	Grant/Gr. Det. _____	
Account Title	_____	Project/Pro. Det. _____	
Account No.	_____	Grant/Gr. Det. _____	

Transfer To: Fund/Department/Division/Activity General Fund Supervisor of Elections

Account Title	Election State Funding - Voting <i>Equipment</i>	Project/Pro. Det.	Amount
Account No.	SEEL1FC - 06508	Grant/Gr. Det. SEE001/02	\$1,005,000.00
Account Title	_____	Project/Pro. Det. _____	
Account No.	_____	Grant/Gr. Det. _____	
Account Title	_____	Project/Pro. Det. _____	
Account No.	_____	Grant/Gr. Det. _____	

PURPOSE: **Appropriate funding for optical scan voting system.**
To be effective October 1, 2001
Cost will be reimbursed by State over a two year period.

APPROVED BY:
MAYOR'S BUDGET
REVIEW COMMITTEE

DATE: AUG 27 2001

DIVISION CHIEF _____

[Signature]

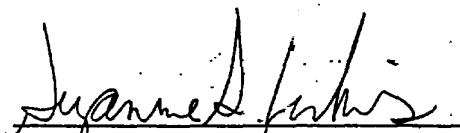
DATE INITIATED 8/23

ORDINANCE 2001-874-E

CERTIFICATE OF AUTHENTICATION

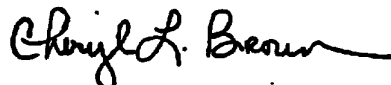
ENACTED BY THE COUNCIL

OCTOBER 9, 2001




SUZANNE S. JENKINS
COUNCIL VICE-PRESIDENT

ATTEST:



CHERYL L. BROWN
COUNCIL SECRETARY

APPROVED: OCT 15 2001



JOHN A. DELANEY, MAYOR

