IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

American Association of People with Disabilities, et al.,

Plaintiff

v.

Katherine Harris, et al.,

Defendants.

Civil Action No. 3:01-CV-1275-J-21TJC

OPPOSITION TO THE MOTION TO DISMISS OF DEFENDANTS STAFFORD AND CITY COUNCIL

Plaintiffs respectfully submit this opposition to the Motion to Dismiss of Defendants John Stafford, Supervisor of Elections, and the members of the City Council ("Motion").

I. OVERVIEW

> The County contends that because [the plaintiffs] were able to attend the trial, they have not alleged a violation of Title II [of the ADA]. A violation of Title II, however, *does not occur only when a disabled person is completely prevented from enjoying a service, program, or activity.* The regulations specifically require that services, programs, and activities be "readily accessible." If the Courthouse's wheelchair ramps are so steep that they impede a disabled person or if its bathrooms are unfit for the use of a disabled person, then it cannot be said that the trial is "readily accessible," *regardless whether the disabled person manages in some fashion to attend the trial.* We therefore conclude that the plaintiffs have alleged a set of facts that, if true, would constitute a violation of Title II.

Shotz v. Cates, 256 F.3d 1077, 1080 (11th Cir. 2001) (emphasis added, citation omitted).

Thus, the Eleventh Circuit precedent has made it clear that the ADA prohibits discrimination on the basis of disability in public programs and activities, and that individuals with disabilities must be able to participate in such programs and activities as fully as non-disabled persons. In the Eleventh Circuit, burdensome programs or activities are

as reprehensible under the ADA as programs or activities that are completely inaccessible to individuals with disabilities. Defendants ignore this law and the express allegations of the Complaint. Instead, they mischaracterize the Complaint as merely a plea for absolute secrecy in voting for visually and manually impaired voters. They do so apparently to avail themselves of non-binding Sixth Circuit precedent. That precedent, however, involved facts, a statutory framework, and allegations that are entirely different from those in this case.

Indeed, the essence of this case – as alleged in the Complaint – is that plaintiffs have been denied the services, programs, and benefits of Duval County with respect to voting *and* have been discriminated against in the process of voting. (*Complaint*, ¶¶ 42-44, 48-50, 51-53, 57-58, 69-70, 72-74, 79, 85, 93, 114, 116.) Plaintiffs do not allege that they have been denied the right to vote, as defendants suggest in their Motion. Instead, the Complaint alleges that plaintiffs have been discriminated against because they must cast their votes through a burdensome and unnecessary process by reason of their disabilities. (*Complaint*, ¶¶ 42-44.) That discrimination could be remedied through readily available technology as Duval County purchases its new voting systems.

Paraphrasing the Eleventh Circuit's ruling in *Shotz*, just because a "disabled person manages in some fashion to [vote]" does not mean that the ADA and Rehabilitation Act have not been violated. The burdens imposed by the current voting system are such that the "services, programs, and activities" applicable to voting in Duval County are not "readily accessible" to voters with visual or manual impairments. (*Complaint*, ¶¶ 42-43, 48-49, 52-53, 57-58, 67-74, 85, 89.) As in *Shotz*, the court cannot conclude "that the plaintiffs have alleged [no] set of facts that, if true, would [not] constitute a violation" of the ADA and Rehabilitation Act. *Shotz*, 256 F.3d at 1080.

The allegations of the Complaint are not merely theoretical, but are rooted in the admissions and findings of the defendants themselves. It was the defendants who concluded

"[i]t is currently an estimated 20% of people with disabilities who are LESS LIKELY to vote, when compared to the general population, and another 10% who are LESS LIKELY to register to vote due to lack of accessability [sic]." (*Exhibit A, Minutes of Sept. 10, 2001 Meeting of the Secretary's Select Task Force On Voting Accessibility* (emphasis in original.) It was the defendants who concluded that "only about 60% of all U.S. polling places do not pose significant accessibility problems." (*Id.*) It was Duval County that concluded that new voting technologies are "available, affordable and manageable" and have not been purchased to replace "outmoded equipment" because the County has "conducted our electoral process on the cheap." (*Exhibit B, Duval County Election Reform Task Force, Final Report at 6-7.*)

And, it is clear why disabled voters have been less likely to vote with this "outmoded equipment" – as the defendants know from their own public investigations of the Florida and Duval County election processes. The defendants solicited testimony from voters with disabilities about how, if at all, the third-party assistance approach in Florida was working as an accommodation for them. That testimony was distressing, although hardly surprising given the intrusive nature of third-party assistance. Voters with disabilities testified that: pollworkers announce and comment on visually and manually impaired voters' election choices; pollworkers refuse to read ballots to such voters, but instead summarize them for the sake of convenience; pollworkers deputize strangers to shepherd visually and manually impaired voters through the process; pollworkers refuse to allow such voters' family members to assist with the process; and pollworkers have actually shouted at visually impaired voters out of apparent frustration with the delays caused by third-party assistance voting. This is precisely the type of humiliating and demeaning treatment against which the ADA and Rehabilitation Act protect – and treatment that would vanish through the purchase of, as Duval County puts it, "available, affordable, and manageable" voting technology. (*Id.*)

These admissions of the defendants barely scratch the surface of what will be revealed through discovery and trial regarding the impact of, and relative ease to remedy, the discrimination against disabled voters in Duval County. The Complaint makes all of the requisite allegations under Eleventh Circuit precedent to state claims for violations of the ADA, Rehabilitation Act, and Florida Constitution. Therefore, the Motion must be denied.[1]

II. APPLICABLE LEGAL STANDARDS

"Dismissal of a claim on the basis of barebone pleadings is a precarious disposition with a high mortality rate." *Brooks v. Blue Cross & Blue Shield, Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (quoting *International Erectors, Inc. v. Wilhoit Steel Erectors & Rental Serv.*, 400 F.2d 465, 471 (5th Cir. 1968)). In considering a Rule 12(b)(6) motion, the court must "accept the facts in the complaint as true" and construe all allegations of the complaint "in the light most favorable to the nonmoving party." *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998) (citations omitted); *Brooks* at 1369 (citations omitted). The court confines its analysis to the "facial sufficiency of the statement of claim . . . [and] the face of the complaint and attachments thereto." *Brooks*, at 1368 (citations omitted). Dismissal is appropriate only if the defendants demonstrate "beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief." *Id.* at 1369 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)) (emphasis added)). Where, as here, the plaintiffs allege civil rights violations, the scrutiny under Rule 12(b)(6) is even higher. *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994). Indeed, "in complex cases involving both fundamental rights and important questions of public policy, such peremptory

[1] Plaintiffs are under no obligation to address the facts at this stage of the proceedings, but do so on a limited basis herein to show that preliminary factual investigation has revealed substantial support for the express allegations of the Complaint. At this juncture, the allegations of the Complaint must be taken as true.

treatment [as dismissal] is rarely appropriate." *DeMallory v. Cullan*, 855 F.2d 442, 445 (7th Cir. 1988) (citations omitted). Defendants' Motion cannot survive such scrutiny.

III. ARGUMENT

A. The Complaint States A Claim Under Title II Of The ADA

Title II of the ADA prohibits discrimination by public entities. The statute mandates 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 state a claim under Title II, the plaintiff must allege: (1) that she is a "qualified individual with a disability;" (2) that she was "excluded from participation in or...denied the benefits of the services, programs, or activities of a public entity" or otherwise "discriminat[ed] [against] by such entity;" (3) "by reason of such disability." *Shotz v. Cates*, 256 F.3d at 1079. Defendants do not dispute that they are a "public entity" as defined by the statute. (*See Complaint*, ¶ 10-30.) Nor do they challenge that plaintiffs have properly alleged that they are "qualified individuals with a disability." (*See Id.*, ¶ 4-7.) However, because plaintiffs can vote – regardless of how burdensome the process may be – defendants contend that plaintiffs have not been denied participation in or the benefits of the County's services, programs, or activities and have not otherwise been subjected to discrimination. (*Motion*, p. 5-6, 15-16.) This argument ignores binding Eleventh Circuit precedent and the clear allegations of the Complaint.

1. The County's Services, Programs, And Activities Are Not Readily Accessible To Plaintiffs Because Plaintiffs Have Been Discriminated Against By Being Subjected To A Burdensome And Intrusive Voting Process

In the Eleventh Circuit, "[a] violation of Title II . . . [of the ADA] does not occur only when a disabled person is completely prevented from enjoying a service, program or

activity." *Shotz v. Cates,* 256 F.3d at 1080. Rather, a public entity must operate each service, program, or activity so that the service, program, or activity, is "readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a).[2]

In *Shotz,* plaintiffs with physical impairments brought suit against the chief judge of a state court and the county sheriff for failing to remove barriers that would make the courthouse accessible and usable by individuals with disabilities. 256 F.3d at 1079. The Eleventh Circuit held that the County must ensure that its services, programs, or activities are "readily accessible" to individuals with disabilities. *Id.* at 1080. The court explained that if wheelchair ramps leading to the courthouse are steep or the bathrooms are not usable, then the trial is not "'readily accessible,' regardless whether the disabled person manages in some fashion to attend the trial." *Id.*[3] Plaintiffs here, like the plaintiffs in *Shotz*, have properly alleged that the County's services, programs, or activities are not readily accessible to voters with visual and manual impairments. (*Complaint* ¶¶ 42-44, 48-49, 52-53, 57-58, 69, 72-74, 85; *Complaint* ¶ 89: "By deciding to purchase voting equipment that is not accessible to voters with visual and manual impairments, Defendants Stafford and Commissioners have

---

[2] In addition to the ADA's general bar against discrimination, the Act instructs the Attorney General to develop regulations that implement the prohibition contained therein. *Kinney v. Yerusalim*, 9 F.3d 1067, 1071 (3d Cir. 1993). Those regulations, as they interpret Title II of the ADA, are found at 28 C.F.R. §§ 35.101 *et seq.* They broadly prohibit discrimination in public programs, services, or activities, and require that such activities be readily accessible to and usable by individuals with disabilities. *Id.* at 35.150. They also require, *inter alia,* that priority be given to services offered in the most integrated setting appropriate (35.150(b)), that persons with disabilities be assured means of communication that are as effective as communications with others (35.160), and that appropriate auxiliary aids be offered where necessary to afford equal opportunity to participate in public programs (35.160).

[3] Even though courthouse in *Shotz* was an existing facility, the Eleventh Circuit's analysis of what constitutes "readily accessible" is equally applicable to altered or newly constructed facilities because under the ADA regulations altered or newly constructed facilities also must be "readily accessible." 28 C.F.R. § 35.151(a) and (b).

failed to ensure that Florida's new voting equipment will be designed and constructed to be readily accessible to and usable by people with disabilities.") These allegations must be "taken as true." *Brooks*, 116 F.3d at 1369.

Defendants respond in their Motion by asserting that because voters *can* vote, regardless of the burdens incident thereto, there can be no violation of the ADA or Rehabilitation Act. (*Motion*, p. 5-6, 15-16). Defendants' position is not only at odds with Title II and its implementing regulations, it has been squarely rejected by the Eleventh Circuit in *Shotz*. In the Eleventh Circuit, it is irrelevant that the plaintiffs somehow manage to vote. The ADA is violated because the process of voting is not readily accessible to plaintiffs as they cannot cast a direct and secret ballot or vote in a manner free from burdens not placed on non-disabled persons. (*Complaint*, ¶ 57, 69-74, 79, 85-86, 87, 89-90, 91, 93-94, 96).

This is precisely the conclusion reached by the Eastern District of Pennsylvania under *identical* circumstances in *National Organization on Disability v. Tartaglione*, No. 01-1923, 2001 U.S. Dist. LEXIS 16731 (E.D. Pa. Oct. 11, 2001). In *Tartaglione*, visually and manually impaired plaintiffs alleged that the Pennsylvania third-party assistance statute violated the ADA and Rehabilitation Act because it imposed burdens upon them not placed upon non-disabled voters. The defendants filed a Rule 12(b)(6) motion arguing that no violation could occur because the plaintiffs had not been prevented from voting. The Court denied the defendants' motion and held:

> Defendants' argument that Plaintiffs cannot state claims for relief [under the ADA and Rehabilitation Act] because Plaintiffs have not been prevented from voting mischaracterizes the Complaint . . . . Plaintiffs claim to have been discriminated against in the process of voting because they are not afforded the same opportunity to participate in the voting process as non-disabled voters. The complaint alleges that assisted voting . . . is substantially different from, more burdensome than, and more intrusive than the voting process utilized by non-disabled voters . . . . The Complaint alleges that the . . . Plaintiffs . . . cannot participate in the program or benefit of voting in the same manner as other voters but, instead, must participate in a more burdensome process . . .

> [T]he Court concludes that the Complaint states a claim for discrimination in the process of voting.

2000 U.S. Dist. LEXIS 16731, at *11-*13.

Consistent with *Shotz* and *Tartaglione*, plaintiffs' claim is also properly stated under Title II's anti-discrimination clause, which is a "catch-all phrase that prohibits all discrimination by a public entity, regardless of the context." *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 45 (2d Cir. 1997). A public entity cannot discriminate against individuals with disabilities "by placing additional burdens on them" for participation in its services, programs, or activities. *Ellen S. v. Florida Bd. of Bar Examiners*, 859 F. Supp. 1489, 1494 (S.D. Fla. 1994). Where plaintiffs allege that they cannot participate in the voting process "in the same manner as other voters but, instead, must participate in a more burdensome process," a violation of Title II is properly alleged. *Tartaglione*, 2001 U.S. Dist. LEXIS 16731, at *13.

Tartaglione is directly on point and consistent with the Eleventh Circuit's ruling in *Shotz*. In defendants' 20 page Motion, they devote a single footnote to *Tartaglione* suggesting it is "unpersuasive" because the court did not analyze *Nelson v. Miller*. (*Motion*, p. 13, n.8.) However, *Nelson* represents a peculiarly state-oriented analysis with entirely different facts and legal standards from those at issue here, whereas *Tartaglione* is not only better reasoned, but precisely on point.[4]

[4] Tartaglione addressed directly the issues presented here. Plaintiffs allege that to cast a ballot with the County's current equipment or newly purchased equipment, they require third party assistance to read the ballot. (*Complaint*, ¶¶ 42, 43, 44). Then, they must reveal their choice to the third party and rely on the third party to cast their vote as directed. (*Id.* ¶¶ 42, 43, 44). Plaintiffs claim that this voting process does not allow them to "cast a direct and secret ballot or otherwise vote under the same conditions as non-disabled persons." (*Id.* ¶ 57).

2. Defendants' Reliance On *Nelson v. Miller* Is Misplaced

Defendants' assertion that "[t]he decision in *Nelson v. Miller* is dispositive of this action" ignores the fact that applicable Florida precedent and constitutional language are far different from that at issue in *Nelson*. While defendants spend most of their brief discussing *Nelson*, they ignore that the central question in *Nelson* was "whether the Michigan Constitution requires more secrecy than the Michigan legislature has provided for in MICH. COMP. LAWS ANN. § 168.751." *Nelson v. Miller*, 170 F.3d 641, 650 (6th Cir. 1999) (emphasis added). The court did not hold that third-party voting assistance to the blind is constitutional in all states or under all circumstances, but rather limited its holding to whether the Michigan third-party voting assistance statute met secrecy requirements consistent with the Michigan Constitution. *Id.* at 651. *Nelson* is inapposite for the following reasons.

First, at its most basic level, the plain language of the Florida Constitution is different from that used in the Michigan Constitution. The Florida Constitution states that "[a]ll elections by the people shall be by direct and secret vote." FLA. CONST. ART. VI, § 1 (1968). By contrast, the Michigan constitution provides that the Michigan legislature "shall enact laws to . . . preserve the secrecy of the ballot." MICH. CONST. ART. 2, § 4. There is no requirement under the Michigan Constitution that a vote be "direct." Therefore, the "absolute secrecy" that *Nelson* held was not required in Michigan is precisely what *is* required under the Florida Constitution.

Second, Nelson is also distinguishable because the court relied on prior interpretations of the Michigan Constitution and the third-party voter assistance statute by the Michigan courts and legislature. *Nelson* is grounded in Michigan court rulings finding no absolute right to secrecy under the Michigan Constitution, and thus finding the third-party voter assistance statute to be constitutional. 170 F.3d at 651 (discussing prior decisions of the Michigan courts). Neither the Eleventh Circuit nor any Florida court has ruled on the constitutionality

of the Florida third-party voter assistance statute. (*Harris' & Roberts' Motion*, at 10) Nor can any precedent be relied on when it does not take account of the fact that fully accessible equipment is now available that can assure a secret ballot to all.

Third, the *Nelson* court deferred to the Michigan legislature's alleged interpretation of the constitutional language as not requiring "absolute secrecy." 170 F.3d at 652. It did so because the Michigan Constitution confers on the Michigan legislature an "affirmative duty to do something" (*Nelson,* 170 F.3d at 652) – specifically, to "enact laws to preserve secrecy of the ballot." MICH. CONST. ART. 2, § 4. As a prior Michigan court explained, "[w]hen power is conferred upon the legislature to provide instrumentalities by which certain objects are to be accomplished, the sole right to choose the means accompanies the power, in the absence of any constitutional provisions prescribing the means." *Nelson*, 170 F.3d at 653 (*quoting Common Council v. Rush*, 46 N.W. 951, 952-53 (Mich. 1890)). By contrast, the plain language of the Florida Constitution is self-executing, and there is no authority for the Florida legislature to intervene or any need for it to do so to trigger this provision. *See Florida Dep't of Educ. v. Glasser*, 622 So. 2d 944, 947 (Fla. 1993) (distinguishing between self-executing provisions and those that need legislative enactment). Therefore, although third-party assistance for voters with disabilities is still provided for in Florida, that fact cannot supersede the rights protected by the Florida Constitution and by federal law now that technology makes unassisted voting possible. It is for the courts, utilizing general rules of constitutional construction, to interpret the Florida Constitution.[5]

[5] These distinctions between the Florida Constitution and the Michigan Constitution are important because, as even the *Nelson* court acknowledged, the ADA does not limit the rights provided by state law if the state law provides greater or equal protection for the rights of individuals with disabilities than are afforded by the ADA. *Nelson*, 170 F.3d at 644 n.4. The *Nelson* court's determination of the rights of voters under the Michigan Constitution cannot be seen as a limit on the accommodation defendants must provide to voters which visual or manual impairments in Florida if the Florida Constitution grants each voter greater or equal rights and benefits than provided by the Michigan Constitution.

In construing the Florida Constitution, the Florida Supreme Court has stated that the interpretation must begin with an examination of that provision's explicit language. *Florida Soc'y of Ophthalmology v. Florida Optometric Ass'n*, 489 So. 2d 1118, 1119 (Fla. 1986). Where the constitutional language is "clear, unambiguous, and addresses the matter in issue, then it must be enforced as written." *Id.* In addition, the constitutional provision must be read so that no language is rendered superfluous. *Department of Envtl. Prot. v. Millender*, 666 So. 2d 882, 886 (Fla. 1996); *see also Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979) ("[a] constitutional provision is to be construed in such a manner as to make it meaningful"). The plain language of the Florida Constitution states: "All elections by the people shall be by *direct **and** secret* vote." FLA. CONST. ART. VI, § 1 (1968) (emphasis added). The plain meaning of this provision must be read as guaranteeing each voter not only the right to secretly cast his or her vote, but also to *directly* cast this secret vote with nothing intervening between the voter and his or her ballot. *See, e.g.*, Black's Law Dictionary (6th Ed.) ("Direct" defined as "without any intervening medium, agency or influence; unconditional"); *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 656 (D.C. Cir. 1994) ("'Direct' signifies 'marked by absence of an intervening agency'" (citation omitted)).[6]

Further, the legislative history of Article VI, § 1 of the Florida Constitution confirms that the Florida constitutional committee intended to provide voters in Florida with a greater set of rights than those provided by the Michigan Constitution. The minutes of the constitutional committee show that the committee considered, and rejected, the following language:

---

[6] Early drafts of the constitutional amendment provided separately for a "direct vote and . . . a secret ballot." *See, e.g., Exhibit C, Suffrage and Elections Committee Second Draft.* Any argument that Article VI, § 1, as enacted, still provides separately for a direct vote and a secret ballot must fail as the drafters clearly knew how to express but rejected such an intention.

> Unless otherwise provided herein, all elections by the people shall be by direct vote and shall be determined by a plurality of votes cast. 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 by law for the conduct of elections, requirements for absentee voting, methods of voting, determination of election returns and procedure in election contests.

(*Exhibit D, Minutes of the Suffrage and Elections Committee of the Florida Constitution Revision Committee*, Feb. 2 & 3, 1966, at 13 (emphasis added).) As the Committee *rejected* language delegating action to the Florida Legislature in favor of the clear and self-executing pronouncement that "[a]ll elections by the people shall be by direct and secret vote," the Florida Constitution must be read as providing a greater right to the Florida voter than the Michigan language provides to the Michigan voter. The holding in *Nelson* cannot, therefore, be applied to the present case.

3. Defendants' Reliance On A Non-Binding 1993 DOJ Opinion Letter Is Misplaced

Defendants' reliance on a Department of Justice 1993 Letter of Findings is similarly misplaced. First and foremost, the world has changed since 1993. It is no longer necessary to find alternatives that permit voting, but not secrecy. The Department's letter cannot be considered persuasive authority, because it was written at a time when accessible electronic voting systems did not exist. In any event, such opinion letters are not binding or controlling authority. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Gonzalez v. Reno*, 215 F.3d 1243, 1245 (11th Cir. 2000).

The 1993 DOJ letter, in reviewing Pinellas County's election practices, concluded that, because no alternative for a blind voter to cast a ballot existed, third-party assisted voting allowed blind voters to participate in and enjoy the benefits of a service, program, or activity conducted by a public entity. (Letter from Steward B. Oneglia, Chief Coordination and Review Section, Civil Rights Division, to Complainant, Aug. 25, 1993, at 2, *Exhibit E*). Indeed, the DOJ found, as footnote 9 of the Motion admits, that "electronic systems of voting

by telephone that meet the security requirements necessary for casting ballots are not currently available." *Id.*

The DOJ has more recently taken another view. When accessible electronic voting is available, as it is now, the ADA requires states to utilize that technology. *See Exhibit F,* Brief of *Amicus Curiae* Department of Justice, at 11-12, *Nelson v. Miller*, 170 F.3d 641 (6th Cir. 1999). In its *amicus curiae* brief, the DOJ stated, "If reasonable modifications were available that would allow blind or visually impaired voters to cast their ballots without assistance and that would assure ballot secrecy, the plain import of the ADA and its implementing regulations would require the state to adopt those modifications." *(Id.)* The facts alleged in this case take into account the changed electronic world. Electronic voting systems do exist and are readily available. (*Complaint*, ¶ 1). These allegations must be taken as true, and, accordingly, the Motion must be denied. Moreover, whether defendants must provide electronic voting systems in order to afford plaintiffs an "equal opportunity to obtain the same benefit" as that provided to non-disabled voters is the ultimate issue to be decided after full factual development and trial. 28 C.F.R. § 35.130(b)(1); *see also Crowder v. Kitagaw*, 81 F.3d 1480, 1486 (9th Cir. 1996) ("the determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry"); *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995) ("the determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry"); *McCray v. City of Dothan*, 169 F. Supp. 2d 1260, 1275 (S.D. Ala. 2001) ("[w]hether an accommodation is reasonable 'involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question").

Plaintiffs also allege that they asked defendants to certify only voting systems that are accessible to persons with visual and manual impairments. (*Complaint*, ¶ 64.) Plaintiffs

further allege that defendants Harris and Roberts certified voting systems that are not accessible to voters with visual or manual impairments, and defendants Stafford and Council purchased optical scan and touchscreen systems that are not accessible to voters with visual or manual impairments. (*Complaint*, ¶¶ 65, 69.) Taking these allegations as true, the trier of fact must still determine whether these actions violate the requirement that public entities provide auxiliary aids and services that would provide plaintiffs "an equal opportunity to participate in, and enjoy the benefits of" the state's voting process, and whether defendants' refusal constitutes a failure to "give primary consideration" to the requests of the disabled. 28 C.F.R. § 35.160(b)(2). These, too, are issues of fact. *Hahn v. Linn County*, 130 F. Supp. 2d 1036, 1047 (N.D. Iowa 2001); *McCray*, 169 F. Supp. 2d at 1276. As such, they are not appropriate for a Rule 12(b)(6) determination.

4. Defendants' Reliance On The Voter Assistance Statute As Satisfying The ADA Ignores Their Obligation To Make Altered Or New Facilities Readily Accessible

Defendants' argument that the Florida voter assistance statute satisfies their ADA obligation reveals their misunderstanding of how the ADA's regulations apply to the voting process and voting machines. The fact that the voter assistance statute satisfied the ADA in the past is irrelevant, because once defendants decided to purchase new voting systems, their action triggered a heightened accessibility standard.[7] A voting machine is equipment, and equipment is included in the definition of "facility" in the regulations. *National Org. on*

[7] The ADA's implementing regulations, as stated above, require a public entity to conduct its services, program, or activities so that they are "readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). The regulations, however, do not require that a public entity make each existing facility accessible and usable. 28 C.F.R. § 35.150(a)(1). A public entity may comply with the "readily accessible" and "usable" requirements through various methods including "alteration of existing facilities and construction new facilities . . . or any other methods" that accomplish accessibility. 28 C.F.R. § 35.150(b)(1). Alterations are governed by 28 C.F.R. § 35.151 and must be made readily accessible to the "maximum extent feasible."

Disability v. Tartaglione, 2001 U.S. Dist. LEXIS 16731 (E.D. Pa. Oct. 11, 2001). A change in voting machines that affects their usability is an alteration. *Kinney v. Yerusalim*, 9 F.3d 1067, 1071 (3d Cir. 1993). When defendants upgrade the voting machines, they must comply with "substantially more stringent" regulations than those that apply to existing machines. *Id.* Those stricter regulations require that alterations be completed in a nondiscriminatory manner that provides full access to all qualified voters. *Id.* at 1073.

Indeed, Congress recognized that altered or new facilities presented "an immediate opportunity to provide full accessibility." *Id.* at 1074. Accordingly, it required such changes to be made free of discrimination and to be usable by all. *Id.* at 1073. Congress also appreciated the importance of implementing advances in technology. The House Committee made it clear that "technological advances can be expected to further advance options for making meaningful and effective opportunities available." H.R. Rep. No. 101-485, pt. 2, at 108 (1990), reprinted in, 1990 U.S.C.C.A.N. 303, 391. That Committee intended accommodations and services to "keep pace with the rapidly changing technology of the times." *Id.*

In *Molloy v. Metropolitan Transportation Authority*, the Second Circuit considered whether installation of such a technological advance, a ticket vending machine (TVM), was an alteration under the ADA. 94 F.3d 808, 812 (2^{d} Cir. 1996). In *Molloy*, plaintiffs with visual impairments brought suit against the Metro Transit Authority and the Long Island Railroad (LIRR) for installing TVMs that were not accessible to plaintiffs. *Id.* at 810. The court held that plaintiffs were likely to establish that the installed TVMs were an alteration and that TVMs were not usable by plaintiffs because they lacked an audio component. *Id.* at 812.

Following the *Molloy* decision, the court in *Civic Association of the Deaf v. Guiliani* allowed hearing-impaired individuals to sue New York City for an alteration that violated

Title II of the ADA. 970 F. Supp. 352, 360 (S.D.N.Y. 1997). Plaintiffs there alleged that converting the current street alarm boxes to new boxes that are not accessible and usable by hearing-impaired people violated Title II. *Id.* First, the court held that the replacement of the current system with a new system was an alteration to equipment covered by the ADA. *Id.* Next, the court addressed whether the new system is accessible and usable to the maximum extent feasible. *Id.* That inquiry, the court explained, is "fact-specific inquiry based on a fully-developed record." *Id.* After considering the evidence, the court held that the new system was unusable by hearing-impaired people and therefore violated Title II. *Id.*

Molloy and *Guiliani* have compelling applicability to this case. Plaintiffs here allege that the County has "failed to ensure that [its] *new* voting equipment will be designed and constructed to be readily accessible to and usable by people with disabilities." (*Complaint,* ¶ 89, *emphasis added.*) The purchase by Duval County of that "new voting equipment" requires compliance with the "substantially more stringent" regulations applicable to new facilities. *Kinney*, 9 F.3d at 1071. These "stringent" regulations require that the new voting equipment provide full access to all voters, including those with visual or manual impairments.[8] Thus, plaintiffs have alleged a set of facts that, if true, would constitute a violation of Title II of the ADA.[9]

---

[8] Defendants assert that they "have gone beyond [ADA] requirements" by providing three or four touchscreen systems (out of 300) at the Supervisor's of Elections office. Plaintiffs allege specifically, however, that those touchscreen systems are accessible only with an audio and puff stick option. (*Complaint,* ¶ 52, 53). Those few touchscreen systems are not equipped with the necessary accessible components. (*Id.*) Even if they included the audio and puff stick options, installing three or four touchscreens at only one location in the "largest land area city in the United States" imposes significant burdens, does not meet "readily accessible" requirements, and does not provide access to all voters as required by strict alterations standards. (*Complaint,* ¶ 56).

[9] While these allegations must be taken as true, the court must still decide whether the new equipment will be usable to the maximum extent feasible. This is an issue of fact not appropriately decided on a Rule 12(b)(6) motion. *Guiliani*, 970 F. Supp. at 360.

B. Plaintiff Have Stated A Claim Under The Rehabilitation Act

Defendants urge the Court to dismiss Count Three of the Complaint for failure to state a claim. Count Three alleges violations of Section 504 of the Rehabilitation Act. To state a claim under the Rehabilitation Act, Plaintiffs need only allege that they are (1) qualified (2) handicapped individuals (3) who have been "excluded from the participation in, . . . denied the benefits of, or [have been] subjected to discrimination" (4) "under a program or activity receiving federal financial assistance." 29 U.S.C. § 794(a).[10]

Defendants contend that the Complaint fails "to adequately plead the jurisdictional requirement that the Defendants receive federal funds." (*Motion*, n.12.). To the contrary, Plaintiff pled exactly what is required by the Rehabilitation Act—that each defendant is a local government instrumentality *and* "is a recipient of federal financial assistance." (*Complaint*, ¶112). This allegation must be "taken as true" (*Brooks*, 116 F.3d at 1369), therefore ending the Court's inquiry under Rule 12(b)(6).

Interestingly, Defendants do not deny that they have received federal financial assistance. In any event, the issue of whether a state entity "receives federal financial assistance within the meaning of the civil rights laws . . . requires inquiry into factual matters outside the complaint and, accordingly, is a matter better suited for resolution after both sides have conducted discovery on the issue." *Sims v. United Government*, 120 F. Supp. 2d 938, 954 (D. Kan. 2000); *see also Shepard v. United States Olympic Comm.*, 94 F. Supp. 2d 1136, 1146-47 (D. Colo. 2000); *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 26 F. Supp. 2d 1001, 1008 (W.D. Mich. 1998); *Bowers v. NCAA*, 9 F. Supp. 2d 460, 492 (D.N.J.

[10] The elements required to establish a Rehabilitation Act claim are nearly identical to those required to establish an ADA claim. *Cash v. Smith*, 231 F. 3d 1301, 1305 (11th Cir. 2000). Having discussed the elements common to both Rehabilitation Act and ADA claims, *supra* at § III(A)(1), Plaintiffs need only address the sufficiency of the Complaint as to the element of federal financial assistance.

1998); *Gazouski v. City of Belvidere*, No. 93-C-20157, 1993 U.S. Dist. LEXIS 17675, (N.D. Ill. Dec. 13, 1993); *Gonzales Development Assistance Corp.*, No. 88-0191-LFO, 1989 U.S. Dist. LEXIS 6921 (D. D.C., June 21, 1989); *Bellamy Roadway Express, Inc.*, 668 F. Supp. 615, 618 (N.D. Oh. 1987). As in *Lightbourn*, resolution of the federal financial assistance issue is possible only after full discovery and trial. *Lightburn v. County of El Paso*, 118 F.3d 421 (5th Cir. 1997).

C. Plaintiffs Allege A Claim Under The Florida Constitution

Defendants admit that the Florida Constitution grants a right to its citizens to cast "a direct and secret vote." (*Motion*, p. 17). However, for the following reasons, Defendants miss the mark in claiming that the third-party assistance statute is constitutional because it allegedly constitutes a reasonable regulation of this right.[11] *Id.*

First, by its plain language, the Florida Constitution guarantees the right to cast a vote both secretly and directly, with nothing intervening between the voter and the ballot. (*See*, Section III(A)(2)). The legislative history confirms that the Florida Constitutional Committee intended to grant voters a right of absolute secrecy. (*Id.*)

Second, contrary to defendants' position that a reasonableness standard applies, the voter-assistance statutes must be strictly scrutinized. That is because voting is a fundamental right. *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *Dunn v. Blumstein*, 405 U.S. 330, 336

[11] The caselaw relied upon by defendants is inapposite. In *Smith v. Dunn*, the plaintiffs challenged the voter assistance statute under the Fourteenth and Fifteenth Amendments of the U.S. Constitution and not under an express right to a secret ballot granted by the Tennessee Constitution. 381 F. Supp. 822 (M.D. Tenn. 1974). In contrast, plaintiffs, here, challenge three statutes that improperly limit the right to a direct and secret vote granted by the Florida Constitution. Because a state constitution can grant greater protections than the Federal Constitution, Florida voters have a right to absolute secrecy in voting protected by the Florida Constitution. Further, in *Bodner* (the other case relied upon by defendants), the determination that a statute was a "reasonable regulation" was made only after extensive discovery and trial. *Bodner v. Gray*, 129 So. 2d 419, 421 (Fla. 1961).

(1972); *Reynolds v. Sims*, 377 U.S. 533 (1964). Under a strict scrutiny analysis, the least restrictive means must be used to achieve the State's interest intended to be protected by the limitation. *Burson* at 199. Clearly, the Florida voter-assistance statutes do not use the least restrictive means. Florida's purported compelling interest under these statutes is to enable citizens with disabilities to vote. There are less restrictive means to protect that interest – technological advances in voting machines have made it possible for each voter, including voters with visual and manual impairments, to cast a direct and secret ballot.

Third, even if the court determines that the rational basis test applies, the challenged statutes are not rationally related to the State's goals. With the availability of affordable technology that would allow voters with visual and manual impairments to vote independently and without the potential for fraud, it is not reasonable to impose additional burdens only on a particular population. This inquiry, however, is fact specific and not appropriate for resolution under Rule 12(b)(6). *Bodner v. Gray*, 129 So. 2d 419, 421 (Fla. 1961). Thus, dismissal of the Florida constitutional claims is inappropriate.

D. Defendant City Council Members Are Not Entitled To The Protection Of Legislative Immunity

In their Motion, the City Council members attempt to invoke the shield of Eleventh Amendment immunity. This argument ignores the "long standing and well-recognized exception to [legislative immunity] for suits against state officers seeking prospective equitable relief to end continuing violations of federal law." *Florida Ass'n of Rehabilitation Facilities, Inc. v. Florida Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1219 (11th Cir. 2000); *Seminole Tribe v. Florida.*, 517 U.S. 44 (1996); *Luckey v. Miller*, 929 F.2d 618, 620 n.2 (11th Cir. 1991); *see also Ex Parte Young*, 209 U.S. 123 (1908). The facts of this case warrant application of this time-honored exception.

First, the Plaintiffs brought suit against City Council members in their "official capacity only". (*Complaint,* ¶¶ 11-29.) Second, the plaintiffs unambiguously allege injuries arising from the continuing violations of the ADA, the Rehabilitation Act, and the corresponding implementing regulations. (*Id.*, ¶¶ 78-79, 83-87, 89-91, 93-94, 96-98, 100-101, 110-114, 116-117.) Third, the Complaint does not seek money damages, but instead seeks only declaratory and injunctive relief.[12] (*Complaint,* ¶ C & F.) Therefore, the City Council members are not entitled to invoke legislative immunity. *Florida Ass'n of Rehabilitation Facilities v. Florida Dep't of Health & Rehabilitative Servs.* 225 F.3d 1208, 1220 (11th Cir. 2000); *Doe by & Through Doe v. Chiles*, 136 F.3d 709, 720-21 (11th Cir. 1998).

IV. CONCLUSION

For the foregoing reasons, the Motion must be denied. The Complaint is facially sufficient and the facts alleged support its claims and entitle plaintiffs to relief.

Respectfully submitted,

J. Douglas Baldridge
Trial Counsel
Florida Bar No. 0708070
HOWREY SIMON ARNOLD & WHITE, L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

[12] Defendants' reliance on *Woods v. Gamel*, 132 F.3d 1417 (11th Cir. 1998) and *Ellis v. Coffee County Bd. of Registrars*, 981 F.2d 1185 (11th Cir. 1993) is misplaced. The facts in *Woods* and *Ellis* did not warrant application of the *Ex parte Young* exception, as both involve claims brought against officials in their individual capacities, seeking money damages as redress for past injuries.

Lois G. Williams
Co-Counsel
Washington Lawyers' Committee for Civil
Rights and Urban Affairs
11 Dupont Circle NW, Suite 400
Washington, D.C. 20036
(202) 319-1000

Attorneys for Plaintiffs

Dated: January 17, 2002

Of Counsel:

Alan M. Wiseman
Danielle R. Oddo
Courtney O. Taylor
Vincent E. Verrocchio
HOWREY SIMON ARNOLD & WHITE, L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition To The Motion To Dismiss Of Defendants Stafford And City Council were served by regular United States mail, postage prepaid, this 17th day of January, 2002, upon each of the parties listed below:

Scott D. Makar, Esq.
Office of General Counsel
117 West Duval Street
Suite 480
Jacksonville, FL 32202

Charles A. Finkel, Esq.
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050

Courtney O. Taylor

Secretary's Select Task Force on Voting Accessibility

Minutes of September 10, 2001 meeting
Tallahassee, Florida

The Organizational meeting of the Secretary of State's Select Task Force on Voting Accessibility was held in Room 412, Knott Building, Tallahassee, Florida, on September 10, 2001.

All members were present, except: Lyn Bodiford, representing AARP-Florida, who sent Jeff Johnson in her place, Senator Manny Dawson, and Gloria Mills.

Following a self-introduction of the members, many of whom thanked Secretary Harris for the creation of this Task Force, Assistant Secretary of State, David Mann, welcomed the members and thanked them on behalf of the Secretary for their willingness to serve. The Co-Chairmen, Senator Richard Mitchell and Representative Larry Crow, introduced the staff director, Fred Dudley and staff secretary, Ginger Simmons.

The staff director then made presentations to the members regarding the Ethics laws, and the requirements for both public records and public meetings. Also, members were given copies of the reimbursement vouchers, with a written explanation of allowable charges, and a request to complete, sign and turn in to Ms. Simmons at the end of each meeting.

The members reviewed and approved the "purposes" of the Task Force, as follows:

1. To ascertain the obstacles persons with disabilities face in voting in Florida's elections.

2. To develop and implement solutions for overcoming these obstacles.

3. To devise a mandatory training program for all election officials and poll workers, which includes instruction from persons with disabilities.

4. To propose a funding mechanism for the estimated costs association with implementation and training.

Julie Shaw made a written and oral presentation regarding the various legal requirements applicable to disabled Americans, as follows:

The Rehabilitation Act of 1973 - requires that all federal grants and programs or entities that receive federal funding, comply with physical, program and service accessability. It is currently an estimated 20% of people with disabilities who are LESS LIKELY to vote, when compared to the general population, and another 10% who are LESS LIKELY to register to vote due to lack of accessability. There are presently 33.7 million Americans with disabilities of voting age, and if all polling sites were accessible, an additional 5-10 million of these disabled would vote.

1984 Voter Accessibilities For the Elderly and Handicapped Act - for the first time required that all polling places be physically accessible, or moved to another location if not made temporarily accessible. Alternative voting,

such as by absentee ballot or by curb-side voting, were authorized.

1992 Final Report on Compliance - indicated that only 86% of polling places were physically accessible to voters with disabilities. However, the accuracy of this report has been seriously questioned, with independent surveys and court cases suggesting that only about 60% of all U.S. polling places do not pose significant accessibility problems.

1990 Americans with Disabilities Act ("ADA") - requires accessibility of all facilities, programs and services in all state and local governmental entities ("Title II"). It should be noted that "program" accessibility may be permitted in lieu of actual "facility" accessibility, so that accessibility to the entire building would not be required if accessibility were available to the to the areas were voting is conducted, and to the exit. Churches are exempt from the ADA, and the Florida Accessibility Code or buildings constructed since 1997, EXCEPT were they are used as polling places. Initial compliance lies with the local supervisors of elections.

Finally, Julie pointed out the need for accessibility at pre-elections activities, such as candidate forums, and public broadcasts, such as debates and interviews, all to better inform every voter, including those who have disabilities. In addition, she stressed that "we must not provide unequal opportunities," by which she explained that we should not create "different" or "separate" facilities or services for those with disabilities, nor discriminate in the procurement process.

Ms. Shaw concluded her presentation with some key recommendations, as follows:

1. Consider "alternative" methods of permitting voting to occur, such as large type ballots, use of TTY machines, audio ballots;

2. Trained volunteers to assist the disabled,

3. Distribution of "disability etiquette guidelines;"

4. Help to close the severe digital divide by increasing access of computer technology by those with disabilities.

5. Set up a minimum state standard for all polling places;

6. Define an accessible piece of voting equipment and environment;

7. Identify and hold a single state elections official responsible for compliance with these new standards;

8. Design and implement poll worker education on disabled voters.

Steve Hardy questioned Julie on the current status of federal requirements for closed captioned television broadcast. Staff was directed to undertake a survey of Florida television stations to determine how each of them were progressing on upcoming compliance requirements for closed captioning. The federal deadline is 2006, with all televisions now having the capability.

Robert Miller pointed out that transportation to and from the polls in a timely fashion is another barrier to effective participation by disabled citizens in the voting process. David Evans agreed, and pointed out the need

to increase state funding for the existing transportation program, such as that being sought by Senator Mitchell in Senate Bill 100 during the past legislative session.

Mr. Evans also sought clarification that a disabled voter, such as an elderly blind citizen who didn't want to use the latest technology could continue to have the right to request assistance at the polls, as in the past. The general consensus was that this right to assistance would be continued, regardless of other alternatives later employed to allow more secret and confidential voting controls.

Chris Wagner agreed that the transportation problem is a major obstacle for those with disabilities, as well as the need to have someone at each polling place to assist with questions regarding the equipment and the process. Mr. Miller stated that training of both poll workers and disabled persons is essential. Pam Dorwarth inquired about any present requirements for "sensitivity" training, and the consensus seemed to be that there are no such requirements at the present time.

Valerie Breen about the present job descriptions of poll workers. Teresa LaPore pointed out that Palm Beach County hires and trains approximately 4,000 poll workers in each election, and that such training there does include sensitivity training on the needs of disabled voters; she also referred to several accessibility and sensitivity training videos prepared by the state of North Carolina, which she has obtained permission to use them, and to share them with other Florida Supervisors of Elections.

Mr. Kracht questioned the likelihood that several days of sensitivity training will be given for a one-day job. Ms. Breen agreed, and suggested that we should review any existing training and sensitivity requirements before we propose additional ones. Ms. LaPore pointed out that the recent election law changes require six (6) hours of training spread throughout the year prior to the general election.

Michael Phillips pointed out that no one particular type of voting is going to meet the needs of every disabled voter, but that he thought Internet voting would allow more disabled citizens to vote.

Chairman Mitchell directed Mr. Dudley to survey Florida television stations regarding their willingness and ability to being closed captioning even prior to the 2006 deadline. Ms. Shaw pointed out how critical this capability would have been during a disaster like Hurricane Andrew when many disabled persons were unable to obtain safety and health information from their televisions. David Evans pointed out that, for the blind and visually impaired, failure of stations to read aloud the "number at the bottom of the screen" should be avoided, especially in disaster situations. Mr. Hardy pointed out that the current FCC requirements for closed captioning are merely voluntary prior to 2006, and not mandatory until that date.

Kristi Reid Bronson, a staff attorney with the State Division of Elections, made a presentation on state and federal election laws, a written copy of which is located in each member's Handbook under Tab 8. To Ms. Shaw's description of federal laws, she added the "Motor Voter" Act of 1993 (effective in 1995). Among other things, this act requires state funded programs, such as for welfare assistance, that are primarily engaged in providing services to persons with disabilities to also provide these same persons with the opportunity to register to vote. These program offices are required to provide not only the registration forms, but assistance in filling them out and forwarding them to the appropriate Supervisor of Elections.

However, this law applied only to registration for federal elections only.

In 1994, Florida passed similar legislation for registration in state elections as well; the state law also contains a complaint process for anyone who believes that they have been aggrieved by any violation of the federal or state requirements. Such complaints are processed and monitored by the state Division of Elections, who act as mediators to resolve problems (as does the Office of Governor if the complaint is against the Elections Division). Requests for assistance is a part of both federal and state registration requirements.

Ms. Bronson also described section 101.715, Florida Statutes, regarding the accessibility of polling places, which includes minimum widths for doors, entrance and exists, handrails on stairs and ramps, and location of any barriers between the door and the voting booth itself. These requirements have been in the law since 1976, according to Ms. Bronson, and some of them (such as minimum door width of "29 inches" conflicts with the Florida Accessibility Code according to Ms. Shaw. Richard Labelle cited Article VI, Section 1 of the state constitution, and Ms. Bronson acknowledged that she was unaware of any cases or statutes that modifies or qualifies the right secured therein to a "direct and secret vote."

Jeff Johnson inquired if the definition of "disability" in the state elections code would include difficulty speaking or reading the English language, and Ms. Bronson said that it would not. Further, Mr. Dudley pointed out the technical difficulty of section 101.051, Florida Statues, regarding the need for an actual sworn statement from someone who needed assistance. Mr. Miller commented on the lack of uniform requirements for information regarding one's disabilities.

Next, Mr. Paul Craft, Chief of the Elections Division's Bureau of Voting Systems, described some his work over the past ten (10) years. He pointed out that, pursuant to section 101.5, Florida Statutes, no voting system may be used in the state, unless his office has first certified it. He described the certification program as an engineering evaluation which he claims is being used widely as one of the best in the country, with the following standards required for certification:

1. It has to tell what races are going to be voted on;

2. It has to tell how many candidates are in each race.

3. It has to explain the rules for voting (for example: vote for one, etc.).

4. It has to identify what candidates are in each race.

5. It has to allow the voter to select a candidate.

6. It has to allow the voter to review their choices, and modify their selections until the ballot is cast.

7. It has to allow for a write-in candidate, and for the edit of a write-in candidate;

8. It must have a definitive moment when the ballot is cast without further changes.

With the application of these standards, Mr. Craft claims that his bureau has

already certified several new machines, one of which is actually certified with an audio ballot interface. HOWEVER, Mr. Craft DOES NOT HAVE ANY STANDARDS FOR ACCESSIBILITY. On the other hand, he agreed that he needs such standards, and asked our Task Force to develop same for use by his bureau.

Mr. Craft reported that there are currently two (2) MARSYMS systems used throughout the state at the present time: the Optechs Eagle (used in Clay, St. Johns, Escambia, and several other counties), whose manufacturer is currently working on a touch screen, and Global Elections (as is used in Leon County). Tech Company is also working on a touch screen certification. As a result, there should be at least three (3) units from major manufacturers to choose. In addition, he reported that a telecommunications company has already done a lot of work with voice recognition systems.

Mr. Labelle sympathized with Mr. Craft's evaluation tasks, and thanked him for this work, which also pointing out his agreement with Mr. Phillips' concern that there is not a "one-size-fits-all" solution, as has been the case in the past with punch card ballots.

Mr. Miller pointed out that, as with the transportation problems faced by many disabled voters which greatly varies from place to place, it is important to maximize the choices we have among different certified voting systems.

Mr. Kracht was also appreciative of Mr. Craft's difficult responsibilities, and likewise expressed his appreciation for the job being done. However, he expressed frustration about the failure or refusal of companies to bring new products forward for certification, and grave concern about the on-going acquisition of new voting equipment without first dealing with certification. Mr. Craft responded that he thought the market place was going to adapted rapidly now that the first touch screen technology has been certified, and that the real question is whether or not to place mandatory requirements on the market.

Ms. Grubb differed with Mr. Craft on her perception of the market place by claiming that many manufacturers have been intentionally withholding their "access" packages until their main products were first certified. She claims that these companies are "treating their access packages as step children." In this vain, Chairman Mitchell inquired of Mr. Craft about the adoption of a rule requiring an "access package" as part of the certification process. Mr. Craft was not opposed to that idea, but argued that a statutory mandate would be stronger, especially in light of the on-going certification process and the likelihood of legal challenges to such a rule. Chairman Mitchell countered that the statutory mandate would take longer, and that perhaps both a statute and a rule would be appropriate (to which Mr. Craft seemed to agree). Ms. Shaw pointed out the year-old Texas full accessibility statute, mandating the use of new voting equipment in every county.

Mr. Clay Roberts, Director of the Division of Elections, indicated to the Task Force that he was concerned about any mandates by rule alone, and urged the Task Force to also consider recommendation of a statutory change as well. At the same time, he indicated to the members that the department will proceed with a rule in this area.

Senator Sanderson pointed out that she and fellow Task Force member, Representative Dudley Goodlette, serve as the chairs of the respective legislative Elections committees, and might be able to fast-track such legislation. After further discussion in which several members expressed

concern that all Supervisors of Elections need to be aware of this problem and the possible solution, it was agreed that Mr. Dudley would work with the respective committee staff directors and the chairs to formulate such a letter to be signed by both Senator Sanderson and Representative Goodlette.

(**Editor's Note**: Before this day was over, Mr. Dudley had scheduled such a meeting with Richard Hixon, Representative Goodlette's staff director of the House Rules Committee, for the following date at 2:00 p.m. The tragic circumstances of the following morning, Tuesday, September 11th, caused the meeting to be canceled when Governor Bush ordered an evacuation of the Capitol complex. However, in discussing this matter with Mr. Roberts later in the week, Mr. Dudley drafted and submitted a Memorandum for Secretary Harris' consideration and signature, a final mailed copy of which is found under Tab 11).

Mr. Evans expressed his belief that there is not something in all of these systems for every contingency, and that counties may well have to use several different types of voting equipment in order to meet all the needs. Mr. Dudley pointed out that some changes in current laws will be needed in order to "tally" all votes at each precinct unless different equipment can be interfaced in order to communicate with other equipment being used at the same location.

Chairman Mitchell directed the staff to arrange for a presentation by the various vendors of their products. Mr. Phillips asked Mr. Craft about the use of the Internet for voting. Mr. Craft responded that work on such a system has been underway since 1997, including a Department of Defense Internet voting project in the 2000 elections; however, he reported that the well-documented findings are that there is no good way to secure the voter's choice once it leaves their computer; it may pick up a virus or script that would change the vote either before or after it left the computer.

At approximately 12:40 p.m., the members took a lunch break, re-convening at 1:50 p.m.

Mr. Doug Towne was recognized to make a presentation regarding the barriers to voting by those who are disabled. He first explained that, while he had been involved in the creation of this Task Force he was not serving as a member, because he had since been retained by one of the product vendors as a consultant. He identified some of the following "barriers" to voting accessibility:

1. To overcome attitudes by enforcing current laws and finding new laws and rules to assure accessibility.

2. Elimination of non-accessible polling places (perhaps with the use, in some cases, of absentee ballots).

3. Flexibility to substitute technology.

4. Inadequate transportation.

5. Systematic and social barriers based on perceptions about disabilities.

Chairman Mitchell lead the members in a discussion of "problems and solutions," with the following results:

Ms. Grubb: Expressed her pleasure at seeing the Task Force moving to

accomplish its mandate to assure accessibility in voting for all citizens, not as a "favor," but because it is the right thing to do. She pointed out that every single person will be touched by our successful efforts, whether due to their own disability brought on by accident, disease or aging, or due to the disability of someone they love.

Mr. Miller: Hope all of us have learned from today's discussions that there are many reasons for the lack of voting accessibility, such as inadequate transportation and insufficient use of close captioning.

Mr. Evans: He will propose to his local Transportation Disadvantaged Coordinating Council in Palm Beach County that they include voting access as part of its top priority on the same level as serious medical care.

Ms. LePore: Expressed her belief that all Supervisors of Elections are supportive of maximizing voting accessibility.

Ms. Dorwarth: Posed the question about the existence of any statutory mandate to survey the accessibility of each polling place (to which Ms. LePore indicated that these was no such requirement, and that such determination is done on a county-by-county basis).

Ms. Shaw: Creating such a survey should be one of the duties of this Task force.

Mr. Phillips: Also encouraged the use of an accessibility survey, including the use of the Internet as a viable option (referencing materials he has given to Mr. Dudley).

Mr. Miller: Recommended that we look strongly at some of the telephone technologies for convenience.

Mr. Evans: Also encouraged the use of telephone technology, especially in rural areas where transportation is also a major accessibility problem. In addition, he would like the Task Force to prepare a list of all the available technologies.

Mr. Labelle: Encouraged the proposed legislation and rule changes as having the greatest long-term impact, but is still concerned about the on-going process around the state of counties continuing with the purchase of new voting equipment (citing to his own observation in Tampa). Also urged that the Task Force put Boards of County Commissioners "on notice" to use great caution in committing to purchase voting equipment which may later be determined NOT to be accessible. He recommended that we maximize input from manufacturers, including those out of the country, with "accessibility" and "security" being the two considerations (including the Internet). Finally, he suggested the use of a subcommittee to begin drafting legislation.

Mr. Kracht: Stressed his sense of urgency and immediacy to the issue of voting accessibility, especially as it relates to delivering a strong message to both Commissioners and Supervisors.

Ms. Dorwarth: Sought, and obtain, clarification of the current law, which prohibits the expenditure of funds to purchase voting equipment not yet certified. Also expressed concern about the apparent discrepancies in the various state laws dealing with accessibility standards (and recommending a subcommittee to look into that issue as well).

Mr. Hardy: Expressed his concern about people with language problems, including speakers of languages other than English, and suggested pictures of the candidates be used on the ballots.

Mr. Miller: Pointed out that at least one voting system has been certified that is "accessible." being the touch screen product described by Mr. Craft.

Senator Sanderson: Offer to work with her House counterpart, Representative Goodlette, and Mr. Dudley, to draft a strong letter to Supervisors and Commissioners.

Ms. Shaw: It might also be instructive for the Task Force to review the work on accessibility recently completed in Texas.

Representative Goodlette: Expressed his hope that all new purchase contracts would contain an "accessibility component." He also mentioned the possibility that some federal funds may become available for new purchases.

Mr. Evans: Discussed pending federal funding bills, and the required stipulation of "accessibility."

Ms. Shaw: We should look not only at the pending federal legislation, but the actions of other states, such as Washington, Missouri, Michigan and Texas, to "steal" their best ideas.

Chairman Mitchell: Inquired of Senator Sanderson and Representative Goodlette if their committee staffs might be able to obtain such information for us. (Off record indication was "yes.")

Ms. Sumlin: Agreed that taking ideas from the federal and other states' efforts was good, and encouraged us to prepare a list of accessibility standards as soon as possible.

Ms. Grubbs: She has talked with people in Texas, California and Georgia, who have already certified accessible equipment which has not yet been certified in Florida.

Chairman Mitchell then summarized a number of issues on which the Task Force has appeared to have reached consensus, as follows:

1. Transportation is a main problem or barrier for voting access.

2. Accessibility technology should include the use of Internet and telephones.

3. A determination of accessibility as to specific polling places may involve use of a survey.

4. Development of accessibility standards for certification of new voting equipment.

5. Require voting equipment of include an accessibility component.

The chairman concluded his remarks by observing the difficulty of the overriding factor of "funding."

A discussion next ensued about the use of a web site for Task Force information, such as the minutes. The Chairs agreed to work something out with the Department of State for use of their website for all this information.

Representative Crow: Reviewed Mr. Labelle's suggestion for a subcommittee to begin drafting legislation, but agreed, in light of the sunshine law requirements for notice of all meetings, that any member with ideas along these lines should send them to Mr. Dudley. He also brought back up the idea of studying the accessibility work of the federal government and other states, and agreed that we could use the resources of the Senate and House committees for this purpose as well.

Ms. Dorwarth: Again raised the subject of possible discrepencies in state laws governing accessibility, and suggested that they be reviewed. Mr. Dudley agreed to do so.

Mr. Dudley then reviewed the other meeting dates and locations, including the switching of the Tampa meeting from October 29th to October 4th, and moving the West Palm meeting from October 4th to October 29th to facilitate the use of Ms. LaPore's new office complex. Several members expressed concerns about the upcoming meeting dates, but they are very firm in light of the efforts to get some legislation filed for consideration as soon as possible in advance of the next regular session which is due to commence on January 22, 2002.

A change in the time for starting the Orlando meeting to 9:00 a.m. was approved.

Finally, Mr. Dudley reviewed the proposed time frames for drafting and finalizing the Task Force's Report to Secretary Harris (November 12th), so that legislation could be filed shortly thereafter. Both chairs, Senate Mitchell and Representative Crow, have agreed to serve as the prime sponsors of each chamber's bill, and both Senator Sanderson and Representative Goodlette have indicated prompt action from their respective committees.

Ms. Shaw suggested that a better effort be made to advertise our meetings to the disabled community. Mr. Miller offered to do that for the upcoming meeting in Orlando.

Mr. Phillips requested that all e-mail from the staff be in Word format, and Mr. Dudley agreed to do so in the future (as his firm is now switching over from Word Perfect to Word).

No further business appearing, the meeting as adjourned at approximately 3:45 p.m.

Respectfully submitted,
Fred R. Dudley

Duval County

Election Reform Task Force

FINAL REPORT

Jacksonville, Florida

June 12, 2001

Table of Contents

IV. INCREASING PROCESS EFFICIENCY

APPENDICES

Members of the Task Force

Preston H. Haskell, *Chairman*
Chairman
The Haskell Company

Judith A. Albertelli
Vice Chairman
Republican Party of Duval County

Bruce E. Barcelo
Principal
Barcelo & Company

Terrie Brady
President
Duval Teachers United

Barbara A. Darby, Ed. D.
President
FCCJ North Campus

Michael R. Hightower
Vice President,
Governmental & Legislative Relations
Blue Cross/Blue Shield of Florida, Inc.

Berrylin M. Houston
Community Volunteer

Michael E. Langton
President
Langton Associates, Inc.

Francis L. (Len) Loving
Director, Northeast Florida Region
Office of State Comptroller

Reverend Rudolph W. McKissick, Jr.
Pastor
Bethel Baptist Institutional Church

Isaiah Rumlin
President
Jacksonville Branch, NAACP

Mark Tippins
Attorney-at-Law

Charge, Approach and Methodology

The Election Reform Task Force was created on February 7, 2001 by Mayor John A. Delaney and City Council President Alberta Hipps, to address the widespread concerns throughout the Jacksonville community arising from the flawed and discredited presidential election of November 2000.

At its initial meeting of March 5, 2001, the Task Force adopted the following statement of Mission, Goals and Vision:

- *To provide an open forum for the full and impartial hearing of grievances and reports of irregularities as to the November 2000 election, and*
- *To investigate irregularities which occurred and make recommendations to correct such problems, and to provide other improvements as appropriate.*

The central goals of the Task Force, deriving from this mission, are (1) to create a voting process which is fair, inclusive and effective, and (2) to restore public confidence in the election process.

Our collective vision is that Duval County have the best election process in the state of Florida, and among the best in the nation.

At this time, the Task Force also adopted a tentative program of work and schedule of meetings. The Task Force determined to meet weekly for approximately two months in an information-gathering phase, to be followed by several weekly meetings to synthesize the information which it received and draft a final report. These planned steps indeed became the course which the Task Force eventually followed, and its work was done essentially in accordance with the March 5 plan. A copy of the initial plan of work, and of the actual schedule of meetings, appear as Appendices A and B.

The Task Force held thirteen meetings, the first eight of which were devoted entirely to information gathering. During six of these meetings, the Task Force received information and unsworn testimony from authorities and experts on electoral procedures, voting systems, and other subjects related to its work. The other two meetings were public hearings at which any citizen could appear and provide testimony. In all, the Task Force heard from over 60 witnesses and benefited immensely from the input received.

Following the information gathering meetings, the Task Force held three meetings, in a workshop format, in which it discussed the information it had received, made certain tentative judgements and decisions, and organized its material for placement in its final report. In its last two meetings, the Task Force reviewed, considered and refined the draft report, and adopted the final report. All meetings were open to the public.

Early, the Task Force considered whether it should investigate findings of wrongdoing in a prosecutorial manner or restrict itself to determining trends and patterns which were subject to improvement and remediation and render its findings and recommendations without attempting to identify wrongdoers. After discussion of this issue, it was determined that the Task Force would follow the latter course of action. Thus its findings are based upon broad observation rather than detailed investigation, and are oriented toward improvement versus the discovery of malfeasance.

Many aspects of the electoral process were considered by the Governor's Select Task Force on Election Procedures, Standards and Technology and the Florida Legislature, both of which took positive action during the same time that the Task Force was active. However, under Florida's highly decentralized election system, county governments and Supervisors of Elections have considerable local discretion as to budget and finance, ballot design, balloting technology, pollworker training and development, voter education and outreach, and many other topics not addressed at the state level. Rather than finding itself preempted by the state task force or Legislature, the Task Force found an extensive array of improvements and reforms which could be effected at the local level.

Although the Task Force was, by design, evenly divided between Democrats and Republicans, partisan or party line debate was rare. Rather, the members sought to reach conclusions based upon quality of ideas, benefits to the community, reasonableness of implementation, consistency with sound public policy, and enhancement of confidence in the voting process.

* * * * * * * *

The Task Force acknowledges and expresses its appreciation to the many individuals and organizations who contributed to its work and its success. Mayor Delaney and President Hipps, in addition to providing the initial inspiration for the Task Force, made capable staff resources available. These were led by Jason R. Teal of the Office of General Counsel, who was ably assisted by Cheryl L. Brown, Chief of Research of the City Council and Michael Miller of the Office of the Mayor.

Supervisor of Elections John L. Stafford and his Director of Operations, Robert Phillips, were helpful and cooperative in making information available to the Task Force and responding to specific requests for research and information. For expert advice in specific fields, the Task Force heard from Pam Iorio, Hillsborough County Supervisor of Elections and President of the Florida Association of Supervisors of Elections; Helen Howard, Special Program Coordinator, Division of Drivers Licenses of the Florida Department of Motor Vehicles and Highway Safety; and representatives of three national manufacturers of advanced voting technology; all of whom traveled from other cities to make their presentations. Invaluable research and recommendations were provided by five members of the Political Science faculties of the University of North Florida and Jacksonville University under the leadership of Dr. Matt Corrigan and Dr. Stephen Baker. The League of Women Voters and the National Council of Jewish Women provided several recommendations in the areas of citizen participation and voter effectiveness which were adopted by the Task Force. Raymond Reid of the Office of General Counsel was a constant source of technical and legal information and advice.

There were scores of other individuals, too numerous to mention in this brief acknowledgement, who provided excellent advice and information to the Task Force. The Task Force expresses its deep appreciation to each of them for their interest and support, and the contributions which they made to its work. A complete list of individuals appearing before the Task Force is found in Appendix C.

A Message to our Community

The November 2000 election had a divisive and disillusioning effect upon our community. The integrity and effectiveness of our electoral process was questioned as never before, threatening the very fabric of our community at a time when Jacksonville was making significant strides in economic development, race relations, public education, and governmental effectiveness.

Two groups were affected most adversely by the November 2000 elections: those whose votes did not count, and those who attempted to vote but were turned away. The number of spoiled ballots due to overvote was devastatingly high - over 22,000 - greater by far than any election in our history and the most of any county in Florida. Lesser but still significant numbers of voters were told that they were not registered, were sent elsewhere to vote, or gave up entirely. The cumulative effect of these failures fell disproportionately upon our African-American population, leading to a concentrated loss of confidence in the system within this important segment of our community.

These occurrences were not isolated, random or unrelated. They resulted from widespread error, multilevel mismanagement, obsolete systems and flawed practices. The Task Force found, however, no evidence of conspiracy or intentional wrongdoing. While the latter is comforting, it should in no way lessen our resolve to dramatically and permanently rectify the failure of our electoral processes, and to once again insure every citizen's right to vote and to have his or her vote counted.

How did we get into this situation? For too long, we have conducted our electoral processes on the cheap. We tolerated outmoded equipment, inadequate personnel, insufficient voter education, and low funding across the board. We tolerated these things because margins of victory tended to exceed the known margin of error in our election system. The closeness of the 2000 election, however, was a wakeup call showing us

how imperative it is that systemic errors be reduced to the absolute minimum. The right to vote is too precious and too fundamental to our democratic society to permit error, neglect and underfunding to continue.

These shortcomings are highly correctable. Available voting technology is decades ahead of that which we have been using. Methodologies for voter education and outreach, for enhancement and facilitation of registration, for improved pollworker training and development, for quality management and performance improvement, and many similar enhancements are available, affordable and manageable.

The office of the Supervisor of Elections, though not perfect, is capable of managing these reforms. The Supervisor himself has expressed commitment to these reforms and indeed had initiated certain of them before the Task Force began its work.

It is also encouraging to note that the improvements recently enacted by the Florida Legislature have thrust our state into the forefront of electoral reform nationally. Correspondingly, Duval County can seize the top spot among all Florida counties - making Jacksonville's electoral process the best in the state, which in turn is arguably the best in the nation.

The Task Force believes that the recommendations of this report, if adopted, can indeed put Jacksonville in such a premier position statewide and nationally. Their adoption will lead to dramatic technical improvements throughout the election process. These in turn will restore confidence in the system, create a more informed electorate and increase participation in the voting process. These are among the hallmarks of a first tier city.

We must never again permit our election processes and systems to fall into the chronic disrepair found in November 2000. Rather, we must continually commit the attention and resources necessary to insure that these processes are kept at the highest level of effectiveness, that there is unquestioned quality and transparency in our electoral system, and that elections are a source of confidence and cohesion across all segments of our

community. This report provides a clear blueprint for achieving these aspirations. The people of Jacksonville deserve nothing less.

Summary Of Recommendations

This summary is taken from the four chapters which immediately follow it. The number in parentheses following each recommendation refers to the page upon which rationale and detail for it may be found. These recommendations are in no order of rank or priority; indeed, the Task Force believes them all to be of compelling importance and equally worthy of adoption and implementation.

- The process of transmitting registration applications from the Division of Drivers Licenses to the Supervisor of Elections should be strengthened beyond measures recently taken. Each applicant for registration should be furnished with a personalized "receipt" at the time of application, to permit the applicant to follow up if the registration card is not received within a certain time. (12)

- A community-wide voter registration drive should be conducted biannually, under the direction of the Supervisor of Elections, but involving a broad cross-section of community organizations. (13)

- Voter education and outreach should receive enhanced resources and emphasis. Particularly, a personalized sample ballot should be mailed to all registrants proceeding each election cycle. Greater use should be made of mailings, demonstration sites and mock elections, videotape presentations, print and broadcast media, coordinated efforts of civic groups, and schools and colleges. These channels should cover the basics of voting, registration, turnout, knowledge of precinct locations, voting technology, and the voting process. (15)

- The Voter Bill of Rights adopted by the 2001 Florida Legislature should be broadly disseminated to all voters, appear at all registration sites and polling locations, and be published widely. (18)

- The 2002 election cycle should be given high priority in voter education and outreach efforts, educating voters as to the many systems and processes that will be new in that cycle. (19)

- Voter identification and access at the polls should be made easier and more accurate through the use of improved election day communications, appropriate use of affidavits and provisional ballots, and more diligence on the part of pollworkers. (20)

- Measures should be taken to improve the electorate's knowledge of proper polling locations through sophisticated change of address techniques, voter education as to address currency, and improved notification of changes in polling locations. (21)

- Duval County should adopt precinct-based optical scanning technology for the next two to four years, followed by the acquisition of direct recording electronic (touch screen) technology. Continuous attention must be given to maintaining current, state-of-the-art technology thereafter. (27)

- Election day communications should be strengthened by equipping all precincts with laptop computers continuously connected to the central registration data bank. (28)

- The recruitment, compensation, training, development and evaluation of pollworkers should be significantly upgraded to include more extensive education, greater diversity, better compensation, and an emphasis upon customer service. (29)

- Businesses and other organizations should be encouraged to volunteer their employees - particularly those proficient in systems and technology - to work at polling locations on election day. (31)

- Cases of fraud or double-voting discerned by the Supervisor of Elections should be turned over to the State Attorney. An interagency anti-fraud task force should be

created. These measures will send a strong message that fraudulent voting will not be tolerated. (32)

- Formal measures should be instituted for evaluation of performance and quality improvement throughout the electoral process, including evaluation and feedback from voters themselves. (32)

- An Elections Advisory Panel should be created by ordinance to advise on ballot design and voting instructions, recommend polling sites, advise on voter and pollworker education, act as ombudsman for voting complaints, and oversee quality improvement measures. (33)

- The office of the Supervisor of Elections should be strengthened by the addition of key senior managers for voter education and registration, pollworker training and development, quality assurance, and technology, plus appropriate subordinate support. The budget for this office should be increased by $600,000 to $1,000,000 annually to cover the cost of new positions, increased compensation for pollworkers, enhancements in voter education and outreach, and improved pollworker training and development. (35)

- The Canvassing Board should be reduced from four members to three by eliminating the General Counsel as a member. Appointments to the Canvassing Board should consider racial, gender and political party diversity. (37)

I. FACILITATING AND INCREASING REGISTRATION

Since enactment of the National Voter Registration Act of 1993 ("motor voter" law), voter registration has accelerated sharply, and Florida and Duval County are no exceptions. Currently, approximately one-half of all new registrations come through the motor voter procedure, a proportion which will increase. Accordingly, in considering measures to facilitate and increase registration, the Task Force placed greatest emphasis upon motor voter registration.

Motor Voter Procedures

Prior to and following the November 2000 elections, chronic system failures were found with regard to transmittal of completed motor voter registration applications from the Division of Drivers Licenses (DDL) offices to the Supervisor of Elections office. The system provided little or no followup when applicants failed to receive a registration card. No duplicate of the list of applicants sent to the Supervisor was maintained by the DDL office which created the list. Additionally, the Task Force found that registration book closing dates were not well communicated to voters, resulting in many registrants erroneously believing they had registered for the next election. One witness testified, not entirely facetiously, "If you think you're registered to vote, think again."

Beginning in early 2001, the Division has made strides in correcting these problems. A statewide office has been established with the sole responsibility of liaison between the Division and the 67 Supervisors of Elections, and for providing better training of DDL employees with respect to voter registration. Also, each DDL office now maintains a duplicate copy of the applicant list for reference in resolving applications which do not result in registration.

In addition to these state level measures, the Task Force found improvements which can be made locally. These include:

1. The applicant list should be transmitted electronically by DDL to the Duval Supervisor of Elections, on a daily basis. Both agencies testified as to having this electronic capability in place, but not yet in use.

2. Public notices as to closing dates should be prominently posted at all DDL offices.

3. Each applicant should be furnished with a personalized "receipt" at the DDL office, acknowledging his or her application and providing a telephone number to call if a registration card is not received within a certain time.

There are other remote registration sites, such as libraries, public assistance offices, and armed forces recruitment centers, at which voters may be registered. The foregoing recommendations, particularly number 3, should apply to these locations also.

Encouraging Registration

The Task Force found that although voter registration continues to increase generally, registration efforts are uneven and often provided by private special interest groups and political parties. The Task Force recommends that community-wide biannual registration drives be an important responsibility of the Supervisor of Elections.

Such a community-wide registration drive might be modeled after the United Way campaign with attendant publicity, milestone events and recognitions. Specifically, the Task Force recommends the extensive use of public service announcements, signs and billboards containing United Way-style thermometers or charts, campaign kickoff events, completion celebrations, and the involvement of corporations, political action committees, labor unions and other associations. Efforts to increase registration should be a regular and ongoing part of voter education, discussed further in Chapter II, and the Supervisor of Elections must commit financial and staff resources to it accordingly.

The biannual campaign should not be the only, or even most important, registration activity. Registration must be a continuous, consistent effort. In particular, continuous registration activity should be aimed toward potential registrants as they reach age 18.

A senior manager in the Supervisor of Elections office should have ongoing responsibility for registration efforts. This perhaps could be the same person recommended in Chapter II to head voter education.

Felon List

In the fall 2000 elections, extensive inaccuracies were found in the so-called felon list, which is promulgated by the Division of Elections to prevent convicted felons from casting a vote. Among other shortcomings, it was determined that many of the names on the list were not those of convicted felons, or were felons whose rights had been restored.

In Duval County, the Supervisor of Elections sends a letter to all names which appeared on the list, giving the voter an opportunity to correct the record if his or her name had appeared on the list erroneously, and otherwise accorded the voter the benefit of the doubt if his or her name was on the list.

In the future, compilation of the felon list will be contracted to a different vendor, and there are indications that a far more competent list will be provided for future elections. However, the Task Force recommends that the Supervisor continue his practice of sending verification letters to every Duval County name on the list. In addition, the Task Force recommends that any apparently convicted felon, who disputes his felon status and wishes to vote on election day, be given a provisional ballot and permitted to vote pending confirmation of his registration status.

II. IMPROVING VOTER EDUCATION

The Task Force found that past voter education and outreach efforts have been inconsistent, unorganized and underfunded. This has resulted in unacceptably high levels of voter confusion, overvotes, and voter error. It has also adversely affected registration and turnout.

While the Supervisor of Elections should take the overall lead in improving voter education, there are also many community resources which can be effectively utilized in this improvement effort.

Educational Methodologies

The Supervisor of Elections should assume a much-enlarged role in voter education and outreach. The office should include a full-time position responsible for voter education, and greater funding must be provided for educational resources and programs. However, there are many other institutions and resources which can be used for disseminating information to the public. The Task Force particularly recommends the following initiatives and methodologies:

1. The reverse side of the voter registration card should provide key information about voting, change of address, and the number for a telephone "hot line".

2. A district- or precinct-specific sample ballot should be mailed to each registrant at the onset of each election cycle, perhaps using Hillsborough County's model. This mailing should also provide key information about that cycle, including election dates, the scope of each election, and frequently asked questions and answers.

3. Demonstration sites should be set up around the city to demonstrate new voting technology, provide for mock voting, and provide other information to

the public. This could be integrated with the existing "City Hall at the Mall" initiative.

4. The Supervisor should give consideration to creating a mobile demonstration unit ("votemobile") which could travel to office buildings, shopping centers, college campuses, civic clubs, and similar locations.

5. The Supervisor should create a videotape presentation covering registration, balloting and election issues. Copies of the video should be made widely available to clubs, churches, schools, and other organizations.

6. Local print and broadcast media should be encouraged to provide more free advertising regarding voter education issues.

7. A pamphlet or packet of voter education materials should be made available to newcomers to Jacksonville through realtors, relocation firms, and other entities dealing with new arrivals to the city.

8. The Supervisor should establish a coalition of community groups to work collaboratively with the Supervisor's office to ensure that new information is disseminated to voters in an accurate, consistent, and understandable way. Such a coalition might include the League of Women Voters, the National Council of Jewish Women, the NAACP, church networks, political parties, the Lutheran Social Services' citizen program, local colleges and universities, and other associations.

9. The Supervisor of Election's web site should be strengthened and expanded to include precinct locations and all of information recommended in the section on Educational Content below. The Supervisor's web site should be separate from, while remaining also linked to, the City's web site, www.coj.net

10. Division of Drivers Licenses offices should be used to disseminate printed materials regarding registration and voting.

11. Utility bill stuffers should be considered as a means of communicating important and time-critical messages to voters. Other Florida counties have found this to be particularly effective.

12. Particular efforts should be made to reach potential voters as they arrive at age 18. The civics instruction being offered in the Duval County School District should complement these efforts with particular focus on voting prior to each election cycle.

13. Particular emphasis should be placed upon voter education and outreach to populations most in need of such efforts.

14. Public recognition and reward should be given to those print and broadcast media entities, associations, and individuals who voluntarily contribute to voter education programs.

Educational Content

Educational content is equally as important as educational methodologies. The Task Force recommends that the following subject matter areas be emphasized in an expanded program of voter education.

Drill the Basics. Certain fundamental tenets of the electoral process should be made basic, standard components of all voter education. These include possessing valid registration, keeping address current, knowing precinct location, and basic familiarity with the balloting process.

Registration. Public education efforts should also extend to those not necessarily registered to vote, teaching the importance of voting and how to become registered.

Turnout. Voter outreach should emphasize the importance of election day turnout. Percentage goals should be set and publicized, and prominently reported afterwards. The community should be congratulated if it reaches or exceeds its goal, which in turn should be set higher in the future.

Precinct Locations. Because precinct locations may shift from time to time, and will particularly do so with the upcoming redistricting, an important part of voter education is disseminating the location of polling places.

Voting Technology. With the introduction of new voting machines in the 2002 election cycle, particular attention much be given to educating voters as to the use of such new machines.

Sample Ballots. As has always been the case, the publication of sample ballots in advance of each election is an important aspect of voter education. With the advent of new voting technology, and thus new ballot design, publication of sample ballots is again highly important. In particular, great care must be given to ensure that the published sample ballots are identical to the actual ballots.

Voting Process. Voters should be made familiar with the provisional ballot, various affidavits that are available, the ability to revote if ballots are spoiled, and the right of a voter to bring an assistant to help with voting.

Voter Bill of Rights. The Voter Bill of Rights adopted by the 2001 Florida Legislature should be widely disseminated to all voters. Duval County should go beyond the state statutory requirements, causing it to appear at all registration sites and be printed in educational materials and public media.

2002 Election Cycle

In 2002, essentially "every voter will become a first time voter" due to new voting technology, new district boundaries, new polling locations and new ballot design. This condition makes voter education an even higher priority during the next 17 months, and special efforts must be directed toward educating voters as to those systems and processes that are new in the cycle. In particular, consideration should be given to a special community awareness-building campaign for this purpose.

Finance and Funding

The Task Force found that, together with so much of the electoral process, voter education has suffered from egregious underfunding in recent years. This condition must change.

The 2001 Florida Legislature made significant state funding available to those counties demonstrating well-developed voter education programs. Duval County should be at the forefront of such program development and secure the maximum funding available from the state.

Because the state grants will be one year only, local funding should be significantly increased on a recurring basis. A senior management position within the Supervisor's office should be established solely for voter education, and adequate funding provided for print materials, videotape production, media advertising, web site enhancement, and similar resources.

In-kind funding and resources should be provided by print and broadcast media, the Duval school district, area colleges and universities, and civic clubs and organizations. These efforts should be particularly intensive in preparation for the many new and different aspects of the 2002 election cycle.

III. ENHANCING THE ELECTION DAY EXPERIENCE

The Task Force heard testimony that numerous voters in the November 2000 election encountered difficulty in verifying registration, arrived at polling places which had moved, experienced unsatisfactory pollworker demeanor, and were not provided affidavits when needed. The recommendations of this chapter seek to address these issues, among others.

Registrant Identification

The Task Force believes that measures can and should be taken which will greatly improve the process of voter identification and verification of registration. Among these are the following:

1. Having laptop computers at all precincts to immediately verify current registration will greatly improve the current process. This is discussed in greater detail in Chapter IV of this report.

2. If the voter is unable to produce photo identification at the poll, the voter should be provided with an affidavit verifying the voter's identity and be allowed to cast a ballot.

3. If a voter's registration or criminal record is in doubt, the voter should be permitted to cast a provisional ballot and have the voter's eligibility verified subsequently.

4. Pollworkers should be trained to exercise diligence in seeking a voter's name on the registration list, providing a provisional ballot if necessary, and otherwise giving the voter the benefit of the doubt.

Mislocated Registrants

A chronic, recurring problem in the electoral process is that of voters appearing at the wrong polling location. While this sometimes is occasioned by the relocation of a polling place, it is most often caused by the voter having moved and not having notified the Supervisor of Elections. The voter then appears at the polling location closest to his or her residence seeking to vote.

The importance of maintaining address accuracy with the Supervisor's office should be emphasized consistently and at every opportunity. The channels for doing this should include all of those discussed under Education Methodologies in Chapter II.

In addition, the Supervisor should explore the development of a joint initiative with JEA to use the utility's change of address process to trigger updates of a voter's change of address. Similarly, the National Change of Address process of the U.S. Postal Service, and the public registration of homestead purchases, also might be utilized for triggering an electoral change of address. In all cases, the Supervisor's office, when notified of a possible change of address, would send a letter asking the registrant to verify his or her change of address.

In addition, the Supervisor should establish a telephone line dedicated to disseminating polling location information. Again, perhaps modeled after JEA, such a telephone system would enable the voter to punch in his or her address, and be automatically told the precinct number and location.

Spoiled Ballots

The Task Force found that the right to recast a ballot in the event of a mistake on one's first ballot is not widely known to the voting public. This process, which permits a voter to cancel up to two ballots and revote up to a third time, should be emphasized in voter education efforts and made a part of pollworker training and knowledge.

With the implementation of new voting technology (discussed in Chapter IV), an overvote will be called to the voter's attention immediately, and the voter given the opportunity to correct his or her ballot. This will reduce overvoting to negligible, perhaps even zero, levels.

By the same token, an undervote will also be called to the voter's attention. However, it should be understood that an undervote does not constitute a spoiled ballot, and the voter may well wish to not vote in a particular race.

Disabled Voters

Testimony received by the Task Force generally indicated that physically and mentally disabled voters were appropriately accommodated. Most locations properly provide for wheelchairs, and sight-impaired voters are permitted to bring someone to assist them. In some instances, pollworkers bring the ballots out to a disabled voter's automobile. The Task Force commends the Supervisor of Elections on all of these accommodations.

However, the Supervisor should be vigilant in maintaining such access and relentless in expanding it. The Task Force further recommends that consideration be given to the establishment of a centralized voting facility for extraordinary access. This would not only include wheelchair accessibility, but headphone and Braille voting for the sight impaired.

Finally, the Task Force strongly recommends that the pollworker training curriculum include a component dealing with accessibility and accommodation issues.

Access to Polls

The Task Force received no testimony to the effect that there was intentional blocking of access to polls by police roadblocks or other means. The only report which came close

to being one of restricted access was a driver's license check that was conducted the night before the November 7 election. There appeared to be no connection between this event and the subsequent day's voting.

Further, the Task Force received no testimony as to voters who were present and in line at 7:00 p.m. being prevented from voting.

There were, however, reports of voter intimidation by other voters waiting in line and occasionally by pollworkers themselves. To prevent recurrences of this, pollworker training should emphasize proper behavior by the pollworkers and their authority to curtail inappropriate or intimidating language by anyone in the polling place. Importantly, prominent posting of the Voter's Bill of Rights, and proper enforcement of it by pollworkers, should be emphasized.

Polling Locations

Maintenance of appropriate, convenient, and stable polling locations has long been a challenge to the Supervisor of Elections. The Task Force found that the Supervisor has done a commendable job of providing appropriate polling locations. To further improve these efforts, however, the Task Force recommends the following measures:

1. Any change in polling locations should be widely publicized, using the appropriate measures from those recommended in Chapter II of this report.

2. New registration cards should be sent to all affected voters whenever a polling location is changed. A message accompanying the new card should call attention to the fact that the voter's polling location has changed.

3. On election day, large signs should be posted at any changed polling location directing voters to the new location.

4. Positive and favorable recognition should be given to the providers of free polling locations, thanking them for their civic generosity in making their space available.

Demeanor of Pollworkers

The Task Force heard testimony indicating unacceptable departures from appropriate demeanor and conduct of pollworkers at some locations. While not uniform or widespread, such irregularities demand that appropriate improvement measures be taken.

Many aspects of the election day experience can be enhanced simply by greater sensitivity and knowledge on the part of pollworkers. Many of the recommendations regarding pollworker development in Chapter IV of this report are concerned with providing better assistance to voters in the balloting process, being more sensitive to voters with impairments, and maintaining strict neutrality of atmosphere at the polling locations.

The role of the Clerk* in assuring proper pollworker demeanor is critical. The Clerk should be held accountable for maintenance of proper standards within his or her precinct. As recommended elsewhere in this report, measurement of results and feedback to senior officials in the Supervisor's office should be instituted.

Poll Watchers

The Task Force found that the role and scope of Poll Watchers is widely misunderstood, often leading to animosity between pollworkers and Poll Watchers, and somewhat undermining the effectiveness of both.

* The Clerk is the pollworker in overall charge of a polling site. He or she is assisted by several Inspectors, and a Deputy, who has responsibility for the exterior of the site.

It should be more clearly understood that Poll Watchers are designated representatives of a political party whose sole purpose is to determine whether registrants at a particular precinct have voted so that they may be contacted by the party organization and encouraged to vote. Poll Watchers should not endeavor to act beyond this very narrow scope of responsibility, and particularly should refrain from influencing the behavior of pollworkers or voters. To ensure these objectives, the Task Force makes the following recommendations:

1. Pollworker training should include instruction as to the role and scope of the Poll Watchers.

2. Upon arrival at the polling location, Poll Watchers should introduce themselves to the Clerk and a cordial line of communication should be established.

3. Poll Watchers should continue to be validated and certified through the Supervisor of Elections office and the political parties or candidates. As part of this certification Poll Watchers should be educated as to their roles and the roles of the pollworkers.

Absentee Balloting

Procedures and measures regarding absentee voting are almost entirely the province of state law, and the ability to make changes at the local level is limited. However, the Task Force found certain areas in which local process and procedure could be strengthened.

First, the Task Force finds the Supervisor's system of designating "absentee ballot coordinators" in nursing homes and similar institutions a commendable one and recommends that this process be expanded.

Second, the importance of signature match should receive greater emphasis. As one measure, a reminder notice should accompany the absentee ballot, pointing out to the voter that his or her signature on the absentee ballot must match the signature on file with the Supervisor.

Finally, absentee voters should be informed that, if a signature match is in doubt, witnessing of the signature by a Notary Public will guarantee its authenticity.

IV. INCREASING PROCESS EFFICIENCY

The Task Force found numerous processes, systems and technology which were obsolete, inefficient, and had remained unchanged for decades. The Task Force believes that new paradigms must replace our old and discredited technology, personnel standards, and institutional structures. Importantly, the concept of continuous quality improvement should be introduced across all aspects of the electoral process.

Balloting Technology

The 2001 session of the Florida Legislature outlawed the use of punch card, paper and lever machine balloting, leaving counties the option of adopting precinct-level optical scanning or direct recording electronic (DRE) technology, also known as touch-screen. Either of these technologies will provide, among many other improvements, for the automatic identification of ballots cast for more than one candidate in a race, permitting the voter to recast the ballot, thus greatly reducing or even eliminating overvoting. The Legislature also provided one-time funding to counties for upgrading technologies, which in the case of Duval County will amount to approximately $1 million.

The Task Force carefully considered both technology options, hearing presentations from vendors, the Supervisor of Elections, and other authorities. It recommends that Duval County **adopt precinct-based optical scanning technology for no more than two to four years, accompanied by a firm commitment to acquiring DRE technology thereafter.** In reaching this conclusion, the Task Force considered the current state of technological reliability, state certification, and cost. It was also influenced by the possibility of recovering a substantial portion of the cost of the interim technology through leasing or otherwise recovering the residual value of the optical scan equipment.

Upgrading our voting technology should not be thought of, however, as simply executing this two-step process. Rather, there should be a commitment to continuous technology upgrades to accommodate the inexorable trends of higher number of voters, the increased

mobility of our population, the growing linguistic diversity of the electorate, and the not-too-distant prospect of "non geographic" voting where a voter may vote from any location in the county rather than his or her home precinct. Thus we must make a firm civic commitment to an ongoing investment in improved technology and effecting arrangements with vendors which will facilitate automatic upgrades of balloting equipment.

Election Day Communications

Among the most prevalent grievances which the Task Force heard regarding the November 2000 election was the inability of precinct workers to communicate with the central office of the Supervisor of Elections, particularly to verify registration. Accordingly, a number of registrants were denied the right to vote, and others voted who were not registered.

The Task Force endorses the Supervisor's plan to equip all precinct locations with laptop computers continuously connected to the central registration data bank. In addition to this modem connection, each laptop will have disk containing the entire voter registration roll, updated one week prior to the election.

In addition to the laptop computer initiative, the telephone bank at the central office should be strengthened on both election day and the days immediately prior thereto. This telephone bank should include operators trained and skilled in dealing with inquiries regarding polling locations, registration, and other voter information. The number of phone lines, and systems and procedures, should be adequate to deal with the potential demands upon it, ensuring that every citizen needing to get through does so.

Pollworker Development

Perhaps in no other area did the Task Force find greater potential for improvement than in the recruitment, compensation, training and development of pollworkers. Our

standards for pollworkers have remained unchanged while technology, election complexity, and expectations as to customer service have advanced rapidly. The Task Force recommends that increased levels of performance be achieved in the following specific areas:

Standards and Expectations. For many years, there has been no change in the pollworker positions and our expectations of them. Compensation is low, training is insufficient, turnover is minimal, and diversity is lacking. A new vision is needed as to how our pollworkers should perform, how they are recruited and selected, and how they are trained and compensated.

Recruitment. While the Task Force recognizes and commends our many long-serving pollworkers for their loyalty and effective service, it believes that an active mix of new and old pollworkers is needed for the elections of the future. Efforts must be made to recruit younger and more technologically savvy pollworkers, particularly given the recommendations as to communications and technology made elsewhere in this report.

Training. Existing training programs are insufficient even for current needs, much less to support the greater pollworker responsibilities envisioned by this report. The Task Force recommends that the existing video-based training session be replaced by a minimum of four hours of interactive instruction separately for Clerks, Inspectors and Deputies. Testing should be done to certify each class of pollworkers. Continuing education of lesser intensity and duration should be required every two years.

Consideration should be given to contracting with a local training or educational institution to develop standards, curriculum, educational content, and testing and evaluation, and even provide instruction.

Compensation. To attract and retain the higher level of pollworker recommended, substantial increases in compensation must be offered. Additionally, a premium or bonus should be offered to pollworkers working outside of their precincts.

Diversity. Because of the low turnover among pollworkers, and the custom of pollworkers working only in their home precincts, there is little diversity as to age, gender, race and political party in many precincts. Deliberate, affirmative efforts must be made to bring fresh faces into each precinct and to provide greater diversity in the profile of pollworkers.

Role of the Clerk. Particular emphasis must be placed upon the importance of the Clerk position, and additional training given in management, supervision and customer service. In addition, the Clerk should be responsible for counseling and evaluating his or her Inspectors and Deputy. The Clerk should be held accountable for performance of his or her polling location in terms of quality improvement, feedback, and evaluation processes recommended elsewhere in this report.

Appearance. Consideration should be given to providing pollworkers with jackets, vests or other attire which identifies them as pollworkers, with a distinctive color for the Clerk. Name badges should be provided, perhaps containing a motto reflecting the customer service orientation of the pollworker position. A sign in each precinct should give the name of the Clerk.

Additional Management Level. Currently the 268 clerks report, in effect, to a single person, the Director of Operations. This is clearly an unmanageable span of control and provides no level of supervision between the central office and hundreds of precinct locations.

The Task Force recommends the creation of a new level of management between the director of operations and the clerks. Specifically, it endorses the Supervisor

of Elections' proposal for 28 "Superclerks" in this position. Each of these managers would be responsible for approximately ten precincts (or one half of a council district). On election day, they would be responsible for general oversight, problem solving and adjusting manpower. They would have ongoing responsibility for performance evaluation and quality improvement in the precincts under their management.

Volunteer Pollworkers. As part of his efforts to upgrade polling location processes, and obtain greater volunteer support for the election process, the Supervisor of Elections has made two proposals, known as Adopt-a-Poll and Partners in Democracy. In the Adopt-a-Poll proposal, an entity such as a service club, corporation, or labor union would, on a volunteer basis, take responsibility for staffing and operating an entire precinct location. Under Partners in Democracy, businesses would volunteer their employees - particularly those proficient in systems and technology - to work at a polling location on election day.

The Task Force does not support the Adopt-a-Poll proposal, believing that it would create the perception, if not the reality, of a special interest organization having control of the electoral process in a precinct, and perhaps influencing its outcome.

On the other hand, the Task Force strongly supports the Partners in Democracy concept and encourages the Supervisor of Elections to develop a program modeled after United Way's Loaned Executive program to recruit skilled volunteers as pollworkers. Notably, these pollworkers should undergo the same training and evaluation as their paid counterparts. Additionally, favorable public recognition should be given to the corporations loaning pollworkers.

Fraud Prevention

The Task Force received testimony from the Supervisor of Elections that 34 cases of double voting occurred in the November 2000 election. Fifteen of these were found to be, by all reasonable evidence, instances of an elderly or forgetful individual inadvertently casting an absentee ballot weeks in advance of November 7 and then voting in person on that date.

The remaining 19 cases were judged to be deliberate by the Supervisor. One of these was a voter who voted at two precincts on election day. The remaining 18 either voted absentee and then in person deliberately, or voted in person at the Supervisor of Elections office less than seven days before the election and again at the precinct. These 19 names were turned over to the Office of General Counsel which has held them in abeyance awaiting recommendations of the Task Force.

The Task Force finds that 19 cases of double voting out of 291,626 votes cast to be quantitatively insignificant, but qualitatively troubling, and strongly recommends that the Office of General Counsel turn the 19 names over to the State Attorney for prosecution, and that the Supervisor do so directly in all future elections, sending a strong signal to the public that fraudulent voting will not be tolerated.

Additionally, the Task Force endorses the Supervisor's plan to create an interagency anti-fraud task force to develop measures to detect and preclude attempts at double voting, ballot stuffing, pollworker intimidation, votes for compensation and other illegal conduct.

Evaluation and Improvement

As has been mentioned throughout this report, the Task Force strongly recommends that formal measures be instituted for continuing evaluation of performance and improvement of quality throughout the electoral process.

Clerks should be given responsibility for quality improvement and evaluating pollworkers for quality performance. Comment cards should be made available at each precinct for voter feedback.

A senior manager in the Supervisor's office should have responsibility for continuous quality improvement. This might logically be the same person who has responsibility for pollworker training and development.

In addition, the Task Force recommends the creation by ordinance of an Elections Advisory Panel whose members would be appointed by the Mayor and confirmed by the City Council. Its responsibilities would include review of ballot design, examination of the sample ballot to assure agreement with the actual ballot, review of voting instructions for clarity and accuracy, recommendations for polling sites, advice on voter and pollworker education, and acting as ombudsman for voting complaints.

The Advisory Panel would also have responsibility for measuring election effectiveness and reporting to the public after each major election cycle. This should be done using defined and measurable benchmarks, such as proportion of registrants who voted compared to previous cycles, number of provisional ballots issued and the number accepted and counted, number of ballots disqualified by category and by precinct, error rates found in motor voter registration requests by site compared to previous year's rates, and numbers of address change requests received from registered voters who have moved within Duval County.

Finally the Advisory Panel should measure and report on voter or community satisfaction with the election process, using voter comment cards, "secret voters," voter exit polls and community-based surveys, perhaps in conjunction with other poll- and survey-conducting organizations.

The panel should be given staff and professional resources to assist in carrying out its duties, and publishing its report following every major election cycle.

Supervisor of Elections Office

The Task Force found the Supervisor of Elections office to be capable of managing the reforms envisioned in this report. The Supervisor has expressed commitment to the goals and objectives of the Task Force and support for nearly all of its recommendations. Indeed, the Supervisor had begun a number of these proposed initiatives prior to the formation of the Task Force.

However, the Supervisor's office has been historically underfunded and understaffed, and will never be able to implement any of his or the Task Force's proposed initiatives without significantly increased budgetary support. In a comparison of the five largest Florida counties, Duval ranked fourth in per registrant spending for elections purposes and fifth in the ratio of elections personnel to number of registrants (see table below).

COMPARATIVE BUDGET DATA

Supervisors of Elections - Major Florida Counties (FY- 2000)

County	Number of Registrants	Annual Budget		Office Staff	
		Amount	Per Registrant	Number	Registrants per Staffer
Duval	**424,630**	**$2,601,754**	**$6.13**	**19**	**22,349**
Broward	887,764	4,937,360	5.56	59	15,047
Dade	902,464	6,593,111	7.31	68	13,271
Hillsborough	496,722	3,102,296	6.25	24	20,697
Orange	408,277	4,091,988	10.02	42	9,721

Bringing Duval County's spending and personnel to the average of the other four counties would require additional spending of $400,000 per year and seven new positions. However, the other counties undoubtedly will increase their spending significantly to

correct deficiencies, implement new technology, and prepare for the 2002 cycle. Thus, these figures should be viewed only as amounts needed to establish parity with our peer counties, above which funding for strategic improvements must be added.

Accordingly, the Task Force makes the following recommendations for organizational and budgetary improvement of the Supervisor of Elections office:

1. A minimum of three full time senior management positions should be established, one each for voter education, pollworker training and development, and technology enhancements. Subordinate positions should be established to support these new initiatives and to reinforce existing functions such as the telephone bank, election day operations, and voter registration efforts.

2. A new level of management should be introduced immediately above the level of precinct Clerk, and filled with twenty-eight part time workers.

3. The compensation of pollworkers should be increased, including greater differential for the position of Clerk, premiums for working out of the home precinct, and compensation for time spent in training classes.

4. Financial resources for enhancing voter education should be budgeted, including print materials, personalized sample ballots, demonstration units, media advertising and web site enhancements. (As one point of reference, Leon County spends $1.75 per registrant per cycle on voter education, compared to approximately $0.18 per registered voter in Duval County.)

5. Financial resources should be committed to upgrading the pollworker training and development process, including funding for recruitment, curriculum design, instruction, instructional materials, testing and evaluation, and possibly contracting with an educational institution for these services.

6. These additional personnel and functions, as well as improvements and enhancements of existing operations, will require additional and reconfigured space, and additional equipment, for the Supervisor of Elections staff and operations.

7. Particular budgetary attention should be paid to the challenges of the 2002 election cycle in terms of voter education, redistricting issues, new precinct locations, and increased number of precincts.

8. Funding for new optical scan voting technology should be viewed as only the first step in a continuous process of technological enhancement. When Duval County is ready for DRE technology two to four years from the date of this report, a one-time expenditure in the range of five to ten million dollars will be required. Our elected leaders should not retreat from this requirement at that point, but should address it boldly and comprehensively.

The Task Force believes that, exclusive of item 8 and one-time funding for laptop computers, these recommendations will require additional funding in the range of $600,000 to $1,000,000 per year. Again, this amount is greater than that required to bring Duval to the average of the other four largest counties; however, we should not simply seek to be average, but must rectify the shortcomings of the past, seize upon the opportunities for improved technology, make our pollworkers the best in the state, and have voter education programs and results that are highly effective.

Historical forces - notably inattention and indifference toward election processes, low-cost punch card technology, and an unduly high tolerance for voting error - have kept costs low. This can no longer continue. Jacksonville's government, with a general fund approaching $700 million, can well afford the additional expenditures recommended herein; indeed, it cannot afford to do less.

Canvassing Board

Like all Florida counties, Duval County has a Canvassing Board which is responsible for certifying election results, conducting recounts when required, and transmitting results to the Secretary of State. The Task Force found no evidence of incompetent or improper conduct by the Canvassing Board.

Under Jacksonville's charter government powers, the composition of the Duval County Canvassing Board was curiously altered in 1978 from the statewide norm which provides that the Board shall consist of three officials: the Chairman of the County Commission (in Jacksonville, the President of the City Council) or his/her designee, the Chief Judge of the County Court or his/her designee, and the Supervisor of Elections. In Jacksonville, these three elected officials plus the General Counsel constitute the Canvassing Board.

The Task Force believes that this anomaly is not justified and adds no value compared to the statewide model. Indeed, the opportunity for a deadlocked Board is presented by the even number of members, and the presence of one non-elected officer as a member seems inherently inconsistent. The Task Force recommends that local law be changed to make Duval County's Canvassing Board consistent with the statewide norm.

Perhaps more importantly, the absence of racial, gender or political diversity in the Canvassing Board is a matter of concern to the Task Force. The membership of the 2000 Board reflected no such diversity.

The Task Force believes that the City Council President and Chief County Judge can and should provide for racial, gender and party diversity through the exercise of discretion in making their appointments. The Task Force recommends that the City Council pass a resolution to this effect.

Appendix A

INITIAL PLAN OF WORK

1. **Registration Procedures**. Enhance the accuracy of registration records, improve coordination with the Driver's Licenses Division, and examine the need for registration cards; the goal being to maximize the number of registrants, remove barriers to voting, minimize disenfranchisement, and avoid fraud.

2. **Voter Education and Communications**. Educate the public as to registration procedures, increase the publication and distribution of sample ballots, and improve education, outreach and communication with voters; again, the goal being to maximize registration and participation, and minimize faulty ballots.

3. **Election Day Communications**. Enhance communication between the Supervisor's Office and poll locations, to verify registrations, avoid turnaways, and prevent double voting.

4. **Absentee and Provisional Ballots**. Improve the availability of absentee ballots, particularly to overseas voters, (including possible electronic voting) insure accurate and prompt counting of absentee ballots. Provide provisional ballots for voters whose registration is in doubt.

5. **Fraud Prevention**. Develop measures to prevent double voting, ballet stuffing or votes for compensation; insure free and unintimidated access to polls and voting.

6. **Balloting Technology.** Make recommendations for improved technology to replace punch card system, with emphasis on easy, accurate voting and avoidance of undervoting and overvoting.

7. **Pollworker Recruitment and Training.** Measures for recruiting and training high quality pollworkers, with emphasis upon the human as well as technical sides of poll administration.

8. **Supervisor's Office.** Consider making the position non-partisan, making the office civil service exempt, and enhancing the technological sophistication of the office and its personnel.

9. **Canvassing Board.** Examine makeup of the Canvassing Board, and consider recommendations for improvement

Adopted by the Task Force on March 5, 2001, with the stipulation that this program of work may change, expand or otherwise evolve during the course of the Task Force's work.

Appendix B

SCHEDULE OF MEETINGS

Date & Location	Content
March 5, 2001 City Hall	Organizational matters, consideration of program of work and invited witnesses, establish meeting date schedule.
March 22, 2001 City Hall	Presentations by Raymond Reid, Esq., Office of General Counsel; Helen Howard and John Bolton, Division of Drivers Licenses; panel discussion on election process from party and campaign perspective by Republican and Democratic representatives.
March 29, 2001 Bethel Baptist Church	Public Hearing
April 5, 2001 City Hall	Presentations by John Stafford, Supervisor of Elections; Raymond Reid, Esq., Office of General Counsel; Tracey Arpen, Jr., Office of General Counsel; Eileen Wadding, Regional Voting Assistance Officer, U.S. Navy; Jack Gillrup, Division Chief, Disabled Services; Bobbie Probst, Jacksonville Council of the Blind; Jim Whittaker, The Arc Jacksonville; Legal Comments by Jason Teal, Assistant General Counsel
April 12, 2001 Edward Waters College	Remarks by U. S. Congresswoman Corrine Brown Public Hearing
April 19, 2001 City Hall	Presentations by Pam Iorio, Hillsborough County Supervisor of Elections; Lois Chepenick and Carla Marlier, JCCI; Dr. Matthew Corrigan and Dr. Steven Baker, UNF-JU Political Science group.
April 26, 2001 City Hall	Presentations by Allen Rushing, Duval County Schools; presentations regarding technology by representatives of Global Election Systems, Election Systems and Software, Inc., and Sequoia Voting Systems.
May 3, 2001 City Hall	Followup report from Helen Howard and John Bolton, Division of Drivers Licenses; report from Mary Ann Rosenthal and Gloria Einstein, League of Women Voters/National Council of Jewish Women; information from John Stafford, Supervisor of Elections; briefings from Jason Teal, Staff Director.

May 16, 2001 City Hall	Workshop to consider and synthesize testimony and findings, begin formulating recommendations.
May 23, 2001 City Hall	Continuation of May 16 workshop.
May 31, 2001 City Hall	Continuation of May 23 workshop.
June 7, 2001 City Hall	Review, consideration and revision of draft Final Report.
June 12, 2001 City Hall	Review of revised draft Final Report, adoption of Final Report.

Appendix C

PRESENTERS AND WITNESSES

Invited Witnesses

Tracey Arpen, Jr., Office of General Counsel
Judy Arranz, Volunteer Coordinator, George Bush Campaign
Dr. Steven Baker, JU/UNF Political Science group
John Bolton, Division of Drivers Licenses
Honorable Corrine Brown, U.S. Congresswoman
Lois Chepenick, JCCI
Clyde Collins, Esq., Chairman, Democratic Executive Committee of Duval County
Dr. Matthew Corrigan, JU/UNF Political Science group
Gloria Einstein, League of Women Voters/National Council of Jewish Women
Jack Gillrup, Division Chief, Disabled Services, City of Jacksonville
Paul Griego, Election Systems and Software, Inc.
Wayne Hogan, Esq., Attorney, Al Gore Campaign
Reynolds Hoover, Esq., Attorney, Republican Party of Duval County
Helen Howard, Division of Drivers Licenses
Pam Iorio, Hillsborough County Supervisor of Elections
Lawrence Jefferson, Poll Watcher Coordinator, Republican Party of Duval County
John Krizka, Sequoia Voting Systems
Carla Marlier, JCCI
John McLaurin, Global Election Systems
Robert Phillips, Director of Operations, Duval County Supervisor of Elections Office
Bobbie Probst, Jacksonville Council of the Blind
Raymond Reid, Esq., Office of General Counsel
Mary Ann Rosenthal, League of Women Voters/National Council of Jewish Women
Allen Rushing, Duval County Schools
John L. Stafford, Duval County Supervisor of Elections
Eileen Wadding, Regional Voting Assistance Officer, U.S. Navy
Jim Whittaker, The ARC Jacksonville

Public Hearing Witnesses

James R. Austin
Marsha Berdit
Richard L. Berry
Helen C. Boyle
Denise Buda
Marsha Burdit
Leo Frank Bush

Julie Ann Cumming
Estrelita Davis
Lannie Ross Davis
Anne Davison Farrah
Anne Farrah reading letter from Ann Horton
Estelle Garner
Althan Gibbs, Sr.
Moses A. Henry, Jr.
Tony Hill
Wendy Hinton
Patricia James
Rahman Johnson
Rev. Oscar Jones, Jr.
Hon. Pat Lockett-Felder
Mary Ellen Ludeking
Barbara Mauney
Shirley Myers
Merrill Robertson
Portia Scott
Rhonda Silver
Kimberly Stanford
Larry Thompson
Sandra Valdes
Marcella Washington

SUFFRAGE AND ELECTIONS COMMITTEE

SECOND DRAFT

ARTICLE VI

SUFFRAGE AND ELECTIONS

Section 1. Secret vote -- direct vote -- choice by plurality -- regulation of elections. -- All elections by the people shall be by direct vote and by secret ballot. Elections shall be determined by a plurality of votes cast unless a majority vote shall be required by law. 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 shall by law prescribe the conduct of elections, requirements for write-in and absentee voting, methods of voting, determination of election returns and procedure in election contests. Recognition, regulation and nominating procedure of political parties may be provided by law. If the Legislature shall provide for political party nominations, such elections shall be by secret vote and direct ballot.

Section 2. Voters -- qualifications -- registration. -- Every citizen of the United States who is twenty-one years of age, and who immediately preceding registration has been a permanent resident for one year in the state and for such time as provided by law within the county in which he applies to register, shall upon registering be a qualified voter of such county at all elections under this constitution, provided, however, the legislature may provide for voting in national elections for president and vice president of the United States by persons who have become residents of the State of Florida but who have not yet fulfilled the residency requirements of voters as to length or residency. The legislature shall provide for registration of all voters, and may provide for registration of voters outside the territorial limits of the state, and no person may vote unless registered according to law.

Section 3. Municipal Elections. -- All elections held by municipal corporations or other governmental entities created by law shall be by secret and direct vote and shall be determined

by plurality of the votes cast unless a majority vote shall be required by law. Qualifications for voters therein shall be the same as otherwise provided in this constitution, provided that requirements for residence within such corporation or voting unit shall be the same as generally required by law for residence within a county to be a qualified voter of that county.

Section 4. Oath of voters. -- Each voter shall subscribe the following oath upon registering: "I do solemnly swear [or affirm] that I will protect and defend the Constitution of the United States and the Constitution of the State of Florida, and that I am qualified to vote under the Constitution and laws of the State of Florida."

Section 5. Disqualifications. -- No person convicted of a felony or persons adjudicated mentally incompetent in this or any other state and who have not had their competency judicially restored, shall be qualified to vote or hold public office until his civil rights are restored or his disability removed.

Section 6. General and special elections. -- A general election shall be held in each county on the first Tuesday

after the first Monday in November of each even numbered year to choose a successor to each elective state or county officer whose term will expire before the next general election and, except as provided herein, to fill each vacancy in elective office for the unexpired portion of the term.

Special elections and referenda shall be held at the time and in the manner provided by law.

Section 7. Reserved for the treatment of bond elections and requirements for qualifying as a freeholder to vote in bond elections.

ARTICLE XIX

If home rule be adopted, this article to be deleted; otherwise, this article to be redrafted.

MINUTES

Suffrage and Elections Committee

of the

Florida Constitution Revision Commission

February 2 & 3, 1966

The meeting of the Suffrage and Elections Committee of the Florida Constitution Revision Commission was called to order at 9:40 A. M. in the International Room of the International Inn, Tampa, Florida, on February 2, 1966.

The roll was called, and the following members were present:

George B. Stallings, Jr., Chairman
Richard T. Earle, Jr.
Warren M. Goodrich
Richard A. Pettigrew
C. W. Bill Young

Chairman Stallings welcomed the Commission Chairman, Honorable Chesterfield H. Smith, to the Committee meeting and invited him to speak to the members. Mr. Smith clarified the procedures which he desired the various committees to follow in the certification of philosophical issues to the full Commission. He asked that the Committee study thoroughly their assigned sections of the Constitution and to make changes which were necessary, but at the same time not to eliminate provisions which needed to be retained.

After a lengthy discussion of the procedure to follow in completing the Committee's overall objective, it was agreed that the questions to be certified for discussion to the full Commission should be drawn up first and then the group could begin work on an initial draft of its proposal which is to be submitted to the Chairman of the full Commission by June 1, 1966.

Mr. Young moved that the Committee take up page 1a of Chairman Smith's letter to Chairman Stallings in the order as outlined and then go through the articles and sections one by one to determine if there are any provisions therein which should be further discussed or certified to the full Commission for actual debate. The motion was seconded and carried.

The following tentative list was selected for further examination in connection with the certification of philosophical questions to the full Commission:

Article VI, Sections 1, 2 and 5
Article XVII, All Sections
Article XVIII, Section 10
Article XIX, All Sections
Proposed Amendments
  Senate Joint Resolution No. 115
  House Joint Resolution No. 344

Article III, Section 7
Article XII

Initiative and related matters

Mr. Goodrich moved that the Committee consider Article XVII, Amendments, as top priority in the certification of discussion questions to the full Commission. Mr. Earle seconded the motion, and it was adopted.

Mr. Goodrich moved that the Committee on Suffrage and Elections certify to the full Commission the following question: "Shall this Committee further consider, draft and propose a provision of the Constitution to provide for amendment of the Constitution by direct initiative of the electorate?" Mr. Young seconded the motion.

After discussion, the following substitute motion was offered by Mr. Young: "Shall the Suffrage and Elections Committee of the Florida Constitution Revision Commission consider a method whereby the electors of Florida will be able to initiate revisions, changes or amendments to their State Constitution?" This substitute motion was seconded and adopted.

Mr. Goodrich moved that the Committee on Suffrage and Elections do certify the following question to the full Commission, to-wit: "Should the Committee on Suffrage and Elections consider a provision of the Florida Constitution which would lower the voting age of electors in Florida?" The motion was seconded by Mr. Earle, discussed by the Committee and was adopted.

After discussion on the Local Option provision, Article XIX, Mr. Young moved that this Committee request the Chairman of the full Commission to transmit this Article, <u>for study only</u>, to the Local Government Committee. He explained further it was his intention that this Committee would retain jurisdiction of the Article insofar as the committee assignments were concerned, and that the Chairman of the Local Government Committee be sent a copy of this letter. The motion was seconded by Mr. Earle and was adopted.

Mr. Goodrich moved that this Committee certify the following question to the full Commission: "Should references to the levying of taxes for school purposes by virtue of special school elections be removed from the Constitution?" Mr. Young seconded the motion, and it was adopted.

A copy of the questions to be certified to the full Commission is attached to these Minutes.

Mr. Young moved that the Suffrage and Elections Chairman request the Commission Chairman to assign to this Committee, in addition to its present assignments, Article 3, Section 7. After discussion, the motion failed for lack of a second.

The other articles contained in the tentative list on page two hereof and not specifically endorsed were withdrawn from consideration for certification to the full Commission.

The meeting adjourned for lunch at 1:10 P. M., and reconvened at 2:30 P. M.

After consideration and discussion of a procedure to follow in drafting the Committee's proposal to submit to the full Commission by June 1st, Mr. Earle moved that the Committee recommend Article VI, Section 1 as prepared by the Legislature on Page 23 of the "Revised Florida Constitution Proposed by the Legislature and Explanation of Changes." Mr. Young seconded the motion.

Mr. Goodrich moved to amend by deleting the word "shall" in line 9 of Section 1 and inserting "may." The motion failed for lack of a second.

Section 1 of Article VI was adopted.

Mr. Earle moved that Article VI, Section 2 be adopted by the Committee. The motion was seconded by Mr. Pettigrew.

Mr. Goodrich moved that the last line in Section 2 be stricken. This motion was seconded and adopted.

Mr. Earle moved that after the word "constitution" in line 9 of Section 2, the following sentence be added: "The Legislature shall by law define residence for voting purposes." Mr. Pettigrew seconded the motion, and it was adopted.

Mr. Pettigrew moved that the one year residency requirement be stricken from the Constitution and that the Legislature be authorized to set the period, provided that the Legislature would not be able to set more than one year as a residence requirement. There was no second, and the motion failed.

Mr. Goodrich moved that Section 2 be amended by the addition of the following: "The Legislature may by law provide for special registration for voting for state and federal officers only for a registered elector who changes his residence from one county within the state to another and who at the time of registration has lived in the county less than six months." After consideration and discussion by the Committee, Mr. Goodrich withdrew his motion.

Mr. Goodrich moved to amend Section 2 by striking the words beginning on line 6 "and for six months in the county in which he applies to register" and insert "and for such time as provided by law within the county in which he applies to register." The motion was seconded and adopted.

Mr. Pettigrew moved that in line 9 of Section 2 following the word "constitution" the following be added: "provided, however, the Legislature may provide for voting in national elections for president and vice president of the United States by persons who have become residents of the State of Florida but who have not yet fulfilled the residency requirements of electors." The motion was seconded.

Mr. Goodrich moved to amend Mr. Pettigrew's motion by adding after "electors" the words "as to length of residency." Mr. Goodrich's amendment was accepted by Mr. Pettigrew, following which Mr. Pettigrew's motion was adopted.

Section 2, as amended by the Committee, was then adopted.

Mr. Earle moved that Section 3 of Article VI be adopted by the Committee. The motion was seconded.

After discussion, Mr. Young moved that beginning on line 8 of Section 3 the words "one year and of the county for six months" be deleted and the following inserted: "the time prescribed by this Constitution and law." Mr. Earle seconded the motion, and it was carried.

Mr. Earle moved that in line 2 of Section 3 the word "take" be changed to "subscribe." This amendment was seconded and carried.

Section 3 was adopted by the Committee without further amendments.

Mr. Earle moved that Article VI, Section 4 be adopted by the Committee on Suffrage and Elections. The motion was seconded.

Mr. Pettigrew moved to amend Mr. Earle's motion by striking "judicially determined to be of unsound mind, or under judicial guardianship because of mental disability" and to substitute therefor "persons adjudicated mentally incompetent." This motion was seconded and passed.

Mr. Pettigrew moved to further amend Section 4 by adding to his previous amendment: "in this or any other state and who have not had their competency judicially restored." This amendment was seconded and also passed.

After considerable discussion, Mr. Pettigrew moved that Section 4 be deleted and the following inserted: "The Legislature may by law establish disqualifications for voting for mental incompetency or convication of felony." The motion was seconded.

Mr. Goodrich offered the following substitute motion to Mr. Pettigrew's motion: Delete Section 4 and insert: "The Legislature may by law exclude persons from voting because of mental incompetence or commitment to a jail or penal institution." After discussion, Mr. Goorich's motion failed for lack of a second.

The vote was then taken on Mr. Pettigrew's motion, but it failed of adoption.

Mr. Goodrich moved that the word "felony" in line 2 of Section 4 be changed to "crime." The motion failed for lack of a second.

The Committee adopted Section 4 of Article VI with no further amendments.

Mr. Earle moved the adoption of Section 5 as the Committee's proposal.

Mr. Goodrich moved that the last sentence in the first paragraph of Section 5 be stricken. The motion was seconded and carried.

Section 5, as amended, was adopted by the Committee.

Mr. Goodrich moved that the Committee strike from further consideration Section 6 of Article VI, which motion was seconded and carried. By mutual agreement the Committee accepted Sections 1, 2, 3, 4 and 5 of Article VI as amended as its first draft of the proposal to be submitted to the Commission by the June 1st deadline.

The Committee proceeded to check the various sections of the present Constitution to insure that no sections were omitted.

Mr. Pettigrew moved that in Section 2 of the Legislature's proposal after "shall upon registering be a qualified elector of such county" that "and shall have the right to vote" be inserted. There was discussion on the subject, but the motion was left pending.

The meeting was adjourned at 5:30 P. M. to reconvene at 9:00 A. M. the following morning.

Chairman Stallings called the Committee to order at 9:15 A. M., February 3, 1966. All members were present.

The Committee decided upon March 30 and 31 as the tentative dates for its next meeting, subject to the approval of the Commission Chairman. Mr. Young offered to make arrangements for accommodations in St. Petersburg, and it was agreed that the

Committee would prefer the meeting held there. Members will be notified of specific details at a later date.

Mr. Anthony A. Maisano, Administrative Assistant to the Republican State Executive Committee of Florida was recognized and expressed the desire of the Republican Party to submit a proposal and suggestions in writing for the Suffrage and Elections Committee to consider. Mr. Stallings replied that the general Chairman, Mr. Chesterfield Smith, has planned a schedule of public hearings for such presentations as the public would care to make, but that the Commission would be happy to accept suggestions at any time.

Representative Bob Mann of Hillsborough County, present in the audience, welcomed the Committee to Tampa.

Discussion was resumed on Mr. Pettigrew's motion concerning the right of a person to vote being specified in the Constitution.

Mr. Goodrich offered the following substitute motion: "That the Committee on Suffrage and Elections request the Chairman of the full Commission to ask the Committee on Human Rights to determine how this freedom can be used in the Declaration of Rights. Mr. Earle Seconded the motion.

Mr. Goodrich then moved that all pending motions be laid on the table. This motion was seconded and adopted.

Mr. Pettigrew introduced Mr. William Garcia, President of the Young Democratic Clubs of Florida, who was present in the audience.

An extensive discussion then followed concerning municipal elections. It was suggested than an invitation be issued to municipal clerks and county supervisors of registration to attend the next Committee meeting to discuss the problems connected with municipal elections.

Mr. Pettigrew moved that following the last section of the Suffrage and Elections provision, the Committee reserve at this time a section tentatively for purposes of providing uniform residency requirements and qualification provisions for electors within municipalities and all other political subdivisions of the State other than county and state. The motion was seconded, and Mr. Goodrich moved to amend the same by including "and that the uniformity conform with whatever residence requirements are required by the Legislature for an elector in a county." The amendment was acceptable to Mr. Pettigrew.

Mr. Young moved to amend as follows: "That this subject contained in the main motion be a continuing order of business of this Committee to be placed on the agenda for our next committee meeting and that notice of the Committee's intention be given to supervisors of registration and city officials with an invitation for them to appear or suggest in writing their thoughts on this general subject." Mr. Pettigrew accepted the amendment to his motion.

Mr. Pettigrew agreed to temporary passage of his motion in order for some drafting to be done.

Mr. Pettigrew moved that a section following the municipal provision be reserved to treatment of bond elections and

requirements for qualifying as a freeholder to vote in bond elections. The motion was seconded and adopted.

Mr. Goodrich proposed the following substitute motion: "That a new section be created between existing Sections 2 and 3 of the proposed revision of Article VI which was passed yesterday and renumbered to read as follows and that thereafter the procedure outlined in Mr. Young's motion be followed: 'All elections held by municipal corporations or other governmental entities created by law shall be by secret and direct vote and shall be determined by plurality of the votes cast unless a majority vote shall be required by law. Qualifications for electors therein shall be the same as otherwise provided in this Constitution, provided that requirements for residence within such corporation or voting unit shall be the same as generally required by law for residence within a county to be a qualified elector of that county.' "

Mr. Stallings explained that the substance of the main motion had, in effect, been combined with Mr. Goodrich's motion, which was then seconded and passed.

It was agreed that an invitation to appear at the next meeting of the Committee to discuss this subject be issued to the following groups:

League of Municipalities
Clerks of Circuit Court
Supervisors of Registration
Boards of County Commissioners
Representative of the Attorney General
Representative of the Secretary of State

Mr. Goodrich requested that the representatives of the Attorney General and the Secretary of State be asked to specifically research the following question: "What would be the

effect upon existing municipal charters which would be in conflict with this new constitutional provision in view of the fact that it is an antecedent grant of power by a governmental body then not under such prohibition as this?"

It was agreed that Mr. Stallings would, upon approval of the Commission Chairman, notify the Chairman of the Local Government Committee, Senator Gautier, by copy of the letter requesting research from the Attorney General and the Secretary of State that the Suffrage and Elections Committee is studying this area.

Mr. Pettigrew requested Mr. Duden of the Secretary of State's office to research by the next Committee meeting the subject of write-in provisions in the Constitution; the specific court decisions; and any opinion of the Attorney General in this area. He further asked Mr. Duden to bring any materials or proposals studied in this regard by the previous Interim Elections Committee.

Mr. Earle suggested that the Committee go back to the committee assignment section by section to insure that no section has been omitted inadvertently.

Mr. Joe Fuller of the Democratic Committee, who was in the audience, was recognized by the Chairman.

After a general discussion, Mr. Stallings assured the Committee that any items this Committee felt were of concurrent jurisdiction would be brought to the attention of the Steering Committee at its March 4th meeting.

Mr. Pettigrew suggested that the following be added after the first sentence in Section 1 of Article VI of the Committee's proposal: "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 shall provide by law for the conduct of elections, requirements for absentee voting, methods of voting, determination of election returns and procedure in election contests."

Mr. Earle moved that the Committee defer action on this Section 26 of Article III, which was the same general subject matter as Mr. Pettigrew's motion, until the next meeting. The motion was seconded by Mr. Goodrich, but it failed of adoption.

Mr. Pettigrew moved that Section 26, Article III be deleted and amend the proposed Article VI, Section 1 to read: "Unless otherwise provided herein, all elections by the people shall be by direct vote and shall be determined by a plurality of votes cast. The Legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against the abuses of the elective franchise and shall prescribe by law for the conduct of elections, requirements for absentee voting, methods of voting, determination of election returns and procedure in election contests. Recognition, regulation and nominating procedure of political parties shall be provided by law."

Mr. Young seconded the motion.

Mr. Goodrich raised a point or order that Mr. Pettigrew's motion would have to be a motion to reconsider, which would require

a two-thirds vote. Mr. Stallings ruled the point not well taken.

There was no further discussion on the motion, and it was adopted.

It was noted that Section 27, Article III was deleted intentionally.

Mr. Earle brought to the attention of the Committee that Section 6 of Article VI had been eliminated, which was agreeable to the Committee.

It was the consensus of the group that the remainder of Article VI had either been covered or eliminated purposely.

It was agreed that Article XVI, Section 8 had been covered, and Section 20 omitted.

Article XVII has been certified to the Commission.

In Article XVIII, Section 7 has been omitted; Section 9 covered; Section 10 omitted; Section 14 omitted.

Mr. Pettigrew suggested that Article XIX should be redrafted upon further study.

The proposed amendments have been covered.

Mr. Young requested Mr. Duden to prepare a resumé comparing the previous provisions in the Constitution which were assigned to this Committee and the revisions proposed by the Committee during this work session -- something similar to the manner in which he indicated the changes in the proposal of the Interim Elections Committee. Mr. Duden agreed to prepare this to be transmitted to the members.

Pursuant to Mr. Earle's request for research information prior to the next meeting concerning all aspects of initiative

and referendum, Mr. Stallings stated he would request Dave Kerns, Director of the Legislative Reference Bureau, to submit to the Committee a study report of this issue.

Mr. Goodrich brought to the attention of the Committee that "secret" in line 4 of Article VI, Section 1 had been omitted. It was decided that this particular question could be brought up a the next meeting when all members had their typewritten proposals before them.

There being no further discussion, the meeting was adjourned at 11:30 A. M.

APPROVED:

George B. Stallings, Jr.

George B. Stallings, Jr.
Chairman, Committee on
Suffrage and Elections

QUESTIONS TO BE CERTIFIED TO THE FULL COMMISSION BY THE SUFFRAGE AND ELECTIONS COMMITTEE

1. Shall the Suffrage and Elections Committee consider a method whereby the electorate of Florida will be able to initiate revisions, changes or amendments to their State Constitution? TOP PRIORITY (Article XVII)

2. Should the Suffrage and Elections Committee consider a provision of the Florida Constitution which would lower the voting age of electors in Florida? (Article VI, Section 1)

3. Should references to the levying of taxes for school purposes by virtue of special school elections be removed from the Constitution? (Article XII)

99

II-7.1000 August 25, 1993

XXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXX
XXXXXXXXXX, Florida XXXXX

RE: Complaint Number XXXXXXXXXX (formerly XXXXXXXXXXXX

Dear Ms. XXXXXX:

This constitutes our Letter of Findings with regard to your complaint against the Supervisor of Elections, Pinellas County, Florida, under title II of the Americans with Disabilities Act (ADA), which prohibits discrimination against qualified individuals with disabilities on the basis of disability by State and local governments. Specifically, you allege that the Supervisor of Elections of Pinellas County does not provide Braille ballots or an electronic system of voting, such as voting by telephone, to blind voters. You further allege that the present system of providing assistance at the polling place does not allow a blind voter to cast a secret ballot.

The Civil Rights Division has completed its investigation of your complaint. Our investigation revealed that the Supervisor of Elections of Pinellas County follows the Florida statute (Chapter 97.061, F.S.), which requires the following provisions for voters with visual impairments: 1) the assistance of any two election officials at the polling place; or 2) the assistance of any one person of the individual's choice. Pinellas County also provides a magnifying lens at polling places. In a telephone conversation with our office, Ms. Dorothy Ruggles, Supervisor of Elections, stated that when a blind person comes to the polling place to vote, the poll workers offer a choice of allowing someone the person knows or two poll officials to assist in casting the ballot.

Legal Requirements

The Department of Justice's regulation implementing title II provides that a public entity must ensure that its communications with individuals with disabilities are as effective as communications with others and must furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity. 28 C.F.R. 35.160. A public entity is not required to take any steps that would result in a fundamental

alteration in the service, program, or activity or in undue financial and administrative burdens. 28 C.F.R. 35.164

In determining what type of auxiliary aid or service is necessary, a public entity must give primary consideration to the requests of the individual with a disability, that is, the public entity must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice and must honor that choice unless it can demonstrate that another effective means of communication exists or that provision of the aid or service requested would result in a fundamental alteration or in undue financial and administrative burdens. 28 C.F.R. 35.160(b)(2); 35.164.

Discussion

The Pinellas County Supervisor of Elections provides magnifying lenses and readers for individuals with vision impairments seeking to vote. The election procedures specify that an individual who requests assistance will be assisted by two poll workers, or by one person selected by the voter. Your complaint alleged that the provision of assistance to an individual who is unable to fill out a printed ballot is inadequate because it does not allow a blind voter to cast a secret ballot. A Braille ballot, however, would not meet your objective of keeping your vote secret, because it would have to be counted separately and would be readily identifiable. Also, electronic systems of voting by telephone that meet the security requirements necessary for casting ballots are not currently available.

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.

Based upon the facts and legal requirements discussed above, we have determined that the Pinellas County Supervisor of Elections is not in violation of title II with respect to the issues you have raised. If you are dissatisfied with our determination, you may file a private complaint in the appropriate United States District Court under title II of the ADA.

You should be aware that no one may intimidate, threaten, coerce, or engage in other discriminatory conduct against anyone who has either taken action or participated in an action to secure rights protected by the ADA. Any individual alleging such harassment or intimidation may file a complaint with the Department of Justice. We would investigate such a complaint if

the situation warrants.

Under the Freedom of Information Act, 5 U.S.C. 522, we may be required to release this letter and other correspondence and records related to this complaint in response to a request from a third party. Should we receive such a request, we will safeguard, to the extent permitted by the Freedom of Information Act and the Privacy Act, the release of information which could constitute an unwarranted invasion of privacy.

If you have any questions, please contact Linda King at (202) 307-2231.

Sincerely,

Stewart B. Oneglia
Chief
Coordination and Review Section
Civil Rights Division

1 This interpretation is consistent with long-standing interpretation of section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability in federally assisted programs and activities. See the discussion of the general prohibitions of discrimination in the preamble to the Department's title II regulation at 56 FR 35,703 and the analysis of the Department of Health, Education, and Welfare's original regulation implementing section 504 (later transferred to the Department of Health and Human Services) at 45 C.F.R. pt. 84, Appendix A.

No. 97-1155

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KING NELSON, et al.,

Plaintiffs-Appellants,

v.

CANDICE S. MILLER, in her official capacity as Secretary of State for the State of Michigan,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ISABELLE KATZ PINZLER
Acting Assistant Attorney General

MARK L. GROSS
SAMUEL R. BAGENSTOS
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-2174

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CASES (continued): **PAGE**

CONSTITUTION AND STATUTES:

STATUTES (continued): **PAGE**

REGULATIONS:

RULES:

LEGISLATIVE HISTORY:

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-1155

KING NELSON, et al.,

Plaintiffs-Appellants,

v.

CANDICE S. MILLER, in her official capacity as Secretary of State for the State of Michigan,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case involves the relationships among four statutes enforced by the United States: Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504); Section 208 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973aa-6 (Section 208); the Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. 1973ee et seq. (Voting Accessibility Act); and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 et seq. (ADA Title II). The district court effectively held that the ADA and Section 504 do not impose any requirements regarding voting accessibility beyond those imposed by the Voting Accessibility Act and Section 208. That holding, if affirmed, could significantly affect the government's enforcement responsibilities under these statutes.

STATEMENT OF THE ISSUE

Whether the district court properly dismissed plaintiffs' complaint alleging that the failure to provide a means for blind voters to cast secret ballots violated the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504).

STATEMENT OF THE CASE

1. This case arises on the pleadings. Plaintiffs are six blind Michigan voters. They are suing on behalf of all legal voters in the state "who are blind or visually impaired and are in need of appropriate modifications to the voting procedures in order to exercise their fundamental constitutional right to vote and to do so by secret ballot" (R. 1: Complaint at 7 (¶ 35)).[1/] They challenge Michigan's procedures for assisting blind or visually impaired voters. Under those procedures, voters who are blind or visually impaired may receive the assistance of either two poll officials or an individual of their choice in marking their ballots (R. 1 at 4 (¶ 19)). The state does not, however, "provide them with a ballot or voting system which would allow them to read and mark the vote in private" (R. 1 at 4 (¶ 21)). Plaintiffs contend that the state's procedures impermissibly deprive blind or visually impaired people of the right to vote by secret ballot -- a right guaranteed to all other Michigan citizens (R. 1 at 5-6 (¶¶ 29-34)). See Mich. Const., Art. 3, § 4. In addition to the intrusion on secrecy inherent in having a

[1/] "R. __" refers to entries on the district court's docket sheet.

third party present in the voting booth, one plaintiff alleges that an election worker "shouted out her voting choice in front of other voters present at the polling place" (R. 1 at 5 (¶ 23)). Plaintiffs seek "ballots in a format which would allow them the right to vote by secret ballot" (R. 1 at 6 (¶ 34)). They allege that "inexpensive technologies that are currently in commercial use" such as "brailled ballot overlays or templates, taped text or phone-in voting systems" would "permit persons who are blind to read and mark ballots without involving a third party" (R. 1 at 6 (¶ 34)).

2. On September 26, 1996, plaintiffs brought this suit in the District Court for the Western District of Michigan. The Michigan Secretary of State, sued in her official capacity, was the sole defendant (R. 1 at 3 (¶ 10)). Plaintiffs claim that the state's failure to provide ballots in an accessible format violates Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 et seq.. See R. 1 at 8-9 (¶¶ 41-48). Specifically, they contend that the state's current procedures "deny voters who are blind an equal opportunity to vote by secret ballot" and that the provision of ballots in alternative formats would constitute a reasonable modification that would "avoid discrimination on the basis of disability" (R. 1 at 9 (¶¶ 47-48)). For essentially the same reasons, plaintiffs also claim that defendants have violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. See R. 1 at 9-10 (¶¶ 49-54).

On December 20, 1996, the district court granted the state's

motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (R. 17: Opinion). The court observed that the Voting Accessibility Act and Section 208 of the Voting Rights Act explicitly addressed issues of accessibility in voting (R. 17 at 2-4). Because "Congress did not intend that the ADA displace the Federal Voting Rights Acts" (R. 17 at 2), the district court first addressed whether Michigan's current procedures violated either of these two statutes (R. 17 at 3-4). The court concluded that the state's procedures do not violate Section 208 or the Voting Accessibility Act. Indeed, Section 208 specifically requires states to allow blind or visually impaired voters to be assisted by a person of their choice. 42 U.S.C. 1973aa-6.[2/] In fact, the Voting Accessibility Act allows the states to set their own accessibility standards -- and it does not apply to state and local elections. 42 U.S.C. 1973ee-6(1).

[2/]Section 208 entitles "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write" to receive assistance "by a person of the voter's choice." 42 U.S.C. 1973aa-6. By its terms, the Michigan voter assistance statute (M.C.L.A. § 168.751 (West 1989)) does not fully comply with Section 208. The Michigan law allows people with disabilities to receive assistance by a person of their choice only if they are "disabled on account of blindness"; unlike Section 208, it does not extend this right to persons with other disabilities or persons who are illiterate. See M.C.L.A. § 168.751 (West 1989). Even as to blind voters, the Michigan law allows the voter to obtain assistance only from "a member of his or her immediate family" or a person of his or her choice over 18 years of age; the federal statute contains no age or familial limitation. In correspondence initiated by the United States in 1984, however, Michigan assured us that it fully complies with Section 208 in practice, notwithstanding the limitations incorporated in the state statute. See letter from Gary P. Gordon, Assistant Attorney General, to Gerald W. Jones, Chief, Voting Section (Aug. 31, 1984) (attached as addendum).

The court next disposed of plaintiffs' ADA and Section 504 claims (R. 17 at 5-6) (footnotes omitted):

> Clearly, if the Plaintiffs were excluded from being able to cast a ballot, the Defendant would be in violation of the Voting Rights Acts, §12132 of the ADA, and §504 of the RA. However, the Plaintiffs do not contend that they are being denied the right to cast their ballots. Instead, they want this Court to go even further and find that Congress intended to elevate a blind voter's privacy in casting a ballot to a protected right under the ADA or RA. There is no indication from the wording of the ADA and RA or the legislative history of either Act that Congress intended such a broad reading. This conclusion is further strengthened when the ADA and RA are read in harmony with the Voting Rights Acts, which also do not mandate the result proposed by the Plaintiffs.

Without citing any language in the ADA or its legislative history, to support its conclusion, the court announced that "[s]imilar to the Voting Rights Acts, Congress intended that blind voters have access to the voting booth and freedom from coercion within the voting booth, not complete secrecy in casting a ballot. This Court will not rewrite the ADA or RA to require such a privacy right" (R. 17 at 7).

SUMMARY OF ARGUMENT

Michigan generally guarantees voters the right to cast secret ballots, but it does not enable blind or visually impaired voters to vote in secret. Under the state's procedures for assisting voters with disabilities, blind or visually impaired voters must announce their choices to one or more assistants, who then cast their ballots. Plaintiffs have alleged, however, that inexpensive alternative technologies exist that would guarantee ballot secrecy to blind or visually impaired voters. Taking this allegation as true, as this Court must at the pleading stage,

plaintiffs have stated a claim for a violation of the Americans with Disabilities Act. The ADA prohibits states from providing services in a manner that denies persons with disabilities an equal opportunity to gain the same benefits as those provided to others, and it requires states to adopt reasonable modifications to their existing practices where those modifications would avoid such discrimination and would not result in a fundamental alteration of the nature of their program. Plaintiffs' complaint alleges that Michigan has refused to adopt reasonable modifications to its voting practices that would afford blind or visually impaired voters the same ballot secrecy the state provides to voters in general. Should plaintiffs establish that such modifications exist, defendants will be liable for violating the ADA. The district court therefore erred by dismissing plaintiffs' complaint under Rule 12(b)(6).

In ruling for the defendants, the district court appeared to conclude that the ADA imposes no requirements for accessible voting procedures beyond those set forth in two pre-ADA statutes: the Voting Accessibility Act and Section 208 of the Voting Rights Act. That conclusion is incorrect. By its plain terms, the ADA applies with full force to discriminatory election practices, whether or not those practices comply with pre-ADA federal accessibility standards. Indeed, Congress specifically identified voting as an area in which disability-based discrimination persisted at the time it enacted the ADA. The Act's legislative history confirms that Congress believed the existing voting

accessibility laws to be inadequate.

The district court also appeared to conclude that only the outright denial of the franchise -- and not the discriminatory denial of ballot secrecy -- could make out a violation of the ADA. That conclusion, too, was incorrect. While the ADA prohibits the complete exclusion of persons with disabilities from government services or benefits, it independently prohibits discrimination in the manner in which services or benefits are provided. Michigan's current procedures deprive blind or visually impaired voters of an important benefit -- ballot secrecy -- generally afforded to voters in the state. Plaintiffs have stated a claim that those procedures violate the ADA.

ARGUMENT

THE DISTRICT COURT ERRED BY DISMISSING PLAINTIFFS' COMPLAINT

This case arose on the pleadings. Accordingly, the district court was required to "construe the complaint in a light most favorable to the plaintiff, accept all of the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. When an allegation is capable of more than one inference, it must be construed in the plaintiff's favor." Columbia Natural Resources, Inc. v. Tatum, 58 F.3d 1101, 1109 (6th Cir. 1995) (citations omitted) (citing cases), cert. denied, 116 S. Ct. 1041 (1996). Applying this standard to plaintiffs' complaint, Rule 12(b)(6) dismissal was inappropriate here.

Under Michigan's election system, blind or visually impaired

voters lack an important benefit generally guaranteed to voters in the state -- the ability to cast their ballots in secret. Plaintiffs have alleged that inexpensive technologies exist to assure blind or visually impaired voters ballot secrecy. Taking that allegation as true, as the court must at this stage of the litigation, plaintiffs' complaint clearly states a claim that Michigan has violated the ADA.[1/] Those allegations, if proven at trial, would establish that the state has failed to adopt reasonable modifications of its existing procedures that would eliminate discrimination. The only other federal court case of which we are aware that has addressed these issues found a violation of the ADA. See Lightbourn v. County of El Paso, 904 F. Supp. 1429 (W.D. Tex. 1995). The district court accordingly erred in granting defendants' motion to dismiss.

A. Plaintiffs Have Stated A Claim That Michigan's Voting Assistance Procedures Discriminatorily Deny Blind Voters Ballot Secrecy In Violation Of The ADA

1. Title II of the ADA covers "public entities" -- that is, units of state and local government. 42 U.S.C. 12131(1). The operative section of Title II 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

[1/] The remedies available to a plaintiff under the ADA are precisely the same as those available under Section 504. See 42 U.S.C. 12133. Because, on the allegations of this case, plaintiffs could not prevail on their Section 504 claim without also prevailing on their ADA claim, this brief focuses on the ADA. Cf. 42 U.S.C. 12201(a) (setting forth relationship between ADA and the Rehabilitation Act).

subjected to discrimination by any such entity." 42 U.S.C. 12132 (emphasis added). The Act vests the Attorney General with authority to promulgate legislative rules to implement this provision. 42 U.S.C. 12134.

Pursuant to that authority, the Attorney General has issued regulations that "establish the general principles for analyzing whether any particular action of the public entity violates [Title II's general nondiscrimination] mandate." 28 C.F.R. Part 35, App. A § 35.130. These regulations state, inter alia, that a public entity may not "[p]rovide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others." 28 C.F.R. 35.130(b)(1). They also require public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7).

The regulations also apply these principles to the specific context of communications with the public. They require public entities to "take appropriate steps to ensure" that communications with people with disabilities "are as effective as communications with others." 28 C.F.R. 35.160(a). In particular, such entities must "furnish appropriate auxiliary aids and services

where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity" they conduct. 28 C.F.R. 35.160(b)(1). Public entities must "give primary consideration to the requests of the individuals with disabilities" in determining what auxiliary aid or service to use. 28 C.F.R. 35.160(b)(2). An exception occurs only when the public entity can prove that providing the requested aid or service would result in a fundamental alteration or an undue financial or administrative burden. See 28 C.F.R. 35.164.

2. Plaintiffs have clearly pleaded a violation of these requirements. "The State of Michigan has guaranteed the right to vote by secret ballot to all Michigan citizens" (R. 1 at 5 (¶ 29)). But the state's current voter assistance procedures do not provide blind or visually impaired voters with ballot secrecy. Thus, the state provides blind or visually impaired voters "with an aid or service that is not as effective in affording equal opportunity to obtain the same benefit, to gain the same benefit, or to reach the same level of achievement as that provided to others." 28 C.F.R. 35.130(b)(1); see Lightbourn, 904 F. Supp. at 1433. And although plaintiffs have alleged that "reasonable modifications" of the state's current procedures -- such as the adoption of alternative ballot formats -- would avoid this discrimination, the state has refused to adopt those modifications, in violation of 28 C.F.R. 35.130(b)(7). As alleged in the complaint, the state's refusal also violates the effective

communications regulations, for the state has failed to furnish auxiliary aids and services (alternative ballots) that would afford blind or visually impaired voters "an equal opportunity to participate in, and enjoy the benefits of," the state's voting activities, 28 C.F.R. 35.160(b)(1), and the state has failed to "give primary consideration to the requests" of those blind or visually impaired voters who desire ballot secrecy. 28 C.F.R. 35.160(b)(2).

The United States has previously addressed these issues in our Title II Technical Assistance Manual. The 1994 Supplement to that publication discussed a hypothetical case in which a county allowed blind voters to vote with the assistance of "two poll workers, or one person selected by the voter," but rejected a blind voter's request to complete a ballot that had been printed in Braille. ADA Title II Technical Assistance Manual, 1994 Supp., § II-7.1100 at 5-6. We stated that the denial of the voter's request would not violate Title II, because a Brailled ballot "would have to be counted separately and would be readily identifiable, and thus would not resolve the problem of ballot secrecy." ADA Title II Technical Assistance Manual, 1994 Supp., § II-7.1100 at 5-6.

The discussion in our technical assistance manual rested on the factual premise that Brailled ballots would not assure ballot secrecy and that no other accommodations were available that would assure ballot secrecy. If reasonable modifications were available that would allow blind or visually impaired voters to

cast their ballots without assistance and that would assure ballot secrecy, the plain import of the ADA and its implementing regulations would require the state to adopt those modifications. Here, plaintiffs have alleged that such reasonable modifications exist. Unlike the hypothetical plaintiff in our technical assistance manual, they have not sought Brailled ballots. Rather, they have requested that the state employ such alternatives as "brailled ballot overlays or templates" (which would not require their ballots to be counted separately or be readily identifiable once cast), as well as "taped text or phone-in voting systems" (R. 1 at 6 (¶ 34)). Plaintiffs allege that these alternative formats "would allow them the right to vote by secret ballot" (R. 1 at 6 (¶ 34)).

In light of these allegations, Rule 12(b)(6) dismissal was improper. The complaint, taken in the light most favorable to the plaintiffs, see Columbia Natural Resources, Inc., 58 F.3d at 1109, alleges that inexpensive balloting formats are available that would allow them to vote without compromising their secrecy. If those allegations are proven, plaintiffs will have established a violation of the ADA. Plaintiffs are entitled to an opportunity to prove their allegations.

B. The ADA's Requirements Of Voting Accessibility Are Not Limited By The Less Protective Requirements Of Pre-ADA Statutes

In granting the motion to dismiss, the district court appeared to conclude that the ADA did not impose any accessibility requirements on the voting process beyond those already

embodied in the Voting Accessibility Act and Section 208 of the Voting Rights Act. See R. 17 at 2 ("Congress did not intend that the ADA displace the Federal Voting Rights Acts."); R. 17 at 6 (stating that the court's conclusion that the ADA cannot afford plaintiffs relief "is further strengthened when the ADA and RA are read in harmony with the Voting Rights Acts, which also do not mandate the result proposed by the Plaintiffs"); R. 17 at 7 ("This Court does not find anything in the ADA to indicate that Congress believed that the Voting Rights Acts were insufficient."). That ruling is incorrect.[4/]

By its plain terms, ADA Title II's general prohibition of discrimination applies to discriminatory election practices. Indeed, that prohibition "applies to anything a public entity does." 28 C.F.R. Part 35, App. A § 35.102; see also Innovative Health Sys., Inc. v. City of White Plains, 931 F. Supp. 222, 232 (S.D.N.Y. 1996) (finding "nothing in the text or legislative history of the ADA to suggest that zoning or any other governmental activity was excluded from its mandate"); H.R. Rep. No. 485, Part 2, 101st Cong., 2d Sess. 84 (1990) (Title II applies "to all actions of state and local governments").[5/] Title II provides, without qualification, that "no qualified individual with a

[4/]The district court also erred in presuming that the Michigan statute complies with Section 208. As we have explained, see n.2, supra, the Michigan statute on its face violates Section 208, although state officials have assured us that they comply with federal law in practice.

[5/]By contrast, the Voting Accessibility Act does not even apply to a state's administration of state and local elections. See 42 U.S.C. 1973ee et seq.

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. On its face, this broad language would appear to reach any state action that subjects people with disabilities to "discrimination" as defined in the ADA regulations -- regardless of whether that action complies with the requirements of pre-ADA statutes such as the Voting Accessibility Act and Section 208.

In reaching a contrary conclusion, the district court purported to rely on the principle that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Morton v. Mancari, 417 U.S. 535, 551 (1974) (quoted in R. 17 at 2). But the district court's decision directly contradicts that principle. Under that ruling, the ADA has no independent effect in the voting area, for the court read Section 208 and the Voting Accessibility Act to occupy the field. In short, the district court undertook "to pick and choose among congressional enactments," which "[t]he courts are not at liberty to" do. Morton, 417 U.S. at 551.

Congress itself made clear that earlier, less protective statutes cannot limit the application of the ADA. The ADA's savings provision specifically addresses this question. That provision preserves the operation of other state and federal disability rights laws, but only to the extent that those laws

"provide[] greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter." 42 U.S.C. 12201(b). This provision underscores Congress's intent "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. 12101(b)(1), and not to limit people with disabilities to the often ineffectual protections of prior laws. While the ADA does not prohibit plaintiffs from invoking the remedies available under laws such as Section 208 and the Voting Accessibility Act,[5] those alternative remedies do not in any way limit the application of the ADA itself. Cf. Staron v. McDonald's Corp., 51 F.3d 353, 357 (2d Cir. 1995) (ADA savings clause "does not state, and it does not follow, that violations of the ADA should go unaddressed merely because a state has chosen to provide some degree of protection to those with disabilities").

In rejecting this conclusion, the district court stated that it had found "[no]thing in the ADA to indicate that Congress believed that the Voting Rights Acts were insufficient" (R. 17 at 7). But the district court overlooked several portions of the statute and its legislative history that bore directly on this question. In the ADA's statement of findings, Congress singled

[5] See Ellenwood v. Exxon Shipping Co., 984 F.2d 1270, 1277 (1st Cir.) (ADA savings clause "allow[s] overlapping remedies for employment discrimination"), cert. denied, 508 U.S. 981 (1993); H.R. Rep. No. 485, Part 3, 101st Cong., 2d Sess. 70 (1990) (ADA savings clause allows a plaintiff "to pursue claims under a state law that does not confer greater substantive rights, or even confers fewer substantive rights, if the plaintiff's situation is protected under the alternative law and the remedies are greater").

out "voting" as one of the "critical areas" in which "discrimination against individuals with disabilities persist[ed]," 42 U.S.C. 12201(a)(3) -- even though Section 208 and the Voting Accessibility Act had been on the books for eight and six years, respectively. See Lightbourn, 904 F. Supp. at 1432 ("Evidently, Congress did not feel that [the Voting Accessibility Act] was sufficient, as it revisited and specifically addressed the same issue six years later in the ADA."). The Senate Report accompanying the Act quoted the testimony of Illinois's Attorney General, who "focused on the need to ensure access to polling places: 'You cannot exercise one of your most basic rights as an American if the polling places are not accessible.'" S. Rep. No. 116, 101st Cong., 1st Sess. 12 (1989). In the House hearings on the bill, the limitations of the Voting Accessibility Act were specifically discussed. One witness described how some jurisdictions had implemented that statute in a manner that was "demeaning to the disabled person" and that "create[d] a loss of dignity and independence for the disabled voter." H.R. 2273, Americans with Disabilities Act of 1989: Hearing Before the Subcomm. on Select Education of the House Comm. on Education & Labor, 101st Cong., 1st Sess. 41 (1989) (statement of Nanette Bowling, Staff Liaison to the Mayor's Advisory Council for Handicapped Individuals, Kokomo, IN).[2/] (The plaintiffs in this case have alleged

[2/]The issue of voting accessibility also arose in the floor debates over the ADA. See 135 Cong. Rec. S10753 (1989) (remarks of Senator Gore) ("As a practical matter, many Americans with disabilities find it impossible to vote. Obviously, such a

(continued...)

that defendants' procedures have caused them a similar loss of dignity. See R. 1 at 5 (¶ 23). These statements demonstrate that Congress specifically targeted the problem of voting accessibility when it enacted the ADA. They provide further support for the conclusion that is apparent from the statutory text: Title II added additional accessibility requirements; its reach is not limited to the narrow protections afforded by existing laws. The district court erred in reaching a contrary conclusion.

C. Discriminatory Denial Of Ballot Secrecy Violates The ADA Even If It Does Not Result In Complete Denial Of The Franchise

In ruling for defendants, the district court also concluded that the denial to blind or visually impaired voters of ballot secrecy -- as opposed to the outright deprivation of the right to vote -- is not sufficiently serious to constitute prohibited discrimination under the ADA. See R. 17 at 5-6 ("[T]he Plaintiffs do not contend that they are being denied the right to cast their ballots. Instead, they want this Court to go even further and find that Congress intended to elevate a blind voter's privacy in casting a ballot to a protected right under the ADA or RA."); R. 17 at 6 n.3 ("Neither the ADA [n]or the RA indicate that voting privacy for blind voters was a 'benefit' Congress sought to protect or a 'discrimination' that Congress sought to

---

2/(...continued)
situation is completely unacceptable and unconscionable. We must take strong action to end the tradition of blatant and subtle discrimination that has made people with disability second-class citizens."); 135 Cong. Rec. S10793 (1989) (remarks of Sen. Biden).

prevent."); R. 17 at 7 ("Similar to the Voting Rights Acts, Congress intended that blind voters have access to the voting booth and freedom from coercion within the voting booth, not complete secrecy in casting a ballot."). That ruling is also incorrect.

The operative provision of Title II is phrased in the disjunctive: "no qualified individual with a disability shall * * * be excluded from participation in or be denied the benefits of" a service, program, or activity "or be subjected to discrimination" by a public entity. 42 U.S.C. 12132 (emphasis added). This language plainly prohibits both the outright exclusion of people with disabilities from government activities and discrimination in the manner in which those activities are administered. See Crowder v. Kitagawa, 81 F.3d 1480, 1483 (9th Cir. 1996). While the Michigan system does not entirely deprive blind or visually impaired voters of the franchise, it clearly discriminates against them. As alleged in the complaint, all other voters in the state are entitled to ballot secrecy, but blind or visually impaired voters are not, simply because the state has failed to adopt reasonable modifications to its existing procedures. As we have explained, that conduct would constitute "discrimination" within the meaning of the ADA and its implementing regulations.

The district court concluded that finding a violation here would improperly "elevate a blind voter's privacy in casting a ballot to a protected right" under the ADA (R. 17 at 5-6). The

district court misconceived the proper inquiry. Title II's prohibition on "discrimination" is not limited to discrimination that affects a "protected right." Rather, it encompasses all disability-based discrimination committed by a public entity. See Crowder, 81 F.3d at 1483; Innovative Health Sys., Inc., 931 F. Supp. at 232; Oak Ridge Care Ctr., Inc. v. Racine County, 896 F. Supp. 867, 872-873 (E.D. Wis. 1995). In this respect, the ADA functions like the Equal Protection Clause, which subjects to strict scrutiny all discriminations involving suspect classifications, whether or not those discriminations also involve "fundamental rights." See Lightbourn, 904 F. Supp. at 1433 ("The ADA is about equality; Plaintiffs seek to be afforded the same rights and privileges as their non-handicapped peers on election day.").

In any event, Michigan's voting assistance procedures deprive blind or visually impaired voters of an exceptionally important interest -- ballot secrecy. The state's constitution itself explicitly protects the "secrecy of the ballot." Mich. Const., Art. 3, § 4; see Belcher v. Mayor of Ann Arbor, 262 N.W.2d 1, 2 (Mich. 1978) (ballot secrecy may not be compromised absent showing that voter acted fraudulently). The Supreme Court has similarly recognized that the secret ballot serves compelling state interests. See Burson v. Freeman, 504 U.S. 191, 206 (1992); see also McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1517 (1995) (observing that the "respected tradition of anonymity in the advocacy of political causes" is "perhaps best exemplified by the secret ballot, the hard-won right to vote

one's conscience without fear of retaliation"); Buckley v. Valeo, 424 U.S. 1, 237 (1976) (Burger, C.J., concurring in part and dissenting in part) ("[S]ecrecy and privacy as to political preferences and convictions are fundamental in a free society. For example, one of the great political reforms was the advent of the secret ballot as a universal practice."). Given their allegations that alternative, inexpensive ballot formats are available, plaintiffs have stated a claim that the failure to choose those alternatives unlawfully "denie[s]" blind or visually impaired voters an important "benefit[]" -- the benefit of ballot secrecy. Thus, even if the Michigan system did not violate the "discrimination" prong of Title II, plaintiffs would still have adequately alleged a violation of the "deny a benefit" prong of that Title. The district court accordingly erred in granting the motion to dismiss.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully Submitted,

ISABELLE KATZ PINZLER
Acting Assistant Attorney General

MARK L. GROSS
SAMUEL R. BAGENSTOS
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-2174

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 1997, two copies of the foregoing Brief for the United States as Amicus Curiae were served by first-class mail, postage prepaid, on the following counsel:

Amy E. Maes, Esq.
Michigan Protection & Advocacy Services
106 W. Allegan St.
Suite 300
Lansing, MI 48933-1706

Denise C. Barton, Esq.
Office of the Attorney General
Public Employment & Elections Div.
P.O. Box 30212
600 Law Building
Lansing, MI 48913

SAMUEL R. BAGENSTOS
Attorney

ADDENDUM

Directed 9/7/84

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

STANLEY D. STEINBORN
Chief Assistant Attorney General

FRANK J. KELLEY
ATTORNEY GENERAL

LANSING
48913

August 31, 1984

Mr. Gerald W. Jones
Chief, Voting Section
United States Department of Justice
Washington, D.C. 20530

ATTN: Mrs. Schwartz

Re: 1982 Amendments to the Voting Rights Act, Public Law 97-205

Dear Mr. Jones:

Your letter inquiring as to what steps the State of Michigan has taken or will take to comply with § 208 of the 1982 amendments to the Voting Rights Act, Public Law 97-205 has been referred to me for reply. The Michigan Election Law, 1954 PA 116, § 751; MCLA 168.751; MSA 6.1751 discusses what assistance may be given to an elector who is unable to mark his or her ballot and provides that this assistance shall be rendered by two inspectors of election or, if the elector is blind, he or she may be assisted by a member of his or her family or by any person over 18 years of age designated by the blind person.

This provision of Michigan Election Law appears to be in conflict with § 208 of Public Law 97-205 in that the handicapped individual must be assisted by inspectors of election only, unless the elector is blind. However, the Michigan Secretary of State, through his authority as the chief election officer of the State of Michigan with supervisory authority over local election officials, has specifically directed these officials to comply with the provisions of the 1982 amendments to the Voting Rights Act. Copies of directions to the local election officials are

166-01
166-37-0

attached to this letter indicating that § 208 of the Voting Rights Act was to be complied with by the local clerks and precinct officials at Michigan's recent primary election.

Therefore, based upon the attached instructions of the Secretary of State issued to local election officials directing them to comply with the Voting Rights Act, no change in Michigan law is required for compliance with the Voting Rights Act at the present time. However, it may be advisable for the Michigan Secretary of State, based upon his position as director of Michigan elections, to request the Legislature to amend Michigan Election Law to specifically comport with the provisions of § 208 of the Voting Rights Act. However, in the interim, please be assured that the Michigan Secretary of State and this office will make every effort to insure that the Voting Rights Act provisions are complied with by all Michigan election officials.

If you have any additional questions or desire further information, please do not hesitate to contact me.

Very truly yours,

FRANK J. KELLEY
Attorney General

Gary P. Gordon
Assistant Attorney General
650 Law Building
525 West Ottawa Street
Lansing, MI 48913
(517) 373-6434

GPG/jad

Attachments

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

MUTUAL BUILDING
208 N. CAPITOL AVENUE

LANSING
MICHIGAN 48918

August 2, 1984

TO ALL COUNTY CLERKS:

Please be advised that the Federal Voting Rights Act of 1965 was amended by Public Law 97-205 of 1982 which added the following section:

Voting Assistance

"Sec. 208. Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of that employer or officer or agent of the voter's union."

This amendment took effect in 1984 and differs from Michigan Law 168.751 which reads as follows:

"Sec. 751. 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. In 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."

Both of these sections are in effect for all elections conducted in Michigan. Precinct inspectors are to be advised of the following procedures.

If a person is requesting assistance of two precinct inspectors, the voter only needs to state that he or she needs assistance. No reason for need of assistance is required. The precinct inspectors shall note the name of the assisted voter in the remarks section of the poll book; that assistance was given; and the names of the two inspectors assisting.

If the person is requesting to be assisted by a person of their own choice the following question must be asked of the voter: "Are you requesting assistance to vote by reason of blindness, disability, or inability to read or write?" Only a "yes" or "no" answer is required. Specific details are not necessary. If the answer is yes to the question, the person who will assist the voter is to be asked: "Are you the voter's employer or agent of that employer or an officer or agent of an union to which the voter belongs?" If the answer is NO, the person may assist the voter. In such a case the precinct inspectors shall note in the remarks section of the poll book the name of the voter being assisted and the name of the person assisting the voter. Under this provision there is no age requirement on who may assist the voter.

Please advise all city and township clerks in your county of the contents of this letter.

Sincerely,

Christopher M. Thomas
Director of Elections

CMT:jmf

Voter requiring assistance: "I will require some help in voting my ballot."

Election Inspector: Are you requesting assistance from two election inspectors or from a person of your choice?

Answer 1

Assisted Voter: "I would like two election inspectors to assist me."

Note: No further questions are required. The election inspector shall note the name of the assisted voter in the remarks section of the poll book; that assistance was given; and the names of the two inspectors assisting.

Answer 2

Assisted Voter: "I would like Mr. John Smith to assist me."

Election Inspector: "Are you requesting assistance to vote by reason of blindness, disability, or inability to read or write?"

Note: Only a "yes" or "no" answer is required. Specific details are not necessary.

Assisted Voter: "Yes."

Election Inspector: Question to the person named to assist: "Are you the voter's employer or agent of that employer or an officer or agent of a union to which the voter belongs?"

Person Chosen to Assist the Voter: "No" - The person may assist the voter. The election inspector shall note in the remarks section of the poll book the name of the voter being assisted and the name of the person assisting the voter.

Person Chosen to Assist the Voter: "Yes" - The person shall not be allowed to assist the voter if he or she is the employer or agent of that employer of the voter or an officer or agent of a union to which the voter belongs.