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 HARRIS AND ROBERTS

Plaintiffs respectfully submit this opposition to the Motion to Dismiss of Defendants Harris and Roberts ("Motion").

I. OVERVIEW

The Motion does not attack the facial sufficiency of the Complaint, and does not suggest that plaintiffs can prove no set of facts in support of their claims. Instead, it argues that this case is not ripe for adjudication because plaintiffs have not presented, and Defendants Harris and Roberts have not declined to approve, any voting system meeting the requirements of the ADA and Rehabilitation Act. (*Motion*, p. 4.) It further argues that Defendants Harris and Roberts owe no duty to voters with visual or manual impairments to ensure that they receive the benefits of and are not discriminated against in the process of voting. (*Id.*) Standing on this erroneous factual and legal predicate, Defendants Harris and Roberts argue that the denial of benefits and discrimination alleged in the Complaint "is not one for which the Secretary is responsible." (*Id.*)

The purported legal basis for this position is the Fifth Circuit's decision in *Lightbourn v. County of El Paso*, 118 F.3d 421 (5th Cir. 1997). For the following reasons, *Lightbourn*

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actually requires *denial* of the Motion when applied to the materially different facts and statutory framework of this case. Moreover, the Fifth Circuit's analysis reveals that the issues raised by the Motion are rife with factual content that cannot be resolved under Rule 12(b)(6) as the Complaint's allegations must be taken as true. Finally, Defendant Harris is in fact an indispensable party to this action, as the Pennsylvania Secretary of the Commonwealth (under facts *identical* to those at issue here) has been held to be an indispensable party. For these reasons, the Motion must be denied.

First, in *Lightbourn*, the Fifth Circuit addressed the *factual* finding that the Texas Secretary of State had not been presented with and had not failed to approve accessible voting equipment. (*Id.* at 431.) Contrary to the statements in the Motion, the Complaint unambiguously makes the allegation that Defendants Harris and Roberts were presented with and declined to approve accessible voting systems. (*Complaint*, ¶¶ 64, 65, 82, 98 and 99.) In fact, Defendants Harris and Roberts have been directly involved in public meetings and official hearings where such requests were made. (*See infra § III.2(a).*) Still, *none* of the voting systems to be purchased by Duval County is accessible to voters with visual or manual impairments. (*Complaint*, ¶¶ 48-49, 53, 63-66.) Under Rule 12(b)(6), these allegations of the Complaint must be accepted as true.

Second, the Fifth Circuit relied heavily on the lack of mandatory statutory requirements incumbent upon the Texas Secretary of State under Texas voting laws. *Lightbourn*, 118 F.3d at 428-29. Because the Texas Secretary of State's duties were all discretionary – he was not *required* to do anything relevant to the claims alleged – the court reasoned that his failure to ensure compliance with the ADA and Rehabilitation Act was of no moment. By contrast, Defendants Harris and Roberts are subject to mandatory statutory duties to act in ways directly related to plaintiffs' claims. For example, they are required to "adopt rules to achieve and maintain the maximum degree of correctness" and to ensure secrecy in the voting process, and have in fact adopted rules establishing uniform standards

for the purchase of voting equipment by local election officials. Fla. Stat. §§ 101.015(3), 101.5606(1) and 101.294(2); Fla. Admin. Code, Rules IS-2.0004 and 2.0007 (2001). These mandatory responsibilities of Defendants Harris and Roberts remove this case from the ambit of *Lightbourn*, and demonstrate that this dispute is present and "ripe" for adjudication.

Third, the Fifth Circuit's decision in *Lightbourn* is further tainted by what plaintiffs respectfully suggest is a flawed and incomplete analysis of the ADA's applicability to voting. The Fifth Circuit concluded that the ADA is not an "election law" and, therefore, the Texas Secretary of State had no duty to ensure compliance with its requirements. The Fifth Circuit's analysis acknowledged but failed to apply the ADA itself, which expresses a clear intent to remedy "discrimination against individuals with disabilities [that] persists in such critical areas as . . . voting." *Lightbourn*, 118 F.3d at 430; 42 U.S.C. § 12101(a)(3). The Fifth Circuit's analysis also omitted any consideration of the applicable legislative history which is legion with pronouncements that the ADA is in fact a law intended to specifically target the voting process. The Fifth Circuit's failure to give appropriate consideration to the express language of the ADA and its legislative history renders highly suspect its conclusion that the ADA is not an election law.

Fourth, unlike the Secretary of State in *Lightbourn*, Defendants Harris and Roberts have unambiguously assumed the responsibility to ensure compliance with the ADA and Rehabilitation Act in the process of voting. Their public announcements, and self-avowed purposes, include the responsibility "to ascertain the obstacles persons with disabilities face in voting in Florida's elections . . . [and] to develop and implement solutions for overcoming these obstacles." (*Exhibit A, Minutes of Sept. 10, 2001 meeting* of *Secretary's Select Task Force on Voting Accessibility*). In addressing this responsibility, Defendants Harris and Roberts analyzed the ADA and Rehabilitation Act and reached no conclusions inconsistent with the full applicability of these laws to their official duties. (*Id.*) Thus, assuming

arguendo they had no responsibility in the first place to ensure ADA and Rehabilitation Act compliance, they assumed such a responsibility as a matter of public policy.

Fifth, in further reliance on *Lightbourn*, the Motion attacks Plaintiffs' Rehabilitation Act claim asserting that the Complaint does not allege that Defendants Harris and Roberts have received the requisite federal financial assistance. (*Motion*, p. 8.) To the contrary, the Complaint makes this specific allegation (*Complaint*, ¶ 112), which must be accepted as true. The specific nature of how, when, and through what means that assistance is provided has been repeatedly held to raise factual matters not appropriate for Rule 12(b)(6). Even in *Lightbourn*, this issue was resolved through the trial testimony of the Texas Assistant Secretary of State. *Lightbourn*, 118 F.3d at 427.

Sixth, the issues raised in the Motion are fact specific and are therefore not appropriate for resolution under Rule 12(b)(6). For example, consistent with the allegations of the Complaint (which must be taken as true), publicly available information indicates that Secretary Harris and Roberts have ignored requests that they certify accessible voting systems, have become closely involved with ensuring compliance with the ADA and Rehabilitation Act, and likely have received federal financial assistance sufficient to sustain the Rehabilitation Act claim. Resolution of these and other issues requires full discovery and a trial on the merits. Even in *Lightbourn*, the Fifth Circuit reviewed "extensive evidence" compiled through a two-phase trial. (*Id.* at 424 and 428 n.7.)[1]

Seventh, in *National Organization on Disability v. Tartaglione*, No. 01-1923, 2001 U.S. Dist. LEXIS 16731 (E.D. Pa. Oct. 11, 2001) the Pennsylvania Secretary of Commonwealth was held to be an indispensable party because he, like Defendant Harris in Florida, is the only Pennsylvania official authorized to approve voting systems. The court

[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.

reached this conclusion on facts identical to those at issue here, concluding that any relief it might ultimately grant the plaintiffs (in the form of new or modified voting systems) would have to be approved by the Pennsylvania Secretary.

For these and the following more specific reasons, the Motion must be denied.

II. APPLICABLE LEGAL STANDARDS

Rule 12(b)(6) motions are "viewed with disfavor and [are] rarely granted." *Brooks v. Blue Cross & Blue Shield., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (citations omitted). The scrutiny under Rule 12(b)(6) is heightened where, as here, "fundamental rights" and "important questions of public policy" are at issue. *DeMallory v. Cullen*, 855 F.2d 442, 445 (7th Cir. 1988); *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994). "The purpose of a Rule 12(b)(6) motion is to test the facial sufficiency of the statement of claim for relief . . . and the analysis of a 12(b)(6) motion is limited primarily to the face of the complaint and attachments thereto." *Brooks*, 116 F.3d at 1368 (citation omitted). The "complaint must be construed in a light most favorable to the plaintiff and the factual allegations taken as true." *Id.* at 1369 (citation omitted). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *Tiftarea Shopper, Inc. v. Georgia Shopper, Inc.*, 786 F.2d 1115, 1117-18 (11th Cir. 1986 (quoting *Conley*)). These stringent standards explain why "[d]ismissal of a claim on the basis of barebone pleadings is a precarious disposition with a high mortality rate." *Id.* (quoting *International Erectors, Inc. v. Wilhoit Steel Erectors & Rental Serv.*, 400 F.2d 465, 471 (5th Cir. 1968)).

III. ARGUMENT

The Motion must be denied because the Complaint makes all of the requisite allegations upon which relief is sought and the bases upon which it rests involve numerous issues of fact that are inappropriate for resolution under Rule 12(b)(6).

1. The Complaint Alleges the Necessary Elements of ADA and Rehabilitation Act Claims

The relevant question before this Court is whether the Complaint makes the necessary allegations to state a claim and not, as the Motion suggests, whether plaintiffs can prove every aspect of their case at this early stage of the proceedings. (*See Motion*, p. 6, improperly suggesting that plaintiffs must "present specific and concrete facts.") There is no dispute that the Complaint alleges all of the required elements of the claims upon which relief is sought. Those allegations must be "taken as true." *Brooks*, 116 F.3d at 1369. Accordingly, the Complaint is facially sufficient and it cannot be said that plaintiffs can prove no set of facts supporting their claims.

a. The Requisite Elements of an ADA Claim Are Pled

Count One of the Complaint alleges a claim under Title II of the Americans With Disabilities Act. "To state a claim under Title II of the ADA, a plaintiff must allege: (1) that he is a 'qualified individual with a disability'; (2) that he was 'excluded from participation in or . . . denied the benefits of the services, programs, or activities of a public entity' or otherwise 'discriminated [against] by such entity'; (3) 'by reason of such disability.'" (*Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001) (quoting 42 U.S.C. § 12132)). Each of these requisite elements -- which must be taken as true -- is alleged in the Complaint, and Defendants Harris and Roberts make no arguments to the contrary. (*Complaint*, ¶¶ 41-44, 57-58, 69, 72, 75, 79, 85, 92-93.) For Rule 12(b)(6) purposes, the Court's analysis need go no further.

b. The Requisite Elements of a Rehabilitation Act Claim Are Pled

Count Three of the Complaint alleges a violation of Section 504 of the Rehabilitation Act. Defendants Harris and Roberts do not suggest that the Complaint fails to allege the necessary elements of a Rehabilitation Act claim. Nor could they, as each predicate allegation is clearly set forth in the Complaint. Indeed, the Complaint alleges that plaintiffs

are "qualified handicapped individual[s]" who have been "excluded from the participation in, . . . denied the benefits of, or [have been] subjected to discrimination under a program or activity receiving Federal financial assistance." (29 U.S.C. § 794(a); *Complaint*, ¶¶ 110-17.) These allegations are true for purposes of Rule 12(b)(6) (*Brooks*, 116 F.3d at 1369), and the Motion therefore must be denied.

The only specific attack lodged by Defendants Harris and Roberts against plaintiffs' Rehabilitation Act claim is that "plaintiffs failed to allege that defendants Harris and Roberts . . . receive federal assistance *for election programs*." (*Motion*, p. 8 (emphasis added).) They contend that a "specific program or activity" with which Harris and Roberts are involved must "receive or directly benefit[] from federal financial assistance in order to state a § 504 claim." (*Id.* at 8-9.) Neither the Eleventh Circuit nor any Florida federal or state court has addressed whether federal financial assistance must be "direct" to state a Rehabilitation Act claim, much less whether a complaint must allege that it is "direct" to survive Rule 12(b)(6). There is ample authority that it need not be "as direct" – *i.e.*, "for election purposes" – as the Motion suggests,[2] and, certainly, a Rule 12(b)(6) motion is inappropriate to resolve this issue of fact.

Whether or not Defendants Harris and Roberts directly receive federal financial assistance is replete with factual issues, making a Rule 12(b)(6) motion inappropriate. Indeed, 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

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[2] *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (holding that the Arkansas Department of Education is subject to a Rehabilitation Act § 504 claim for any of its activities not merely those activities or programs that actually receive federal funds, *cert. denied,* 121 S. Ct. 2519 (2001)); *Shepherd v. United States Olympic Comm.*, 94 F. Supp. 2d 1136, 1146 (D. Colo. 2000) (holding that the U.S. Olympic Committee is subject to a Rehabilitation Act claim where the federal funding went to the committee for other activities not the athlete training program in question); *Sharrow v. Bailey*, 910 F. Supp. 187, 193 (M.D. Pa. 1995) (holding that a doctor is subject to a Rehabilitation Act claim where hospital at which he worked received federal financial assistance).

complaint and, accordingly, is a matter better suited for resolution after both sides have conducted discovery on the issue." *Sims v. United Gov't* 120 F. Supp. 2d 938, 955 (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. 1998); *Gazouski v. City of Belvidere*, No. 93-C-20157, 1993 U.S. Dist. LEXIS 17675, (N.D. Ill. Dec. 13, 1993); *Gonzales Dev. Assistance Corp.*, No. 88-0191-LFO, 1989 U.S. Dist. LEXIS 6921 (D.D.C. June 21, 1989); *Bellamy v. Roadway Express, Inc.*, 668 F. Supp. 615, 618 (N.D. Ohio 1987).

Moreover, Defendants Harris and Roberts do not deny that they have received direct financial assistance, and it is doubtful that they could. Preliminary factual investigation reveals that Ms. Harris' Select Task Force On Voting Accessibility received "written and oral presentation" regarding the applicability of the Rehabilitation Act to the voting process in Florida. (*Exhibit* A.) The written presentation concludes:

> 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.

(*Id.*)

Ms. Harris' Task Force reached no express conclusions as to whether federal financial assistance must be direct at all, much less directly benefit "election programs," to make the Rehabilitation Act applicable. More importantly, why would Ms. Harris' Select Task Force solicit specific advice about the Rehabilitation Act if it did not apply? What was said in the "oral presentation" about the Rehabilitation Act, the nature of the federal financial

assistance received by the State, and the alleged "directness" requirement? Moreover, Mr. Roberts' website reveals that he is involved in federally sponsored voting pilot programs. (*Exhibit B, Director's Office – Division of Elections – Florida Dep't of State*). Is the Florida Department of State being federally funded for its participation in these federal election programs? As the caselaw unanimously provides, these are some of the critical questions that can be answered only through discovery and a trial on the merits. Even in *Lightbourn*, it took full discovery and a two-phase trial to resolve this issue. *See Lightbourn,* 118 F.3d at 427 (trial testimony regarding whether the Texas Secretary of State received federal financial assistance.)

2. This Case is Ripe for Adjudication Because Defendants Harris and Roberts Owe Direct and Present Responsibilities to Voters With Disabilities in Duval County, Florida

The thrust of the Motion is that both the ADA and Rehabilitation Act claims fail because Defendants Harris and Roberts have no present responsibility to plaintiffs and, therefore, this case is not ripe for adjudication. Specifically, Defendants Harris and Roberts argue that:

> Since the complaint has not alleged that the plaintiffs herein have presented any such voting machine to the defendants and that the defendants have failed to approve such a machine, the plaintiffs have not been denied the benefits of services, programs or activities for which the defendants are responsible, which renders this action premature.

(*Motion*, p. 4.)

Based upon this erroneous factual predicate, the Motion concludes that the denial of benefits and discrimination admittedly alleged in the Complaint "is not one for which the Secretary is responsible." (*Id.*). This argument is based exclusively upon the Fifth Circuit's decision in *Lightbourn*. Application of *Lightbourn* to the allegations of the Complaint, however, summarily refutes this position. Indeed, the Complaint unambiguously makes the

very allegations claimed to be missing (which must be taken as true), and the law otherwise imposes direct and present responsibilities upon Defendants Harris and Roberts for the denial of benefits and discrimination alleged herein.

a. Defendants Harris and Roberts Have a Clear Responsibility to Plaintiffs Under *Lightbourn*

Defendants Harris and Roberts concede that if the Complaint "alleged that the plaintiffs herein have presented any such [accessible] voting machine to the defendants and that the defendants have failed to approve such a machine," a denial of benefits or discrimination for which they are responsible has been alleged sufficient to survive Rule 12(b)(6). (*Motion*, p. 4.) They had to make this concession because the Fifth Circuit in *Lightbourn* concluded "[p]erhaps the plaintiffs could state a claim under the ADA if they demonstrated that the Secretary wrongfully refused to approve such equipment after it was presented to him for approval." *Lightbourn*, 118 F.3d at 431.

Contrary to the statement in the Motion (*Motion*, p. 4), however, the Complaint specifically alleges that accessible voting systems were presented to and rejected by Defendants Harris and Roberts:

> · "Plaintiffs have made specific requests of Defendants to certify and purchase only accessible voting systems that ensure Plaintiffs' right and others similarly situated to cast a direct and secret ballot under the same conditions as non-disabled persons." (*Id.*, ¶ 98.)
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> · "Defendants Harris and Roberts have certified voting systems that are not accessible to voters with visual or manual impairments. . . ." (*Id.*, ¶ 65.)
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> · "By certifying voting systems that are inaccessible, Defendants Harris and Roberts have denied Plaintiffs and others similarly situated the benefit of voting by direct and secret ballot and, therefore, have not afforded Plaintiffs and others similarly situated the same opportunity to participate in the voting process as non-disabled voters." (*Id.*, ¶ 82.)

> · "By ignoring Plaintiffs' request to certify only accessible voting systems, Defendants Harris and Roberts have failed to give primary consideration to the requests of voters with disabilities in determining the auxiliary aids and services to provide." (*Id.*, ¶ 99.)

These allegations must be "taken as true." *Brooks*, 116 F.3d at 1369. Therefore, the requisite responsibility of Defendants Harris and Roberts is sufficiently alleged to meet the requirements of Rule 12(b)(6).

Preliminary investigation reveals that these allegations of the Complaint are supported by facts that can be explored only through discovery and trial. On February 1, 2001, at the Fort Lauderdale public hearing of the Governor's Select Task Force on Election Reform a specific request was made for accessible equipment and State officials viewed a variety of accessible voting systems. (*Exhibit C*, Testimony of James K. Kracht before the Governor's Select Task Force on Election Procedures, Standards, and Technology, Feb. 1, 2001, and *Exhibit D*, Letter from James K. Kracht to James C. Smith & Edward T. Foote, Feb. 2, 2001.) Again, on February 13, 2001, that Task Force (together with the Duval County Election Reform Task Force) received specific testimony asking for accessible voting systems. On June 4, 2001, a meeting took place directly with Defendant Roberts where accessible voting systems were presented to Mr. Roberts. Finally, on June 13, 2001, the disabled community met directly with Defendant Harris where specific voting systems were presented. Almost a year has passed, yet *none* of the voting systems to be purchased by Duval County are accessible to disabled voters. (*Complaint*, ¶¶ 48-49, 53, 63-66.) These critical facts can be fully divined only through discovery and trial.[3]

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[3] Even if Defendants Harris and Roberts certify, and Duval County purchases, voting systems defendants contend are accessible, an issue of fact exists. *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"); *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996) ("the determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry"); *McCray v. City of Dothan*, 169 F. Supp. 2d 1260, 1275 (M.D. Ala. 2001) ("[w]hether an accommodation is reasonable 'involves a fact-specific, case-by-case inquiry that considers, among other factors, the

b. Defendants Harris and Roberts Have Express Statutory Responsibilities under Florida Law

Defendants Harris and Roberts argue that they "do not have the duty of ensuring that local election officials interpret and apply the ADA uniformly." (*Motion*, p. 8.) This argument is lifted from the text of the *Lightbourn* decision. However, the holding in *Lightbourn* is based upon analysis of the Texas voting statutes which imposed no mandatory duties upon the Texas Secretary of State to take any action relevant to the claims alleged, and otherwise materially differ from the Florida statutory framework. Under Florida law, Defendants Harris and Roberts are under express and mandatory statutory requirements that did not exist in *Lightbourn*.[4]

Specifically, Florida law provides that Defendants Harris and Roberts "*shall* adopt rules to achieve and maintain the *maximum degree of correctness*, impartiality, and efficiency of the *procedures* of voting, including write-in voting, and of counting, tabulating, and recording votes by voting systems used in the state." Fla. Stat. 101.015(3) (emphasis added).[5] This duty is mandatory. The practical harm caused by the use of inaccessible voting systems is the loss of accuracy. It cannot be disputed that where, as in Florida, visually and manually impaired voters vote through third party assistance "the maximum degree of correctness" cannot be achieved. Mistakes in transmission of the voter's intent can, will, and have been made, not to mention the fact that this process is not "direct" as required by the Florida Constitution. It is Defendants Harris and Roberts statutory mandate

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effectiveness of the modification in light of the nature of the disability in question'") (citation omitted).

[4] The Fifth Circuit in *Lightbourn* placed significant weight on the fact that the applicable Texas statutes were not mandatory but instead provided that the Texas Secretary 'may' take certain action. *Lightbourn*, 118 F.3d at 429.

[5] It should be noted that "counting, tabulating, and recording votes" are functions of local election officials for which Defendants Harris and Roberts have direct responsibility. *Id.* Each function is directly impacted by accessible voting systems.

— and, hence, direct, present and "ripe" responsibility — to achieve and maintain a "maximum degree of correctness." Fla. Stat. § 101.015(3). By ignoring the ADA and Rehabilitation Act, they are not meeting this responsibility.

Again, this argument is not merely theoretical, but is supported by material facts rendering Rule 12(b)(6) inapplicable. Defendants Harris and Roberts are acutely aware that numerous irregularities and inaccuracies have occurred in Florida elections as a direct result of the failure to certify and implement accessible voting systems. On February 1, 2001, they received testimony regarding pollworkers' refusal to read ballots to disabled voters, refusal to properly witness assisted voting, deputization of strangers to shepherd disabled voters through the voting procedures, and refusal to allow visually impaired voters to be assisted by family members. (*Exhibit C.*) Whether and to what extent Defendants Harris and Roberts are not achieving the "maximum degree of correctness" are matters for discovery and trial.

Further, Defendants Harris and Roberts are statutorily and constitutionally mandated to certify only voting systems that "permit[] and require[] voting in secrecy." Fla. Stat. 101.5606(1); Florida Constitution, Art. VI, § 1.[6] Secrecy is not ensured where, as here, the voting systems certified in Florida and to be purchased by Duval County are not accessible to disabled voters. (*Complaint*, ¶¶ 48-49, 52-53, 63-66.) In Florida, disabled voters must cast their votes through the assistance of third parties. This is not a secret much less direct process, and is inherent with all of the problems against which the "direct and secret" entitlement of the Florida Constitution intends to protect. Again, this allegation is not without significant factual support. On February 1, 2001, Defendants Harris and Roberts received testimony about pollworkers openly announcing and negatively commenting on the choices of voters with manual and visual impairments. (*Exhibit* C.)

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[6] The Florida Constitution requires more than secrecy – it mandates that voting be both "direct and secret."

Moreover, as Duval County admits in its motion to dismiss, "[t]he Division [of Elections, Department of State] has 'adopted uniform rules for the purchase, use, and sale of voting equipment' in Florida, such rules relating to the technical and bid specifications for the procurement of such equipment." (*Duval County Motion*, p. 4.) (citing Rules IS-2.0004 and 2.007, Fla. Admin. Code (2001)). Thus, unlike the Texas Secretary of State in *Lightbourn*, Defendants Harris and Roberts have the express duty to ensure uniformity at the local level with respect to the purchase of voting systems. Therefore, the argument that Defendants Harris and Roberts have no duty to ensure that local officials uniformly comply with the ADA and Rehabilitation Act is without merit.[7]

For these reasons, *Lightbourn* is inapposite as Defendants Harris and Roberts, unlike the Texas Secretary of State, are under mandatory duties to address the issues alleged in the Complaint.

c. Defendants Harris and Roberts Have Statutory Responsibility Under Federal Law

Parroting *Lightbourn*, Defendants Harris and Roberts further argue that they have no responsibility for the denial of benefits or discrimination alleged here, because "[t]he ADA is not an election law." (*Motion*, p. 8.) Plaintiffs respectfully suggest that the Fifth Circuit's conclusion in *Lightbourn* is plainly wrong.

The Fifth Circuit's acknowledgement of the express reference to "voting" in the ADA regulations, and dismissal of that reference as "tangential allusion," is unsupportable. *Lightbourn*, 118 F.3d at 430. As the Fifth Circuit noted in *Lightbourn*, 42 U.S.C. § 12101(a)(3) provides "*discrimination against individuals with disabilities persists in [the]*

[7] Defendants Harris and Roberts also have the responsibility to approve "hardware and software for innovative use of electronic and electromechanical voting systems" including standards for "physical and design characteristics." Fla. Stat. 101.015(5)(a)(3). The "physical and design characteristics" of the voting systems currently in use pose a significant barrier to disabled voters and, thus, this responsibility necessarily includes a requirement that ADA accessible voting systems be implemented.

. . . *critical area[]* [of] *voting* . . . ." *Id.* (*emphasis added*). Armed with this clear authority that the ADA governs discrimination in the process of voting, the Fifth Circuit wrongfully concluded that "[t]he mere mention of the word 'voting' here does not transform the ADA into an 'election law.'" *Id.* Plaintiffs respectfully disagree.

The fact that the ADA is indeed an "election law" is unambiguously supported by the applicable legislative history, which was not analyzed by the Fifth Circuit in *Lightbourn*. The Senate Report accompanying the ADA quoted the testimony that "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. 101-116, 12 (1989). The House hearings described how some jurisdictions had implemented the Voting Accessibility Act in a manner that was "demeaning to the disabled person" and that "create[d] a loss of dignity and independence for the disabled voter." *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). Former-Vice President (then Senator) Gore stated: "As a practical matter, many Americans with disabilities find it impossible to vote. Obviously, such a 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." (See 135 Cong. Rec. S10753 (1989).); *accord* 135 Cong. Rec. S10793 (1989) (remarks of Senator Biden).

The "strong action" intended to address discrimination in voting was enactment of the ADA. The laws then in place did not meet the particular needs of voters with disabilities and the ADA expressly intended to fill the gap.[8] What is apparent from 42 U.S.C. § 12101(a)(3)

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[8] 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 prohibit discrimination in public programs, services, or activities, and require that such activities be readily accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.150. They also require, *inter alia,* that priority be given to services offered in the most integrated setting

and other ADA regulations is crystallized by this legislative history – contrary to the Fifth Circuit's position, the ADA is an "election law" that added accessibility requirements applicable directly to voting, and its reach is not limited to the narrow protections afforded by prior laws enacted long before today's technological advances.

d. Defendants Harris and Roberts Assumed Responsibility

Defendants Harris and Roberts argue that they have not yet exercised their admitted discretionary duties over "voting systems, *which would include plaintiffs'* concerns." (*Motion*, p. 8 (emphasis added).) To the contrary, Defendants Harris and Roberts have repeatedly exercised that alleged discretion, and have assumed the responsibility to ensure compliance with the ADA and Rehabilitation Act in the process of voting. When a governmental body makes a policy decision to assume responsibility for an issue *not* expressly imposed upon that body, it also assumes the legal duty to fulfill that responsibility. *Indian Towing Co. v. United States,* 350 U.S. 61, 69 (1955); *Magno v. Corros*, 630 F.2d 224, 227 (4th Cir. 1980); *Commercial Union Ins. Co. v. United States*, 928 F.2d 176, 178 (5th Cir. 1991); *Sheridan Transp. Co. v. United States*, 897 F.2d 795, 800 (5th Cir. 1990); *Eklof Marine Corp. v. United States*, 762 F.2d 200, 202 (2d Cir. 1985); *Thigpen v. United States*, 800 F.2d 393, 401 (4th Cir. 1986); *Sheridan Transp. Co. v. United States*, 834 F.2d 467, 475 (5th Cir. 1987); *Campbell v. United States,* No. 00-11942-NMG, 2001 U.S. Dist. LEXIS 21646, at *12 (D. Mass., Sept. 28, 2001).

Defendant Harris generally describes her mandate as creation of election systems which guarantee that no voter ever doubts whether his or her vote counts. To achieve this

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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).

mandate, Defendants Harris and Roberts set up the Secretary's Select Task Force on Voting Accessibility. The express purposes of the Task Force include:

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.

(*Exhibit* A, *emphasis added.*)

Accordingly, Defendants Harris and Roberts assumed the responsibility to "ascertain the obstacles persons with disabilities face in voting in Florida's elections [and] . . . [t]o *develop and implement* solutions for overcoming those obstacles." (*Id.* emphasis added). In the context of addressing this duty, Defendants Harris and Roberts have evaluated, analyzed, and solicited expert advice regarding the need to comply with the ADA, Rehabilitation Act, and other federal laws. (*Id.*) None of this analysis concludes that they lack the responsibility to ensure compliance with the ADA and Rehabilitation Act. All of it, in fact, suggests such a responsibility. Putting aside that the allegations of the Complaint must be taken as true, and that this raises numerous issues of fact, it is clear that Defendants Harris and Roberts have assumed the responsibility they attempt to evade through their Motion.

For the foregoing reasons, it is clear that Defendants Harris and Roberts have mandatory, present, and thus "ripe" responsibilities to ensure compliance with the ADA and Rehabilitation Act.

3. Defendant Harris Is An Indispensable Party

Defendant Harris is not only a necessary party to this action, she is indispensable. This Court cannot grant full and complete relief in her absence.

In *National Organization On Disability v. Tartaglione*, No. 01-1923, 2001 U.S. Dist. LEXIS 16731 (E.D. Pa. Oct. 11, 2001), the court denied the defendants' motion to dismiss in a case involving identical facts to those alleged in the Complaint. The Court did so because the complaint alleged that voters with disabilities "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."[9]

In so doing, the Eastern District of Pennsylvania in *Tartaglione* also concluded that the Pennsylvania Secretary of the Commonwealth was an indispensable party. The court reached this conclusion because:

> The Pennsylvania Election Code prohibits the use of voting machines which have not been pre-approved by the Secretary of the Commonwealth . . . . Defendants aver, and Plaintiffs concede, that the Secretary of the Commonwealth has not approved any electronic voting machines with the audio output technology required by the visually impaired Plaintiffs. Consequently, if Plaintiffs were to succeed in this proceeding, the Court could not order Defendants to use the accessible voting machines sought by the visually impaired Plaintiffs.

2001 U.S. Dist. LEXIS 16731, at *25-*26. It is undisputed that this is the *identical* factual and statutory situation existing here. *Tartaglione* compels the conclusion that Defendant Harris is an indispensable party to this action.

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[9] Unlike *Lightbourn*, the holding reached in *Tartaglione* is mandated here by Eleventh Circuit precedent which provides that "[a] violation of Title II [of the ADA], 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.'" *Shotz*, 256 F.3d at 1080. Indeed, the Eleventh Circuit recognizes that a burdensome process violates that ADA in the same manner that an absolutely inaccessible process does. Paraphrasing *Shotz* and *Tartaglione*, if the voting system is so burdensome that it is "unfit for the use of a disabled person, then it cannot be said that [it] is 'readily accessible,' regardless [of] whether the disabled person manages in some fashion to [vote]." *Id.*

4. The Pullman Abstention Doctrine Is Inapplicable

Defendants Harris and Roberts concede that the requisite elements of a violation of the Florida Constitution have been pled in the Complaint. They suggest, however, that this Court should abstain from considering plaintiffs' Florida Constitution claim (Count III) under the Pullman Abstention Doctrine. (*Motion*, p. 9.) This argument is predicated upon the Court first dismissing Plaintiffs' ADA and Rehabilitation Act claims because, in such event, Defendants Harris and Robert contend that "there would be no reason for this court to assume jurisdiction of these defendants for the sole purpose of deciding issues governed by state law." (*Id.*) Because, as the foregoing demonstrates, plaintiffs' ADA and Rehabilitation Act claims should not be dismissed, this argument fails.

Moreover, the Court need not abstain under *Pullman* where, as here, the state law at issue is clear. *Baggett v. Bullitt*, 377 U.S. 360, 378 n.11 (1964) (even absent precedent from the state judiciary, court need not abstain where the state law is clear); *see also Pittman v. Cole*, 267 F.3d 1269, 1286 (11th Cir. 2001). The plain meaning of the Florida Constitution's provision granting the right to a "direct and secret vote" is clear – Florida voters have a right to vote both directly and secretly. (See *Opposition to Duval County Motion to Dismiss* at Section III(A)(2).)

Further, courts exercise substantial restraint in invoking the Pullman Doctrine. *Baggett,* 377 U.S. at 375. That restraint is all the more necessary in "voting cases." Indeed, the Eleventh Circuit has made it clear that "voting rights cases are particularly inappropriate for abstention." *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000); *Pittman,* 267 F.3d at 1287. Even in both *Nelson* and *Lightbourn* – the principal authority upon which defendants

rely – federal courts decided issues under state voting laws without application of the Pullman Abstention Doctrine.

Finally, even if the applicable state law was not clear, and restraint was not required, rather than abstain under *Pullman*, federal courts prefer certification of novel state-law questions to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response. *Id.*

For the foregoing reasons, the Pullman Abstention Doctrine has no bearing on Plaintiffs' claims under the Florida Constitution.

IV. CONCLUSION

For the foregoing reasons, the Motion must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition to the Motion to Dismiss of Defendants Harris and Roberts were served by regular United States mail, postage prepaid, this 17th day of January, 2002, upon each of the parties listed below:

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Courtney O. Taylor

A

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,

Secretary's Select Task Force on Voting Accessibility

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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,

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

B

Director's Office

! **Administration/Legal**

- Oversees the interpretation and enforcement of election laws.
- Provides advisory opinions to supervisors of elections, candidates, local officers having election related duties, political parties, political committees, committees of continuous existence or other persons or organizations engaged in political activity, relating to any provisions or possible violations of Florida laws.
- Prescribes rules and regulations to carry out the provisions of the election laws.
- Acts as the Secretary of State's designee with respect to:
  - Interpretation of the election laws.
  - Providing uniform standards for the proper and equitable implementation of the voter registration laws.
  - Actively seeking out and collecting data and statistics necessary to knowledgeably scrutinize the effectiveness of the election laws.
  - Providing technical assistance to the supervisors of elections on voter education and election personnel training services.
  - Providing technical assistance to the supervisors of elections on voting systems.
  - Coordinating with the United States Department of Defense so that the armed forces recruitment offices can administer voter registration in a manner consistent with the procedures set forth in the election laws for voter registration agencies.
  - Providing voter education assistance to the public.
  - Coordinating the state's responsibilities under the National Voter Registration Act of 1993.
  - Providing training to all affected state agencies on the necessary procedures for proper implementation of the Florida Voter Registration Act.
  - Ensuring that all registration applications and forms prescribed, or approved, are in compliance with the Voting Rights Act of 1965.
- Oversees the process by which citizens propose constitutional amendments by initiative.
- Publishes notices of general election stating what offices are to be filled at the general election in the state, and in each county and district.
- Publishes full text of the proposed constitutional amendments in one newspaper of general circulation in each county, once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held. (Article XI, Section 5(b), Fla. Const.) Note: Section 101.171, F.S., provides that the Division of Elections have printed, and furnish to each supervisor

of elections, a sufficient number of copies of the full text of the proposed constitutional amendments to be posted at each precinct on election day.

- Publishes notice of voter registration book closing dates, election dates, assistance for the elderly and handicapped, and instructions for obtaining absentee ballots prior to the first primary and general election pursuant to federal law.
- Prescribes forms for statements and other information required by Chapter 106, Florida Statutes.
- Prepares and publishes manuals or brochures setting forth recommended uniform methods of bookkeeping and reporting, including appropriate portions of the election code, for use by persons required by Chapter 106, Florida Statutes, to file reports.
- Oversees and approves training courses for continuing education for supervisors of elections.
- Serves as depository for official orders and acts of the Governor, such as proclamations, executive orders of reassignment, executive orders of clemency, applications for issuance of extraditions, suspensions and reinstatements of elected and appointed officials, and appointments and commissions of elected and appointed officials.
- Coordinates, on an annual basis, two statewide workshops for the supervisors of elections by reviewing and providing updates on the election laws to ensure uniformity statewide in the interpretation of the election laws.
- Conducts regional workshops around the state for supervisors of elections, candidates, political committees, committees of continuous existence, political parties and groups having election-related interest.
- Oversees the entire budget process for the Division of Elections and pays all bills.
- Provides fiscal analyses to the legislature on all proposed election-related bills and all other proposed bills for the bureaus under the division.
- Makes recommendations to the legislature for changes in the statutes relating to the duties and responsibilities of the division.
- Makes an annual report to the President of the Senate and the Speaker of the House of Representatives concerning activities of the division.
- Oversees and coordinates personnel matters for the division.
- Maintains voter fraud hotline and provides election-fraud education to the public

Voting Systems Section

- Certification of new systems, testing and evaluation.
- Approval and review of modifications, updates, or revisions to the security procedure documents on file with the division.
- Works with the Department of Defense's office of the Federal Voter Assistance Program on the development of a pilot program to enable overseas service personnel to cast absentee ballots over the Internet.
- Worked with the National Association of State Election Directors, and its Independent Testing Authority laboratories to develop a mature national testing program for voting systems.
- Correspondence and meetings with Federal Elections

Commission staff and consultants, on the revision of the National Standards for Voting Systems.

- Provided technical assistance in many areas.

top

C

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February 1, 2001

TESTIMONY BEFORE THE GOVERNOR'S SELECT TASK FORCE ON ELECTION PROCEDURES, STANDARDS, AND TECHNOLOGY

Co-Chairs, and distinguished members of the Governor's Select Task Force on Election Procedures,

My name is James Kracht and I am here representing the American Council of the Blind, the Florida Council of the Blind and as a private citizen. We are here today because for each and every one of us, voting is fundamentally important. In fact, in this country it is a 225 year-old right.

Last November, each and every one of you were able to walk into your precinct and in the true American spirit independently cast a secret ballot. I, on the other hand, could not.

I graduated from a prestigious college and law school. I have become an accomplished and well respected professional in South Florida's governmental and legal communities. I have fathered and raised 2 children. I have been a meaningful contributor to my community by giving time, energy, and leadership to several charities, civic groups, and organizations. I am a significant taxpayer. I am an accomplished computer user, a web surfer, and an avid reader -- all of this I do, striving for independence and success.

But last November, unlike each of you, I could not and did not cast my ballot either independently or secretly. In fact, the more than 250,000 Floridians who are visually impaired have never had that right.

Florida law says that when I go to a precinct I can request a sighted assistant to read and mark my ballot, and further that a witness shall be provided. Last November, to see how it worked, I went to the precinct and I asked for assistance. By the time I reached the voting machine, I thought that I couldn't be further humiliated, but I was wrong. When I asked for the legally required witness, it was shouted across the crowded precinct of at least a hundred people, that "this gentleman doesn't trust me and wants a witness, get over here." And I didn't even crawl under the table when on four more occasions after I

requested the witness to return to the voting machine, similar shouting occurred. I should mention the comments from the assistant on my voting choices; that I was informed I really didn't have to have the ballot questions read but rather my helper would be glad just to summarize them; and that "the witness" wasn't even within hearing or seeing range of the machine more than 80% of the time that I was voting, according to a sighted observer watching from the sidelines. And I should also tell you about my colleague, another blind voter who, like myself, cannot exercise the right to independently cast a secret ballot, who took his own sighted assistant to the precinct, only to be told that he had to use poll workers, and only after being unable to understand three of them, was his father permitted to read and mark his ballot. Conversations with visually impaired voters around the state make it clear that these experiences are not uncommon for our state's visually impaired voters.

The point is that in a system of precincts manned by volunteer part time poll workers with unreadable ballots and unusable voting machines, we have a problem, a huge problem.

I, like all of you, want the right, the ability, and the means to independently and secretly vote. When you examine technology and make your recommendations, I urge you to reflect, to consider, to remember, and to help to finally fully enfranchise Florida's visually impaired voters. Today, with the federal government promoting accessible websites and the government's purchase of only that computer hardware and software which is accessible to the visually impaired population, and today when technology makes it possible to provide absentee ballots, voting machines, and other voting systems which are fully accessible to blind voters, we can finally make a difference.

PLEASE! Do all that you can do, to enable our 250,000 visually impaired Floridians to cast their ballots
with the same independence and secrecy as Florida's other voters.

Respectfully submitted,

James K. Kracht

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February 2, 2001

VIA TELEFACSIMILE
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The Honorable James C. Smith
Mr. Edward T. Foote
Governor's Select Task Force on
Election Procedures, Standars & Technology
c/o Dr. Mark S. Pritchett
Executive Vice President
The Collins Center for Public Policy, Inc.
P.O. Box 1658
Tallahassee, FL 32302-1658

Dear Honorable James C. Smith and Mr. Edward T. Foote, Co-Chairs, and Members of the Governor's Select Task Force:

On behalf of the American Council of the Blind, the Florida Council of the Blind, and as a private citizen I wish to extend my sincere thanks for the opportunity which you afforded us yesterday afternoon to briefly discuss with you the need for acting now, in order to allow Florida's visually impaired voters the right to independently cast secret ballots -- a right which until now has been unavailable. Because voting is such a fundamental right in our system of democratic government, and because "now" is the time for Florida to purchase equipment for a new and improved uniform voting system, I again urge you to hear from the vendor/vendors of the optical scanning equipment you are proposing to recommend, regarding the issue of the system's accessibility to blind voters.

Yesterday afternoon, prior to delivering my testimony, I was pleased to meet and talk with four different exhibiting vendors of touch screen systems who have built into their systems design features that are supposed to enable blind voters, like Florida's other voters, the ability to cast an independent and secret ballot. While only one of the products was actually available to look at, it is clear that at last, voting equipment vendors are responding to the established need to finally fully enfranchise visually impaired voters.

I again strongly urge the Select Task Force Members only recommend acquisition of new voting equipment in Florida counties that extends to our visually impaired voters the fundamental right to independently cast a secret ballot. The American Council of the Blind and the Florida Council of the Blind remain available for any assistance you need in further discussing, evaluating, and investigating accessible voting equipment.

Sincerely,

James Kracht

cc: Mr. Mark Pritchett the Collins Center
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