

FILED

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

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Case No. \_\_\_\_\_

CLERK OF DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO, FLORIDA

THE NATIONAL FEDERATION  
OF THE BLIND, THE NATIONAL FEDERATION  
OF THE BLIND OF FLORIDA, KATHERYN DAVIS,  
JOHN DAVID TOWNSEND, CHAD BUCKINS,  
PETER CERULLO, AND RYAN MANN,

6:05-CV-997-ORL-JA-DAB

Plaintiffs,

v.

VOLUSIA COUNTY and  
ANN McFALL, as Supervisor  
of Elections of Volusia County,

Defendants.

**PLAINTIFFS' MOTION  
FOR A PRELIMINARY INJUNCTION AND  
INCORPORATED MEMORANDUM OF LAW**

Plaintiffs, **The National Federation of the Blind ("NFB"), The NFB of Florida ("NFBF"), Katheryn Davis, John David Townsend, Chad Buckins, Peter Cerullo, and Ryan Mann**, by and through their undersigned counsel and pursuant to Fed. R. Civ. P. 65 and Local Rule 4.06, move this Court for entry of a preliminary injunction, and as grounds therefore state as follows:

**I. INTRODUCTION**

Plaintiffs are blind voters in Volusia County and two organizations that advocate for the rights of the blind. Plaintiffs seek a preliminary injunction to protect their right to vote after Volusia County's June 29, 2005 refusal to acquire voting machines that are accessible to the

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blind in time for the next election. Defendants' refusal to implement the accessible machines violates the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, *et seq.*, Section 504 of the Rehabilitation Act of 1974 ("Section 504"), 29 U.S.C. § 794, and Florida Statutes § 101.56062 (2005). Immediate injunctive relief is necessary to have the accessible voting machines in place for the municipal elections scheduled to take place October 11, 2005.

## II. FACTS

**A. Blind Volusia County voters have brought this action against the County and the Supervisor of Elections to implement accessible voting machines for the next election, as required by federal and state law.**

Plaintiffs, Katheryn Davis, John David Townsend, Chad Buckins, Peter Cerullo, and Ryan Mann (collectively the "Individual Plaintiffs"), are blind voters in Volusia County. Each is a qualified individual with a disability under the ADA and Section 504 and wants to vote independently and secretly in the October 11, 2005 election in Volusia County. (Ex. A.)

Plaintiff NFB is the leading national organization of blind persons. NFB and its state affiliates, including Plaintiff NFBF, are recognized by the public, the Congress, government agencies, and the courts, as a collective and representative voice of blind Americans and their families. (Ex. A.)

Defendant Volusia County is a political subdivision of the State of Florida. It regularly holds elections for residents of Volusia County to choose their federal, state, and local officials. (Ex. B.)

Defendant Ann McFall, who is sued only in her official capacity, is the Supervisor of Elections of Volusia County. As Supervisor of Elections, she is responsible for overseeing

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elections in the County and ensuring that all aspects of the election process comply with the law.

(Ex. B.)

Plaintiffs have brought this suit to require the Defendants to make available at each precinct voting machines that are accessible to the blind, as required by the ADA, Section 504, and Florida Statutes section 101.56062(2).

**B. Volusia County's voting machines are inaccessible to the blind.**

Since 1994, Volusia County has used the "Accu-Vote" optical scan voting system for all elections. This system requires voters to read and mark a printed paper ballot. (Ex. B.)

The Individual Plaintiffs have been unable to vote independently and secretly in Volusia County because they cannot see the paper ballots utilized by the Accu-Vote system. The Individual Plaintiffs, therefore, have needed third-parties to read the ballots to them, and they have been forced to reveal their voting selections to third-parties and rely on third-parties to cast their votes for them. (Ex. A.)

In April 2002, the Volusia County Supervisor of Elections – at that time, Ms. Deanie Lowe – learned of the availability of "touchscreen" voting machines that enabled blind people to vote without assistance from third-parties. Ms. Lowe recommended that Volusia County buy enough of these machines to have one at each precinct. (Ex. B.)

**C. A new Florida law – Section 101.56062, Florida Statutes – requires Volusia County to purchase accessible voting machines, and the State has given Volusia County funds for purchasing the machines.**

Also in 2002, the Florida Legislature amended the Florida Election Code to require “at least one accessible [voting machine] at each precinct.” Fla. Stat. § 101.56062(2). On July 1, 2004, the State appropriated funds for Volusia County to acquire accessible voting machines and has provided Volusia County with a \$699,884 grant for purchasing the machines. If Volusia County does not use the grant to buy accessible voting machines, it will have to refund the money to the State. (Ex. B.)

The requirement, in Section 101.5602(2), that all counties purchase accessible voting machines became effective on July 1, 2005, that is, one year after the legislature appropriated the funds for counties to purchase the machines.<sup>1</sup>

**D. Time is nearly out to implement the new machines in time for the next election.**

It will take approximately ten weeks to program accessible voting machines, train Volusia County Department of Elections staff and pollworkers how to use them, and educate the public. (Ex. B.) According to the County’s own “Implementation Schedule” and “Training Schedule” for new touchscreen voting machines, the County was supposed to begin inventorying the new machines and creating a database by July 1, 2005. (Ex. C.)

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<sup>1</sup>See Section 12, ch. 02-281, Laws of Fla, which provides that Section 101.56062, Fla. Stat. becomes effective “one year after the legislature adopts the general appropriations act specifically appropriate to the Department of State, for distribution to the counties, \$8.7 million or such other amounts as it determines and appropriates for the specific purpose of funding this act.” One year after the adoption of the appropriation was July 1, 2005. See n.1 to Section 101.56062, Fla. Stat.

**E. The Volusia County Council has refused to purchase accessible voting machines for the upcoming election, prompting the Attorney General of Florida to threaten criminal prosecution of County officials.**

On June 29, 2005, the Volusia County Council held a special session to consider a contract to purchase 210 accessible touchscreen voting machines from Diebold Election Systems. (Ex. B.) The Florida Secretary of State, after rigorous testing, has certified these machines for use in Florida elections, pursuant to Section 101.015, Florida Statutes. (Ex. D.) Nevertheless, some Council members speculated the machines might not be trustworthy. (Ex. B.)

During the June 29, 2005 Council session, the County Attorney, Daniel Eckert, specifically advised the Council that they must approve the contract to purchase the machines that day to be in compliance with Florida law. He said, on the record: "There's not another legally available alternative." Nevertheless, the County Council, voted not to purchase the accessible voting machines. (Ex. B.)

The next day, Florida Attorney General Charlie Crist, wrote to the Chair of the County Council to say that the County's refusal to purchase accessible voting machines for the upcoming election was illegal. (Exs. B, E.) Attorney General Crist threatened criminal charges against County officials for violating State election laws, and warned the County that: "interference with a the ability of a voter with a disability to exercise his or her right to vote unassisted could subject the county to liability for a civil rights violation under state law." (Ex. E. at 2.)

**MEMORANDUM OF LAW**

**A. Standard for a preliminary injunction.**

To obtain a preliminary injunction, the moving party must show:

(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause to the non-moving party; and (4) if issued, the injunction would not be adverse to the public interest.

*Charles H. Wesley Educ. Foundation, Inc. v. Cox*, 408 F.3d 1349, 1354 (11<sup>th</sup> Cir. 2005) (quoting *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc)). Plaintiffs fully meet these standards.

**B. Plaintiffs are substantially likely to prevail on the merits.**

Plaintiffs are substantially likely to prevail on the merits because – as the County’s own attorney advised at the June 29, 2005 Council session – purchasing the accessible voting machines “is the only legal option” available to Volusia County in order to comply with State law. And – as the Florida Attorney General warned the next day – the County’s refusal to purchase accessible voting machines subjected the County to “liability for a civil rights violation” against people with disabilities.

Section 101.015, Florida Statutes, requires every Florida County to “include at least one accessible [voting machine] in each precinct.” Volusia County’s refusal to purchase the machines is a blatant violation, and Plaintiffs certainly will prevail on that claim.

The fact that some County officials have speculated whether accessible touchscreen voting machines are reliable is no defense. That argument already has been heard and rejected by

another federal judge in Florida. *Wexler v. Lepore*, 342 F. Supp.2d 1097, 1110 (S.D. Fla. 2004) (“Distrust in an electorate’s ability to properly use new technology does not give rise to an equal protection violation.”)

In addition to their state law claim, Plaintiffs also are substantially likely to prevail on their federal ADA and Section 504 claims. In an extremely similar case, Judge Alley recently held that Duval County’s purchase of optical scan voting machines – like the ones that Volusia County intends to use in the next election – violated the ADA and Section 504 because blind voters could not use them independently. *American Assoc. of People with Disabilities v. Hood*, 310 F. Supp. 2d 1226 (M.D. Fla. 2004), *appeal docketed*, No. 04-11566 (11<sup>th</sup> Cir. April 20, 2004).

**C. Plaintiffs will suffer irreparable harm without an injunction.**

Where the constitutional right to vote is at stake, irreparable injury is presumed. *See, e.g.*, 11 C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 2948.1, at n.21 (1973 ed.). Limiting a citizen’s full participation in the election process constitutes irreparable harm. *Charles H. Wesley Educ. Foundation*, 408 F.3d at 1355; *Johnson v. Mortham*, 926 F. Supp. 1540, 1543 (N.D. Fla. 1996) (three-judge panel). Thus, Defendants’ refusal to let Plaintiffs vote independently and secretly with accessible touchscreen voting machines will cause irreparable harm to the Plaintiffs on October 11, 2005 if not enjoined immediately.

**D. The harm Plaintiffs will suffer without an injunction outweighs any harm to the County.**

In contrast to the irreparable harm Plaintiffs will suffer without accessible voting machines, Defendants will suffer no harm by being ordered to implement the machines. The

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money to purchase accessible voting machines already has been provided by the State of Florida, and Volusia County will have to refund the money if the County does not use it to purchase the accessible machines. *Cf., American Assoc. of People with Disabilities v. Hood*, No. 3:01cv1275, 2004 Westlaw 1041536 at \* 2 (M.D. Fla. April 16, 2004) (staying order to purchase accessible voting machines, pending appeal, because County would have to use its own funds to purchase the machines). Moreover, the County already has in place a plan for implementing the machines in the next election. Only the Council's June 29, 2005 failure to execute the purchase contract has prevented County personnel from implementing the machines for the next election.

**E. An injunction would benefit the public interest.**

An injunction that protects citizens' access to voting "is without question in the public interest." *Charles H. Wesley Educ. Foundation*, 408 F.3d at 1355. Especially in this case – where Congress and the Florida Legislature have enacted laws to give disabled people full access to public voting facilities – an injunction that Volusia County comply with those laws is in the public interest. *See* 11 C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 2948.4, at n.7 (1973 ed.) (Where congress has enacted a statute declaring the public interest, ordering compliance with the statute benefits the public interest).



**IV. CONCLUSION**

For the reasons set forth above, the Court should enter a preliminary injunction ordering Defendants to implement at least one accessible touchscreen voting machine at each precinct at by the next election on October 11, 2005.

Respectfully submitted,

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<sup>2</sup> Messers Goldstein and Schreiber are not admitted to practice in the State of Florida. A Motion for their Admission Pro Hac Vice, pursuant to Local Rule 2.02, will be filed promptly.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on the Defendants by Hand via Process Server, and by Telecopy & Electronic Mail on Diego "Woody" Rodriguez, Esq., (Counsel for McFall) Marchena & Graham, 233 S. Semoran Blvd, Orlando, Florida 32807-3232 (407.281.8564) (dwrodriguez@mgfirm.com), and Daniel Eckert, Esq., (Counsel for Volusia County), County Attorney's Office, 123 W Indiana Ave, Deland, Florida 32720-4615 (386.736.5990) (deckert@co.volusia.fl.us), this 5<sup>th</sup> day of July, 2005.

By:   
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**Miguel M. de la O**