UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

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

Plaintiffs,

v.

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

Glenda Hood, as Secretary of State for the State of Florida; Edward C. Kast, as Director, Division of Elections; and John Stafford, as Supervisor of Elections, Duval County.

Defendants.
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RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Local Rule 3.01(b), Defendant, John Stafford, as Supervisor of Elections, Duval County, provides this response in opposition to the "Plaintiffs' Motion for Summary Judgment Against Defendant John Stafford On Count I (ADA) of the Amended Complaint." Plaintiffs' motion should be denied because it fails to meet the standards of Rule 56. In addition, the absence of any disputed material factual issues renders the Defendants' pending motions to dismiss/summary judgment due to be granted.

I. PLAINTIFFS' REQUEST FOR SUMMARY JUDGMENT IS MERITLESS.

The most notable aspect of Plaintiffs' submission is the degree to which they have misstated the record in this case. Plaintiffs have patched together snippets, half-statements and outright inaccuracies in order to make it appear that Defendant Stafford has run roughshod over the ADA, and that he has even admitted doing so. They tell this Court that Supervisor Stafford "does not dispute" that "he has failed" to comply with the ADA, "concedes" that Plaintiffs have been mistreated, and "offers no excuse" for his purported

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failures. [Ps' Memo. 1-2][1] Indeed, almost every significant statement Plaintiffs attribute to Supervisor Stafford is incomplete or fails to mention important qualifications or facts necessary to put it in context or make it accurate. Plaintiffs' "fast and loose" rendition of the record is enough for this Court to summarily deny their motion.

Plaintiffs' counsel has also asserted a generic ADA claim with no factual basis for doing so. Given the prior dismissal of their state constitutional claim, as well as their ADA and RA claims attacking third-party assistance, one would expect that they would not further advance this lawsuit without some factual basis other than their unhappiness with the Court's ruling. Instead, consider the following emphatic responses of Plaintiff O'Connor:

> Q: ... other than your complaint that you require third-party assistance at the polls, other than that, is there any other basis you have for asserting that Duval County, through the Supervisor of Elections Office, has discriminated against you?
> A: ***There is no other basis***. ...
> ...
> Q: ... other than your complaint about having to use third-party assistance at the polls –
> A: Un-huh.
> Q: -- do you have any other basis for contending that Duval County, through the Supervisor of Elections Office, has discriminated against you?
> A: ***No other basis***. ...

[O'Connor at 48-49] (emphasis added). As the highlighted language indicates, the sole basis for the Plaintiffs[2] continuing this litigation is their generalized complaint that third-party assistance violates that ADA by forcing them to vote in a "materially different" or "less

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[1] Citations to Plaintiffs' Memorandum will be [Ps' Memo *] where * denotes page number(s). Plaintiffs have filed all depositions including exhibits. Citations to depositions will be by last name (e.g., [Stafford *]), where * denotes page number(s).

[2] As discussed below, Plaintiffs Bowen and Bell testified similarly as to third-party assistance being the basis of this lawsuit.

secret" manner that "reveal[s] their vote to a third party." [Ps' Memo 4-6] This Court, having already dismissed Plaintiffs' ADA claim on this theory, should dismiss this action based on Plaintiffs' failure to produce factual grounds for their ADA discrimination claims.

II. PLAINTIFFS' "STATEMENT OF UNDISPUTED FACTS" IS INACCURATE.

Because of the numerous gross inaccuracies in Plaintiffs' submission, sections II(A)-(E)[3] below set the factual record straight. In section III, a response to Plaintiffs' legal arguments is provided, which demonstrates that dismissal or final summary judgment should be entered in Supervisor Stafford's favor, not the Plaintiffs.

A. *Duval County Purchased Its Voting System In February 2002.*

Plaintiffs' assertion that "Duval County purchased a new optical scan voting system on October 3, 2002" is false. In making this assertion, Plaintiffs attempt to make it appear that Supervisor Stafford waited until a month before the November 2002 general election (and a month ***after*** the primary election had been already held) before purchasing the new voting system and intentionally ignored other options available up to that time.

As Plaintiffs surely know, Supervisor Stafford "closed the deal" in "***February 2002***." [Stafford 95, 130 (emphasis added)]. In the fall of ***2001***, Supervisor Stafford began reviewing ***all*** voting systems available and certified by the Florida Secretary of State. [Stafford 134] Following a thorough review in December 2001 of available and certified systems, in

[3] For purposes of this response, Supervisor Stafford does not contest that each of the individual Plaintiffs has a disability that is recognized under the ADA.

January 2002 he formally requested that the City of Jacksonville procure the Global[4] optical scan system along with three touchscreens with audio components for visually disabled voters. [Stafford 130] His procurement request was approved by the City of Jacksonville Awards Committee in February 2002, effectively becoming a legally enforceable contract at that point. [Stafford 130-32; Gibbs Ex. 2] The financing of the equipment, via a lease rather than a sale, delayed the formal signing of the agreement until October 3, 2002 – the date upon which Plaintiffs fixate. [Gibbs 50-51 (changes to agreements due solely to financing and name change and not the actual purchase of the voting machines)] By then, the vendor had long ago delivered the voting system, ***which had already been used in the September 2002 primary in Jacksonville.***

Specifically, the vendor began delivery of the equipment in ***April 2002*** with additional deliveries in May and June 2002 totaling 315 machines. [Stafford 132-33] Supervisor Stafford had to have in his possession all voting equipment no later than late July or early August 2002 in order to have sufficient time to prepare for the September 2002 primary. [Stafford 133] It would have been impractical for him to make a purchasing decision later than he did, or revisited it, to include systems certified in 2002. [Stafford 134] As Supervisor Stafford noted, the actual decision to purchase in January 2002 "might have been a couple of months ***later*** than we should have been because we did, you know, look at all the machines available." [Stafford 134 (emphasis added)]

[4] The original vendor was named Global Elections System. Subsequent to the purchase, Global was purchased by Diebold Elections Systems. Consequently, the voting system at issue in Duval County will be termed the Diebold/Global system for purposes of this memorandum.

Rather than a hasty, last minute decision to contract for voting equipment on October 3, 2002 without consideration of touchscreens or accessibility issues, Supervisor Stafford (a) made a thorough review of existing certified systems almost a year earlier in Fall 2001, (b) requested in January 2002 the procurement of the Diebold/Global system, which was approved in February 2002, (c) received shipment of the system in April, May and June 2002, and (d) held the primary election on the Global system in September 2002. Plaintiffs' representation that Supervisor Stafford could have purchased any voting system up until October 3, 2002 is insupportable.[5]

B. *The Diebold Contract Provides For Accessible Touchscreens.*

The Plaintiffs wrongfully make it appear that Supervisor Stafford ignored touchscreen technology as well as accessibility issues generally. They assert that Supervisor Stafford had an array of options for obtaining an "accessible" voting system rather than the Diebold/Global system. [Ps' Memo 6-8] They point to various systems that were certified in Florida ***after*** the procurement of the Diebold/Global system. [Ps' Memo 7]

They overlook that the Diebold/Global System had already been formally approved for purchase and use in Duval County prior to the various vendors (e.g., Sequoia) subsequently receiving certification for their touchscreens with audio components later in 2002. [Stafford 134-35; Ex. 12 & 13; Craft Ex. 13-17] As discussed above, the City had already procured the Diebold/Global System in February 2002, with deliveries beginning in April 2002. At that

[5] In this section, Plaintiffs claim that "poll workers in Duval County" have challenged disabled voters right to vote based on their appearance. [Ps' Memo 6] They severely distort a single isolated episode in which a single poll worker mistakenly challenged some disabled voters. [Stafford 76-78] The matter was immediately remedied and the poll worker discharged. [Stafford 76-78]

time, only an ESS touchscreen with audio ballot had been certified for use in Florida [Craft 130-31] with only small counties choosing it. [Stafford Ex. 16 & 17 (Sumter and Pasco Counties)]. Supervisor Stafford had evaluated the ESS system and found it lacking because it did not have the lowest error rate, had an undesirable override feature that allowed voters to overvote, and was slow in uploading. [Stafford 96-97] He felt the Diebold/Global system's touchscreen was superior and had contractual assurances that it would be available for Fall 2002 elections. [Stafford 97]

Months later, after the Diebold/Global system was approved and purchased after a thorough review of all systems including ESS, a few more vendors obtained certification for audio components. [Craft Ex. 13-17] Even if the Diebold/Global systems could be jettisoned at that point, and an entirely new system procured at such a late date, it would have been speculative whether any of those systems could be implemented and put in place in time for the upcoming primary and general elections. [Stafford 135]

Plaintiffs also fail to mention that the contract with Diebold/Global includes the option to trade in the optical scan system for accessible touchscreens, which is consistent with the Duval County Task Force's report recommending the purchase of optical scan with a transition period to touchscreen. [Teal Ex. 13, p. 22][6] The Report stated:

> The Task Force carefully considered both technology options, hearing presentations from vendors, the Supervisor of Elections, and other authorities. It recommends that Duval County ***adopt precinct-based optical scanning technology for no more than two to four years, accompanied by a firm commitment to acquiring DRE [direct recording electronic] technology***

[6] The Report found that disabled voters "were appropriately accommodated" and "commend[ed] the Supervisor of Elections on all of these accommodations." [Teal Ex. 13, p. 22] The Report recommended consideration "be given to the establishment of a centralized voting facility for extraordinary access." Id.

> ***thereafter.*** In reaching this conclusion, the Task Force considered the current state of technological reliability, state certification and cost. It was also influenced by the possibility of recovering a substantial portion of the cost of interim technology through leasing or otherwise recovering the residual value of the optical scan equipment.

Id. (emphasis in original). Consistent with the Task Force's recommendations, the contract gives the City full credit for monies paid for the optical scan system thereby making the transition to touchscreen more economically feasible. [Stafford Ex. 19 p. 4]

Thus, rather than Supervisor Stafford being hostile to touchscreen systems and compatible components for the disabled, he ensured that the City would be able to convert to compatible touchscreen technology as it became more available and proven as a voting system without adverse financial consequence to the City. [Stafford 91] ("We decided that back in – I want to say December 2001 – that when we bought a system, we wanted that capability, for touchscreen with audio."). He testified the more touchscreens are planned to be purchased and made available in every precinct pursuant to pending laws and funding. [Stafford 22]

C. *Touchscreen Technology With Audio-Components Is A Recent Development.*

Plaintiffs' claim that "touchscreen" voting technology has a "proven" track record, inferring that it has been available/affordable for many years and will remedy accessible issues for the disabled.

Plaintiffs assert that "Mr. Stafford admitted that touch screen voting machines have a proven track record in Florida counties other than Duval County [Ps' Memo. 14] Instead, Supervisor Stafford stated precisely the opposite. He noted that there are both advantages and disadvantages of touch screen systems [Stafford 82-83 & Ex. 10], but specifically testified that touch screens do not have a sufficient track record yet. He stated "I would think there's a

track record now in the State of Florida, because some counties bought that screen." [Stafford 83] But, he specifically ***disagreed*** with the Plaintiffs' attempt to characterize it as a "proven" track record. [Stafford 83-84] He said that he "would have to look at how they performed in all counties" and that "there were some problems in certain areas." [Stafford 83] He specifically testified that the problems with touch screen systems in Broward and Miami-Dade were of concern to him. [Stafford 83-84] As such, Plaintiffs have again severely misrepresented Supervisor Stafford's testimony in a material way.

In addition, Plaintiffs fail to present the testimony of their own witnesses that demonstrated that touchscreen systems are not nirvana and are only now in an emerging, nascent state, particularly in larger jurisdictions. Plaintiffs were able to point to only two significant larger jurisdictions in the entire country that have rolled out accessible "touchscreen" systems: (a) Riverside, California and (b) the State of Georgia (which chose the Diebold/Global voting system at issue). [*See generally* Deposition of Georgia Secretary of State Cox 143-45]. Plaintiffs also overlook that the Elections Supervisor in Harris County, Texas decided against touchscreens because of maintenance and financial concerns; instead, she chose a system with buttons that do not require that voters touch a screen. [Kaufman 35-39] ("The task force felt that touch screen technology was delicate, easily damaged and would require a lot of maintenance which could be expensive."). Plaintiffs also overlook that major jurisdictions such as Harris County, Texas and the State of Georgia only phased in touchscreen systems as of Fall 2002 and used optical scan, punch cards and even lever machines up until that time. [Cox 10, 138-39 (discussing phasing out of lever and punchcard); D's Comp. Ex. 1 pp. 9-11 (chronology); Kaufman 66 (most voters in Harris County voted on punch cards until April 2002)]

D. *The Diebold/Global Contract Requires Three Certified Audio Touchscreens.*

Plaintiffs make much ruckus about the three Diebold/Global touchscreen units with audio ballots that were to be used at the Supervisor of Elections office during the Fall 2002 elections. Again, Plaintiffs fail to provide a full and accurate picture of the situation.

As a part of the Diebold/Global system, it was promised to Supervisor Stafford that three touchscreen units with audio-capability were to be provided in sufficient time for the Fall 2002 elections to be used at the Supervisor's Office as an option for disabled voters who wished to utilize the equipment at that location. [Stafford 63; Ex. 19, Exhibit A (Vender "shall have [audio] certification completed in time for use in the September Primary Election of 2002.") (emphasis added)]

Diebold/Global was to provide the equipment without charge and to ensure it had been certified for use in Florida at that time. [Stafford 97; Ex. 19, Exhibit A] Diebold, however, failed to do so (despite having sought and obtained certification for statewide use of their audio ballot in Georgia). [Stafford 98] For this reason, Diebold has breached its agreement and appropriate action is being taken in that regard.

No evidence exists that the failure of Diebold to provide these three touchscreens is attributable to Supervisor Stafford. Instead, Supervisor Stafford – through foresight – requested these machines so that they could be experienced and considered for roll-out in the future pursuant to the above-mentioned option in the Diebold contract. [Stafford 98-99] Supervisor Stafford specifically testified that his plan was is implement more and more audio touchscreens throughout the county. [Stafford 99] Plaintiffs have misportrayed the Supervisor's laudable intent in requesting these machines and thereby proven the adage that "no good deed goes unpunished." They go so far as to say Supervisor Stafford "exacerbates

the discrimination" against them by obtaining these machines. [Ps' Memo. 18] Supervisor Stafford's testimony and actions simply cannot be twisted in this manner.

In addition, the Plaintiffs make it sound as if touchscreen technology with audio components will be made available in perpetuity only at the downtown Jacksonville location where an alleged 40,000 disabled voters will have to vote. [7] [Ps' Memo 18] Plaintiffs overlook both the federal and state legislation that will require some form of this type of technology in the near future.

E. *The One Specific Request For A Voting System Was For Diebold.*

Plaintiffs claims that "Duval County received specific requests to provide equipment with auxiliary aids" for disabled voters, pointing to a few generic, sporadic contacts that were made with the Supervisor's office. Plaintiffs fail to point out that the only specific request for a particular voting system was by Plaintiff Bowen, who stated in her affidavit that Supervisor Stafford should inquire into the Diebold system.[8] The Diebold system, of course, is the system that Supervisor Stafford determined was the best for Duval County (both the optical scan and the touchscreen with audio component). It is also the system certified and used statewide in Georgia for the first time in the Fall of 2002. [*See generally* Cox Depo.]

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[7] Their speculation about 40,000 disabled voters crowding into the Supervisor's office is not based on any evidence. Moreover, this number is merely an unsupported *allegation* in Plaintiffs' amended complaint.

[8] Plaintiff Bowen's affidavit states "I told the official about the accessible equipment, gave him the name of the president of Diebold corporation, one company that manufactures such equipment, and gave him Diebold's Web site." [Bowen 56] Plaintiff Bowen testified, however, that the language in her affidavit was not urging the purchase of Diebold equipment. [Bowen 62]

F. The Plaintiffs' Voting Experiences, Like Their Daily Life Experiences, Are Not The Product of Discrimination Based On Their Disabilities.

Finally, the Plaintiffs make repeated assertions of "fact" about various conditions they have faced at the polls in Duval County as support for a generic ADA claim of discrimination.[9] These conditions, however, are no different from those they generally face and are not due to the voting experience itself. For instance, Plaintiffs claim of having to vote (a) "materially different" or in a "different manner" (b) in "a more intrusive and less secret manner" or (c) in a manner that "reveal[s] their vote to a third party." [Ps' Memo. 4-5] Beyond each of these being Plaintiffs' indirect attack on the third-party assistance statue, section 101.051, Florida Statutes, each can be said to stem from the type of third party assistance upon which Plaintiffs rely in their daily lives for various major activities, not from the voting experience in isolation.

For instance, Plaintiff Bowen who is blind relies on other persons for important daily activities such as paying bills or identifying grocery items. [Bowen 26-29] Plaintiff O'Connor who is legally blind (but retains the ability to read albeit more slowly with difficulty) relies on other persons to assist with meals, grocery shopping, paying bills, and various tasks around the office in which he works. [O'Connor 15-16, 23-26, 29-32] Plaintiff Bell who is manually disabled relies on others for important daily activities such as dressing, personal hygiene, and feeding. [Bell 19] Each of these activities requires a different and more intrusive living experience than that other non-disabled individuals experience.

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[9] Plaintiff Bowen voted absentee until the September 2002 primary election. [Bowen 20] Plaintiff O'Connor has voted in every election in Duval County since 1992. [O'Connor 33-34] Plaintiff Bell testified that he moved to Florida in 2001 and has voted three times in Duval County (in a special election in 2001and in the primary and general elections of 2002). [Bell 52-53]

Notably, Plaintiffs make three additional assertions that are not supported by their citations to the record. First, they claim that they face a "risk" of third parties influencing their votes that is not faced by non-disabled voters. In doing so, they cite to Supervisor Stafford's testimony, which – in fact -- indicates that such a concern would be speculative. [Stafford 53-53] Moreover, no evidence exists that any Plaintiff or disabled voter in Duval County has encountered such a "risk." Second, the Plaintiffs claim that Supervisor Stafford acknowledged that "attention" is drawn to them when they cast their votes that is not experienced by non-disabled voters. The inference is that this is "bad" attention. But, the "attention" to which Supervisor Stafford was referring is the attention of poll workers in providing third party assistance under Florida law. [Stafford 51-52] Third, and similarly, Plaintiffs claim they are subject to discriminatory "delay" [Ps' Memo. 5], when – in fact – the testimony of Supervisor Stafford (upon which they rely) makes clear that any purported delay is de minimus and due solely to ensuring compliance with Florida law, particularly third party assistance. [Stafford 53] Again, Plaintiffs have misconstrued the record in this manner.

III. PLAINTIFFS' LEGAL ARGUMENTS ARE MERITLESS AND CONTRARY TO THIS COURT'S PRIOR DISMISSAL ORDER.

The Plaintiffs' legal argument is based on their displeasure with the requirement that Supervisor Stafford follows his legal duty by providing third party assistance under section 101.051, Florida Statutes. They have asserted this claim despite this Court having dismissed it on October 16, 2002. Plaintiffs were specifically instructed by this Court to replead, if the facts supported it, an ADA claim on a generic discrimination theory. As discussed below, no Plaintiff testified to any recognized legal claim of discrimination generally. As such, their motion for summary judgment against Supervisor Stafford should be denied.

1. *Plaintiffs' Rendition of the "Undisputed Facts" Is Violative Of The Standards of Rule 56 Thereby Justifying Denying Relief.*

At the outset, a party moving for summary judgment in federal court bears not only the legal burden of demonstrating that judgment is appropriate in its favor, but also a duty of candor in stating the factual basis for their claim for relief. It is rote law that this Court's review must be based on viewing "evidence and factual inferences therefrom in the light most favorable to the opposing party." Rowe v. Board of Trustees for Florida School for Deaf and Blind, 70 F. Supp. 2d 1283, 1286 (M.D. Fla. 1998) (Nimmons, J.) (*citing* Clark v. Coats & Clark, Inc., 929 F.2d 604, 606 (11th Cir. 1991)).

Here, Plaintiffs have thwarted the proper role of this Court's review by failing to present the facts in the manner required by law. Rather than present the testimony and evidence in a light most favorable to Supervisor Stafford, Plaintiffs have done precisely the opposite. They have mischaracterized his testimony and slanting it so severely as to forfeit their privilege of having this Court even consider the relief they request.[10] Courts should not countenance this type of systemic misstatement of the record.[11] It is respectfully submitted that Plaintiff have not meet their initial burden under Rule 56 and that this Court should not accord any relief to Plaintiffs in light of the defective submission on their behalf. As the next

[10] *See, e.g.,* Divot Golf Corp. v. Citizens Bank of Mass., 2003 WL 61287 (D. Mass. 2003) (repetition of factual misstatements and legally untenable claims grounds for sanctions).

[11] In re Kunstler, 914 F.2d 505, 514-15 (4th Cir. 1990) (misstatements of fact not "isolated" and, instead, "pervade" the allegations and were "central to the complaint.") (noting that plaintiffs "appear to have relied entirely upon discovery in the hope of finding some factual support for many of their claims.").

sections explain, Plaintiffs have failed to raise any genuine issue for trial on their claims of discrimination under the ADA.

2. *Stafford Has Not Excluded Any Plaintiff From Participation In A Program of Voting.*

In support of their "program exclusion" claim, the Plaintiffs rely upon their embellished testimony of Supervisor Stafford to support their recurring and central theme that the provision of third party assistance, required under Florida law, forces them to vote in a different manner than non-disabled voters thereby violating the ADA. Their theory is that ***any*** voting system that requires third party assistance violates the ADA, which is not the law or the ruling of this Court. Further, no Plaintiff has been excluded from participation in a voting program or denied access to any voting facility or equipment.

Rather than advance some new or different claim under the ADA, or provide some evidence to support their assertions, the Plaintiffs have merely repackaged their prior state law and ADA claims in different language. It would be redundant and wasteful for Supervisor Stafford to again repeat the legal basis for why Plaintiffs' "program exclusion" claim is not viable, having done so in his pending motion to dismiss/summary judgment as well as in his responses to Plaintiffs' motion for reconsideration and their supplemental memorandum in support of reconsideration. That this Court and the Sixth Circuit in Nelson v. Miller, 170 F.3d 641 (6th Cir. 1999) have dispensed with this claim should be sufficient.

Plaintiffs have offered no evidence that they have been denied access to any facility or equipment.[12] No Plaintiff was denied the right to vote or claimed any poll accessibility

[12] Plaintiffs claim that this Court has already held that voting machines are "equipment" within the meaning of 28 CFR § 35.149. [Ps' Memo 13] This Court did not make that ruling; instead, it

problems. Each testified to voting with the assistance of a third party without incident. [Bowen 32-33 ("... the ladies [poll workers] were really nice. They treated – you know, they treated us well and everything."); O'Connor 36, 37-39 (voted with wife's assistance except once at Supervisor's Office in 2002);[13] Bell 23-24 (two people assisted by marking ballot and feeding it into machine) 26-27 (poll worker assisted/personal care attendant assisted)][14] None could point to any evidence that they were discriminated against at the polls in Duval County because of their disability. At best, there was passing reference to an occasional short delay of a few minutes because of a request for accommodations [Bell 34 (five minute wait)] or a suspicion that a poll worker acted insensitively. [Bell 43, 46-47] The voting system at issue, which is used in various jurisdictions throughout Florida (and the United States), is not "inaccessible" as Plaintiffs claim. It is "readily accessible and usable"[15] as demonstrated by Plaintiffs' own testimony, each indicating that they voted without incident on the new system. Because no Plaintiff was prevented from participating in the voting program at issue, which is readily accessible, they have failed to demonstrate grounds for relief.

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stated in passing that it appeared to be that voting machines are included. AAPD, 227 F. Supp. 2d at 1290 n. 16. Even if this Court rules that voting machines are "equipment" covered by the ADA, no record evidence demonstrates that those certified by the State of Florida and purchased and used in Duval County are "inaccessible" or "unusable" by the Plaintiffs.

[13] O'Connor testified that he could hear others speaking nearby, but he did not ask to move. [O'Connor 38-39] He also believed that a poll worker was not "forthcoming" about party affiliations of candidates in a particular race, but clarified that the poll worker – when asked – provided party affiliations as requested. [O'Connor 39]

[14] Bell testified that he felt he may have been given an incorrect ballot, but it was speculation whether it was based on discrimination due to disability. [Bell 28]

[15] *See* Shotz v. Cates, 256 F.3d 1077 (11th Cir. 2001); 28 C.F.R.§ 35.151 (new construction and alterations).

3. *Stafford Has Not Failed To Provide Effective Communications To Plaintiffs.*

Plaintiffs cite no legal precedent in support of their claim under 28 CFR § 35.160 other than the regulation itself, which provides that the government shall makes its communications to the public effective by providing appropriate auxiliary aids as needed. The reason is that none exists. The caselaw makes clear that the regulation is met if a public entity provides a means of communication via "auxiliary aids" for an individual with, for example, a hearing disability that enables effective communication in court proceedings,[16] in public education,[17] in public transportation[18] and other contexts where the government communicates information. "Auxiliary aids and services" include

> (1) ***Qualified interpreters***, ***notetakers***, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or ***other effective methods of making aurally delivered materials available to individuals with hearing impairments***;
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> (2) ***Qualified readers***, taped texts, audio recordings, Brailled materials, large print materials, or ***other effective methods of making visually delivered materials available to individuals with visual impairments***;
>
> (3) Acquisition or modification of equipment or devices; and
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> (4) Other similar services and actions.

28 CFR § 35.104 (emphasis added); Petersen v. Hastings Public Schools, 31 F.3d 705, 708 (8th Cir. 1994) (no merit to plaintiffs' claim that their choice of signing communications was rejected improperly) (concluding that after "modified signing system" was implemented,

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[16] *See, e.g.*, Santiago v. Garcia, 70 F. Supp. 2d 84 (D. Puerto Rico 1999).

[17] *See, e.g.*, Petersen v. Hastings Public Schools, 31 F.3d 705, 708 (8th Cir. 1994).

[18] *See, e.g.*, Burkhart v. Washington Metropolitan Area Transit Auth., 112 F.3d 1207, 1213 (D.C. Cir. 1997).

the "children's scholastic performances improved. Therefore the system has proven to be an effective means of communication.").

As the highlighted language makes clear, the range of permissible methods of ensuring effective communication is broad and specifically includes third party assistance. And while "'a public entity shall give primary consideration to the requests of the individual with disabilities' ... Nevertheless, '[t]he auxiliary aid requirement is a flexible one, and [covered entities] can choose among various alternatives as long as *the result is effective communication*'" *Id.* at Pt. 36, App. B (emphasis added)." Hahn ex rel. Barta v. Linn County, Iowa, 191 F. Supp.2d 1051, 1064 (N.D. Iowa 2002) (citing regulations); *See also* Burkhart v. Washington Metropolitan Area Transit Auth., 112 F.3d 1207, 1213 (D.C. Cir. 1997) ("individual's request need not be honored if 'another effective means of communications exists.'") (citing regulations).

Given the requirement of third party assistance under Florida elections law, and its importance both currently and historically to disabled voters generally, it would be an odd result to condemn such assistance, particularly when it is listed as an option under the flexible ADA regulatory structure at issue. Moreover, nothing in the record shows that any Plaintiff was unable to "effectively communicate" their vote. To the contrary, each testified that they voted without incident. Nothing in the regulations requires absolute secrecy in communications and does not address the right to an independent voting experience.

Notably, even if section 35.160 provides a cause of action in the voting context, section 35.164 provides that a public entity may be relieved of its duty upon proving that, considering all funding and operating resources available, the proposed action would result in either (1) a fundamental alteration in the nature of the service, program or activity or (2)

undue financial or administrative burdens. Either of these standards may apply in the voting system context, particularly the latter because of the disproportionately higher cost of the systems that Plaintiffs seek to impose through this litigation.

4. *Plaintiff Stafford Has Not Violated The "Generic" Discrimination Provision of the ADA.*

This Court specifically instructed Plaintiffs to amend their complaint to add a generic claim of discrimination under the ADA, if appropriate, that was not based on those grounds that were previously dismissed with prejudice. Instead, Plaintiffs' amended complaint again was based in substantial, if not exclusive, manner on "discrimination" arising from the assistance of third parties under section 101.051, Florida Statutes. Because this Court has already dismissed such a theory under the ADA, Defendants moved to dismiss the amended complaint or, alternatively, for summary judgment. That motion, along with the State's dispositive motion, is pending.

Now, after many months of videotaped depositions and voluminous expensive discovery, [19] Plaintiffs have still failed to present any material evidence to support a generic discrimination claim against Supervisor Stafford. They can point to no evidence to support their broad, amorphous claim of discrimination. In fact, each Plaintiff was asked specifically what Supervisor Stafford has done, other than providing third party assistance at the polls as

[19] No document, including the Task Force Reports of Secretary Harris and that of the Duval County (including the Reports' supporting transcripts of proceedings and records), contain any evidence that Supervisor Stafford has done anything to discriminate against disabled voters in Duval County. [Stafford 129-30; Teal Ex. 13] Instead, the sole basis for Plaintiffs' ADA claim is that Supervisor Stafford followed Florida law by providing third party assistance.

Florida law requires, that discriminated against them because of their disability. Each provided testimony ***contrary*** to a generic claim of discrimination against Supervisor Stafford.

Plaintiff O'Connor was asked ***twice*** whether he had any other basis for contending that Supervisor Stafford had discriminated against him because of his disability other than by requiring third party assistance at the polls. He stated emphatically "***There is no other basis***." and that there is "***No other basis***." [O'Connor 48-49]

Plaintiff Bowen testified she had no basis for a generic discrimination claim other than not receiving Braille materials (such as sample ballots) from the Supervisors of Elections office [Bowen 50-51], which has no legal obligation to do so. Bowen, who voted absentee until the Fall 2002 election, also raised alleged problems arising decades ago beyond the statute of limitations that were de minimus and not legally actionable. [Bowen 35-46]

Plaintiff Bell testified emphatically and repeatedly that his basis for discrimination against Supervisor Stafford was the lack of "accessible equipment for persons with disabilities who are visually, manually and neurologically impaired to cast a secret and direct ballot" in Duval County. [Bell 42, 7-8] When asked for any additional basis for his claim of discrimination, he had none other than a generalized, personal belief that voting officials were "insensitivity to the disabled voters" in the community. [Bell 43, 46-47]

In short, Plaintiffs – by their own testimony – have made clear that they have no basis (and have had no basis from the outset of this litigation) for a generic discrimination claim under the ADA against Supervisor Stafford. Their testimony, along with the record generally, establishes that this case should not have been pursued further following this Court's October 16, 2002, due to the lack of any evidence to support an ADA claim. Instead, a meritless

amended claim was filed and a classic "fishing expedition" was conducted. Under these circumstances, Plaintiffs' request for relief should be denied and their lawsuit dismissed.

CONCLUSION

Plaintiffs have failed to demonstrate any factual issue that is relevant to this proceeding. Instead, they have exhibited a pattern of embellishing the testimony and evidence in a manner that merits rejection of the relief they seek. Plaintiffs' request under Rule 56 for summary judgment should be denied, and their action dismissed pursuant to Defendant Stafford's and the State's pending dispositive motions.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. Mail and facsimile to J. Douglas Baldridge, Esq., Howrey, Simon, Arnold & White, LLP, 1299 Pennsylvania Avenue, N.W., Washington, D.C. 20036; by U.S. Mail to Lois G. Williams, Esq., Washington Lawyers' Committee for Civil Rights and Urban Affairs, 11 DuPont Circle, NW, Suite 400, Washington, D.C., 20036, and by U.S. Mail to Charles A. Finkel, Asst. Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050, on this 28th day of April, 2003.

Attorney