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JACKSONVILLE, FLORIDA

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.
_______________________________________/

RESPONSE TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Pursuant to the Court's June 25, 2003 order, Defendant, John Stafford, Supervisor of Elections, Duval County, provides this response in opposition to the "Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss or for Summary Judgment."

I. Federal Financial Assistance.

Supervisor Stafford adopts the response of the State Defendants on this issue.

II. The ADA Is Not An "Election" Law And Does Not Displace The VRA, The VAEHA, Or The "Help America Vote Act of 2002", Which Specifically Address Voting System Accessibility Issues.

The statements of former Secretary of State Katherine Harris do not alter the ***legal*** conclusion that the ADA (and its close kin, the RA) is not an election law and does not displace the Voting Rights Act of 1964 (as amended) ("VRA"), the Voting Accessibility for the Elderly & Handicapped Act of 1984 ("VAEHA) or the Help America Vote Act of 2002. Instead, these latter voting acts are the exclusive federal legislative standards for accessibility issues as they relate to voting systems.

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As in their other legal papers, Plaintiffs seek to transform the former Secretary's unofficial, personal exhortations into the force of law. In a remarkably similar situation, the Fifth Circuit in Lightbourn v. County of El Paso, Tex., 118 F.3d 421, 431 (5th Cir. 1997) specifically held that the deposition testimony of a state election official – which the plaintiffs characterized as "conced[ing]" that the "ADA is an 'election law'" – was not binding as to legal conclusions. Rather, statutory interpretation is done de novo and a party's construction of a law is nonbinding. Id. As in Lightbourn, a review of the deposition testimony of Secretary Harris – a professed non-lawyer – "demonstrates that, rather than conceding that the ADA is an 'election law,' [she] was unsure whether it was." Id.

Further, the testimony of Secretary Harris does not alter the legal conclusion that the ADA and RA do not apply to voting systems. As the district court in Nelson v. Miller, 950 F. Supp. 201 (W.D. Mich. 1996) stated:

> This Court does not find anything in the ADA to indicate that Congress believed that the Voting Rights Acts [VRA and VAEHA] were insufficient. Nothing in *Lightbourn* [*v. County of El Paso, Texas*, 904 F. Supp. 1429 (W.D. Tex. 1995), *reversed* 118 F. 3d 421 (5th Cir. 1997)] or in anything submitted by the Plaintiffs demonstrate that Congress intended that the ADA or RA should be read so broadly as to require states with statutory provisions regarding a secret ballot to provide blind voters with voting privacy free from third party assistance. Similar to the Voting Rights Acts, Congress intended that blind voters have access to the voting booth and freedom from coercion within the voting booth, not complete secrecy in casting a ballot. This Court will not rewrite the ADA or RA to require such a privacy right.

Id. at 204. The district court's concern with expanding the ADA into areas already occupied by federal voting accessibility laws should not go unheeded. As the district court noted:

> … the Plaintiffs do not contend that they are being denied the right to cast their ballots. Instead, they want this Court to go even further and find that Congress intended to elevate a blind voter's privacy in casting a ballot to a protected right under the ADA or RA. ***There is no indication from the wording of the ADA and RA or the legislative history of either Act that Congress intended such a broad reading. This conclusion is further strengthened when the ADA and RA are***

> ***read in harmony with the Voting Rights Acts, which also do not mandate the result proposed by the Plaintiffs.***

Id. (emphasis added). The court noted that the VRA specifically required that a blind voter be provided third party assistance of his or her choice, and that the Senate Report accompanying the VAEHA (which requires polling places to be "accessible" to handicapped voters), specifically stated "'that any minimal effect on the privacy of those who are elderly or handicapped is more than offset by the expanded opportunities for participation in the political process." Nelson v. Miller, 170 F.3d 641, 644-45 (6th Cir. 1999) (citation omitted).

Further, the Fifth Circuit in Lightbourn v. County of El Paso, Tex., 118 F.3d 421, 431 (5th Cir. 1997) has held that the "ADA is not an election law."

> First, the ADA does not include even a single provision specifically governing elections. On the contrary, the statute never refers to elections. Indeed, the statute only mentions voting once, and that is in the "findings and purpose" section. ... The mere mention of the word "voting" here does not transform the ADA into an "election law." Such a tangential allusion is insufficient to impose on the Secretary the rather extraordinary duty of ensuring that local election officials interpret and apply the ADA uniformly.

Id. at 430 (holding that the phrase "election laws" means only those that "relate to elections," such as the VRA or the VAEHA).

Persuasive, if not dispositive of this point, is the enactment of federal legislation, the Help America Vote Act of 2002, which provides funds to States to upgrade their voting systems and "establish[es] minimum election administration standards for States and units of local government" including accessibility standards for disabled voters. PL 107-252, 2002 HR 3295 (Proviso & Title III).[1] That Congress has enacted detailed requirements applicable to new

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[1] Recent Florida legislation also provides standards that will eliminate the Plaintiffs' concerns that prompted the assertion of their ADA and Rehabilitation Act claims. *See* Chapter 2002-281, Laws of Florida.

voting systems and technology for the disabled makes apparent that Congress has no intention that the ADA and RA apply to voting systems and their related technology or that the ADA or RA be vehicles for litigants to obtain affirmative mandatory judicial relief in the form sought by the Plaintiffs in this action.

III. Plaintiffs' Argument Regarding Certification Of "Accessible" And "Readily Available" Voting Equipment Is Vacuous.

Plaintiffs erroneously make it appear that "accessible" voting systems have been "readily available" during all relevant timeframes. First, Plaintiffs fail to point out that, at the time Supervisor Stafford made the decision to purchase the Diebold/Global system in December 2001/January 2002, the ***only*** certified system in Florida for the disabled was an ESS touchscreen system with audio ballot useable only by those with visual disabilities [Craft 130-31, Ex. 13-17, 20; Stafford 134-35; Ex. 12 & 13;] with only a few 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 overvotes,[2] and was slow in uploading. [Stafford 96-97] He felt the Diebold/Global touchscreen with audio ballot for the visually disabled was superior and had contractual assurances it would be available for Fall 2002 elections and beyond. [Stafford 97] As such, Plaintiffs' discussion of voting systems certified (or not) in Florida after the decision to procure the Diebold/Global system for Duval County is irrelevant.

Second, the claim that "numerous" jurisdictions have successfully used "readily available" voting systems for the ***manually*** impaired is insupportable. The archetype to which

[2] This inability to override or prevent overvotes is a criterion that was found unacceptable by Plaintiffs' own witnesses who serve as election officials or vendors. [Cox 136 (Georgia Secretary of State), Kaufman 75-76 (Clerk of Court, Harris County, Texas), Brian O'Connor 65-66 (Vice President, Sales & Marketing, Sequoia Voting Systems)]

they point – the Hart eSlate – has only been used in two Texas jurisdictions and one Colorado jurisdiction in the past year. [Kaufmann, 57] The system was only recently selected for use in Orange County, California. Id. Plaintiffs present no evidence that it was available, much less certifiable in Florida, at the time Supervisor Stafford made his purchasing decision in December 2001/January 2002. [Stafford 130-34]

Ironically, the two jurisdictions the Plaintiffs have highlighted as role models as to ***visually*** disabled voters – Harris County/Austin, Texas and the State of Georgia – had not converted from ***punch cards*** to newer technologies until ***after*** Supervisor Stafford had already made his decision to purchase the Diebold/Global system. The Texas jurisdiction used punch cards as its predominant technology until ***April 2002*** after which it switched to eSlate, a button-based system without touchscreens. [Kaufman 35-39, 66] (Harris County ***rejected*** touchscreen technology because it is "easily damaged and would require a lot of maintenance which could be expensive."). The State of Georgia phased in touchscreen systems as of ***Fall 2002*** and used optical scan, punch cards and even lever machines up until that time (the latter all continuing to be used statewide in municipal elections). [Cox 10, 138-39; D's Comp. Ex. 1 pp. 9-11 (chronology)]

For all these reasons, it is readily apparent that newly emerging voting system technologies that Plaintiffs attempt to have this Court require of Supervisor Stafford were neither "readily available" nor "accessible" (other than the problematic Hart eSlate for visually disabled voters) at the time Supervisor Stafford chose the Diebold/Global system in December 2001/January 2002. Given that Supervisor Stafford committed to a phase-in of touchscreens with audio ballots, as recommended by the Duval County Task Force, it is apparent that Plaintiffs have no claim for relief, even if the ADA/RA were applicable.

IV. Nascent Technology Is Not The Sole Accommodation.

The claim that newly emerging technology is the only legally permissible accommodation for disabled voters is mistaken. Plaintiffs overlook that third party assistance is recognized as a critical accommodation under federal elections law and Office of Civil Rights opinions.[3] They also ignore that Florida law, as reflected in this Court's dismissal order, requires third party assistance as an appropriate accommodation and that the disabled community has long advocated for such assistance. Plaintiffs also again overstate the extent to which newly developing technology was available at the time Supervisor Stafford made the decision to purchase the Diebold/Global system. Ironically, Plaintiffs trumpet that "technology, unavailable only a few years ago, now exists and is readily available" for disabled voters, but overlook that what is becoming available today is irrelevant legally to decisions made by Supervisor Stafford a few years ago when only a handful of systems were available, much less certified in Florida or feasible (economically or technologically).

V. Plaintiffs' Only Grivance Is The Provision Of Third Party Assistance Required Under Florida And Federal Law.

Despite generalized arguments about injuries to which disabled voters have purportedly been subjected, the Plaintiffs' own testimony establishes that the only grievance they claim is the provision of third party assistance, as Florida and federal law requires. Each Plaintiff was asked specifically what Supervisor Stafford has done, other than providing third party assistance, that discriminated against them because of their disability. Plaintiff O'Connor ***twice***

[3] *See* Voting Rights Act of 1984; Voting Accessibility for the Elderly & Handicapped Act of 1984. Letter of Findings, Dep't of Justice (August 25, 1993) (letter to Supervisor of Elections, Pinellas County, Florida) http://www.usdoj.gov/crt/foia/cltr099.txt ("Although providing assistance to blind voters does not allow the individual to vote without assistance, it is an effective means of enabling an individual with a vision impairment to cast a ballot.").

testified 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 claim other than not receiving Braille materials from the Supervisors of Elections office [Bowen 50-51], which has no legal obligation to do so. *See* Letter of Findings, Dep't of Justice (August 25, 1993) (supervisors of elections not "required to provide Braille ballots or electronic voting in order to enable individuals with vision impairments to vote without assistance."). Bowen, who voted absentee until the Fall 2002 election, raised alleged problems arising decades ago that were de minimis, time-barred, or not legally actionable. [Bowen 35-46] Plaintiff Bell testified emphatically and repeatedly that his basis for discrimination 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 7-8, 42] When asked for any additional basis for his claim of discrimination, he had none other than a belief that voting officials were "insensitivity to the disabled voters." [Bell 43, 46-47] Contrary to assertions in Plaintiffs' legal papers, they have no "pervasive" injuries arising from "discrimination they face each and every time they vote."

CONCLUSION

Based on the foregoing, as well as other pending submissions in this case, the remainder of this action should be dismissed and judgment entered in Defendants' favor.

Respectfully Submitted,
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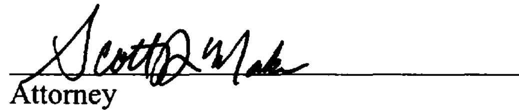
CERTIFICATE OF SERVICE

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 2nd day of July, 2003.



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