IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 07-15004-C

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

Plaintiffs/Appellees,

v.

Jerry Holland, as Supervisor of Elections, Duval County.

Defendant/Appellant.

Appeal from the United States District Court,
Middle District of Florida, Jacksonville Division

INITIAL BRIEF OF APPELLANT HOLLAND

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and the applicable Rules of the Eleventh Circuit Court of Appeals, Defendant/Appellant submits the following certificate of interested persons and corporate disclosure statement:

1. Adams, Honorable Henry L., United States District Judge;
2. Alley, Honorable Wayne E., Senior Judge, United States District Court for the Western District of Oklahoma (presiding by special designation on the United States District Court for the Middle District of Florida, Jacksonville, Division);
3. The American Association of People with Disabilities
4. Arpen, Tracey I., counsel for Appellant;
5. Baldridge, J. Douglas, counsel for Appellees;
6. Bell, Kenton Appellee;
7. Bowen, Elizabeth H., Appellee;
8. Bruskin, Robert, counsel for Appellees;
9. Craft Paul, Chief, Florida Bureau of Systems Certification;
10. Dickson, James D., on behalf of AAPWD;

11. Dimitroff, Sashe, D., counsel for Appellees;

12. Duval County Supervisor of Elections' Office;

13. Florida Division of Elections;

14. Foley, Danielle R., counsel for Appellees;

15. Gardner, Elaine, Washington Lawyers; Committee for Civil Rights and Urban Affairs, co-counsel for Appellees;

16. Hodge, Pamela Ann, visually impaired trial witness;

17. Holland, Jerry, Supervisor of Elections, Duval County, Appellant;

18. Howie, Brian A., counsel for Appellees;

19. Kast, Edward, as Director, Florida Division of Elections;

20. Keeling, Kevin A., counsel for Appellees;

21. Khassian, Heather M., counsel for Appellees;

22. Lawrence, Gregory A., counsel for Appellees;

23. Mueller, Ernst, counsel for Appellant;

24. O'Connor, Daniel W., Appellee;

25. Oddo, Danielle R., counsel for Appellees;

26. Ripley, Richard A., counsel for Appellees;

27. Rothman, Ari N., counsel for Appellees;

28. Sigler, William R., counsel for Appellees;

29. Teal, Jason, counsel for Appellant;

30. Thomas, Milo Scott, counsel for Appellees;

31. Verrocchio, Vincent E., counsel for Appellees;

32. Waas, George L., counsel for the Florida Secretary of State and Division of Elections;

33. Williams, Lois G., Washington Lawyers; Committee for Civil Rights and Urban Affairs, co-counsel for Appellees;

32. Wiseman, Alan M., counsel for Appellees.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant, Supervisor of Elections, believes that oral argument would be helpful to the Court because of the complex history of this case and requests that oral argument be granted.

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STATEMENT OF JURISDICTION

This is an appeal by the Duval County, Florida, Supervisor of Elections ("Supervisor of Elections") from an order and judgment (Doc. 215, 216) entered by the district court in March 2004, which were rendered "final" pursuant to Fed.R.Civ.P. 54(b) on September 20, 2007, through entry of a judgment against other State of Florida defendants (Kurt S. Browning, Secretary of State, Amy Tuck, Director, Division of Elections) (Doc. 295). [1]

This appeal also seeks reversal of a December 3, 2007 district court order (Doc. 341) denying the Supervisor of Elections' Motion to Vacate the 2004 order and judgment (Doc. 215, 216) entered against him on grounds of mootness, which was entered after this appeal was initiated. This order (Doc. 341) was timely appealed through an Amended Notice of Appeal filed on December 4, 2007. See Doc. 342.

[1] All court documents referenced in this Brief are contained in the Appellant Holland's Record Excerpts, unless otherwise indicated.

STATEMENT OF THE ISSUES

I. Whether the Case is Moot and, Accordingly, Requires a Remand by this Court to the District Court with Directions to Vacate the Judgment(s) and Dismiss the Case?

II. Whether, in the event the court determines the case is not moot, the district court erred in not granting the Supervisor of Elections Pretrial Motion to Dismiss (Doc. 53)?

III. Whether, in the event the Court determines the case is moot, and concludes that the ADA was applicable to the Supervisor of Elections purchase of voting machines in February 2002, the district court erred in concluding that the purchase of an optical scan voting system at that point in time violated the ADA?

IV. Whether, in the Event the Court Concludes the Case is Not Moot, and that the ADA was applicable to the Supervisor of Election's purchase of voting machines in February 2002, the District Court Erred in Concluding that 28 C.F.R. § 35.151(b), Required that the Supervisor of Elections to Purchase Voting Machines Which Allowed Visually and Manually Impaired Voters to Vote Unassisted Via Touch Screen Technology?

A. Whether, because no Plaintiff was ever denied the right to vote, neither the ADA nor 28 C.F.R. 35.151(b) were violated?

B. Whether the district court erred in holding that voting systems are "facilitators" under 28 C.F.R. § 35.151(b)?

C. Whether the district court erred in its application of the "Feasability" standard in 28 C.F.R. § 35.151(b)?

1. Whether the district court erred in ruling that State certification determined a voting system's overall feasability?

2. Whether the district court erred in concluding that

the Supervisor of Elections should have purchased the ESS system because it was the only certified system with an audio ballot?

3. Whether the Supervisor of Elections Purchase of Three Audio Ballots for Use/Testing at a Central Location Was a Reasonable Interim Measure?

D. Whether the District Court Erred in Finding a Violation as to the Manually Disabled Plaintiff?

STATEMENT OF THE CASE AND FACTS

Statement of the Case

A. Introduction

This appeal arises from the district court's order (Doc. 215) and final judgment, (Doc. 216) entered in March 2004, holding that Supervisor John Stafford violated the Americans with Disabilities Act (ADA) by procuring a precinct-based optical scan voting system in Duval County in 2002 rather than a touchscreen system with audio ballots of a different vendor, and requiring that such equipment be purchased in one out of every five (5) precincts. The district court's order was stayed, initially by the trial judge and later by this Court until an order determining that the case is moot was entered by this Court on August 15, 2007. See Doc. 290 (copy attached to this Brief as Exhibit A.)

However, as set forth in greater detail below, the district court has determined that the Court of Appeals determination that the case is moot does not bind him, has proceeded to enter an additional judgment and multiple order in the case. These orders include a denial of the Supervisor of Elections motion to vacate the judgment (Doc. 215) against him on grounds of mootness. Hence, this second appeal to this Court in this case has followed.

B. Plaintiffs' Initial Claims Are Dismissed With Prejudice to the Extent They Assert a Right to a Secret and Direct Voting Experience

Plaintiffs' initial complaint against the Supervisor of Elections was filed in November 2001 and asserted three claims: a Florida constitutional claim based on the right to a "direct and secret" vote, [1] an ADA claim, and a Rehabilitation Act (RA) claim, each seeking to invalidate Florida's third party assistance statute, § 101.051, Florida Statutes. [2]

The Supervisor of Elections moved to dismiss the action for failure to state claims for relief based primarily on the Sixth Circuit's decision in Nelson v. Miller,

[1] Art. VI, § 1, Fla. Const. (2001) (" All elections by the people shall be by direct and secret vote.").

[2] The statute provided for assistance at the polls to blind and other disabled voters and states that:

> (1) Any elector applying to vote in any election who requires assistance to vote by reason of blindness, disability, or inability to read or write may request the assistance of two election officials or some other person of the elector's own choice, other than the elector's employer, an agent of the employer, or an officer or agent of his or her union, to assist the elector in casting his or her vote. Any such elector, before retiring to the voting booth, may have one of such persons read over to him or her, without suggestion or interference, the titles of the offices to be filled and the candidates therefor and the issues on the ballot. After the elector requests the aid of the two election officials or the person of the elector's choice, they shall retire to the voting booth for the purpose of casting the elector's vote according to the elector's choice.

§ 101.051 (1), Fla. Stat. (2001)

170 F.3d 641 (6th Cir. 1999). The district court, per Judge Ralph W. Nimmons, Jr., [3] on October 16, 2002 dismissed the Plaintiff's state constitutional claims *with prejudice*, finding that the assistance provided by § 101.051, Florida Statutes, satisfied the "direct and secret" language of the Florida Constitution. Doc. 42. [4]

The trial court also dismissed Plaintiff's ADA and RA claims *with prejudice* to the extent they claimed a right to a voting system that provided a "direct and secret" voting experience without third party assistance. Doc. 42. [5] The court permitted Plaintiffs to replead, noting that their "amended complaint should allege more clearly ... the bases, if any, for their reliance upon the more generic proscription [of the ADA] in contradistinction to the acts' more specific proscriptions." Doc. 42.

C. Plaintiff's Filed Amended Complaint Notwithstanding Enactment of HAVA

The order dismissing Plaintiff's Complaint with prejudice was entered on October 16, 2002. Doc. 42. Within two weeks thereafter, and before Plaintiffs were able to file an Amended Complaint, President Bush, on October 29, 2002, signed into

[3] Judge Nimmons was the assigned judge until shortly before trial when, due to his illness, the case was transferred to a visiting judge.

[4] Document 42 has not been included in the Record Excerpts, but is part of the Record on Appeal.

[5] *See* American Ass'n of People With Disabilities v. Smith, 227 F.Supp.2d 1276 (M.D. Fla. 2002).

law the Help America Vote Act (hereinafter "HAVA") which is codified at 42 U.S.C. §§ 15301-15545. Section 42 U.S.C. 15481(a)(3) of HAVA reads, in part, as follows:

> (3) Accessibility for individuals with disabilities. - - The voting system shall - -
>
> (A) be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters;
>
> (B) satisfy the requirement of subparagraph (a) through the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place;

Compliance with the foregoing was required by January 1, 2006. See 42 U.S.C. § 15481 (d).

Plaintiffs' Amended Complaint was filed on November 5, 2002, six (6) days later. See Doc. 47. The relief sought by Plaintiffs was as follows:

> E. That this Court issue preliminary and permanent injunctions requiring Defendants to provide, in each polling place in Duval County, at least one voting system that is accessible to voters with visual impairments and voters with manual impairments;

This, with the exception of the "manual impairment" language, is identical to the relief for which Congress had already provided in HAVA, per the preceding quotation from the Act. However, Plaintiffs wanted it to happen immediately, a practical

impossibility, rather than on the comparatively reasonable three (3) year timetable established by Congress.

Because the Supervisor of Elections, from the outset, intended to comply with HAVA, mootness was asserted as a defense when the Answer was filed. Doc. 128, p. 18, par. 3.

D. Stafford's Motion to Dismiss the Amended Complaint Is Denied

Plaintiffs Amended Complaint substituted the phrase "cast independently a secret ballot" for the phrase "cast a direct and secret ballot" which had been used in the Initial Complaint and, as to their general discrimination claim, listed various attributes of third party assistance that were allegedly intrusive as to their privacy such as "being forced to reveal their vote to a third-party." Doc. 47, pp. 17-18 The Supervisor of Elections moved to dismiss the amended complaint as another attack on Florida's third party assistance statute, which had already been declared valid in Judge Nimmons dismissal of the Initial Complaint. [6] Doc. 53.

In an August 23, 2003 order, the trial court allowed the Plaintiffs' repleaded ADA claims to survive dispositive motions based on two generic ADA regulations, 28 C.F.R. §§ 35.151(b) & 35.160, and a claim of "generic discrimination." Doc. 124.

[6] Judge Nimmons denied the Plaintiffs' motion for reconsideration of his dismissal order. Doc. 115; (not included in Record Excerpts) *see* American Ass'n of People With Disabilities v. Hood, 278 F.Supp.2d 1337, 1345 (M.D. Fla. 2003)

E. Plaintiffs Prevail at Trial on a Single ADA Regulatory Claim Under 28 CFR § 35.151 (b)

A seven-day bench trial was held from September 23, 2003 to October 1, 2003 Docs. 166-172. On March 24, 2004, the trial court issued its final written order in favor of Plaintiffs on a single ADA regulatory claim under 28 C.F.R. section 35.151(b), that being that the purchase of optical scan voting equipment was an "alteration" to an existing "facility" that failed to make voting in Duval County "readily accessible to visually or manually impaired voters" to the "maximum extent feasible." Doc. 215 [7] Both the Order and Judgment ordered that a touchscreen with audio capacity be placed in one of very five precincts, a significantly less stringent requirement than that imposed by HAVA (one in every precinct) See Doc. 215, page 30, par. No. 2; Doc. 216.

F. The Interlocutory Appeal

The Supervisor of Elections appealed the Order (Doc. 215) and Judgment (Doc. 216) which had been entered. Doc. 217. In addition he moved for a stay of the injunctive relief directed. Doc. 219. This motion was granted by the district court. Doc. 232. This stay remained in effect from April 16, 2004 through August 15, 2007, when the Court of Appeals determined the case was moot (Doc. 290, attached to Brief

[7] *See* American Ass'n of People With Disabilities v. Hood, 2004 WL 626687 (M.D. Fla. March 24, 2004).

as Exhibit A) with the exception of a period of one week from September 28, 2004 (Doc. 267) through October 5, 2004 (Doc. 275). [8]

At the same time the district court ruled against the Supervisor of Elections on the merits of the case in Document 215, it ruled in favor of the State Defendants (the Secretary of State and Director of the Division of Elections), concluding that they [unlike the Supervisor of Elections] had no affirmative obligation to seek out all cutting edge technology and had behave reasonably. Doc. 215, pp. 29-30. [9] The district court, however, withheld entering final judgment in favor of the State Defendants, and never did so prior to the issuance by the Court of Appeals of its final decision in the case on August 15, 2007. See Doc. 215, p. 30, par. No. 5; Doc. 295, entered September 20, 2007.

Accordingly, pursuant to Fed.F.Civ.P. 54(b), the case was not "final" for Fed.R.App. 4 requirements, and the Supervisor of Election's appeal had to proceed on an interlocutory basis. This was recognized and confirmed by specific order of the Court of appeals, which directed that the appeal proceed only on Doc. 215 (the district court's final order) and Doc. 216 (the judgment against the Supervisor of

[8] After the visiting Judge who tried the case rescinded his handling of the case, the new Judge handling the case lifted the stay. Doc. 267. However, it was reinstated by the Court of Appeals within a week. Doc. 275.

[9] This ruling was not impeded by the fact that the State had not certified a voting system specifically designated for "manually" impaired voters, the district court finding this unnecessary. Doc. 215, pp. 28-29.

Elections), and not on Doc. 42 (order dismissing initial complaint on 10/16/02) and Doc. 124 (order denying motion to dismiss amended complaint).

This appeal does not ask the Court of Appeals to address Doc. 42, but does request the Court of Appeals to address Docs. 124, 215, and 216, as incorrect rulings, unless the Court does not determine that the case is moot and directs a remand with directions to vacate the judgments below and dismiss the case. If this occurs, the addition of Doc. 124 to the orders being substantively considered by Court would not render the issues on this appeal any different than they were on the initial interlocutory appeal. The reason is that the Court cannot appropriately address whether 28 C.F.R. § 35.151(b) (the subject of Doc. 215 and 216) was appropriately invoked by the district court, without first determining the ADA does in fact govern voting systems (the subject of Doc. 124).

Accordingly, the issues before the Court of Appeals with respect to the ADA and 28 C.F.R. § 35.151(b), other than mootness, if reached by the Court, will be identical to those presented to the Court on the initial interlocutory appeal.

G. The Court's Decision on Appeal and Post-Appeal Proceedings in the District Court

In it's August 15, 2007, decision the Court of Appeals reviewed information furnished by the district court, an affidavit which supplemented the record (Doc. 343-

9) and concluded that the "case" (not the "appeal") is moot. (Doc. 290; Ex. A, Brief). The Court's mandate issued at the same time. No petition for rehearing was filed, nor further appeal taken by either party.

The Supervisor of Elections, however, did within ten (10) days file in the Court of Appeals a "Motion Requesting Addition of Directions to District Court in Final Order." The added directions requested, which are normally present when a case is declared moot by the Court of Appeals were the addition of the following language to the Court's order:

> Accordingly we vacate the district court's final order (Doc. 215) and judgment (Doc. 216) and remand to the district court with instructions to dismiss the case.

The Court of Appeals denied the request on November 1, 2007, citing lack of jurisdiction because the case had been returned to the district court. See Order (attached to Brief as Exhibit B). In the order, however, the Court characterized what it had done in its August 15, 2007 order as "dismissing the appeal [not"case"] as moot . . . .".

The district court promptly entered, on September 20, 2007, judgment in favor of the State Defendants (Secretary of State Hood; Director of Elections Kast). Doc. 295. This rendered the case "final", pursuant to Fed.R.Civ.P. 54(b). The district

court also entered several other orders which indicated the district court deemed the case not to be moot. See Docket Sheet.

The Supervisor of Elections filed a motion, on October 4, 2007, to vacate the dispositive orders and judgment which had been entered by the district court (Doc. 215, 216, 294, 295), and for dismissal of the case, on grounds of mootness. Doc. 315. This motion was denied by the district court on December 3, 2007, because the Court of Appeals had provided no "directions to dismiss" Doc. 341, page 2. This ruling of the district court was added to an Amended Notice of Appeal, together with the other final orders and judgment in the case, which had already been appealed. See Doc. 342.

Statement of the Facts

A. Post-Election 2000: Replacing Punchcards & Restoring Voter Confidence

After Election 2000, Florida elections officials sought to replace punchcard systems with more accurate equipment to restore voter confidence by eliminating overvotes and undervotes. S.E. Ex. 31, at 30-47; Tr. 5:63-64 (Doc. 170); [10] Tr. 7:10 (Doc. 172). Elimination of infamous "hanging chads" in twenty-four counties with punchcard machines had become necessary. S.E. Ex. at 30-47; Tr. 7:10-11(Doc. 172).

[10] The Supervisor of Election's Exhibit's were called "Stafford's" Exhibits, after the name of the Supervisor of elections at the time of trial. They will be referred to here as "S.E. Exhibit's". Trial transcript citations will follow the form used in the citations preceding this footnote.

(Duval County criticized for overvotes on its punchcard system)] On May 10, 2001, the Florida Legislature enacted the Florida Elections Reform Act of 2001, Chapter 2001-40, Laws of Florida, which decertified punchcard systems effective September 2, 2002 thereby requiring counties to replace such systems.

B. The Governor's Task Force Recommends Optical/Digital Scan

The 2001 Governor's Task Force extensively reviewed and compared so-called "Marksense" [11] technology (i.e., optical/digital scan) versus newly developing direct recording electronic (DRE) technology. The Task Force noted the nascent state of the latter (which includes touchscreens), and that there were "no DRE systems certified in Florida" at that time. S.E. Ex. 31, at 34. The Task Force reviewed existing studies and determined that optical scan systems had lower error rates than DRE systems. S.E. Ex. 31, at 37.

The Report explicitly recognized *two sets of standards* that a voting system must meet. The first are *technical* certification standards set and administrated by the State of Florida. S.E. Ex. 31 at 35. The second are *usability/affordability* "standards that focus on the users of the equipment – voters, poll-workers, and election officials – and include voter error rates compared to other equipment; ease of setup, use, voter

[11] Marksense can be either digital scan or optical scan, the latter scanning ballots faster than the former. Tr. 7:77-78 (Doc. 170). In general, Marksense is a system "in which a ballot card has candidates' names preprinted next to an empty oval, circle, rectangle, or an incomplete arrow." S.E. Ex. 31 at 33.

error corrections and maintenance; documentation for vote-auditing purposes; cost; and availability. Id. The Task Force concluded that "only one voting system currently meets all of these standards: the state-certified marksense voting system with precinct level tabulation.

C. Duval County's Election Reform Task Force Recommends Optical Scan

During 2001, the Duval County Election Reform Task Force held numerous public hearings and issued a final comprehensive report, which 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 technology thereafter.*** In reaching this conclusion, the Task Force considered the current state of technological reliability, state certification and cost.

S E. Ex. 1, at 27 (emphasis in original). The Report recommended "that consideration be given to the establishment of a centralized voting facility for extraordinary access" including additional technology for the disabled based on input from the Jacksonville Chapter of the Florida Council of the Blind, Tr. 6:57-60 (Doc. 171); Tr. 7:137 (Doc. 172), as well as Duval County's Chief of Disabled Services, Jack Gillrup. The Task Force heard reports regarding accommodations for disabled voters such as curbside voting and third party assistance, and commended Stafford for his overall efforts in assisting disabled voters. S.E. Ex. 1, at 22.

D. Certified Voting Systems Available in Late 2001/Early 2002

Florida does not have a uniform statewide voting technology. Instead, its sixty-seven counties may select different voting systems, provided their equipment is certified by the Florida Department of State, Division of Elections. [12] In late 2001/early 2002, counties had the choice of one of three vendors: Global/Diebold,[13] Elections Systems & Software, Inc. (ESS) or Sequoia Voting Systems Inc. (Sequoia). Each vendor offered certified optical/digital scan systems. State Ex. 3, 4; S.E. Ex. 43. Each was developing or had a touchscreen system certified, but touchscreens were substantially more expensive than optical/digital scan systems (*see* below). State Ex. 3, 4; S.E. Ex. 31 & 43. Counties selected only a single vendor because no certification existed for blending the equipment of different vendors. Tr. 3:118-19, & 122-23 (Doc. 168). Moreover, Florida counties preferred to work with a single vendor for warranty service and for technical assistance. Tr. 3:122-23 (Doc. 168) ("the ability to get technical assistance during an election cycle is a big area of risk that the counties want to reduce ...."

[12] § 101.294 (1), Fla. Stat. (2001) ("No governing body shall purchase or cause to be purchased any voting equipment unless such equipment has been certified for use in this state by the Department of State.").

[13] The original vendor was Global Elections System, which was purchased by Diebold Elections Systems in February 2002. Tr. 5:37 (Doc. 170) (the "Global/Diebold" or "Diebold" system).

E. Only One Vendor, ESS, Had A Certified Audio Ballot

One vendor, ESS, received the first certification in Florida for an audio ballot for the visually impaired on August 16, 2001. [14] State Ex. 3, 4; Ex. 19. Global/Diebold had an application pending at that time. State Ex. 4 at ii (#14), and had given assurances that its system, with audio component, would be certified in time for the Fall 2002 election cycle. [15] Tr. 6:76-77; Tr. 5:69-70. Nonetheless, Diebold's four applications were either withdrawn or denied and did not become available for use in Florida until after May 17, 2004. See Doc. 249. [16] On May 30, 2002. Sequoia applied for certification of its audio ballot, which was granted on August 7, 2002, only a month before the primary election. State Ex. 3, 4, at 31.

F. Stafford Contracts With Global/Diebold In January 2002

After a detailed review process starting in 1999 Tr. 7:54-55 (Doc. 172), and continuing through late 2001, the Supervisor of Elections chose to procure the Global

[14] ESS later issued updated and revised technical *versions* for the same touchscreen system on December 27, 2001; May 7, 2002; June 17, 2002; August 7, 2002; and August 21, 2002. State Ex. 3, 4.

[15] In Duval County, Diebold contractually agreed to provide three certified audio ballots without charge for the Fall 2002 elections. S.E. Ex. 97; Ex. 19, Exhibit A.

[16] Document 249 is not included in the Record Excerpts, but is part of the Record on Appeal.

optical scan system, which he and his staff gave high marks. [17] The Supervisor of Elections and his staff found that touchscreens had "no proven track record", that recounts with touchscreens would be problematic, and that optical scan and paper ballots "will be required for absentee voting" in any event. S.E. Ex. 4. Further, they determined, touchscreens would "be extremely costly in terms of" their price; maintenance; storage and transportation; setup and testing; poll worker training; and election day contingency support staffing; and that they also posed "security and accountability" concerns. Id. In contrast, optical scan systems had few disadvantages but may advantages such as a "proven election track record for reliability and accuracy"; ease in setup, storage, administration and recounts; high voter acceptance; substantially lower overall costs and compatibility with other existing components such as voting booths. Id.

On January 17, 2002, Stafford sent a letter to the Chief of Procurement, City of Jacksonville, requesting purchase of the Global/Diebold optical scan system with three touchscreen/audio ballots for visually disabled voters. Tr. 5:79-80 (Doc. 170); S.E. Ex. 6, 7. Id. The City's General Government Awards Committee approved this request on January 24, 2002, creating a legally enforceable obligation at that point.

[17] Stafford was elected in 1999 based on a campaign platform of upgrading the voting system to either optical scan or touchscreens. Tr. 5:41 (Doc. 170); Tr. 7:6 (Doc. 172)

S.E. Ex. 6, 7; Tr. 5:79-80 (Doc. 170); Tr. 4:100 (Doc. 169). ("We had a contract agreement in place in late January")

The Supervisor specifically rejected the ESS system because of a number of features he deemed were ill-advised. Tr. 4:140-41 (Doc. 169); Tr. 5:66-68 (Doc. 170). Its systems required that pollworkers boot-up the ten to twenty machines in each precinct with a single device that was used sequentially for each voting machine and audio ballot. Tr. 5:66-68 (Doc. 170). The sequential nature of uploading required substantial time, typically starting the night before, to prepare a precinct in time for opening at 7 a.m. on election day, making it impractical. Tr. 7:20-21; Tr. 5:75-76 (Doc. 170); Tr. 7: 20-21 (Doc. 172).

This feature created the fiascos in Miami-Dade and Broward Counties in the September 2002 primaries requiring the extraordinary step of the Governor extending poll closing times. P. Ex. 1; Tr. 4:140-41 (Doc. 169); Tr. 7:17-22 (Doc. 172) (logistics of running election in Miami-Dade turned over to emergency management personnel/police department). The severe problems in Miami-Dade and Broward resulted in many reports critical of ESS including those by the Miami-Dade Inspector General's office. S.E. Ex. 12. The Governor's 2002 Task Force noted "numerous problems were experienced" with ESS and that "county election officials mobilized over 4,500 county employees to work as poll workers, filling a variety of roles from

clerks to voting equipment technicians" to prevent their reoccurrence. S.E. Ex. 12, at 28-29. The problems with the ESS system in those counties continued thereafter. Id.; Tr. 7:17-18 (Doc. 172).

As to Sequoia, the Supervisor rejected its scanner unit because it was an old, big, heavy and "blocky" unit that was difficult for pollworkers to transport. Tr. 5:66-67 (Doc. 170); Tr. 7:76-77 (Doc. 172). The unit was "slow to ingest a ballot" because of its slower digital (rather than optical) scan design. Tr. 7:76 (Doc. 172). The unit also permitted voters themselves to override or reject a ballot, a negative feature because voters could do so without a pollworker's knowledge or involvement. Id. Finally, the Sequoia digital scan unit did not have rechargeable batteries, but rather used "one-shot' batteries that required precincts to have spare batteries on hand. Tr. 7:77 (Doc. 172).

G. 52 of 67 Counties Use Optical Scan, 15 Choose Touchscreens, And Only A Very Few Use Audio Ballots

In the Fall 2002 elections, fifty-two (77.6%) of sixty-seven Florida counties, like Duval County, used precinct-based optical/digital systems [18] while fifteen counties used precinct-based touchscreen systems. [19] Thirty counties chose

[18] S.E. Ex. 34, at 4 ("Counties Using Marksense Precinct Voting Method").

[19] S.E. Ex. 34, at 2 ("Counties Using DRE Precinct Voting Method").

Global/Diebold's optical scan voting systems; [20] thirty-two chose systems offered by ESS (twenty-one optical scan); [21] and five chose systems offered by Sequoia (one digital scan). [22] The extent of audio ballot use in the fifteen DRE counties is unknown. State Voting Systems Chief, Paul Craft, had no specific data or factual basis regarding the use of audio ballots and did not know whether any, other than Pasco County, used audio ballots at the precinct level. Tr. 3:42, 151 (Doc. 168).

H. The Cost of Optical Scan v. Touchscreens

The 2001 Governor's Task Force analyzed the cost of optical scan systems versus touchscreen systems, stating:

> Precise estimates on voting system costs are difficult to gauge for many reasons. No two voting systems operate in the same way. Some voting systems have ballots and others do not. Some voting systems require special storage and maintenance and others do not. Some voting systems require computer programming and others do not … one has to make awkward comparisons between different types of equipment costs, software costs, training costs, storage costs, transportation costs, and maintenance costs.

S.E. Ex. 31, at 39. In Duval County, the direct cost of purchasing a precinct-based touchscreen system in January 2002 for Duval County would have been from $6.5 to

[20] Tr. 3:147 (Doc. 168); S.E. Ex. 34, at 4 (Florida Division of Elections website; Voting Systems: Diebold).

[21] S.E. Ex. 34 at 5 (Voting Systems: ES&S).

[22] Id. at 6 (Voting Systems: Sequoia).

$12 million, three to six times the direct cost of an optical scan system. S.E. Ex. 4; P. Ex. 100; Tr. 7:11-14 (Doc. 172). The Global/Diebold System used in 2002 was ultimately procured for $1.8 million (less than estimated) with three audio ballots provided without charge. S.E. Ex. 6, 7.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews the district court's legal conclusions *de novo*. Williams v. Alabama State University, 102 F.3d 1179, 1182 (11th Cir. 1997). Review of factual findings is based on the clearly erroneous standard. Florida Progress Corp. and Subsidiaries v. C.F.R., 348 F.3d 954, 959 (11th Cir. 2003); Fed.R.Civ.P. 52(a) ("Findings of fact, whether based on oral or documentary, evidence, shall not be set aside unless clearly erroneous....").

SUMMARY OF THE ARGUMENT

The district court erred in not vacating the final orders and judgments in the case after the Court of Appeals had declared the case moot in a prior interlocutory appeal. Following the dismissal of their initial Complaint with prejudice, and prior to the filing of the Amended Complaint at issue in this case, Congress passed and the President signed HAVA, on October 29, 2002. HAVA required the precise relief Plaintiff sought - a disabled compliant voting machine with audio component in every precinct. It thus rendered moot from the inception of the renewed suit the declaratory relief which Plaintiffs sought.

HAVA, however, did not require compliance until January 1, 2006. Hence, the only issue in the case was whether Plaintiff could obtain injunctive relief which required the Supervisor to make such equipment available for voting prior to 2006. An injunction so requiring was entered by the district court in March 2004, but stayed pending appeal. This Court, in its August 15, 2007 order, held that inasmuch as the Supervisor of Elections had already obtained a disabled compliant voting machine for every precinct, the case was moot, and dismissed the appeal. This declaration by the Court of Appeals resolved the only issue on the merits remaining in the case.

The firm case law established by the Supreme Court and this Court is that when a case becomes moot on appeal, the judgment must be vacated and the case

dismissed. The district court erred in denying the Supervisor of Election's motion requesting the vacating of the judgments and dismissal of the case, because no other issue remains to be decided, and the case is in fact wholly moot.

In the event the Court determines the case is not moot, the district court must resolve additional errors which the district court made in concluding that the Supervisor of Elections purchase of an optical scan voting system in 2002 – rather than an ESS touchscreen voting system with audio ballot – constituted an ADA violation. These are as follows:

First, the ADA does not apply in this context. As the Sixth Circuit and trial courts in Nelson v. Miller held, the ADA was not intended to displace federal elections laws or create a federal right of secrecy in voting. 170 F.3d 641 (6th Cir. 1999), *affirming on other grounds*, 950 F.Supp. 201 (W.D. Mich. 1996). The district court erred in denying the Supervisor of Elections motion to dismiss on these grounds.

Second, even if the ADA was intended to apply to voting machinery, the trial court committed errors in its application. It erred initially, by concluding that a voting system is itself a "facility" under 28 C.F.R. § 35.151(b). Reported cases under § 35.151(b) involve physical alterations to a permanent structure, such as curb cuts

added to a sidewalk or an elevator to a building, which are dissimilar from voting systems which are portable equipment not affixed to any permanent structure.

Next, the optical scan voting system in Duval County, combined with the provision of third-party assistance at the polls as required by Florida law, was a sufficient and reasonable accommodation that makes voting readily accessible to and usable by all, including voters with disabilities. Given the then-existing choice of a single vendor (ESS) with its newly-developed touchscreen/audio ballot, and the severe administrative, technological and fiscal problems with its system overall, the choice to use an optical scan system was a reasonable one, such a system being accessible to the greatest extent possible under the circumstances that existing in late 2001/early 2002, when experience with touchscreen, audio ballots and other similar unproven voting equipment was virtually non-existent.

The district court also employed a definition of the word "feasible" that rendered it meaningless in the context of 28 C.F.R. § 35.151(b). State approval of a system does not *per se* make that system "feasible", but rather is a certification that the system can perform certain technical functions. Certification does not mean a system is affordable, administratively or technologically useable, or will otherwise meet a jurisdiction's particular needs.

The trial court also erred in concluding that the ESS touchscreen/audio ballot system was "feasible" and thereby compelled in Florida counties. 28 C.F.R. § 35.151(b) does not require that a "facility" be made readily accessible and useable; rather, it requires only that it be made so "to the maximum extent feasible" under the circumstances. Under this reasonableness standard, the trial court engage in "judicial second-guessing" by concluding that the ESS system should have been procured. Indeed, the trial court clearly erred in overlooking the serious flaws in that system that resulted in an elections fiasco in Miami-Date County as well as the severe economic, technological and administrative problems with the ESS system.

Finally, it was error for the district court to conclude that an ADA violation had been committed with respect to a manually (not visually) disabled Plaintiff when no equipment for use by manually disable had been certified by the State for manually disabled voters.

In summary, the case is entirely moot and must be remanded to the district court with directions to vacate the final orders and judgments and dismiss the case. If the Court concludes this is not the case, it must overturn this case on the merits as inconsistent with prior ADA case law and applications.

ARGUMENT

I. The Case is Moot and, Accordingly, Requires a Remand by this Court to the District Court With Directions to Vacate the Judgment(s) and Dismiss the Case

A. Whether There Would be Injunctive Relief Was the Only Remaining Issue in the Case

The district court refused to grant the Supervisor of Elections motion to vacate the final orders and judgments entered in this case (Doc. 315) on the following grounds:

> The Judgment in this action included injunctive relief, and the issue of injunctive relief was the only issue reviewed on appeal to the Eleventh Circuit.

Doc. 341, p. 2. Whether or not this statement is correct, however, does not furnish a valid basis for not declaring the case moot. The reason is that the only issue remaining in the case was whether or not injunctive relief would or should be granted. Hence, when the Court of Appeals resolved that issue by declaring it moot, no other issue was left. Accordingly, the entire case became moot and required the vacating of the final orders and judgments, and the vacating of the case.

It is important to recall and know in this connection that after the dismissal of the initial Complaint with prejudice (Doc. 42) and before the Amended Complaint was filed on November 5, 2002, that HAVA had already become law. Thus, there was no longer any question about whether the law required a voting system in each

precinct which permitted visually impaired voters to vote independently. 42 U.S.C. § 15481 (a)(3) required it. [23] Hence, there was no longer any question whether this right existed, which need to be resolved by a declaratory judgment. Whether this right also conceivably existed under a federal regulation of questionable applicability, 28 C.F.R. § 35.151(b), was thus entirely academic, and moot, except for the effective date by when this right would be enforced, which Plaintiffs wanted immediately, and HAVA didn't grant until January 1, 2006. That is what the injunction in this case was about - - whether the Supervisor of Elections would have to comply with HAVA prior to the effective date of the HAVA and companion State laws. There has been no other issue on the merits of this case, since the date the Amended Complaint was filed. All the legal issues raised concerned whether or not injunctive relief prior to the effective date of the specifically applicable state and federal statutes would be required.

Because this was the only issue in the case, the entire case was clearly moot at the time the Court of Appeals so declared in its August 15, 2007 order. Because the appeal before the Court was interlocutory, the Court of Appeals had a valid technical reason for electing to not direct disposition of the case below when it declared

[23] As the Court of Appeals was aware well prior to its declaration of mootness, this was also required by Florida law. See Doc. 343-9, pp. 1-2, par. 3, which had previously been filed in the Court of Appeals, and was relief upon by the Court in determining that the case was moot. Florida Statute 101.56062.

mootness, because of the possibility that some other issue that effects the merits of the case might have remained pending. However, there is no such other issue, and the district court, clearly, should be aware of this fact. Accordingly, the district court erred in refusing to grant the Supervisor of Elections motion to vacate the final orders and judgments in this case.

B. The Applicable Case Law Requires A Remand to the District Court With Directions to Vacate the Judgment(s) and Dismiss the Case

It is very clear that the law requires vacating of the judgment or judgments entered in and dismissal of a case determined to be moot. This requested action is thoroughly justified under applicable case law. In United States v. Munsingwear, Inc., 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed 36 (1950), the Supreme Court stated: "The established practice of the Court in dealing with a civil case . . . which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." The identical practice has been followed in the Eleventh Circuit:

> In this circuit, when a case becomes moot after the panel publishes its decision but before the mandate issues, we dismiss the appeal, vacate the district court's judgment, and remand to the district court with instructions to dismiss the case.

IAL Aircraft Holding, Inc. v. Federal Aviation Administration, 216 F.3d 1304, 1305 (11th Cir. 2000). To the same effect, see National Advertising Co. v. City of Miami, 402 F3d 1329, 1335 (11th Circ. 2005); Troiano v. Supervisor of Elections, 382 F3d 1276, 1382 (11th. Cir. 2004).

The Troiano case is particularly compelling because it involves issues almost identical to those in this case. The Supervisor of Elections in Palm Beach County, Florida, was sued for not having yet provided audio components which allowed certain disabled voters to vote without receiving assistance. 382 F.3d at 1285. AS in the case of the Supervisor of Elections in Duval County in this case, her delay in installing the audio voting equipment was caused by the State of Florida's failure to timely certify the voting machines for which she had contracted. Id. The district court ruled that the case was moot because the Supervisor intended to continue making the audio equipment available in each precinct as required by law. Id.

The Court of Appeals affirmed the Troiano decision and provided a detailed analysis of the applicability of the mootness doctrine in cases of this nature, concluding with the following:

> In short, this Court has consistently held that a challenge to a government policy that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated. In the absence of any such evidence, there

> is simply no point in allowing the suit to continue and we lack to *[sic]* power to allow it to do so.

382 F.3d at 385. Disabled-compliant voting machines have been available in Duval County in every election at every precinct where there was voting since late 2005, prior to the required compliance date established by HAVA, and that this will continue to be the case. If the Troiano case was moot, as it was, then this case is also moot. This Court should so determine.

The mootness of the case has rendered it non-justiciable. The case must then be remanded with directions to the district court to vacate the final orders and judgments, and dismiss the case.

II. In the Event the Court Determines the Case is Not Moot, the District Court Erred in Not Granting the Supervisor of Elections Motion to Dismiss (Doc. 53).

The trial court erred by not dismissing Plaintiffs' ADA claim on the pleadings based on Nelson v. Miller, 170 F.3d 641, 653 (6th Cir. 1999), which held that the failure to provide voting technology for the disabled is not a violation of the ADA where third party assistance is provided under state law.

In Nelson, a statewide class of blind voters brought an ADA action claiming violations arising from the failure of the State of Michigan to implement methods by which the "Plaintiffs could cast their votes unassisted by another person." 170 F.Ed at 644. Plaintiffs alleged the existence of "inexpensive technologies that are currently

in commercial use which [sic] permit persons who are blind to read and mark ballots without involving a third party, including braille ballot overlays or templates, taped text or phone-in voting systems." Id. at 644 n.1. Plaintiffs sought a permanent injunction requiring that the State implement such methods. Id. at 644.

The Sixth Circuit rejected the argument that the ADA was violated for failure to provide a "secret voting program". 170 F.3d at 650 (quoting district court). Based upon the substantial assistance that Michigan's third party assistance statute provided for blind electors to case their votes, the court concluded that the refusal "to provide [Plaintiffs] with voting assistance other than that already extended to them under ... [Michigan's voter assistance statute], does not discriminate against them in violation of the ADA and/or the RA." 170 F.3d at 653 (emphasis added). The Court upheld the district court's dismissal of the ADA/RA claims.

For similar reasons, the trial court erred in denying the Supervisor of Elections motion to dismiss the Plaintiffs' Amended Complaint. In attempting to state a claim of discrimination under the ADA, the Amended Complaint simply listed various attributes of third party assistance under Florida law that were objectionable such as "being forced to reveal their vote to a third-party." Doc. 47, pp. 17-18, par. 82. Because the Amended Complaint merely challenged Florida's third party assistance

law, the principles of Nelson v. Miller apply and it is urged that this Circuit adopt its reasoning and holdings.

The principles in Nelson v. Miller are further strengthened due to the enactment of HAVA, which establishes federal standards and provides funds for voting equipment for the disabled to be required in each precinct for elections after January 1, 2006. HAVA severely undermines the trial court's conclusion that the ADA is applicable because it is nonsensical that Congress would compel, set standards fro, and appropriate funds to purchase electronic voting equipment for the disabled for use after January 1, 206, yet simultaneously intend that the ADA (which has no funding or standards for voting machines) be used to compel judicially the purchase and use of such voting equipment prior to that. It is illogical to believe that Congress intended to compel a costly addition to a voting system under the imprimatur of the ADA when it established the means for doing so under HAVA. Indeed, Voting Systems Chief Paul Craft – who served on the committee drafting HAVA standards for voting systems – testified without contradiction that any audio ballots procured at the time of trial (September 2002) to accommodate disabled voters would have to be updated or replaced because existing standards would be modified to comply with HAVA standards, which had yet to be formulated. Tr. 3:93-94, 160-

61, 173 (Doc. 168). In short, the rationale for dismissal in Nelson v. Miller was made more compelling due by the enactment of HAVA.

III. In the Event the Court Determines the Case is Not Moot, and Concludes that the ADA was Applicable to the Supervisor of Elections Purchase of Voting Machines in February 2002, the District Court Erred in Concluding that the Purchase of an Optical Scan Voting System at that Point in Time Violated the ADA

Even if the ADA was applicable, the district court erred in concluding that Stafford's procurement of an optical scan system in February 2002 violated 28 C.F.R. § 35.151(b), which applies to "alterations" of physical "facilities." The district court held that the purchase of optical scan equipment in 2002 was an "alteration" to the existing "facility" (i.e., voting system) that filed to make the activity of voting "readily accessible" to the maximum extent feasible." The trial court erred in adopting this novel application of § 35.151(b) to the facts in this case.

A. An Optical Scan System Did Not Violate the ADA Where Third Party Assistance Under Florida Law is Provided.

First, optical scan voting systems, which were used in fifty-two Florida counties (and throughout the United States), were "readily accessible and usable" [24] with third party assistance under Florida law. Indeed, the trial court held as much in ruling against Plaintiffs on their claim that the lack of touchscreens/audio ballots

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

violated 28 C.F.R. § 35.160, which requires appropriate "auxiliary aids." The district court concluded:

> "... **All three individual Plaintiffs have been able to vote with third-party assistance**. While the visually impaired Plaintiffs testified to concern about whether their votes were accurately reflected, **there is no evidence to suggest that their votes were no accurately communicated via third-party assistance**. Similarly, there is evidence that visually and manually impaired voters have consistently been able to vote in Duval County elections using third-party assistance, which indicates that **visually and manually impaired voters have been afforded an equal opportunity to participate in and enjoy the benefits of voting.**"

(emphasis added) Doc. 215, p. 23. [25] That Plaintiffs were "afforded an equal opportunity to participate in and enjoy the benefits of voting" compels the conclusion that the voting system in Duval County complied with the statutory language of the ADA itself.

That certain disabled persons had to disclose their votes to a third party in using an optical scan voting system did not constitute an ADA violation. Notably, the Office of Civil Rights, Department of Justice, had specifically determined that Florida's statutory program of third party assistance met ADA standards. In a Letter of Findings dated August 25, 1993, the Department addressed whether the failure to

[25] 2004 WL 626687 at *11.

provide blind voters in Pinellas County, Florida with an electronic method of voting violated the ADA.[26] The complainant specifically asserted that blind voters were not provided a method of voting that allowed a secret ballot. The Department stated that the Supervisor of Elections, who followed section 97.061, Florida Statutes, by providing third party assistance to blind voters, was in compliance with the Act. The Department stated:

> ***Although providing assistance to blind voters does not allow the individual to vote without assistance, it is an effective means of enabling an individual with a vision impairment to cast a ballot.*** Title II requires a public entity to provide equally effective communications to individuals with disabilities, but "equally effective" encompasses the concept of equivalent, as opposed to identical, services. ***Poll workers who provide assistance to voters are required to respect the confidentiality of the voter's ballot***, and the voter has the option of selecting an individual of his or her choice to provide assistance in place of poll workers. ***The Supervisor of Elections is not***, therefore, ***required to provide*** Braille ballots or ***electronic voting in order to enable individuals with vision impairments to vote without assistance.*** [27]

As the highlighted language indicates, the Division viewed Florida's voter assistance statute as an "effective" method of enabling the visually impaired to vote while

[26] While the Letter addressed § 35.160 dealing with auxiliary aids, its analysis and conclusions were equally applicable to a claim under § 35.151(b) seeking such aids.

[27] Letter of Findings, Dep't of Justice (August 25, 1993) (to Supervisor of Elections, Pinellas County, Florida) http://www.usdoj.gov/crt/foia/lofc018.txt (emphasis added) (footnote omitted).

preserving the secrecy of their votes. Moreover, the Division recognized that, under the ADA a public entity is not required to provide "identical services" in order to meet legal requirements. Instead, the longstanding interpretation of the ADA was that a public entity must provide "equally effective communications to individuals with disabilities" that include "equivalent, as opposed to identical, services." Id. [28]

Finally, no ADA standards for voting equipment or systems existed by the time of trial, September 2003. Paul Craft, Division of Elections, and Jack Gillrup both testified that they consulted with Department of Justice ADA experts who said that no standards exist in this area. Tr. 3: 164-165 (Doc. 168); Tr. 6: 65-66 (Doc. 171). Given the lack of ADA standards, and because the optical scan system at issue, combined with third party assistance under Florida law, is readily accessible and usable by the Plaintiffs, the trial court erred in concluding that the ADA was violated.

IV. In the Event the Court Concludes the Case is Not Moot and that the ADA was Applicable to the Supervisor of Elections Purchase of Voting Machines in February 2002, the District Court Erred in Concluding that 28 C.F.R. 151(b) Required the Supervisor of Elections to Purchase Voting Machines Which Allowed Visually and Manually Impaired Voters to Vote Unassisted With Touchscreen Technology

A. Because Plaintiffs Were Not Excluded from or Denied The Benefit of Voting, Their Regulatory Claim Must Fail.

[28] The Division has stated that certain "curbside voting policies" for otherwise inaccessible polling places are “effective” "alternative methods" that enable disabled voters to cast a ballot. *See* Letter of Findings, Dep't of Justice, Civil Rights Division (August 19, 1993) (to County Elections Department, Las Vegas, Nevada). http://www.usdoj.gov/crt/foia/lofc017.txt

The ADA provides that "… no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Here, the district court specifically ruled – and the evidence fully supports – that no Plaintiff was denied an equal opportunity to participate in or derive the benefits of voting in Duval County. Because Plaintiffs were not excluded from or denied the benefit of voting under the ADA's statutory language itself, their regulatory claim under 28 C.F.R. § 35.151(b) based upon the same conduct must fail. Alexander v. Sandoval, 532 U.S. 275, 291, 121 S. Ct. 1511, 1522 (2001) ("'[T]he language of the statute and not the rules must control' … language in a regulation" cannot "conjure up a private cause of action that has not been authorized by Congress.") (citation omitted).

B. The Trial Court Erred In Holding That Voting Systems Are "Facilities" Under § 35.151(b).

Alternatively, the trial court erred in holding that the purchase of optical scan voting equipment is an "alteration" to an existing "facility" (i.e., voting system) that violates 28 C.F.R. § 35.151(b) of the ADA. The specific type of "accessibility" at issue is "***program*** accessibility***"*** referred to in Subpart D of the regulations. The gist

of these regulations is that a public entity's failure to make a "facility"[29] physically accessible amounts to "exclusion from participation in, or the denial of the benefits of, the program, service or activity" within the "facility" itself.

Here, the court fundamentally erred in concluding that a voting system is a "facility" when, in fact, it is the "program, service or activity" itself. The "program accessibility" regulation at issue was designed to facilitate access to programs, services and activities, such as voting; it was not designed to regulate the program, service or activity itself, particularly the complex and highly regulated "program" or "activity" of voting and elections administration, which is subject to substantial federal and state laws, regulations and policies. *See* Nelson v. Miller, 170 F3d. 641 (6th Circuit. 1999). For this reason alone, the trial court erred in applying section 35.151(b) to a "voting system."

Unlike buildings, ramps, elevators and other semi-permanent structures commonly understood as "facilities" that are susceptible to being "designed and constructed" or "altered" to provide physical access to public programs, services and activities, a voting system in Florida is a "method" of casting votes via an amalgamation of computer hardware/software, voting booths, and other portable

[29] *See* CFR § 35.104 ("Facility means all of any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is lcoated.").

items that are designed to be transportable and thereby not permanently affixed or installed at any one location or site. See Florida Statute 97.021 (43) [30]

Indeed, while the regulatory definition of "facility" is broad, it has not been stretched to extend beyond its common understanding, which is limited to elements that are permanently made part of a physical structure. [31] Reported cases under section 35.151(b) relate to an *alteration to an element made part of a permanent physical structure*, such as curb cuts or ramps on a sidewalk or road, elevators and restrooms in buildings, and alarm boxes/ticket vending machines affixed to public buildings. [32] Addition of these types of elements to a permanent physical structure can be done

[30] *See, e.g.,* Molloy v. Metro. Transp. Auth., 94 F.3d 808, 812 (2nd Cir. 1996) ("Literally, an 'alteration' is 'change' to a 'facility.' By way of non-exclusive example, **the regulation lists only physical modifications of a relatively permanent nature to the facility.** Under the common sense approach to interpreting a general provision in the light of a list of specific illustrative provisions,, *ejusdem generis*, we construe the general term (here, 'change') to include only things similar to the specific items in the list." (emphasis added)

[31] For this reason, the meaning of "equipment" in the definition of a "facility" is best understood as applying to items such as elevators, escalators and other types of "equipment" that become physical modifications to a permanent structure.

[32] Kinney v. Yerusalim, 9 F.3d 1067 (3rd Cir. 1993) (resurfacing of city street was alteration that required installation of curb ramps); Panzardi-Santiago v. Univ. of Puerto Rico, 200 F. Supp. 2d 1 (D. Puerto Rico 2002) (public pathway); Association for Disabled Americans v. City of Orlando, 153 F. Supp. 2d 1310, 1319 (M.D. Fla. 2001) (restrooms and seating); Ability Center of Greater Toledo v. City of Sandusky, 133 F. Supp. 2d 589 (N.D. Ohio 2001) (curb cuts); Deck v. City of Toledo, 29 F. Supp. 2d 431 (N.D. Ohio 1998) (curb ramp); Anderson v. Pa. Dept. of Public Welfare, 1 F. Supp. 2d 456, 463-64 (E.D. Pa.,1998) (alteration of office buildings); Schonfeld v. City of Carlsbad, 978 F. Supp. 1329, 1339 (S.D. Cal. 1997) (restrooms and curb ramps); *see also* Molloy v. Metropolitan Transp. Authority, 94 F.3d 808, 812 (2nd Cir. 1996) ("The installation of a TVM [ticket vending machine] constitutes a *physical* modification to the station. It also requires additional wiring and communication lines which feed into the LIRR's central TVM monitoring facility.") (emphasis added).

during the construction or alteration stage more cheaply (compared to adding them later) and are distinguishable from voting machines, which are portable and not affixed to a permanent structure. It is one thing to require a simple, inexpensive "curb cut" or ramp to a sidewalk that is being altered; it is quite another to require the disproportionate cost and burdens of the additional voting technology that the trial court has compelled in this litigation.

Notably, the lack of any regulatory guidelines under the ADA for voting systems speaks volumes. Detailed and voluminous ADA regulatory standards and technical/engineering specifications exist for many types of physical or structural alterations. [33] None existed for voting systems or equipment [34] and for good reason due to the complexity, portability and pervasive regulation under state law and relating to members of the disability community. For all these reasons, the trial court erred in concluding that § 35.151(b) applies to the purchase of optical scan voting equipment at issue.

C. The Trial Court Erred In Its Application of 28 C.F.R. § 35.151(b)'s "Feasibility" Standard.

[33] *See eg.,* 28 CFR 35.151(e); Americans with Disabilities Act Accessibility Guidelines for Building and Facilities ("ADAAG"); and Uniform Federal Accessibility Standards ("UFAS").

[34] The DOJ had not interpreted section 35.151(b) to apply to voting equipment, nor had the DOJ issued any guidelines or standards for voting equipment under its ADA rulemaking powers, thereby dispensing with the deference that ordinarily would apply if such guidelines or standards existed.

Even if § 35.151(b) extend to voting systems, the trial court erred in its application of the regulation's "feasibility" standard in finding an ADA violation based on the failure to procure the ESS touchscreen/audio ballot system. The trial court correctly ruled in its August 19, 2003 order that the qualifying phrase "to the maximum extent feasible" in § 35.151(b) is "a ***limitation*** rather than an expansion" of the "readily accessible" standard in the regulations. [R124 14 n.5] Yet the court misapplied this limitation in its final order of March 24, 2004.

In this regard, section 35.151, which related to "New construction and alterations", had two subsections with very different compliance standards. While section 35.151(a) provided that any *new* facility must be a designed or constructed facility to make it "readily accessible to and usable by individuals with disabilities," section 35.151(b), which applies to *alterations to existing facilities*, had no such requirement. Instead, section 35.151(b) provided:

> (b) *Alteration*. Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, *to the maximum extent feasible*, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commended after January 26, 1992.

28 C.F.R. § 35.151(b) (emphasis added). While section 3.151(a) required that facilities be "designed and constructed" to be "readily accessible to and usable by"

the disabled, section 35.151(b) was more limited and required that alterations to a facility be "readily accessible to and usable" by persons with disabilities only to the "maximum extent feasible."

In other words, the duty under § 35.151 (b) was not that an alteration render a facility"readily accessible." Instead, the duty was to make the alteration in a way that made the facility "readily accessible." This limiting phrase meant that alterations need not be made if they exceed existing technical ability, involve unreasonable costs, or impose risks or burdens that are disproportionate to the accessible feature sought. Indeed, the term "feasible" is most reasonably understood with this "practical" or "reasonable" interpretation, rather than the extreme position the Plaintiffs advocated and the trial court applied, which transformed this regulatory *limitation* into the judicial *compulsion to buy* a flawed voting system without regard to its usability or costs.

1. The Trial Court Erred in Holding That State Technical Certification Assured A System's Overall "Feasibility."

The district court erred in concluding that state certification alone was sufficient to support a finding of "feasibility" by "ensur[ing] that a system is not a substandard voting system. Doc. 215, pp. 17-18. The court overlooked the official government reports and evidence demonstrating that the ESS system was not only substandard, but resulted in the most calamitous elections experience in Florida in

2002. Given that certification is only an assurance as to technical standards (with no consideration of the usability/affordability standards deemed critical in the 2001 Governor's Task Force Report, (S.E. Ex. 31)it was clear error to conclude that state certification of a voting system ensured that the system met a particular jurisdiction's needs, was economically viable, or was administratively desirable.

2. The Trial Court Erred in Concluding That Stafford Should Have Bought the ESS System Because it was the Only Certified System With an Audio Ballot.

The trial court erred, both legally and factually, in concluding that the ESS touchscreen voting system should have been purchased simply because it had the first and only certified audio ballot in Florida and because it was purportedly used with success in Miami-Date County in 2002. The trial court's findings and analysis are clearly erroneous in a number of respects as to the "feasibility" of this system.

First, the trial court ignored that the ESS system directly caused an unprecedented election fiasco in Miami-Dade. Buying the ESS system with its problems simply to have the first-ever audio ballot would have been foolhardy and a recipe for disaster. The Supervisor of Elections rejected the ESS system as undesirable on numerous technical, administrative and economic grounds. Yet, the trial court engaged in judicial second-guessing by concluding that Stafford violated

the ADA by not procuring that system. For example, the ability to override overvotes was a distinctly disqualifying feature that rendered the system undesirable.

3. Three Audio Ballots for Centralized Short Term Use/Testing Was Reasonable

Finally, Supervisor Stafford's decision to use three audio ballots on a trial basis at a centralized location was reasonable and not an ADA violation. Instead, it was consistent the Duval County Elections Task Force's recommendation of a "centralized voting facility for extraordinary access" to use the equipment on an experimental basis for possible future use on a precinct basis. S.E. Ex. 1 It was also consistent with the 2001 Governor's Task Force Report, which recommended consideration of technology that might become certified and proven in the field. Indeed, Stafford sought to accommodate disabled voters in this procurement decision. Tr. 5;62-63 (Doc. 170). ("We decided that back in – I want to say December 2001 – that wen we bought a system, we wanted that capability, for touchscreen with audio.") [35] No evidence suggests that the unexpected lack of certification for Diebold's audio ballot was attributable to Stafford, who (along with other counties) kept in contact with and pressure Diebold regarding the status of certification. Tr. 6:75-76, 110 (Doc. 171)

[35] To facilitate this possibility, Stafford negotiated a option in the Diebold/Global contract whereby optical scan equipment may be traded at full value for new touchscreens thereby enabling a more effective and affordable transition to that technology, if practicable.

D. The Trial Court Erred in Finding A Violation as to the Manually Disabled Plaintiff.

The trial court erred in concluding that Stafford violated the ADA as to the manually disabled Plaintiff by not purchasing a touchscreen system. No voting system had ever been certified in Florida for use by persons with manual disabilities including the use of mouth sticks. Tr. 3: 145-46 (Doc. 168); State Ex. 3, 4. State Voting Systems Chief Paul Craft testified that his office does not certify touchscreens for this use because "there is no assurance that a given voter with a given mouth stick isn't going to have difficulty with [a touchscreen]. It has not been tested nor certified for that specific accommodation." Id. He stated that absent "regulating the mouth sticks used by people, which I think would be very undesirable, then it's going to be very difficult to bring that particular interface into certification." Tr. 3:146 (Doc. 168) As such, it was error for the trial court to find an ADA violation when Florida counties could not even purchase certified equipment for use by manually disabled voters, including those who might use mouth sticks.

That the one manually disabled Plaintiff was able to utilize his mouth stick on a particular manufacturer's touchscreen at trial [36] has little probative value given that

[36] Notably, Plaintiffs' Amended Complaint pleaded a subclass of manually disabled voters who are precluded "from manipulating a writing instrument" and specifically stated that Plaintiff Bell "cannot manipulate a writing instrument *or a touchscreen with his hands*" – but it was not alleged that he could use a mouth stick on a touchscreen for this purpose. Doc. 47, ¶¶ 16, 24, 35

no certification for that use of existing touchscreen equipment existing. The trial court's findings – that "mouth sticks would not have to be certified" and "manually impaired voters may vote with a mouth stick on an ES & S ... touch screen machine *if they are able"* – are likewise irrelevant and beg the question whether voting systems are certified for such use. *See* Doc. 215, p. 6, par. 19. Given the lack of any official, objective standards by which to assess "mouth stick-accessible" equipment, it was error legally and factually for the trial court to find an ADA violation with respect to the manually disabled.

Conclusion

From the inception of the renewal of this litigation with the filing an Amended Complaint, after the initial Complaint was dismissed with prejudice, the right for the visually disabled to have audio-capacity voting system in every precinct had already been legislatively established through HAVA, rendering any declaratory relief sought moot from the inception. Thus, the only issue at stake in the litigation was injunctive relief - - Plaintiffs' effort to have this right mandated before the effective date set by HAVA. The Court of Appeals held this aspect of the case moot in the prior interlocutory appeal in ths case. Hence, there is no other on the merits left in this case which is not moot. Accordingly, the entire case is now moot and must be remanded with directions that the final orders and judgments be vacated, and the case dismissed.

Alternatively, should the Court of Appeals conclude otherwise, it is requested that the Court of Appeals, for the reasons set forth in the brief, rule that the district court erred in determining that the Supervisor of Elections violated 28 C.F.R. § 35.151(b), in February 2002, by purchasing an optical scan voting system, and reverse this determination on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.Civ.P.3(a)(7) and Eleventh Circuit Rule 28-1, counsel for Appellant certifies that the Brief of Appellant is prepared in 14 point Times New Roman type, and further certifies that the word count for the foregoing brief, as counted by the word processing system used in preparing this brief, is 11,196.00.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Appellant has been furnished to the following by U.S. Mail, this 4th day of February, 2008:

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