CASE NO. 07-15004-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, DANIEL W. O'CONNOR, KENT BELL, BETH BOWEN, On behalf of themselves and others similarly situated,
Plaintiffs-Appellees,

Versus

JERRY HOLLAND, As Supervisor of Elections in Duval County,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION, DC DKT NO. 3:01-cv-01275-J-99HTS

BRIEF OF APPELLEES

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APPELLEES' UPDATED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Appellees, the American Association of People with Disabilities, Daniel W. O'Connor, Kent Bell, and Beth Bowen submit the following Certificate of Interested Persons with additional persons and entities omitted from the initial certificate filed by Appellant:

1. The American Association of People with Disabilities has no parent corporation.
2. The American Association of People with Disabilities is not a corporation and as such has no issued stock.
3. The following individuals have an interest in the outcome of this appeal:
    a. The Honorable Henry L. Adams, United States District Judge for the Middle District of Florida;
    b. The Honorable Wayne E. Alley, 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);
    c. Arpen, Tracey I., counsel for Appellant;

d. Baldridge, J. Douglas, counsel for Appellees;

e. Bell, Kenton, Appellee;

f. Bowen, Elizabeth H., Appellee;

g. Browning, Kurt S., Secretary of State of Florida;

h. Bruskin, Robert, co-counsel for Appellees;

i. Craft, Paul, Chief, Florida Bureau of Systems Certification;

j. Dickson, James C., on behalf of AAPD;

k. Diebold Election Systems;

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

m. Duval County Supervisor of Elections' Office;

n. Election Systems & Software, Inc.;

o. Florida Division of Elections;

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

q. Gardner, Elizabeth Elaine, co-counsel for Appellees;

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

s. Holland, Jerry, Appellant;

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

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

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

w. Mueller, Ernst, counsel for Appellant;

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

y. Sequoia Voting Systems;

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

aa. Teal, Jason, counsel for Appellant;

bb. Thomas, Milo Scott, counsel for Appellees;

cc. Tuck, Amy, as Director, Florida Division of Elections;

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

ee. Williams, Lois G., co-counsel for Appellees; and

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

STATEMENT REGARDING ORAL ARGUMENT

Appellees believe that oral argument would be helpful to the Court because of long and complex history of this case. Appellees respectfully request that oral argument be granted.

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STATEMENT OF JURISDICTION

On October 19, 2007, Appellant ("Holland") appealed the district court's September 20, 2007 final judgment and order, which made final its March 2004 Preliminary Order and Declaratory Judgment (the subject matter of Holland's first appeal that this Court dismissed as moot). (Notice of Appeal, Oct. 19, 2007.) Holland amended his appeal on December 4, 2007 to include the district court's order, issued the prior day, denying Holland's Motion to Vacate. (Dkts. 341, 342.)

As briefed in their January 28, 2008 Motion to Dismiss, Appellees ("AAPD") maintain that this Court has no jurisdiction to hear the present appeal. As explained therein, the matters encompassed by the district court's September 20, 2007 order were found moot by this Court in its review of Holland's first appeal. (*See* 11th Cir. Appeal No. 04-11566.) Any remaining issues in this appeal only relate to Holland's liability for attorneys' fees and costs under 42 U.S.C. § 15545. This issue is not yet ripe for appeal because the amount of such fees and costs have not been quantified and finally determined by the district court.

STATEMENT OF THE ISSUES

The issues presented are:

1. Should this appeal be dismissed for lack of jurisdiction where: (1) Holland previously appealed the injunction related issues in 2004 and this Court held them to be moot due to Holland's voluntary compliance with the injunction; and (2) the remaining issues raised in this appeal only relate to AAPD's pending request for attorneys' fees, costs, and expenses yet to be decided by the district court and thus not yet ripe for appeal?

2. If there is jurisdiction, did the district court abuse its discretion by maintaining its injunction and final judgment where the mootness resulted from Holland's voluntary compliance with injunctive relief ordered by the district court after trial, and there is significant public interest served in allowing the injunction and judgment to remain intact?

3. Did the trial court clearly err in finding that voting was an activity protected by the Americans with Disabilities Act ("ADA") and that voting systems were "facilities," as described by the ADA?

4. Did the trial court clearly err in finding that Holland violated the ADA by purchasing an optical scan voting system in 2002 that was not readily accessible by disabled voters to the "maximum extent feasible" as required by the ADA, where the evidence demonstrated that disabled voters were unable to vote

unassisted on the system in the same manner as non-disabled voters; where Holland admitted (1) that there were material differences in how the purchased system forced disabled voters to vote compared to non-disabled voters; and (2) that disabled voters had a "legitimate complaint" regarding those material differences?

STATEMENT OF THE CASE

AAPD supplements Holland's "Statement of the Case and Facts" to provide the Court with a more complete procedural history.

A. AAPD Filed Suit Under the ADA

Appellees O'Connor, Bell, and Bowden are Florida citizens who are registered to vote in Duval County – importantly, they are all visually or manually impaired voters.[1] Appellee American Association of Disabled Persons is a non-profit association dedicated to advocating for, and enabling persons with, disabilities. (all Appellees are collectively referred to as "AAPD"). (Dkt. 215, ¶¶ 1-3.)[2] AAPD initiated suit on November 8, 2001 to remedy Holland's failure to provide handicap accessible voting systems, a discriminatory practice that violated both the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Rehabilitation Act ("RA"), 29 U.S.C. § 701 *et seq.* (Dkt. 1.) The ADA requires 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

[1] Hereinafter, "visually or manually impaired voters" will be referred to collectively as "disabled voters."

[2] References to the Record on Appeal, including trial transcripts, are designated by their Docket Number, and page and/or paragraph reference, *e.g.*, "Dkt. X, p. YY." References to trial exhibits are prefaced as "PX" for Appellees' Exhibits, and "DX" for the Appellant's or State Defendant's exhibits. State Defendants were part of the suit through trial; however, aside from ordering the State Defendants to report on the certification of certain voting systems, the district court did not hold the State Defendants liable, and they are not parties to this appeal. (Dkt. 215, pp. 30-31.)

services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Holland's discrimination continued until well after AAPD won a declaratory judgment in 2004 as a result of a full trial before the district court. (*See* Dkt. 215, pp. 20, 27-28, 30 (holding Holland liable under the ADA for illegal discrimination against disabled voters), Dkt. 290, p. 3 (finding that accessible voting systems were finally ready for use on November 17, 2005).)

On March 12, 2002, the district court dismissed certain claims in AAPD's complaint which asserted that disabled voters "have been excluded from or denied the benefits of a program of direct and secret voting that does not permit the type of assistance provided for [in Florida's third-party assistance statute]." (Dkt. 42, pp. 37-38.) While dismissing some claims the district court specifically cited this Circuit's precedent that does not restrict the ADA to situations in which "a disabled person is <u>completely prevented</u> from enjoying a service, program, or activity," and held that the ADA "more generically proscribe[s] disability 'discrimination' by the pertinent public entities." *(Id.*, pp. 26-27, 29.) The district court specifically permitted refiling of AAPD's original ADA claims under both the program exclusion and generic discrimination proscriptions. (Dkt. 42, pp. 29-30, 39.)

AAPD subsequently filed an amended complaint on November 5, 2002, alleging that under the system then in place: (1) disabled voters were discriminated

against because they could only vote with third party assistance, (Dkt. 47, pp. 9-10, 16-18); and (2) that the discrimination related to the additional burdens faced by AAPD members when voting that are not faced by non-disabled voters:

> The particular discrimination against Plaintiffs . . . manifests itself as follows: (a) being *forced* to reveal their votes to a third-party; (b) risking having (and actually having) their votes revealed by the third-party to other people; (c) risking having (and actually having) the *third-party attempt to influence their candidate choice;* (d) having to vote in a manner that singles them out in the polling place; (e) having to *wait long periods of time* until a third-party is available to assist the voter; (f) having to incur the burden and impediment of *traveling to the Office of Elections' headquarters* to use the three accessible voting systems in the event Duval County ever purchases such machinery; and (g) having to suffer *embarrassment* and *distress* during the voting process for each of the foregoing reasons and the fact that they are required to vote in a manner *materially different* from, and *substantially more burdensome* than, the manner in which non-disabled voters cast their votes in Duval County.

(*Id.*, pp. 17-18, (emphasis added); *see also id.*, pp. 9-10.) Thus, AAPD's amended complaint was predicated on the discriminatory burdens that Holland imposed on disabled voters in Duval County by purchasing non-accessible systems in 2002, forcing disabled voters to vote using third-party assistance, despite the availability of several handicap accessible options. AAPD's amended complaint was not, as Holland contends, "another attack on Florida's third-party assistance statute." (Br. 8.)

B. AAPD Prevailed on the Merits at Trial

The parties tried AAPD's discrimination claims in a bench trial from September 23, 2003 to October 1, 2003. AAPD prevailed on the merits of its claim under 28 C.F.R. § 35.151(b) (the regulation outlining accessibility standards required by the ADA) and won the complete relief sought - an injunction requiring Holland to provide handicap accessible voting systems that complied with the ADA. The district court issued a Preliminary Order that AAPD's claim under the generic proscription of the ADA "coterminous with its claim under 28 C.F.R. § 35.151" and further that "regulations implementing the Rehabilitation Act contain similar standards." (Dkt. 215, p. 17 n.3; p. 27.) The district court concluded that "the Court will not separately address this claim based upon the conclusion that it is to be resolved in the same manner as AAPD's claim under 28 C.F.R. § 35.151." (*Id.*, pp. 27-28.)

The district court then entered a Declaratory Judgment[3] in which:

1. It held that Holland violated 28 C.F.R. § 35.151(b);
2. It directed Holland to have at least one handicap accessible voting system at 20% of the polling places in Duval County, Florida; and

[3] The Declaratory Judgment was a non-final judgment when it was entered. On September 20, 2007, the district court made this judgment final. (Dkt. 294.)

3. It required Holland to have Diebold touch screen voting systems with audio capacity certified on or before May 14, 2004. (Dkt. 216.)

After the district court issued its March 2004 Preliminary Order and Declaratory Judgment, Holland appealed those decisions.

C. Holland Voluntarily Complied with the District Court's 2004 Injunction

Holland claims in the current appeal that he installed voting systems that were accessible to disabled voters because he was complying with the Help America Vote Act of 2002 ("HAVA"),[4] rather than because he was complying with the district court's injunction. In fact, Holland filed several reports with the district court reporting the steps he was taking to comply with the judgment. In each report, Holland specifically admitted that he was taking these steps pursuant to the district court's orders and never once mentioned HAVA:

- April 12, 2004 –Holland filed a plan with the district court to comply with the injunctive relief granted by the district court (that is, for placing accessible systems in 20% of the voting districts). (Dkt. 227.) In the plan, the Holland, specifically stated that "[***p*]*ursuant to the Court's order dated***

[4] 42 U.S.C. § 15301 *et seq.*

> ***March 24, 2006 [sic] and final judgment dated March 26, 2004, Supervisor John Stafford provides this Report …"***[5]

(Dkt. 227, p. 1 (emphasis added).)

- May 14, 2004 – Holland filed a report indicating that he would have Diebold touch screen voting systems with audio capacity certified and admitted that "Defendants [Hood and Kast in their respective official capacities], by undersigned counsel and ***pursuant to the Court's [March 24, 2004] Order, hereby submit this final report to the court*** …"

(Dkt. 248, p. 1 (emphasis added).)

On September 30, 2004, the parties submitted an agreement that Holland would adopt and fulfill the plan it filed on April 12, 2004 (with only minor changes). (Dkt. 268.) The district court adopted the agreement by its Order dated October 4, 2004. (Dkt. 271.) In the agreement, Holland admitted that he was complying with the Declaratory Judgment that the district court awarded to AAPD:

> ***In light of … this Court's March 24, 2004, Order,*** Plaintiffs and Defendant John Stafford ("Defendant") hereby move this Court to adopt the [April 12, 2004 plan] … by requiring Defendant to install the systems at the precincts identified …

(Dkt. 268, p. 1 (emphasis added).)

[5] Stafford was the originally named Supervisor of Elections for Duval County; since the filing of the suit, Holland replaced Stafford.

D. Holland's First Appeal of the District Court's 2004 Injunction

On March 31, 2004, before he had complied with the district court's order, Holland filed his first appeal (11th Cir. Appeal No. 04-11566) (Dkt. 217) and sought review of the following orders:

- the March 24, 2004 Order that specifically found that Holland violated the provisions of the ADA, 28 C.F.R. § 35.151 (b) (Dkt. 215) ("Preliminary Order");
- the March 26, 2004 Declaratory Judgment requiring Holland to purchase voting machines that are accessible to disabled voters (Dkt. 216) ("Declaratory Judgment");
- the August 19, 2003 Order denying Holland's second motion to dismiss (Dkt. 124); and
- the October 16, 2002 Order granting, in part, Holland's motion to dismiss (Dkt. 42).

While the district court labeled its March 26, 2004 notice as a "Declaratory Judgment," it only established the parameters for the injunctive relief and did not issue a final judgment in the case. (*See* Dkt. 216.)

Following briefing and oral argument, Holland sought a determination that his first appeal was moot since he had contracted to purchase voting systems that

would comply with the appealed injunctive relief. (11th Cir. Further Suggestion of Mootness, May 19, 2005.) Following a limited remand for fact finding,[6] this Court agreed and declared the first appeal moot. (*See* 11th Cir. Order, Aug. 15, 2007; 11th Cir. Order, Nov. 1, 2007 (order dismissed "this appeal as moot").[7])

On April 16, 2004, while this Court was determining jurisdiction over the first appeal, the district court stayed the injunction and stated:

> The court takes issue with Defendant's repeated reference to the uncertified voting machines and the implication that he was an innocent bystander during the acquisition process for those machines. ***Defendant Stafford is solely responsible for having selected and purchased machines that had not yet been certified when other systems with similar capabilities had been certified by the State of Florida.***

(Dkt. 232, p. 3, fn. 1 (emphasis added).)

E. The First Appeal was Mooted by Holland's Voluntary Compliance with the Injunction

Holland mooted his own appeal by voluntarily complying with the district court's injunction while the appeal was pending. The first appeal subsequently progressed as follows:

- January 26, 2005 – oral argument was presented to this Court.

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[6] (*See* 11th Cir. Order, Aug. 8, 2005.)

[7] While the original August 15, 2007 Order stated "we conclude that the case is moot and therefore dismiss it", the subsequent November 1, 2007 Order clarified this statement by issuing an "order dismissing *this appeal* as moot…." (11th Cir. Order, Nov. 1, 2007) (emphasis added).

- August 8, 2005 – over six months after oral argument and after Holland complied with nearly the entire Declaratory Judgment, this Court certified two questions to the district court: (1) whether a contract was in place for purchasing enough accessible voting systems to place one in each voting district, and (2) whether the accessible voting systems would be in place for the subsequent election. (Dkt. 282, pp. 5-6.)
- August 22, 2005 – the district court held an evidentiary hearing regarding Holland's compliance with the remaining portion of the interlocutory orders. (*See* Dkt. 285.) One day later, the district court answered both of this Court's questions in the affirmative. (Dkt. 285.)
- August 15, 2007 – two years after the district court answered the certified questions, this Court recognized that Holland received and deployed handicap accessible voting systems by November 17, 2005 and held that the appeal was moot. (11th Cir. Order, Nov. 1, 2007.)

Given that Holland complied with all portions of the district court's Preliminary Order and Declaratory Judgment, the first appeal was dismissed as moot by this Court. (Dkt. 290, p. 3.) Importantly, the first appeal was not dismissed because AAPD had no valid cause of action, that the district court committed any error, or that Holland had no duty to comply with the district court's order – to the contrary, nothing was left for this Court to resolve since

Holland had fully complied with the injunction that the district court imposed on him. Thus, on August 15, 2007, the first appeal was dismissed and remanded to the district court for further proceedings.

F. On Remand AAPD Moved For Its Attorneys' Fees, Costs, and Expenses Under the ADA

On September 20, 2007, the district court issued its Amended Order and Final Judgment which reiterated exactly the same relief as the district court's Preliminary Order and Final Judgment discussed above. (Dkts. 294 and 295.) The Final Judgment granted no additional relief except that it permitted the parties to file post-trial motions including applications for costs and fees. (Dkt. 294, p. 5.) AAPD originally sought their attorneys' fees and costs pursuant to 42 U.S.C. § 12205 on April 12, 2004. (Dkts. 224-226.) AAPD updated its motions for fees and costs on October 30, 2007 (Dkt. 330), November 6, 2007 (Dkt. 333), and March 13, 2008 (Dkts. 348-350.) Holland has challenged all such motions. (Dkts. 343, 345, 351.) The district court has not yet ruled on AAPD's motions for attorneys' fees and costs are still pending before the district court.

G. Holland Filed a Second Appeal from the Final Judgment

Despite the attorneys' fees and costs motions being the only disputed matters pending in the district court, on October 19, 2007, Holland appealed the district court's Final Judgment. On October 4, 2007, just before Holland filed his second

appeal, Holland filed a motion with the district court to vacate these Judgments and Orders. (Dkt. 315.) On December 3, 2007, the district court rejected Holland's motion and one day later, Holland filed an Amended Notice of Appeal adding that order to the instant appeal. (Dkt. 341, Dkt. 342.)

AAPD filed its motion to dismiss this second appeal on January 28, 2008, because Holland is appealing the same issues that this Court found moot in the first appeal. (Mot. to Dismiss, Jan. 28, 2008.) The only remaining issues that differ from the first appeal are related to the grant of attorneys' fees, and thus are not yet ripe for appeal. (*Id*.)

This Court subsequently ruled that AAPD's pending motion to dismiss is to be carried with the case and should be decided in conjunction with the instant appeal. (*See* 11th Cir. Order, Apr. 1, 2008.)

STATEMENT OF FACTS

A. Holland Altered Duval County's Existing Voting System When Punch Cards Were Outlawed By The Florida Legislature

In the Fall 2000 general elections, Duval County, like many Florida counties, used a punch card voting system. (Dkt. 215, ¶14.) In early 2002, Duval County began the process to alter its voting facilities by replacing the punch card systems, which had been outlawed by the Florida legislature following the state's infamous "hanging chad" experience in the 2000 elections. *(See* Dkt. 215, ¶14.)

B. Holland Purchased a Voting System That Was Not Readily Accessible To Duval County's Disabled Voters

In January 2002, Holland chose a new voting system for Duval County – an optical scan voting system manufactured by Diebold.[8] **(**Dkt. 215**,** ¶20.) To vote on the optical scan voting system, a voter fills in a bubble or otherwise marks a paper ballot with a pen or pencil, which is then fed through an optical scan ballot reader. (Dkt. 166, p. 53:16-22; PX 148, at 33:5-17.) A voter must be able to grip a pencil and see well enough to use these systems. (Dkt. 169, p. 155:20-156:7.) No auxiliary aids exist that would permit a disabled voter to vote in the same or similar manner as non-disabled voters using an optical scan voting system. (PX 150, at 79:25-80:6.) Not surprisingly, Holland admitted that:

[8] The City of Jacksonville, on behalf of Duval County, signed an agreement with Diebold on October 3, 2002. (Dkt. 170, p. 124:14-23; PX 150, at 95:15-17.)

- "there are greater burdens imposed on visually or manually impaired voters under Duval County's optical scan system that are not placed on [non-disabled] voters" (Dkt. 169, p. 154:2-8; *see also id.* 153:16-19, 155:12-15; PX 150, at 51:6-10, 54:17-55:8);
- "visually or manually impaired voters vote in a materially different manner than non-disabled voters vote" in Duval County (Dkt. 169, p. 154:13-155:6); and
- disabled voters "probably have a legitimate complaint" about these material differences in the way they vote. (Dkt. 169, p. 155:20-156:1.)

The trial testimony from disabled voters confirmed Holland's admissions. Kent Bell, who was born without arms or legs **(**Dkt. 215**,** ¶ 2; Dkt. 166, p. 84:6-8), testified that he was forced to wait for two poll workers to assist him to vote (at the "snack table") in the presence of non-disabled voters. **(**Dkt. 215**,** ¶ 6; Dkt. 166, p. 96:6-97:25.) On another occasion, Mr. Bell was forced to reveal his candidate choices in the presence of at least ten other people. **(**Dkt. 215**,** ¶ 6; Dkt. 166, p. 98:1-99:9.)

Dan O'Connor, who is legally blind **(**Dkt. 215**,** ¶ 1; Dkt. 166, p. 51:8-22), testified that he was taken to a "separate room" to vote where he could overhear other voters reveal their selections. **(**Dkt. 215**,** ¶ 5; Dkt. 166, p. 58:11-60:6.) The person assisting him "did not read [the] party affiliation [of] the candidates," which

caused him to doubt whether his ballot had been properly cast. **(**Dkt. 215**,** ¶ 5; Dkt. 166, p. 61:2-16.) As Mr. O'Connor explained, "even when the person went over the selections I made, you know, I didn't know for sure. I wasn't able to verify on my own whether that was actually accurate or not, like I had [with] the experience of the touch screen systems." (Dkt. 166, p. 61:2-16.)

Likewise, Pamela Hodge testified that the poll worker providing her assistance could not pronounce the words on the ballot accurately. (*Id.*, 123:8-124:23.) Beth Bowen, who has been blind since birth **(**Dkt. 215**,** ¶ 1; Dkt. 167, p. 13:2-3), testified that she was put "on display" when she used third party assistance because she was required to vote in the middle of a room where "there's people all around." **(**Dkt. 215**,** ¶ 7; Dkt. 167, p. 18:10-22.)

This trial evidence established that Holland imposed upon tens-of-thousands[9] of disabled voters in Duval County a voting process that is fundamentally different from, and more burdensome than, the process by which non-disabled voters voted. There was no way for disabled voters to vote in a non-discriminatory manner on Duval County's optical scan system – these voters were *forced* to rely on third party assistance. **(**Dkt. 215**,** p. 17; Dkt. 166, p. 53:16-25, 84:23-85:10, 112:13-21; Dkt. 167, p. 14:3-13; Dkt. 169, p. 152:21-153:8; Dkt. 172,

[9] Dkt. 166, p. 50:3-13; Dkt. 169, p. 132:13-134:15; Dkt. 170, p. 145:17-146:7; PX 13, at 159:13-16; PX 145.

p. 88:24-89:3.) On the basis of this and other evidence at trial, the district court found that the "optical scan voting system purchased by Duval County is not readily accessible to visually or manually impaired voters." **(**Dkt. 215, p. 17.)

C. Holland Could Have Purchased a Voting System That Was Accessible to Disabled Voters

1. Florida Certified Voting Systems Included Technologically Feasible Systems That Were More Accessible To Disabled Voters Than the Optical Scan System

Holland did not have to purchase an optical scan system. **(**Dkt. 215**,** p. 5-6, 8; *see also* Dkt. 169, p. 76:11-21.) Florida certified other voting systems that were accessible to disabled voters, yet Holland chose none of them. For example, Holland could have procured a touch screen voting system equipped with an audio ballot, on which disabled voters could vote independently, as non-disabled voters do. **(**Dkt. 215, p. 8, 17-18.) A touch screen system has a screen that enables a voter to select a candidate by pressing the candidate's name on the screen. (DX 31, at 34.) As demonstrated at trial by Mr. Bell, at least some manually impaired voters can use a mouth stick or other device to press the screen. **(**Dkt. 215, p. 19; PX 150, at 57:9-16; Dkt. 166, p. 85:17-86:25; Dkt. 167, p. 52:7-19,173:16-175:8.) Similarly, an auxiliary audio component can be used by visually impaired voters to navigate through the ballot screens with pre-recorded instructions played through headphones. (Dkt. 166, p. 54:3-55:5; PX 150, at 56:20-25; PX 149, at 27:1-3, 43:11-44:11, 89:12-90:10.)

Furthermore, there were at least two Florida-certified touch screen systems at the time the County was considering which voting system to purchase: ES&S and Sequoia.[10] The ES&S touch screen voting system with audio ballot was certified and available for purchase and use on August 16, 2001, more than a year before Holland signed the contract with Diebold.[11] **(**Dkt. 215**,** ¶16; PX 132; *see also* Dkt. 169, p. 76:16-21; PX 150, at 103:19-104:3.)

During the period that the County was investigating which voting system to purchase, at least eleven Florida counties purchased the ES&S touch screen in time for use in the 2002 elections. (PX 1, at 57.) For example, Pasco County, Florida, signed a contract with ES&S to purchase a touch screen system that "accommodate[s] the sight impaired with audio assisted voting" in October 2001. **(**Dkt. 215**,** ¶42; Dkt. 167, p. 166:6-16, 167:23-25.) The system was delivered to

[10] Holland testified that he had the options of "getting Diebold certified, or getting somebody else certified . . ." in addition to the options of purchasing the ES&S or Sequoia touch screen systems equipped with audio ballots. (Dkt. 169, p. 99:18-21; PX 150, at 103:19-104:3; see also Dkt. 172, p. 46:20-47:13; Dkt. 167, p. 46:14-47:5; Dkt. 168, p. 51:11-14.)

[11] Because the certification occurred after the 2001 Governor's Select Task Force on Election Procedures, Standards, and Technology's recommendation, the ES&S system could not be part of the task force's recommendation. (DX 31, at 30.) As a result, the Recommendation was obsolete by the time Holland purchased the County's voting system. Indeed, the 2002 Governor's Select Task Force recognized the new landscape that existed when it concluded that "[t]he current technology" for meeting the needs of disabled voters "is the touch screen electronic voting system with features such as audio that recites the ballot in a headset for blind and illiterate voters." (DX 12, at 23.)

Pasco County (1,455 machines total) approximately two weeks after the contract was signed. (Dkt. 167, p. 167:23-168:4, 169:19-170:2.) By the time of trial in this matter, Pasco County had used its new touch screen system in three elections with "huge success." **(**Dkt. 215**,** ¶42; Dkt. 167, p. 170:6-171:5, 172:8-173:12; PX 81, PX 111.)

Also, by the time of the trial in this matter, "the majority of the State's voters" had used Florida-certified touch screen systems in elections. (PX 1, at 23.) Touch screens were used in at least Dade, Broward, Hillsborough, Pasco, Nassau, Pinellas, and Indian River counties. **(**Dkt. 215**,** ¶41.) Highlands and Palm Beach counties has used systems comprising the specific relief ordered by the district court – blended systems[12] of one touch screen and an optical scan system in each polling place. **(**Dkt. 215**,** ¶41; *Troiano v. LePore*, No. 03-80097, 2003 WL 24832863, at *2-4 (S.D. Fla. May 1, 2003).) Hillsborough County implemented the Sequoia system with audio ballot one month after it was certified, in time for

[12] There is a distinction between the two types of "blended" systems described at trial. The first is a certified system comprised of an optical scan reader and a touch screen system made by the same vendor. The other type of "blended" system is comprised of an optical scan reader and a touch screen system made by different vendors. Both types of blended systems are technologically feasible and used across the country. (Dkt. 170, p. 149: 15-18 (Arapahoe County, Colorado, blends the Hart eSlate with the Sequoia optical scan); Dkt. 170, p. 149:19-150:1 (Tarrant County, Texas, blends the Hart eSlate with an ES&S optical scan); *see also* Dkt. 168, p. 69:12-17; 52:6-14).)

the September 2002 primary election. (Dkt. 167, p. 46:14-47:5, 49:9-20; Dkt. 168, p. 51:11-14; Dkt. 172, p. 46:20-47:13.)

The successful use of touch screen voting systems has not been limited to Florida. Between February 2001 and September 2003 the use of touch screens expanded to "about 500 counties with more than 200,000 units" throughout the country, including counties in California, Georgia, Texas, Colorado, Ohio, Maryland, Arizona, South Carolina, and the District of Columbia. (Dkt. 170, p. 142:9-14; Dkt. 167, p. 82:11-17, 117:23-121:20, 130:16-25, 172:8-173:12; Dkt. 168, p. 53:24-54:5; Dkt. 170, p. 142:15-143:5; Dkt. 171, p. 25:25-26:10.) Thus, the evidence established that touch screen systems "have performed superbly." (Dkt. 170, p. 143:10-22.)

Given the circumstances, the Florida Chief of the Bureau of Voting System Certification admitted there was no reason why Duval County could not have procured an accessible voting system just as these other jurisdictions had done: "I don't know of any reason that Duval County officials would not have the intelligence, management skills and other resources that it would take to do the same thing . . ." as other Florida counties did. (Dkt. 168, p. 26: 19-27:7.)

SUMMARY OF ARGUMENT

The present appeal is from the district court's September 20, 2007 Final Judgment that did nothing more than conclude the litigation (as to Holland) based on the exact same orders that were at issue in Holland's first appeal relating to the injunction, as well as the district court's order denying the motion to vacate. The district court granted no other relief and decided no other issues on remand before the Final Judgment was entered. Holland mooted the first appeal by voluntarily and fully complying with the district court's injunction while the appeal was pending. Because Holland's current appeal challenges the same underlying holdings supporting the permanent injunction, this appeal is not substantively different than his first appeal. Therefore, the issues related to granting the permanent injunction implicated by the current appeal are moot for the same reasons that this Court dismissed the prior appeal. For that reason, this appeal should be dismissed as moot.

As Holland has conceded, the only remaining live issue in this case is AAPD's request for its statutory award of attorneys' fees, including the quantification of any such award. It is well settled that an unresolved issue concerning an award of attorneys' fees is not sufficient to support an appeal of a substantive ruling that is otherwise moot. Without a final order concerning the

attorneys' fees, that issue is not yet ripe for appeal. Moreover, the potential of a future attorneys' fee award cannot be used as a basis for having this Court issue an advisory opinion regarding the merits of the underlying ADA violation upon which any future fee award in this case would be based.

Although Holland amended his notice of appeal in December 2007 to include the district court's denial of the motion to vacate the judgment and dismiss the entire case on grounds of mootness, Holland concedes that such relief was sought merely in an attempt to avoid liability for paying any of AAPD's attorneys' fees. As such, that ruling pertains only to the attorneys' fee issue, which is still pending at the district court and thus is not yet ripe for appeal. In short, there is no final judgment from which an appeal concerning any aspect of the attorneys' fees issue can be taken at the present time, including whether the district court properly held that Holland violated the ADA and whether the district court abused its discretion in denying the motion to vacate.

Even if this Court reaches the vacatur issue, the district court did not abuse its discretion in declining to vacate its orders. First, vacatur is not appropriate where the mootness results from Holland's own voluntary actions in complying with the court's ordered relief. Second, Holland's cited case law is inapplicable to the present facts. Holland's cases merely stand for the proposition that if a defendant's liability is removed (*e.g.* by making his actions legal through repeal of

a statute), then vacatur is appropriate. Vacatur is not appropriate where the defendant's conduct remains illegal and he voluntarily complies with the court ordered relief. Finally, the public interest is best served by leaving the injunction in place. Other jurisdictions have begun returning to the paper "chad" voting system, which is discriminatory towards disabled voters. Thus, there remains a real threat if the injunction is vacated that the rights of disabled voters will be significantly impaired. Additionally, this case is one of the few that has proceeded through trial and represents an important precedent. As such, it has provided valuable guidance and precedence to other courts, and thus should properly be left intact in the public interest.

The district court properly concluded that the ADA applies to the voting process. It also properly concluded that the voting systems are a facility under the ADA. Further, Duval County could have procured an accessible voting system because the touch screen systems were technologically feasible and had been successfully tested and used in other counties in Florida. Holland's failure to provide the touch screen voting systems violated the ADA because the ADA requires new facilities to be readily accessible to the maximum extent feasible.

Holland improperly cites a fifteen year old letter from the Department of Justice to argue that Florida's statutory program of providing third-party assistance to disabled persons when voting was ADA compliant. First, the letter is outdated

and inapplicable. It was written when electronic systems did not exist, and specifically noted that such systems were "not currently available." Second, the letter is not entitled to deference, according to Supreme Court precedent. Finally, the letter appears to be narrowly focused on blind voters in Pinellas County, and thus of limited relevance to this case.

The district court also properly found that the voting system in Duval County was not readily accessible to the maximum extent feasible. The ADA regulations require a heightened standard of accessibility where new facilities are constructed or altered after January 26, 1992. These heightened standards require that the facility "shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities." Holland's plan to provide handicap accessible voting systems in a single polling location did not satisfy the heightened standard of the ADA.

Finally, Congress' enactment of HAVA did not render the case moot. HAVA makes clear, on its face, that it does not limit or supersede the applicability of the ADA. For example, HAVA does not alter the fact that Duval County's voting system purchased in 2002 forced disabled persons to vote in a discriminatory manner. Likewise, there is no inconsistency with the court's injunction requiring Duval County to provide handicap accessible voting systems

sooner than the January 1, 2006 deadline mandated by HAVA. Finally, HAVA merely sets forth voluntary standards that are to be met in order to receive federal funding to help purchase voting systems. HAVA's requirements are not mandatory, and failure to meet HAVA's standards merely results in loss of funding.

STANDARDS OF REVIEW

This Court must defer to the trial court's findings of fact if they are "'plausible in light of the record viewed in its entirety… Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" *Solomon v. Liberty County Comm'rs*, 221 F.3d 1218, 1226-27 (11th Cir. 2000) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511 (1985)). In reviewing these factual findings, this Court must make all credibility choices in favor of the fact-finder's choice, in light of the record as a whole. *Meek v. Metro. Dade County*, 985 F.2d 1471, 1481 (11th Cir. 1993).

This Court reviews the trial court's conclusions of law *de novo. See Kidder, Peabody* & *Co. v. Brandt*, 131 F.3d 1001, 1003 (11th Cir. 1997); *SunAm. Corp. v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325, 1333 (11th Cir. 1996).

This Court reviews the trial court's order denying vacatur for abuse of discretion. *Murchison v. Grand Cypress Hotel Corp.*, 13 F.3d 1483, 1485 (11th Cir. 1994).

ARGUMENT

I. THE CURRENT APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION

A. The Current Appeal, as it Relates to the Injunction is Moot, Therefore This Court Has No Jurisdiction to Hear the Injunction Related Issues

The present appeal is from the district court's Final Judgment that did nothing more than conclude the litigation based on the same orders that were at issue in Holland's first appeal of the injunction, the Preliminary Order, and Declaratory Judgment. The district court granted no other relief and decided no other issues on remand before it entered the final judgment. Thus, Holland's current appeal is not substantively different than his first appeal. Indeed, as Holland informed this Court when opposing AAPD's pending request for attorneys' fees in the first appeal:

> [I]t is important that the Court of Appeals be aware that the only issues on the merits pending in this case at the time of its August 15, 2007 decision, and prior thereto, are the very same matters that were at issue in the interlocutory appeal of district court documents 215 [Preliminary Order] and 216 [Declaratory Judgment].

(11th Cir. Response, Nov. 29, 2007, p. 8.) Because this Court held the injunction-related aspects of the first appeal moot, those identical aspects of the instant appeal should also be dismissed as moot for the same reasons.

If this Court determines that Holland was properly found to have violated the ADA or that the district court properly granted the injunctive relief that this

Court held could not be reviewed in the first appeal, it would be doing nothing more than issuing an advisory opinion. *See, e.g., Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehabilitative Servs.*, 225 F.3d 1208, 1217 (11th Cir. 2000) (*citing Hall v. Beals*, 396 U.S. 45, 48, 90 S. Ct. 200, 202 (1969)). These issues have already been mooted by Holland's voluntary compliance with the injunction; there is no additional relief that can be granted by this Court in this appeal. Hence, to the extent that Holland's current appeal from the district court's Final Judgment is co-extensive with his first appeal of the same injunction, the present appeal should also be dismissed for lack of jurisdiction.

B. The Denial of Holland's Motion to Vacate is Not Yet Ripe for Appeal, Because it Only Relates to the Attorneys' Fees Issues Still Pending at the District Court

The district court's holding that Holland violated the ADA entitles AAPD to seek attorneys' fees under 42 U.S.C. § 12205, but that violation cannot be reviewed by this Court outside an appeal from a final judgment including the amount of the attorneys' fee award. The district court is currently considering AAPD's fee petition (filed at that court's invitation) and Holland's objections thereto, to determine AAPD's appropriate statutory attorneys' fees award. With no final judgment regarding the attorneys' fee award, the remaining portion of Holland's current appeal is not yet ripe for appeal.

By itself, an order holding a party liable for attorneys' fees is not final if it does not quantify the amount of such award. *See Morillo-Cedron v. District Director for the U.S. Citizenship & Immigration Services*, 452 F.3d 1254, 1256 (11th Cir. 2006) (*citing Hibiscus Assocs. Ltd. v. Bd. of Trs. of Policemen and Firemen Ret. Sys. of Detroit*, 50 F.3d 908, 921-22 (11th Cir. 1995) ("Where '[t]he amount of the fee award has not been determined,' a district court order granting attorney's fees 'is not final.'")); *Andrews v. Employees' Retirement Plan of First Ala. Bancshares, Inc.*, 938 F.2d 1245, 1247 (11th Cir. 1991) ("[A]n order holding a party liable for attorney's fees, absent determination of the amount of such fees, is not final and appealable.").[13] Additionally, where there is no other issue in controversy, an unresolved or unquantified award of attorneys' fees cannot be used as a basis for having an appellate court issue an advisory opinion regarding the merits of underlying litigation that is otherwise moot. *See, e.g., Fla. Ass'n of Rehab. Facilities.*, 225 F.3d at 1217.

Where a district court's order makes clear that the court contemplates further action on attorneys' fees issue, such order cannot be considered an appealable order. *Fort v. Roadway Express, Inc.*, 746 F.2d 744, 747 (11th Cir. 1984). Here, the district court clearly contemplated further action on the attorneys' fee issue.

[13] *See generally Special Devices, Inc. v. OEA, Inc.*, 269 F.3d 1340, 1344 (Fed. Cir. 2001) ("Most of our sister circuits have also adopted the rule that an award of unquantified attorney fees … is not a final decision.")(and cases cited).

The district court's Final Order held that the Declaratory Judgment "shall be construed as a final judgment entered against Defendant Holland and in favor of Plaintiffs" and further stated, with respect to the Defendants' Motion to Tax Costs and the Plaintiffs' Motion for Attorneys' Fees, Costs, and Litigation Expenses, "[t]he parties may refile said motions within **fourteen (14) days** hereof." (Dkt. 294, p. 5 (emphasis in original).) Given that the district court's Final Order and Judgment did not include any final determination concerning the amount of fees, but did contemplate a future award of such fees, the attorneys' fees-related issues are not currently ripe for appeal.

The only reason that Holland has repeatedly sought to vacate the district court's Preliminary Order and Declaratory Judgment was his belief that vacatur would negate his liability for the costs and fees to which AAPD is entitled under the ADA. (*See e.g.*, Dkt. 315, p. 8.) Holland informed this Court that the only remaining issue in the case is the attorneys' fees, making this issue the only plausible basis for filing his motion to vacate. (11th Cir. Response, Nov. 29, 2007, at 8 ("No other issues remain, other than Plaintiff's desire to collect attorney's fees.").) Given that Holland's amended appeal challenging the denial of his motion to vacate is tied directly and solely to the propriety of any award of attorneys' fees, the order denying the motion to vacate is not ripe for appeal until a final determination regarding any attorneys' fees is made by the district court.

II. EVEN IF THE COURT ADDRESSES THE MOTION TO VACATE, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO VACATE ITS ORDERS

A. Vacatur is Not Appropriate When Mootness Results From the Appellant's Voluntary Action

Even if this Court finds that the entire case has become moot, the district court was well within its discretion in declining to vacate its orders. If a case becomes moot, vacatur is only appropriate when the mootness results from an action unattributable to either party or results from the unilateral action of the party who prevailed below. *U.S. Bancorp Mort. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25, 115 S. Ct. 386, 391 (1994). In *Bancorp*, the Supreme Court noted that its prior decision, *United States v. Munsingwear*, 340 U.S. 36, 37, 71 S. Ct. 104, 105 (1950),[14] only addressed vacatur in dicta, and thus *Munsingwear* was not binding on this issue. *Bancorp* 513 U.S. at 23-24, 115 S. Ct. at 390-391. Hence, Holland's reliance on *Munsingwear*'s description of the "established practice" of vacating judgments without regard to why the mootness occurred is inappropriate.

In *Bancorp*, the Supreme Court explained that the reason why the case becomes moot is critical to the analysis of whether vacatur is appropriate. 513 U.S. at 24, 115 S. Ct. at 391 ("From the beginning we have disposed of moot cases in the manner "'most consonant to justice' ... *in view of the nature and character of*

[14] Holland's lead case for his vacatur argument. (Br. at 29-30.)

the conditions which have caused the case to become moot." (emphasis added).) In settlement, the losing party has voluntarily forfeited his legal remedy by the ordinary process of appeal, thereby surrendering his claim to the equitable remedy of vacatur. 513 U.S. at 25, 115 S. Ct. at 391. Similarly, where mootness resulted from the losing party complying with the injunctive relief ordered, the equitable remedy of vacatur is neither required nor appropriate. In view of the nature and character of the conditions that caused the present case to become moot, namely Holland's voluntarily compliance with the injunctive relief won by AAPD, vacatur of the district court's Orders and Judgments would be an injustice to the plaintiffs and to disabled voters seeking precedent for establishing similar rights in other jurisdictions.

Holland's 2004 purchase of handicap accessible voting systems was a voluntary action by Holland to comply with the district court's orders, and therefore the motion to vacate was properly denied. A party cannot comply with an order and then later seek vacatur of that same order. *See, e.g., Staley v. Harris County*, 485 F.3d 305, 306 (5th Cir. 2007) (vacatur denial where the County's appeal of the district court's order to remove a bible near a courthouse was mooted by county's voluntary decision to put the bible in storage); *Ford v. Wilder*, 469 F.3d 500, 506 (5th Cir. 2006) (subsequent voiding of the challenged election mooted the case but did not grant vacatur because "the defendants were

responsible for the mooting of this case").

The reason for this rule is to "prevent the litigant from abusing the equitable remedy of vacatur by purposefully mooting his own appeal." *Dilley v. Gunn*, 64 F.3d 1365 (9th Cir. 1995). Holland is seeking to have the district court's judgments vacated in hopes of escaping liability for attorneys' fees. Holland purposefully mooted his first appeal and voluntarily complied with the district court's injunction order by purchasing accessible voting systems for each voting precinct in Duval County – precisely the relief that AAPD sued for and obtained in this litigation. This is exactly the situation in which vacatur should ***not*** be allowed.

1. Holland's Case Law is Inapplicable

The vacatur cases cited by Holland are inapplicable and do not show that the district court abused its discretion here. These cases merely demonstrate that if the basis for a defendant's liability is removed, *e.g.*, a statute is repealed, then the case has become moot for reasons other than the losing party's action. Likewise, if the defendant had remedied its wrongdoing before suit was filed, then vacatur may be appropriate. However, in the instant situation, the ADA has not been repealed, Holland's liability for violating the ADA has not been eliminated, and Holland did not remedy his ADA violations before AAPD sued and obtained its injunction. Therefore, vacatur remains wholly inappropriate in this instance, where any

mootness resulted from Holland voluntarily complying with the injunction.

In *Munsingwear*, the United States alleged that the defendant violated a regulation fixing the maximum price of certain commodities. 340 U.S. at 37, 71 S. Ct. at 105. The district court held that the defendant's prices complied with the regulation; the United States appealed. *Id*. While the appeal was pending, the commodity involved was decontrolled. *Id*. Decontrol made the regulation inapplicable, thus the appellate court determined that the appeal was moot. *Id*. In a subsequent case where the United States sought to avoid the preclusive effect of the prior judgment, the Supreme Court merely observed that the United States could have moved to vacate the earlier district court judgment. 340 U.S. at 39, 715 S. Ct. at 106.

Holland insists that *Munsingwear* stands for an absolute proposition that if a case becomes moot while on appeal, it should be reversed or vacated and remanded with directions to dismiss. (Br. at 29-30.) However, Holland conveniently overlooks that in *Munsingwear* the mootness was caused by a change in the law. Nothing in *Munsingwear* suggests that a defendant can voluntarily moot the appeal to have the unfavorable judgment against him dismissed or vacated. *See supra* at 33-34. In the instant case, Holland's 2002 purchase of optical scan voting systems was found to violate the ADA and *nothing has happened since that changed the fact that Holland's actions were illegal*.

Moreover, as noted above, the Supreme Court later determined that its "established practice" vacatur statements in *Munsingwear* were merely dicta, and as such have invoked its "customary refusal to be bound by dicta" and exercised its "customary skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion" in declining to follow its own vacatur analysis in *Munsingwear*. *Bancorp*, 513 U.S. at 24. Therefore, this Court should follow the directly applicable teachings of *Bancorp* rather than accept Holland's reliance on *Munsingwear*'s discredited position on vacatur.

Holland's reliance on *IAL Aircraft Holding, Inc. v. Federal Aviation Administration*, 21 F.3d 1304, 1305 (11th Cir. 2000), is also misguided. There the owner of an airplane obtained a judgment that its Brazilian registration was no longer valid. After the owner unsuccessfully filed for registration, the owner appealed the denial to this Court. *Id*. While the appeal was pending, the owner sold the aircraft. *Id.* The owner did not notify this Court, and the Court subsequently issued its opinion. Given that the party who sought relief voluntarily mooted the case by selling the aircraft *before* the appellate court rendered a decision, its decision was properly vacated *as it should never have been rendered in the first place because the court had no jurisdiction*. *Id*. at 1306. Here, at the time of the district court's decision, Holland was still violating the ADA. Only as a result of the district court's injunction did Holland finally comply with the ADA.

At no point has any party questioned the district court's jurisdiction at the time it issued its orders.

In *National Advertising Co. v. City of Miami*, 402 F.3d 1329, 1330 (11th Cir. 2005), a billboard company sued the City of Miami challenging municipal zoning ordinances. Subsequently, the City amended its zoning regulations pertaining to signs. *Id.* at 1331. The district court granted summary judgment to the City; National Advertising appealed. *Id*. Upon appeal, this Court concluded that the City's post-suit amendments to its zoning ordinances mooted the appeal, dismissed the case and vacated the summary judgment. *Id*. at 1335. On appeal, the court noted that the City was unlikely to reenact the old zoning ordinances, and thus determined it had no jurisdiction over the appeal. *Id.*

First, *National Advertising* cannot stand for a broad proposition that vacatur is required where a case is mooted by voluntary actions of the losing party. *National Advertising* merely illustrates that when a law changes, and the activity at issue is no longer a violation of the law, a court does not have jurisdiction to review the old law. *Id.* at 1335. Again, here there was been no change in the law – the relevant portion of the ADA has been in effect for the entire duration of this case. Moreover, as discussed in section II.A.3, there is a risk of Duval County returning to non-compliant voting systems, and thus there is a strong public interest to deny vacatur in this situation.

Finally, Holland relies heavily on *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1281 (11th Cir. 2004), as showing that this case is moot, but such reliance does not support vacatur in this case. In *Troiano*, the Supervisor of Elections had provided handicap accessible voting systems in two elections *before* she was sued. *Id.* This is much different than the case at hand where Holland continued to discriminate and failed to provide accessible voting systems until *after* being sued, *after* going to trial, and *after* the district court ordered him to provide accessible voting systems. Thus, Holland's cases do not show that the denial of Holland's motion to vacate was an abuse of discretion.

2. The Public Interest is Best Served by Keeping the Order and Injunction In Place

The Supreme Court had made clear that the public interest should be considered in determining whether to vacate a decision:

> As always when federal courts contemplate equitable relief, our holding must also take account of the public interest. "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur."

Bancorp, 513 U.S. at 26, 115 S. Ct. at 392 (citations omitted). The district court's injunction should remain in place, as it serves an important public interest by protecting the ability of disabled voters to vote using handicap accessible voting systems to the maximum extent possible. In response to the "hanging chad"

controversy associated with the 2000 presidential election, many jurisdictions across the country switched to other forms of voting systems (including Florida). However, recently some jurisdictions have returned to the paper ballot based voting systems, thus suggesting that other jurisdictions, including Duval County could follow suit. (*See* John Gibeaut, *Electing to Litigate*, ABA JOURNAL, Jan. 2008, at 43.) Leaving the current injunction in place is appropriate to protect the right to vote using a system that is handicap accessible to the maximum extent possible, a right which AAPD fought for, and won, in a long and arduous litigation.

Leaving the current injunction in place will not only protect the right of handicapped persons in Duval County, but also in jurisdictions across the country. This case provides an important precedent for other jurisdictions grappling with these same issues. In fact, it has been cited and relied on in other suits by disabled persons fighting for voting rights in other jurisdictions. *See, e.g*, *People of the State of Cal. v. County of Santa Cruz*, 2005 WL 2579968 (N.D. Cal. August 4, 2006)); *Meadows v. Hudson County Bd. of Elections*, 2005 WL 3636482 (D.N.J. July 27, 2005). Where jurisdictions are returning to a discriminatory voting system, this case has great value and importance for all disabled voters. Vacatur of the orders finding liability and establishing the injunction solely because Holland complied with them is not warranted, particularly in view of the important value of

this case to disabled voters in other jurisdictions.

Finally, at least one of the purposes of statutory provisions which provide for the award of attorneys fees is to reward successful law suits of this nature. Without such provisions, many would not undertake the task of seeking relief to which they are entitled. To allow a defendant to avoid paying attorneys' fees through his own compliance with the order granting the relief sought would negate the purpose of allowing those fees – why provide award of attorneys fees to a prevailing party if the losing party can avoid paying them by merely obtaining vacatur after complying with the order granting the relief sought?

III. THE TRIAL COURT PROPERLY FOUND THAT THE ADA APPLIES TO THIS CASE

A. The ADA Requires Voting to be Readily Accessible to Disabled Persons

Holland asserts that the district court erred as a matter of law when it held that Holland violated the ADA (Dkt. 215**,** p. 17-20) because the ADA does not apply to the impairment of disabled voters' rights when they are forced to vote using a more burdensome and discriminatory voting process than non-disabled voters. (Br. 34-35.) However, the district court's application of the ADA and its implementing regulations comports with Supreme Court and Eleventh Circuit precedent. *Shotz v. Cates*, 256 F.3d 1077 (11th Cir. 2001); *see also Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978 (2004) (noting court findings under the ADA

of a "pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, *including ... voting ....*") (emphasis added) (citations omitted).

In *Shotz*, Appellees with physical impairments brought suit against the judge of a state court and the county sheriff for failing to remove barriers that would make the courthouse accessible and usable by individuals with disabilities. *Shotz*, 256 F.3d at 1079. This Court held that a "violation of Title II…[of the ADA] does not occur only when a disabled person is completely prevented from enjoying a service, program or activity." *Id.* at 1080. Therefore, the court explained that if wheelchair ramps leading to the courthouse are steep or the bathrooms are not usable, then the courthouse is not "'readily accessible,' regardless whether the disabled person manages in some fashion to attend the trial." *Id.*

This Court has already rejected Holland's contention that there can be no ADA violation because AAPD somehow managed to vote using Duval County's optical scan system. (Br. 34-35.) The district court properly held that Holland violated the ADA because, in 2002, the voting process in Duval County was not readily accessible to AAPD because they were *forced* to vote in a manner rife with burdens not faced by non-disabled voters. (Dkt. 215, p. 2-3.) Other federal courts' discussions are consistent with the district court's application of the ADA to voting. For example, in *National Organization on Disability v. Tartaglione*, 2001 WL

1231717 (E.D. Pa. Oct. 11, 2001), disabled plaintiffs alleged that the City of Philadelphia violated the ADA when it entered into a contract for new voting equipment that did not include accessible voting systems because they were forced to vote using third party assistance in a manner that imposed burdens upon them not placed upon non-disabled voters. *Id.* at *2. The court denied the City's motion to dismiss:

> Defendant's argument that plaintiffs cannot state claims for relief [under the ADA and Rehabilitation Act] because plaintiffs have not been prevented from voting mischaracterizes the Complaint… plaintiffs claim to have been discriminated against in the process of voting because they are not afforded the same opportunity to participate in the voting process as non-disabled voters. The Complaint alleges that assisted voting…is substantially different from, more burdensome than, and more intrusive than the voting process utilized by non-disabled voters… The Complaint alleges that the … plaintiffs…cannot participate in the program or benefit of voting in the same manner as other voters but, instead, must participate in a more burdensome process… [T]he Court concludes that the Complaint states a claim for discrimination in the process of voting….

Id. at *3. Finally, the Department of Justice has declared that the ADA applies to the voting process: "[i]f reasonable modifications were available that would allow blind or visually impaired voters to cast their ballots without assistance *and* that would assure ballot secrecy, *the plain import of the ADA and its implementing regulations would require the state to adopt those modifications.*" (Dkt. 58, Ex. 2, p. 11-12 (emphasis added).)

Holland's continued reliance on *Nelson v. Miller*, 170 F.3d 641 (6th Cir. 1999), is misplaced for multiple reasons. (Br. 31.) Most importantly, the Sixth Circuit's affirmance of the district court's dismissal was "on grounds different from those advanced [by the district court]…."[15] *Nelson*, 170 F.3d at 645. The Sixth Circuit framed the issue as whether the Michigan Constitution "requires more secrecy than the Michigan legislature has provided for in [the Michigan voter assistance statute]." *Nelson*, 170 F.3d at 650. Given two plausible interpretations, the Sixth Circuit – for reasons completely unrelated to the ADA – picked the interpretation that held the voter assistance statute constitutional. *Id.*

In addition, the claims in *Nelson* were factually distinct from the claims here. The plaintiffs there did not allege the ADA was violated by the defendants' alteration of a facility. Instead, the plaintiffs sought an injunction forcing the State to modify a facility, *i.e.*, purchase new voting equipment. *Nelson*, 170 F.3d at 644. Thus, *Nelson* did not involve a voluntary decision to alter an existing facility which gives rise to the affirmative obligation and more stringent standard applicable to Holland's actions here. Finally, *Nelson* did not involve a claim under the ADA's generic proscription against discrimination. For all these reasons, *Nelson* was properly held to be inapplicable by the district court.

[15] When a public entity alters an existing "facility," it must make the altered facility readily accessible to the "maximum extent feasible." 28 C.F.R. § 35.151 (b); *see infra* p. 48-52.

B. A 1993 DOJ Letter of Findings Does Not Undermine the District Court's Ruling

Holland argues that the district court erred by not adopting a 1993 Department of Justice ("DOJ") Letter of Findings ("Letter") that Holland asserts "specifically determined that Florida's statutory program of third party assistance met ADA standards." (Br. 35.) To the contrary, the district court committed no "clear error in judgment" when it concluded that "[Appellant's] interpretation of the Letter is overly broad." (Dkt. 124, p. 21; *see SunAm.*, 77 F.3d at 1333.)

First, the Letter was written when accessible voting systems did not exist. In reviewing Pinellas County's election practices in 1993, the DOJ concluded that, because no alternative existed for allowing a blind voter to cast a ballot on his own, third-party assisted voting allowed blind voters to participate in and enjoy the benefits of a service, program, or activity conducted by a public entity. (Dkt. 58, Ex. 1.) In a portion of the Letter notably absent from Holland's brief, the DOJ found that "electronic systems of voting by telephone that meet the security requirements necessary for casting ballots *are not currently available*." *(Id.* (emphasis added).) Consistent with this acknowledgement, as technology has changed, so have the views of the DOJ.

More recently, in its *amicus curiae* brief in *Nelson*, the DOJ stated: "If reasonable modifications were available that would allow blind or visually impaired voters to cast their ballots without assistance *and* that would assure ballot

secrecy, **the plain import of the ADA and its implementing regulations would require the state to adopt those modifications**." (Dkt. 58, Ex. 2, p. 11-12 (emphasis added).)[16] In 2002, electronic voting systems did exist and were readily available; thus Holland's failure to purchase these systems was properly held to violate the ADA. (*See also* Dkt. 193, Hrg. Ex. A (encouraging jurisdictions to implement disability requirements of HAVA as soon as possible "to help ensure that disabled voters are able to fully participate in the election process to the maximum extent possible").)

Second, the district court properly concluded that the 1993 Letter "is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984)." (Dkt. 124, pp. 21-22.) This opinion letter is neither binding nor controlling authority. *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 1662 (2000); *Gonzalez v. Reno*, 215 F.3d 1243, 1245 (11th Cir. 2000). At best, it is evidence that the district court properly weighed and did not clearly err in rejecting it in its analysis.

Third, as the district court found, "[t]he Letter only purports to evaluate whether the Pinellas County Supervisor of Elections provided equally effective communications to blind voters. Thus, to the extent that the Letter is relevant to this case, its relevance would appear limited to [AAPD's] claims under 28 C.F.R.

[16] *See Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905 (1997)(giving deference to position taken by U.S. Secretary of Labor in amicus brief).

§ 35.160." (Dkt. 124, p. 21.) Thus, whatever its accuracy or weight, the Letter has no bearing on AAPD's claims under the heightened altered facilities standard of 28 C.F.R. § 35.151 (b).

IV. THE COURT PROPERLY FOUND THAT IN 2002, DUVAL COUNTY DID NOT PROVIDE VOTING SYSTEMS THAT WERE HANDICAP ACCESSIBLE

The district court concluded that "[t]he Diebold optical scan voting system purchased by Duval County is not readily accessible to visually or manually impaired voters." (Dkt. 215, p. 17.) Indeed, Holland admitted as much at trial. (*See supra* p. 15-16.) Specifically, Duval County's purchase of optical scan systems required disabled voters in 2002 to vote in a materially different manner than non-disabled voters. (Dkt. 169, p. 154:13-155:19.)

A. The District Court Properly Concluded That Voting Equipment is a Facility Under the ADA

The threshold inquiry facing the district court was whether the voting systems that Holland purchased in 2002 constituted a "facility" under the ADA implementing regulations. (Dkt. 215, p. 17.) The district court concluded that "voting equipment plainly falls within the expansive definition of 'facility' contained in the regulations .... ," because a voting system is equipment, and equipment is, on its face, included in the definition of "facility" in the regulations. (Dkt. 215, p. 17; Dkt. 124, p. 14, n.5; Dkt. 42, p. 25, n.16.)

The trial court's ruling is firmly grounded in the plain language of the regulations. A "facility" is defined in part as "all or any portion of . . . *equipment* . . . ." 28 C.F.R. § 35.104 (2003) (emphasis added). (*See* Dkt. 215, p. 17; Dkt. 42, p. 25 n.16; Dkt. 124, p. 14 n.5.) Courts that have addressed this issue have likewise held that voting systems constitute "facilities" under the ADA. *See Troiano* v. *LePore*, No. 03-80097, 2003 WL 24832863, at 1-2 (S.D. Fla. May 1, 2003); *Tartaglione*, 2001 U.S. Dist. LEXIS 16731, at *17-*18. Thus, this is not a "novel" conclusion, as Holland advocates. (Br. 34.) Moreover, Holland's contention that facilities are "limited to elements that are permanently made part of a physical structure" (Br. 40) is neither supported by the cases he cites nor consistent with the plain language of the regulations.[17] 28 C.F.R. § 35.104; *see also Kinney*, 9 F.3d at 1071.

B. The District Court Applied the Proper ADA Standard to Holland's Conduct

The ADA distinguishes between existing facilities and those constructed or altered after January 26, 1992. 28 C.F.R. §§ 35.150 & 151 (2007). The regulations do not require public entities affirmatively make changes to existing facilities.

[17] Holland's assertion that "[r]eported cases under § 35.151 (b) relates to an alteration to an element made part of a permanent physical structure," ignores *Tartaglione*. Holland also ignored the word "equipment" contained in the regulation's definition of "facilities." 28 C.F.R. § 35.104. (Br. 40.)

Shotz, 256 F .3d at 1080. However, the ADA does impose a "heightened standard" of accessibility when public entities choose to alter existing facilities or construct new ones. "When a public entity independently decides to alter a facility, it 'shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities.'" *Kinney v. Yerusalim*, 9 F.3d 1067, 1071 (3d Cir. 1993) (quoting 28 C.F.R. § 35.151 (b)); *see also Ass'n for Disabled Ams. v. City of Orlando*, 153 F. Supp. 2d 1310, 1317 (M.D. Fla. 2001). This standard is "substantially more stringent" than the standard applied to existing facilities. *Kinney*, 9 F.3d at 1071. These stricter regulations require that alterations be completed in a nondiscriminatory manner that provides full access to all qualified voters.[18] *Id.* at 1073. Thus, the district court properly analyzed AAPD's ADA claims under the heightened standard of § 35.151(b), which obligated Holland to make Duval County's voting system

[18] Indeed, Congress recognized that altered or new facilities presented "an immediate opportunity to provide full accessibility." *Kinney*, 9 F.3d at 1074. Accordingly, it required such changes to be made free of discrimination and to be usable by all. *Id.* at 1073. Congress also appreciated the importance of implementing advances in technology. The House Committee made it clear that "technological advances can be expected to further advance options for making meaningful and effective opportunities available." H.R. Rep. No. 101-485 (II), at 108 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 391. That Committee intended accommodations and services to "keep pace with the rapidly changing technology of the times." *Id.*

accessible to the maximum extent feasible at the time he purchased the optical scan system in 2002. (Dkt. 215**,** p. 16-17.)

Holland proffers several excuses in an attempt to justify his decision to purchase a wholly inaccessible voting system. For example, Holland argues that there were certain features of the Diebold optical scan system he preferred over the ES&S optical scan system and that he did not like the "boot up" process of the ES&S touch screen.[19] (Br. 19.) Similarly, Holland places great weight on the recommendations of the Duval County Task Force and the "research" of the staff of the Supervisor of Elections' office. (Br. 15, 17-20.) Holland ignores that all of these purported excuses are legally irrelevant in light of the heightened standard imposed by § 35.151 (b). Indeed, the record demonstrates that neither the Duval County Task Force nor the Supervisor of Elections' office considered the admittedly "specific needs" of disabled voters when choosing the optical scan system, let alone ensured that the voting system Holland procured was accessible to the maximum extent feasible, as compliance with § 35.151(b) obligated them to do. (PX 74; PX 150, at 38:13-17.)

Holland admitted that despite the fact he received requests to provide accessible voting systems, he did no real analysis of what technology existed to

[19] While Holland did compare different optical scan voting systems, he admitted that he made *no* comparison of touch screen systems. (Dkt. 169, p. 150:12-151:6; Dkt. 170, p. 117:14-118:5.)

meet the needs of disabled voters, and never sent out a request for proposals to investigate what technology existed. (Dkt. 169, p. 127:7-129:15, 145:1-5; Dkt. 170, p. 32:1-5; Dkt. 166, p. 63:14-64:18, 102:11-20, 115:13-117:25; Dkt. 167, p. 25:15-27:2; Dkt. 170, p. 11:5-15:10.) Similarly, the chairman of the Duval County Task Force admitted that the Task Force's conclusions were not based on "a detailed investigation" of issues faced by disabled voters. (Dkt. 171, p. 166:8-15.) Instead, the chairman testified that despite receiving testimony about the problems encountered by disabled voters, the Task Force did not regard the problems faced by disabled voters to be among the "top sixteen" issues that needed to be addressed. (Dkt. 171, p. 151:10-152:13.)

For similar reasons, Holland's "plan" to place three touch screen voting systems with audio ballot in the Supervisor of Elections' downtown office does not satisfy the heightened standard of § 35.151 (b). (Dkt. 215, p. 18-19.) This "plan" fails to "satisfy the accessibility standard" because "Duval County is a geographically large county," and would "require[e] AAPD, who already lack the mobility that non-disabled voters have, to travel downtown" instead of voting in their neighborhood polling places. (Dkt. 215, p. 19.) As the record demonstrates, this plan would require tens-of-thousands of disabled voters in the county to travel, up to five hours, on election day (Dkt. 215, ¶ 25; Dkt. 166, p. 62:10-63:1, 99:20-100:21; Dkt. 167, p. 22:21-23:9), through one of the nation's largest counties (Dkt.

169, p. 162:10-16) to Holland's 10,000 square foot office (*Id.* 179:4-23) to cast their votes on these three systems. (*Id.* 160:22-161:13.)

Holland admitted that in formulating this "plan," he did no analysis of the travel issues faced by disabled voters in Duval County. (Dkt. 169, p. 164:19-167:10.) He has "no idea how long it takes for a visually or manually impaired person to travel on disabled transportation in Duval County." (*Id.* 165:7-10, 166:15-19.) Nor does he have any "knowledge regarding the reliability of ParaTransit in Duval County." (Dkt. 169, p. 165:11-13, 167:11-13.)

Holland's argument that this "plan" was "reasonable" again ignores the standards imposed by the ADA. (Br. 45.) The applicable standard has nothing to do with reasonableness. To the contrary, the ADA required that Duval County's voting system be readily accessible and usable by disabled voters to the maximum extent feasible *at the time* the County purchased the system in October 2002. A plan to one day comply with the ADA does not constitute compliance at all. *Kinney*, 9 F.3d at 1072; *Engle v. Gallas*, No. 93-3324, 1994 U.S. Dist. LEXIS 7935, at *9 (E.D. Pa. June 10, 1994) (unimplemented plan is insufficient to remedy an ADA violation because "[g]ood intentions, in this regard, are of little help to one who must endure the hardship of a disability").

C. It was Feasible for Holland to Procure an Accessible Voting System

There is no dispute that disabled voters cannot vote using the optical scan voting system in the same or similar manner as non-disabled voters, and that other options were available at the time Holland chose to procure the optical scan system. (*See supra* p. 22-23.) Thus, as the trial court properly framed the issue, "[i]f it was feasible for Duval County to purchase a readily accessible system, then AAPD's rights under the ADA ... were violated." **(**Dkt. 215**,** p. 17.) The record evidence clearly supports the trial court's answer to this question in the affirmative that: "[a]t the time the City purchased the optical scan system, it was technologically and financially feasible" for Holland to have provided an accessible touch screen voting system instead. **(**Dkt. 215, p. 17-18.)

Holland does not contest that § 35.151 (b) requires that alterations to facilities must be readily accessible to and usable by people with disabilities to the maximum extent feasible. (Br. 42.) Instead, Holland argues that the trial court imposed too broad a standard of feasibility that resulted in the "transforma[tion of] this regulatory *limitation* into the judicial *compulsion to buy* a flawed voting system without regard to its usability or costs." (Br. 43 (emphasis in original).) Holland argues "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." (*Id.* at 43.) This standard,

which contradicts the plain language of § 35.151(b), lacks any legal support. Moreover, as discussed below, the trial court's decision clearly took into account both the usability and cost of accessible voting equipment, and the record clearly supports the trial court's conclusion that procuring accessible voting systems was both technologically and financially feasible.

1. Touch screens were technologically feasible

Holland challenges the district court's conclusion that it was technologically feasible, "[a]t the time the City purchased the optical scan system," to provide an accessible touch screen voting system. **(**Dkt. 215, p. 17.) Specifically, Holland contends that it was "clear error" for the district court to make this conclusion because (1) the court relied on state certification "alone," and (2) the ES&S touch screen "resulted in the most calamitous election experiences in Florida in 2002." (Br. 43.) The record supports neither of these assertions, and, given that the record demonstrates the district court's findings were "plausible," this Court is constrained to defer to that conclusion. *Solomon*, 221 F.3d at 1226-27.

First, the trial evidence clearly supports the district court's finding that certification by Florida means a voting system "has been tested to the highest standards of accuracy and reliability and can be relied upon to be dependable and to be a fairly good investment in terms of durability." **(**Dkt. 215, ¶11.) Indeed, this was the uncontroverted testimony of Paul Craft, Chief of the Florida Bureau of

Voting System Certification, who testified at length about the stringent certification process, and noted, in particular, that Florida's testing is far more stringent than that employed elsewhere. (Dkt. 168, p. 15:8-16, 19:9-21:2; PX 142; *see also* Dkt. 168, p. 89:2-16, 103:20-105:24.)

Although the district court could properly find that the system was "technologically feasible" based solely on the fact that the system enjoyed certification by Florida, that certification is not the only factual support for technological feasibility. The trial court also based its finding on the evidence that "other jurisdictions within Florida and outside of Florida provided accessible equipment around the same time. . . ." **(**Dkt. 215**,** p. 18.) Indeed, the record is replete with evidence demonstrating that touch screen technology was not only certified, but was used successfully throughout Florida and the rest of the country during, and even before Holland decided to purchase the optical scan system. The previous Supervisor of Elections, Stafford, admitted that 257 counties across the country used touch screen systems as of 2001, and as early as February 2001, Stafford advocated that the county take immediate steps to adopt a touch screen system. (Dkt. 169, p. 183:4-8; PX 11**,** at 10; Dkt. 170, p. 113:21-114:19; PX 123, at 2-4.) Finally, the record shows that the use of touch screen voting systems has grown exponentially, with "in the neighborhood now of 500 counties" using touch screen technology across the country. (Dkt. 170, p. 142:9-14.)

Similarly, the record flatly contradicts Holland's contention that the district court erred as to technological feasibility because the ES&S system "caused" problems during the September 2002 primaries. (Br. 43-45.) First, the record demonstrates that any problems encountered in Broward and Dade Counties during the 2002 primary election "stemmed from not permitting sufficient time for the large, multilingual ballots to boot up on the ES&S systems and logistical problems such as getting all of the systems to precincts and poll worker training," as opposed to any system malfunction. **(**Dkt. 215, ¶ 43.) Indeed, all of the evidence demonstrates that the problems arose from mismanagement by the elections supervisors in those counties, which has been fully corrected. (Dkt. 168, p. 76:6-11.) The Chief of the Florida Bureau of Voting System Certification, the only person to testify with first-hand knowledge of the situation, stated that "the problems [in Dade County] stemmed primarily from failure to allow enough time to open the precincts, [and] failure to understand how much time that would take." **(**Dkt. 215**,** ¶ 43; Dkt. 168, p. 74:5-17; *see also id.* 74:18-75:24.) He explained that the problems in Broward County were attributable to "logistics," "problems with training the poll workers," and problems "getting all the systems and all the supporting devices to the precincts." **(**Dkt. 215**,** ¶ 43; Dkt. 168, p. 75:13-17.)

Tellingly, Holland's argument even contradicts Stafford's deposition testimony that the problems in Broward were attributable to the mismanagement of

the Broward County elections supervisor, and that Dade Counties' "issue" was with the boot-up time of the systems, *alone*. (Dkt. 170, p. 25:5-24; PX 150, at 86:4-20.)[20] Finally, Holland's contention on this issue is belied by the fact that the ES&S system was not decertified following the 2002 primary, and indeed remained certified and in use in these same counties subsequent to the 2002 primary. (Dkt. 169, p.141:21-142:1.)[21]

D. The District Court Properly Concluded That Holland Violated the ADA by Failing to Provide Touch Screen Voting Systems for Manually Impaired Voters

The record similarly supports the trial court's determination that Holland violated the ADA by failing to provide a touch screen voting system, because such a system "is accessible to at least some manually impaired voters." **(**Dkt. 215**,** p. 19-20.) Indeed, Appellee Bell, who has no arms or legs, demonstrated for the trial court how he could vote on a touch screen system by using his mouth stick. (Dkt. 166, p. 93:6-96:2.)

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[20] Holland's description of Mr. Dickson's testimony about Miami Dade and Broward counties is incorrect. Mr. Dickson clearly testified, "My study and examination of the problems concurred with Mr. Craft. . . . The problems were election administratively related, poll worker training." (Dkt. 171, p. 14:2-7.)

[21] Stafford was forced to admit that he "never questioned the accuracy of [the ES&S touch screen]," but rather his sole concern "was with the cartridge as far as uploading and downloading ...." (Dkt. 170, p. 117:3-118:5.) He also admitted that "ES&S... would work." (Dkt. 169, p. 186:1-6.)

Holland attempts to confuse the record by arguing that "[n]o voting system has ever been certified in Florida for use by persons with manual disabilities including the use of mouth sticks." (Br. 46.) This is nothing more than a red herring. As the district court concluded, "[a] mouth stick would not have to be certified because mouth sticks are available to the general public." **(**Dkt. 215**,** ¶19.) Indeed Paul Craft, Chief of the Bureau of Voting System Certification, specifically testified that there is no hardware certification requirement for "a mouth stick," or any other items that a manually impaired person could use to press the touch screen and cast a ballot. (Dkt. 168, p. 68:20-69:11.) A mouth stick is something that is maintained by the disabled voter and used in every day activities. It is not a part of any voting system and is not something that is provided by the polling place. *(Id.* 145:24-147:7.) Indeed, a manually impaired person can use a variety of items to operate a touch screen, including other body parts, and is not restricted to voting only by the use of a mouth stick. *(Id.* 145:17-20.) This, in and of itself, demonstrates that the district court properly concluded touch screen voting systems available in Florida are accessible, to the maximum extent feasible, to at least some manually impaired voters. **(**Dkt. 215**,** p. 19.)

V. THE ENACTMENT OF HAVA DOES NOT RENDER THIS CASE MOOT

The district court ruled that HAVA does not render this case moot because "HAVA makes clear that it is not to be construed as superseding or limiting the

application of the ADA...." **(**Dkt. 215**,** p. 28 n.10; Dkt. 124, p. 20, n.9.) Holland's argument to the contrary (Br. 32-34.) ignores the plain language of HAVA itself. On its face, HAVA explicitly provides that "nothing in this Act may be construed to ... supercede, restrict, or limit the application of .... The Americans With Disabilities Act of 1990 (42 U.S.C. §§ 12101 *et seq.*)." 42 U.S.C. § 15545(a)(5) (2002). Holland even admitted at trial that he is "not suggesting that [his] plans under HAVA somehow excuse [him] from complying with the Americans With Disabilities Act." (Dkt. 169, p. 73:24-74:2.) The ADA made Holland's discrimination illegal and the provisions of HAVA did nothing to excuse Holland's conduct.

There is no inconsistency with the district court's declaration that Holland violated the ADA and was thus required to provide accessible voting systems before HAVA's deadline requiring jurisdictions to provide accessible voting systems no later than January 1, 2006. The district court's March 23, 2004 order mandated a remedy for Holland's adjudicated violation of the ADA, while HAVA's subsequent January 1, 2006 deadline, served only as the absolute latest date by which a county which had not already violated the ADA by purchasing a new voting system could wait to install accessible voting systems.

Similarly, Holland's insinuation that Duval County would have had to buy new voting systems in 2006 because the touch screens that were currently certified

and used in Florida and across the country in 2002 may not meet the current accessibility standards of HAVA is erroneous. (Br. 32-34.) First, the DOJ had directed counties to comply with HAVA's disability provision "*as soon as practical*... to help ensure that disabled voters are able to fully participate in the election process to the maximum extent possible. This will ensure that disabled voters are provided access *as soon as possible.*" (Dkt. 193, Hrg. Ex. A (emphasis added).) It defies logic to argue that the DOJ would "encourage" jurisdictions to provide accessible voting systems now, but then require these jurisdictions to buy new systems later.

Next, to the extent Holland argues there were no accessibility standards in 2002, the DOJ had also directed that until the HAVA commission promulgated standards, "the voluntary guidance of the Federal Election Commission on Voting System Standards can be used to determine the accessibility of voting systems." (Dkt. 200, Exs. A & B.) Thus, any of the touch screen voting systems which met the FEC's voluntary standards – which Mr. Craft admitted "the vast majority of states," including Georgia, use (Dkt. 169, p. 66:20-67:25) – would have also satisfied the accessibility requirements of § 301 of HAVA.[22]

[22] This pronouncement by the DOJ also undermined Holland's argument that there are no specific regulations governing voting systems under the ADA. (Br. 34.)

Finally, the to-be-crafted HAVA "standards" to which Holland refers were *voluntary* – not mandatory – that must be met in order to receive federal funding to purchase voting systems. (Br. 33.) All HAVA required at that time was that a jurisdiction provide one voting system per polling place that is "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." 42 U.S.C. § 15481(a)(3)(A) (2002). HAVA specifically states that this requirement can be met "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." *Id.* at (a)(3)(B). HAVA does not mandate that the touch screens meet any other requirements, nor does HAVA make noncompliance with these standards illegal. Thus, there was no need to wait for any regulations to be promulgated, because the touch screen voting systems certified and used in Florida already met HAVA's requirement.

CONCLUSION

The current appeal should be dismissed for lack of jurisdiction, as the injunction-related issues have already been declared moot by this Court. The remaining issues are all related to Holland's baseless attempt to circumvent payment of AAPD's attorneys' fees to which AAPD is entitled under the ADA.

The district court, in a thoughtful, detailed opinion, correctly determined that Holland has violated the ADA in 2002 by refusing to provide accessible voting systems for Duval County's disabled voters to allow them to vote in the fully accessible manner enjoyed by voters in hundreds of jurisdictions throughout the country and Florida. The factual findings underlying this decision are supported by credible trial evidence and the legal principles on which the judgment is based are sound. Thus, if reached in the current appeal, this Court should affirm the declaratory and injunctive relief granted to AAPD.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and Eleventh Circuit Rule 28-1, counsel for Appellees certifies that the Brief of Appellees 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 13,796.

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