IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 04-11566-JJ

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

Plaintiffs/Appellees,

v.

John Stafford, as Supervisor of Elections, Duval County.

Defendant/Appellant.

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

INITIAL BRIEF OF APPELLANT STAFFORD

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STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that oral argument would assist in the resolution of the issues raised in this appeal.

CERTIFICATE OF TYPE/VOLUME

Appellant certifies that this Answer Brief is presented in Times New Roman style, 14-point size and contains 13,964 words.

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Note: This Brief uses the following designations:

- References to Record on Appeal are [R# *] (# = docket number; * = page number).
- References to Transcripts in Record on Appeal are [TR# *] (# = docket number; * = page number)
- References to Exhibits are prefaced as either "Ps'" "State" or "Stafford" followed by number.
- Depositions are designated by deponent's name and page number (e.g., [Stafford 23-24]).
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TABLE OF AUTHORITIES

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STATEMENT OF JURISDICTION

This appeal is from a final judgment entered upon an order of the United States District Court against Defendant John Stafford, Supervisor of Elections, Duval County. The district court's jurisdiction was based on federal question jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction over the final judgment pursuant to 28 U.S.C. §§ 1291 (final orders) and 1292(a)(1) (injunctions).

STATEMENT OF THE ISSUES

I. Whether the trial court erred by not dismissing Plaintiffs' amended complaint because the Americans with Disabilities Act (ADA) does not supplant federal election laws or create a federal right of voting secrecy?

II. Whether the trial court erred in concluding that Supervisor Stafford's procurement of an optical scan voting system violated 28 C.F.R. § 35.151(b) promulgated pursuant to the ADA?

III. Whether the trial court erred in ruling that the Help America Vote Act (HAVA) did not moot Plaintiffs' ADA claims?

IV. Whether the trial court erred as to the remedy imposed and in failing to certify a class action thereby warranting reversal?

STATEMENT OF THE CASE AND FACTS

Statement of the Case

This appeal arises from the district court's order and final judgment, holding that Supervisor John Stafford violated the Americans with Disabilities Act (ADA) by procuring a precinct-based optical scan voting system in Duval County in 2002 rather than the touchscreen system with audio ballots of a different vendor.

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

Plaintiffs' initial class complaint against Stafford[1] in November 2001 asserted three claims: a Florida constitutional claim that elections be by "direct and secret" vote,[2] an ADA claim, and a Rehabilitation Act (RA) claim, each seeking to invalidate Florida' voter assistance statute, § 101.051, Florida Statutes.[3] [R1; RE1]

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[1] Plaintiffs also sued members of the Jacksonville City Council, who were dismissed based on legislative immunity on October 12, 2002. [R42] Plaintiffs also sued Secretary Katherine Harris, Florida's Secretary of State, and Clay Roberts, Florida Division of Elections, whose predecessors in office prevailed after trial. [RE7/R215]

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

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

> (1) Any elector applying to vote in any election who requires assistance to vote by reason of blindness, disability, or inability to

(Continued …)

Stafford moved to dismiss the action for failure to state claims for relief based primarily on the Sixth Circuit's decision in Nelson v. Miller, 170 F.3d 641 (6th Cir. 1999). [R6] After oral argument in early 2002 [R27], the district court, per Judge Ralph W. Nimmons, Jr.,[4] on October 16, 2002 dismissed the Plaintiffs' state constitutional claim *with prejudice*, finding that the assistance provided by § 101.051, Florida Statutes, satisfies the "direct and secret" language of the Florida Constitution. [RE3; R42 21 ("Stafford did not violate Article VI, Section 1 … by purchasing voting equipment that did not permit visually and manually disabled voters to vote without assistance.") & 18 (noting the "significant lengths" to which

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

§ 101.051(1), Fla. Stat. (2001).

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

Florida law goes to prevent influencing or disclosing vote citing § 104.23 making it a third degree felony to disclose how voter voted]

Similarly, the trial court dismissed their ADA and RA claims *with prejudice* to the extent they claimed a right to a voting system that provided a "direct and secret" voting experience without third party assistance. [RE2; R42 37-38][5] The court permitted Plaintiffs to replead, noting that their "amended complaint should allege more clearly … the bases, if any, for their reliance upon the more generic proscription [of the ADA] in contradistinction to the acts' more specific proscriptions." [RE2; R42 30] Trial was set for September 2003 term. [R48]

B. Stafford's Motion to Dismiss the Amended Complaint, Which Is Similar To Their Initial Complaint, Is Denied.

Plaintiffs filed an amended class action complaint on November 5, 2002 that substituted the phrase "cast independently a secret ballot" for the phrase "cast a direct and secret ballot" and, as to their general discrimination claim, listed various attributes of third party assistance that were allegedly intrusive as to their voting privacy such as "being forced to reveal their vote to a third-party." [R47 17-18; RE4] On November 21, 2002, Stafford moved to dismiss the amended complaint as merely another attack on Florida's third party assistance statute. [R53]

[5] *See* American Ass'n of People With Disabilities v. Smith, 227 F. Supp. 2d 1276 (M.D. Fla. 2002). [RE3]

On August 1, 2003, Senior District Judge Wayne E. Alley was assigned to handle pending motions[6] and to preside at trial. [R118] In an August 23, 2003 order, the trial court allowed the Plaintiffs' repleaded ADA claims to survive dispositive motions based on two generic ADA regulations, 28 C.F.R. §§ 35.151(b) & 35.160, and a claim of "generic discrimination." [RE5; R124][7] Stafford answered the amended complaint on September 4, 2003, and asserted defenses. [RE6; R128]

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

A seven-day bench trial was held from September 23, 2003 to October 1, 2003 [R166-172] and proposed findings of fact were submitted on November 17, 2003. [R176, 177 & 178] On March 24, 2004, the trial court issued its final written order in favor of Plaintiffs on a single ADA regulatory claim under 28 C.F.R. section 35.151(b), that being that the purchase of optical scan voting equipment was an "alteration" to an existing "facility" that failed to make voting in Duval County "readily accessible to visually or manually impaired voters" to the

[6] Prior to reassignment, on July 23, 2003, Judge Nimmons denied the Plaintiffs' motion for reconsideration of his dismissal order. [R115; *see* American Ass'n of People With Disabilities v. Hood, 278 F. Supp. 2d 1337, 1345 (M.D. Fla. 2003)]

[7] *See* American Ass'n of People With Disabilities v. Hood, 278 F. Supp. 2d 1345 (M.D. Fla. 2003). [RE5]

"maximum extent feasible." [RE7; R215][8] The trial court entered judgment against Stafford on March 26, 2004. [RE8; R216]

F. The Trial Court Rules That Duval County Should Have Purchased the ESS Voting System Used in Miami-Dade County in 2002

In concluding that Stafford violated 28 C.F.R. § 35.151(b), the trial court held that Duval County should have procured the ESS touchscreen/audio ballot system in 2002 because that was the first and "only voting system that enabled visually impaired voters[9] to vote without assistance, that was certified early enough to allow Duval County to adopt the system after certification, but in time for the September 2002 election" in Florida. [RE7/R215 8]

The court reached this conclusion despite acknowledging that this same ESS system caused major election failures in two large Florida counties (Miami-Dade and Broward) arising from (a) the failure to open polling places due to slow "booting up" of the ESS machines, (b) "logistical problems" such as "getting machines to precincts" and (c) poor pollworker training for the system. [RE7/R215 14 (citing 2001 Governor's Task Force Report, P's Ex. 1)] The trial court also

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[8] *See* American Ass'n of People With Disabilities v. Hood, 2004 WL 626687 (M.D. Fla. March 24, 2004) [RE7].

[9] As to manually impaired voters, the trial court found that because Plaintiff Bell showed at trial that he could "vote" on an ESS touchscreen with his mouth stick, that the failure to procure ESS touchscreens violated the ADA. [RE7/R215 19-20]

acknowledged that ESS was rejected by Stafford, in part, because (a) pollworkers had to use cartridges to boot up machines and download them, tasks that are time-consuming and better suited for technicians, and (b) cost. [RE7/R215 8-9] The trial court further acknowledged that Stafford favored the Diebold optical scan system because "it had a proven track record" and because it was easier (a) to train pollworkers; (b) to conduct a recount; and (c) to vote generally. [RE7/R215 8-9]

G. Trial Court Rules For Stafford On Other Claims Including That Third Party Assistance Is An Appropriate "Auxiliary Aid" Under The ADA That Provides Effective Communications in Voting

The trial court found no ADA violation as to an "effective communications/-auxiliary aids" regulatory claim under 28 C.F.R. § 35.160. The Court held that third party assistance under Florida law is an effective and appropriate auxiliary aid by which disabled voters may communicate their votes that provides "*an equal opportunity to participate in and enjoy the benefits of voting*." [RE7/R215 23 (emphasis added)] The court found no independent violation of the "generic" discrimination provision of the ADA [RE7/R215 25-27] and made no mention of the RA claims.

H. The Trial Court's Remedy

The trial court ordered "at least one voting machine that permits visually impaired voters to vote without assistance at 20% of the polling places in Duval County." [RE7/R215 30] Stafford was directed to file a report indicating which

polling places should receive machines "taking into account, *inter alia,* population density and transportation availability." [RE7/R215 30] The trial court also ordered that if "the Diebold touch screen machines with audio ballot capabilities are not certified ***on or before May 14, 2004,*** and/or the Diebold touch screen machines do not permit a manually impaired voter to vote alone via mouth stick, Defendant Stafford is **DIRECTED** to select and procure another vendor's acceptable touch screen machines with audio ballot capabilities in time for use during the August 2004 primaries." [RE7/R215 30 (emphasis in original)]

I. Stafford Appeals And The Trial Court Stays Its Order

Stafford appealed the trial court's order and judgment [R217], and moved for a stay pending appeal [R219], which the trial court granted. [R232] The trial court stated that while optical scan with third party assistance is not the "preferred" method of voting, no Plaintiff would be denied "the substantive right to vote." [R232 3] Prior to the stay being entered, Stafford filed his report, which indicated that approximately 35 persons had been identified countywide that might *potentially* benefit from an audio ballot. [R227 3] Plaintiffs filed a motion seeking over $2 million in attorneys' fees and costs, [R223 & R224] which has been stayed as well. [R238] Plaintiffs did not file a cross-appeal.

Statement of the Facts

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

After Election 2000, Florida elections officials sought to replace punchcard systems with more accurate equipment to restore voter confidence by eliminating overvotes and undervotes. [Stafford Ex. 31 30-47; TR170 63-64, 7:10] Elimination of infamous "hanging chads" in the twenty-four counties with punchcard machines had become necessary. [Id.;; TR172 10-11 (Duval County criticized for overvotes on its punchcard system)] On May 10, 2001, the Florida Legislature enacted the Florida Election Reform Act of 2001, Chapter 2001-40, Laws of Florida, which decertified punchcard systems effective September 2, 2002 thereby requiring counties to replace such systems.

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

The 2001 Governor's Task Force extensively reviewed and compared so-called "Marksense"[10] technology (i.e., optical/digital scan) versus newly developing direct recording electronic (DRE) technology. The Task Force noted the nascent state of the latter (which includes touchscreens), and that there were

[10] Marksense can be either digital scan or optical scan, the latter scanning ballots faster than the former. [TR172 77-78] In general, Marksense is a system "in which a ballot card has candidates' names preprinted next to an empty oval, circle, rectangle, or an incomplete arrow." [Stafford Ex. 31 33]

"no DRE systems certified in Florida" at that time.[11] It found the advantages/disadvantages of ***optical/digital scan*** were:

Advantages

- Estimated costs at $4,000-$5,000 per precinct are less than per precinct cost for DRE systems.
- Fewer marksense system units are needed than the DRE system requires; DRE systems require a DRE machine for each booth in a polling place while marksense/precinct tabulation systems require only one scanner per polling place.
- 41 Florida counties already use some type of certified marksense system.
- Voter errors such as 'overvotes' can be corrected by voters at the polls, eliminating a large percentage of 'spoiled' ballots.
- Marksense systems are proven systems; 26 Florida counties using the marksense precinct-level tabulation system had the lowest percentage of 'spoiled' or blank ballots during the November 2000 election.
- Counties converting from punch cards to marksense can use existing privacy booths.
- Storage space is minimal compared to larger systems.
- Number of staff to operate and maintain a marksense system is smaller than the more technologically advanced DRE voting system; more sophisticated staff are required to operate the DRE system.
- Some voters generally feel more comfortable with paper ballots, and a paper 'audit trail' exists in marksense systems for possible vote recounts.

Disadvantages

- Voter errors such as 'undervotes' or blank ballots may go undetected.
- Ballots must be preprinted and can be a costly recurring expense for counties.
- Elections with large numbers of candidates and issues may require more than one ballot per voter.
- Visually impaired and other disabled individuals will still need assistance to mark their ballots.

[11] Id. at 34.

[Stafford Ex. 31 33-34] The advantages/disadvantages of ***DRE systems*** were:

Advantages

- DRE machines are more expensive to purchase and maintain but their overall, long-term costs may be less than marksense machines because they have no paper ballots and therefore reduce recurring costs for County governments.
- 'Overvotes' are impossible to make thus eliminating a large percentage of 'spoiled' ballots.
- It is easy to change one's vote if a mistake is made; no assistance is required from a poll-worker.
- Some DRE machines are easier to use for illiterate voters because candidates' photographs can be displayed.
- Some DRE machines have audio features and large fonts that make them easier to use for visually impaired voters and other disabled voters.

Disadvantages

- DRE machines are more costly per precinct than marksense machines because it takes more DRE machines per voter at the polling place than marksense systems and maintenance costs are higher.
- Many DRE machines produce no paper ballots, making recounts difficult.
- DRE machines require more technologically competent staff for maintenance.
- Poll-workers are not prepared to troubleshoot DRE machines if they fail.
- It is unclear whether manufacturers can meet Florida's demand for DRE machines by the 2002 primary and general elections.

[Stafford Ex. 31 34] The Task Force reviewed existing studies and determined that optical scan systems had lower error rates than DRE systems.[12]

[12] [Stafford Ex. 31 37 (noting research report in February 2001 "found that the marksense or 'optical scan' system had a lower residual rate than DRE or touchscreen systems. An even bigger surprise was that the DRE or touchscreen systems had a residual rate as high as punchcard systems.")]

The Report explicitly recognized *two sets of standards* that a voting system must meet. The first are *technical* certification standards set and administered by the State of Florida. Id. at 35. The second are *usability/affordability* "standards that focus on the users of the equipment – voters, poll-workers, and election officials – and include voter error rates compared to other equipment; ease of setup, use, voter error corrections and maintenance; documentation for vote-auditing purposes; cost; and availability." Id. at 35. This "second set of standards[13] is not yet promulgated by law or regulation but is high in the minds of the voters and Elections Supervisors and could be known as 'user-friendly standards.'" Id. The Task Force concluded that "***only one voting system currently meets all of these standards: the state-certified marksense voting system with precinct level tabulation***." Id. at 38 (emphasis added).

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

During 2001, the Duval County Election Reform Task Force held numerous public hearings and issued a final comprehensive report, which stated:

[13] These usability/affordability standards include: "Be accurate; Be simple for voters to use; Provide the ability to correct common errors made by voters; Be easy for poll-workers to set-up on election days; Allow for re-creation of voter intent independent of technology; Allow the Elections Supervisor and his or her staff to set up and take down the equipment from beginning to end without being dependent on any third party outside his or her office; Be cost efficient so that the local county government could afford to purchase it." Id. at 35-36.

> The Task Force carefully considered both technology options, hearing presentations from vendors, the Supervisor of Elections, and other authorities. ***It recommends that Duval County adopt precinct-based optical scanning technology for no more than two to four years, accompanied by a firm commitment to acquiring DRE technology thereafter.*** In reaching this conclusion, the Task Force considered the current state of technological reliability, state certification and cost.

[Stafford Ex. 1 27 (emphasis in original)] The Report recommended "that consideration be given to the establishment of a centralized voting facility for extraordinary access" including additional technology for the disabled based on input from the Jacksonville Chapter of the Florida Council of the Blind [TR171 57-60; 7:137], as well as Duval County's Chief of Disabled Services, Jack Gillrup. [TR171 57-60; 7:137][14] The Task Force heard reports regarding accommodations for disabled voters such as curbside voting and third party assistance, and commended Stafford for his overall efforts. [Stafford Ex. 1 22]

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

Florida does not have a uniform statewide voting technology. Instead, its sixty-seven counties may select different voting systems, provided their equipment

[14] Both Ms. Bobbie Probst (Chapter President) and Mr. Gillrup requested that the Task Force recommend a centrally located downtown site with such access for disabled persons. [TR171 59-60, TR172 144 & 149; Ps' Ex. 13 164-72]

is certified by the Florida Department of State, Division of Elections.[15] In late 2001/early 2002, counties had the choice of one of three vendors: Global/Diebold,[16] Elections Systems & Software, Inc. (ESS) or Sequoia Voting Systems Inc. (Sequoia). Each vendor offered certified optical/digital scan systems. [State Ex. 3 & 4; Stafford Ex. 43] Each was developing or had a touchscreen system certified, though they were substantially more expensive than optical/digital scan (*see* below). [State Ex. 3 & 4; Stafford Ex. 31 & 43] Counties selected only a single vendor because no certification exists for blending different vendors' equipment. [TR168 118-19 & 122-23] Moreover, Florida counties prefer to work with a single vendor for warranty service and for technical assistance. [TR168 122-23 ("the ability to get technical assistance during an election cycle is a big area of risk that the counties want to reduce …")]

[15] § 101.294(1), Fla. Stat. (2001) ("No governing body shall purchase or cause to be purchased any voting equipment unless such equipment has been certified for use in this state by the Department of State.").

[16] The original vendor was Global Elections System, which was purchased by Diebold Elections Systems in February 2002. [TR170 37] (the "Global/Diebold" or "Diebold" system).

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

One vendor, ESS, received the first certification in Florida for an audio ballot for the visually impaired on August 16, 2001.[17] [State Ex. 3 & 4; PS 19] Global/Diebold had an application pending at that time [State Ex. 4 at ii (#14)], and had given assurances that its audio ballot would be certified in time for the Fall 2002 election cycle.[18] [TR171 76:77; 5:69-70] Nonetheless, its four applications were either withdrawn or denied and its audio ballot is not yet available for use in Florida.[19] On May 30, 2002, Sequoia applied for certification of its audio ballot, which was certified on August 7, 2002, a month before the primary election. [State Ex. 3 & 4 at 31]

F. Stafford Procures Global/Diebold In January 2002

After a detailed review process starting in 1999 [Tr. 754-55] and continuing through late 2001, Stafford chose to procure the Global optical scan system, which

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

[18] Diebold contractually agreed to provide three certified audio ballots without charge for the Fall 2002 elections. [Stafford 97; Stafford Ex. 19 Ex. A]

[19] Its most recent application has passed all testing phases and is awaiting final certification by the Department. [R242 & R 246]

he and his staff gave high marks.[20] Assistant Supervisor of Elections, Dick Carlberg, compiled a list of advantages/disadvantages of optical scan versus DRE systems, and reviewed each based on his years of technical experience as well as his familiarity with how voters/pollworkers relate to technology.[21] [Stafford Ex. 4; TR172 58-59] He found that touchscreens had "no proven track record", that recounts would be problematic, and that optical scan and paper ballots "will be required for absentee voting" in any event. [Stafford Ex. 4] Touchscreens would "be extremely costly in terms of" their price; maintenance; storage and transportation; setup and testing; poll worker training; and election day contingency support staffing; they also posed "security and accountability" concerns. Id. In contrast, optical scan systems had few disadvantages but many advantages such as a "proven election track record for reliability and accuracy"; ease in setup, storage, administration and recounts; high voter acceptance;

[20] Stafford was elected in 1999 based on a campaign platform of upgrading the voting system to either optical scan or touchscreens. [TR170 41; TR171 6] One of his "ten points" for election reform in February 2001 was consideration of touchscreens and audio ballots. [Stafford Ex. 3 (Ten-Point Plan); Ps' Ex. 123; TR170 41]

[21] Mr. Carlberg has masters' degrees in business and public administration and worked for the City's Information Technologies Division for seventeen years after serving in the military as a naval aviator. [TR172 52-53]

substantially lower overall costs and compatibility with other existing components such as voting booths. Id.

On January 17, 2002, Stafford sent a letter to the Chief of Procurement, City of Jacksonville, requesting purchase of the Global/Diebold optical scan system with three touchscreen/audio ballots for visually disabled voters. [RE9; TR170 79-80; Stafford Ex. 6 & 7] He noted that the "Governor, the Governor's Task Force, the Secretary of State, and the Duval County Election Reform Task Force" had recommended optical scan and that "DRE products are unduly expensive when deployed in all precincts, have no proven track record of success, and could easily be confusing to certain segments of the voting population." [Stafford Ex. 7, Ex. A] He indicated that the Global/Diebold system had "the lowest incidence of voter error" in Florida by a threefold margin. Id. The City's General Government Awards Committee approved this request on January 24, 2002, creating a legally enforceable obligation at that point. [Stafford Ex. 6 & 7; TR170 79-80; Stafford 95, 130-32; Tr. 4:100 ("We had a contract agreement in place in late January")][22]

[22] Diebold began delivery of the equipment in April 2002 with additional deliveries in May and June 2002. [TR170 62 & -83-84; Stafford 132-33] Negotiation with Diebold – the successor to Global in February 2002 – delayed the formal signing of a revised agreement until October 3, 2002. [Stafford Ex. 9a & 9b; TR170 123-24] The only change to the original agreement was a name change. [TR170 99-100]

As to the two other vendors, Stafford specifically rejected the ESS system because of a number of features he deemed to be ill-advised. [Tr. 4:140-41, 5:66-68] He rejected ESS because its systems required that pollworkers boot-up the ten to twenty machines in each precinct with a single device that is used sequentially for each voting machine and audio ballot. [TR170 66-68] The sequential nature of uploading required substantial time, typically starting the night before, to prepare a precinct in time for opening at 7 a.m. on election day. [TR172 20-21; 5:75-76]

This last feature created the fiascos in Miami-Dade and Broward Counties in the September 2002 primaries requiring the extraordinary step of the Governor extending poll closing times. [Ps' Ex. 1; Tr. 4:140-41; 7:17-22 (logistics of running election in Miami-Dade turned over to emergency management personnel/police department)] The severe problems in Miami-Dade and Broward resulted in many critical reports of ESS, including those by the Miami-Dade Inspector General's office. [Stafford Ex. 12][23] The Governor's 2002 Task Force noted "numerous problems were experienced" with ESS and that "county election officials mobilized over 4,500 county employees to work as poll

[23] The 2002 Governor's Task Force Report noted that there "were three major reports generated as a result of problems experienced by Miami-Dade County – one from the Office of Inspector General Miami-Dade County, one from the Center for Voting and Democracy, and one from the Miami-Dade Election Reform Coalition." Id. at 30. [Ps' Ex. 1 at 65; Stafford Ex. 12 at 65]

workers, filling a variety of roles from clerks to voting equipment technicians" to prevent their reoccurrence. [Stafford Ex. 12 28-29] The problems with the ESS system in those counties continue to this day. Id.; [TR172 17-18]

Stafford and his staff also disliked the process of relying on pollworkers to boot-up the ESS systems. [Tr. 4:140-41] Based on Stafford's experience in data processing and elections administration, he felt it was "dangerous" to have pollworkers rather than technicians preparing the voting systems. [Tr.4:140-41; 5:75-76] This factor too was part of the problem experienced in Miami-Dade and Broward. [Tr. 4:140-41; 5:72-73; 7:17-19] The 2002 Governor's Task Force noted that the Miami-Dade and Broward experiences "confirm that increased efforts on a statewide and local basis are necessary to establish a pool of poll workers capable of filling the stringent experience requirements necessary for the more technologically complex voting systems being implemented." [Stafford Ex. 12 29] Finally, the ESS system was very complex – a "Rube Goldberg" setup in Mr. Carlberg's words – because it used both DOS and Windows-based software. [TR172 82-83] Requiring use and understanding of two operating systems and multiple file servers (versus one on the Diebold System) was a drawback and significant concern. Id.

As to Sequoia, Stafford rejected its scanner unit because it was an old, big, heavy and "blocky" unit that was difficult for pollworkers to transport. [TR170

66-67; 7:76-77] The unit was "slow to ingest a ballot" because of its slower digital (rather than optical) scan design. [TR172 76] The unit also permitted voters themselves to override or reject a ballot, a negative feature because voters could do so without a pollworker's knowledge or involvement. [TR172 76] The Sequoia digital scan unit did not have rechargeable batteries; instead, it used "one-shot' batteries that required precincts to have spare batteries on hand. [TR172 77]

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

In the Fall 2002 elections, fifty-two (77.6%) of sixty-seven Florida counties used precinct-based optical/digital scan systems[24] while fifteen counties used precinct-based touchscreen systems.[25] Thirty counties used Global/Diebold's optical scan voting systems;[26] thirty-two used systems offered by ESS (twenty-one optical scan);[27] and five used systems offered by Sequoia (one digital scan).[28] The

[24] [Stafford Ex. 34 4 ("Counties Using Marksense Precinct Voting Method")]

[25] [Stafford Ex. 34 2 ("Counties Using DRE Precinct Voting Method")]

[26] [Stafford Ex. 34 4 (Florida Division of Elections website; Voting Systems: Diebold); TR168 147]

[27] [Stafford Ex. 34 5 (Voting Systems: ES&S)]

[28] [Stafford Ex. 34 6 (Voting Systems: Sequoia)]

extent of audio ballot use in the fifteen DRE counties is unknown. Voting Systems Chief Paul Craft had no specific data or factual basis regarding the use of audio ballots and did not know whether any county, other than Pasco County, used audio ballots at the precinct level. [TR168 42, 151]

H. The Cost of Optical Scan v. Touchscreens

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

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

[Stafford Ex. 31 39] Based upon information it obtained, it estimated that the cost for a statewide touchscreen system would be about ***two to five times as expensive*** as optical scan. Id. at 40. As to Duval County, the direct cost of purchasing a precinct-based touchscreen system in January 2002 for Duval County would have been from $6.5 to $12 million, which is more than ***three to six times*** the direct cost of an optical scan system. [Stafford Ex. 4; Ps' Ex. 100; TR172 11-14].[29] The

[29] The $12 million figure is based on $3,000-3,500 per DRE unit with one touchscreen for every 125 registered voters, which equals about 4000 machines for (Continued …)

Global/Diebold System was ultimately procured for $1.8 million (less than estimated) with three touchscreen/audio ballots without charge. [Stafford Ex. 6 & 7] The cost of printed ballots in Duval County was very low due to negotiations with a local printer that provided a rate (17 cents per page) well below that charged by the voting system vendor (25 cents per page). [TR172 15]

Duval County (i.e., 4000 units times $3,000). [TR172 11] This amount did **not** include annual maintenance costs of $360,000 based on $90 per touchscreen or pollworker training and voter education costs. [TR172 12-13] The $6.5 million figure is based on 250 registered voters per unit. Ps' Ex. 100; TR172 12-14] Even at this level, the direct cost of purchasing a DRE system would have been between $5.8 to $7.6 million (depending on which vendor is selected) exclusive of maintenance and other costs. [Ps' Ex. 100].

STATEMENT OF THE STANDARDS OF REVIEW

This Court reviews the trial court's legal conclusions *de novo*, [cite] and factual findings based on the clearly erroneous standard. Florida Progress Corp. and Subsidiaries v. C.I.R., 348 F.3d 954, 959 (11th Cir. 2003); Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous....").

The trial court's denial of a motion to dismiss is subject to *de novo* review as to the law. S & Davis Intern., Inc. v. The Republic of Yemen, 218 F.3d 1292, 1298 (11th Cir. 2000). Review of the denial of a motion for summary judgment is "*de novo,* viewing the record and drawing all reasonable inferences in the light most favorable to the non-moving party." Patton v. Triad Guar. Ins. Corp., 277 F.3d 1294, 1296 (11th Cir. 2002).

SUMMARY OF THE ARGUMENT

The trial court erred in a number of respects in concluding that Stafford's purchase of an optical scan voting system in January 2002 – rather than an ESS touchscreen voting system with audio ballot – constituted an ADA violation.

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

Second, even if the ADA was intended to supplant election laws, the trial court committed errors in its application. First, it erred by concluding that a voting system is itself a "facility" under 28 C.F.R. § 35.151(b). Every reported case under § 35.151(b) involves a physical alteration to a permanent structure, such as curb cuts added to a sidewalk or an elevator to a building, which are dissimilar from voting systems that involve portable equipment not affixed to any permanent structure. At best, the ADA might require "auxiliary aids" be made available for use with a government program under 28 C.F.R. § 35.160, but the trial court ruled *in favor* of Stafford on this regulatory claim in concluding that third party assistance is an effective means of communication/auxiliary aid.

Next, the optical scan voting system in Duval County, combined with the provision of third-party assistance at the polls as required by Florida law, is a

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

The trial court also employed an interpretation of "feasible" under section 35.151(b) that rendered this term meaningless. Section 35.151(b) only requires an alteration improve access to the greatest extent it can be done under the circumstances. Under its misapplication of this "feasibility" standard, the trial court engaged in "judicial second-guessing" by concluding that the ESS touchscreen system should have been procured, simply because it had the first and only certified audio ballot in Florida. Indeed, the trial court clearly erred by ignoring the serious flaws in that system that caused the election debacles in Miami-Dade and Broward Counties resulting in severe economic, technological and administrative problems.

Moreover, state approval of a voting system does not make that system "feasible" and, instead, is merely a certification that the system will perform

certain technical functions. Certification does not mean a system is affordable, administratively or technologically useable, or will otherwise meet a jurisdiction's particular needs, as the 2001 Governor's Task Force in Florida made evident in its comprehensive report. And merely because two jurisdictions (Georgia and Harris County, Texas) had some limited experience in Fall 2002 using certain touchscreen/audio ballots, did not make those voting systems "feasible" in Florida where neither system is certified.

Finally, the court erred in refusing to dismiss the action as moot in light of HAVA, which legislatively provided the precise relief the Plaintiffs sought. A case is rendered moot *after* its commencement if a court can no longer give "meaningful relief." Here, the district court could provide no relief beyond what HAVA already required thereby rendering the case moot. Also, the court's remedy was flawed by creating constitutional and statutory problems and by not following class certification procedures or making class rulings.

The ADA requires that no person be excluded from or denied the benefits of any government program, service or activity. The trial court held that no Plaintiff was denied an equal opportunity to participate in and enjoy the benefits of voting in Duval County on the optical scan system with third party assistance. As such, the trial court's conclusion that section 35.151(b) was violated is erroneous and should be reversed with directions to enter judgment for Stafford.

ARGUMENT

I. THE TRIAL COURT ERRED BY NOT DISMISSING PLAINTIFFS' ACTION BECAUSE THE ADA DOES NOT SUPPLANT FEDERAL ELECTION LAWS OR CREATE A FEDERAL RIGHT OF VOTING SECRECY.

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

In Nelson, a statewide class of blind voters brought an ADA action claiming violations arising from the failure of the State of Michigan to implement methods by which the "Plaintiffs could cast their votes unassisted by another person." Id. at 644. Plaintiffs alleged the existence of "inexpensive technologies that are currently in commercial use which [sic] permit persons who are blind to read and mark ballots without involving a third party, including braille ballot overlays or templates, taped text or phone-in voting systems." Id. at 644 n.1. Plaintiffs sought a permanent injunction requiring that the State implement such methods. Id. at 644.

The defendants moved to dismiss the entire action for two reasons. First, they argued that Michigan's law allowing blind voters to designate any person over the age of eighteen or a family member to assist in casting a ballot was in compliance with the Federal Voting Rights Act of 1965 and the Voting Accessibility for the Elderly and Handicapped Act of 1984, both of which

specifically address the issues of assistance with and accessibility to voting by handicapped individuals. 950 F. Supp. at 202. Second, the Defendants argued that the ADA and RA do not establish a right to privately cast a ballot without the assistance of a third party. Id.

The district court granted the Defendants' motion, holding that "Michigan's current voting law, which permits blind voters to have third-party assistance of their choosing in marking their ballots, complies with the ADA and RA and thus that the Plaintiffs had failed to allege facts upon which relief could be granted under either act." 170 F.3d at 644. The district court made two rulings.

> First, the court found that the ADA and RA, statutes that apply generally to disability-based discrimination, needed to be read in conjunction with older, specific congressional acts dealing with voting rights for the disabled, namely the Voting Rights Act of 1965 (as amended in 1982), 42 U.S.C.A. § 1973aa-6 (West 1994) ("VRA"), and the Voting Accessibility for the Elderly & Handicapped Act of 1984, 42 U.S.C.A. § 1973ee-1 (West 1994) ("VAEH"), insofar as they involved the elections of federal officers.

170 F.3d at 644. In doing so, the district "court stated that Congress did not intend for the ADA to displace the Federal Voting Rights Acts" and noted that "the VRA specifically required that a blind voter be provided assistance by a person of his or her choice when voting" (with certain immaterial exceptions). Id. Also, the Senate Report accompanying the VAEH (which requires polling places to be "accessible" to handicapped voters), specifically noted "'that any minimal effect on the privacy of those who are elderly or handicapped is more than offset by the expanded

opportunities for participation in the political process.'" Id. at 644-45 (citation omitted). Thus, to the extent the ADA or RA were applicable, the district court "concluded that the Defendant could not be said to have violated them by providing the Plaintiffs with the same type of meaningful assistance prescribed by them." Id. at 645.

Second, the district court addressed whether, as to state and local elections that the VRA and VAEH did not cover, the ADA or RA created a private right of blind or visually impaired voters to cast a secret ballot. In rejecting this claim, the district court:

> reasoned that nothing in the language of the ADA or RA indicated that voting *privacy* was a benefit Congress sought to protect under them … and that Congress did not intend the ADA and RA to extend to blind voters in state and local elections anything more than it had already extended to them in federal elections through the VRA and VAEH.

Id. Stated differently, the ADA and RA were intended to ensure that disabled voters are not excluded from participation in, or denied the benefits of, the state's voting program; they were not intended to create a federal right of secrecy of the ballot independent of that established under state law. For these reasons, the district court dismissed the Plaintiffs' ADA and RA claims.

The Sixth Circuit affirmed, rejecting the argument that the ADA was violated for failure to provide a 'secret voting program.'" Id. at 650 (quoting district court). Based upon the substantial assistance that Michigan's third party

assistance statute provided for blind electors to cast their votes, the court concluded that ***the refusal "to provide [Plaintiffs] with voting assistance other than that already extended to them under … [Michigan's voter assistance statute], does not discriminate against them in violation of the ADA*** and/or the RA." Id. at 653 (emphasis added). As such, the court upheld the district court's dismissal of the ADA/RA claims.[30]

For similar reasons, the trial court erred in denying Stafford's motion to dismiss the Plaintiffs' amended complaint, which was simply another attempt to attack Florida's third party assistance statute under the guise of an ADA violation.[31] Indeed, in attempting to state a claim of discrimination under the ADA, the amended complaint merely listed various attributes of third party assistance under Florida law that were objectionable such as "being forced to reveal their vote to a third-party." [R47 17-18] Because the amended complaint merely challenged

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[30] *See also* NAACP v. Philadelphia Bd. of Elections, 1998 WL 321253 at *4 (E.D. Pa. 1998) ("The defendants' provision of the alternative ballot procedures [authorized by the VAEH] to qualified individuals with disabilities fulfills their obligation under the ADA...."). Plaintiffs have relied on the decision in National Org. on Disability v. Tartaglione, 2001 WL 1231717 (E.D. Pa. Oct. 11, 2001), which is neither binding nor persuasive. Indeed, that decision fails to even mention Nelson v. Miller decided two years earlier.

[31] For instance, when asked what basis he had for an ADA claim other than the provision of third party assistance at the polls, Plaintiff O'Connor stated emphatically: "There is no other basis … No other basis." [O'Connor 48-49]

Florida's third party assistance law, the principles of the Nelson v. Miller cases apply and it is urged that this Circuit adopt their reasoning and holdings.

The principles in Nelson v. Miller are further strengthened due to the enactment of HAVA, which establishes federal standards and provides funds for voting equipment for disabled voters to be required in each precinct for elections after January 1, 2006. HAVA severely undermines the trial court's conclusion that the ADA is applicable because it is nonsensical that Congress would compel, set standards for, and appropriate funds to purchase electronic voting equipment for disabled voters for use after January 1, 2006, yet simultaneously intend that the ADA (which has no funding or standards for voting machines) be used to compel judicially the purchase and use of such voting equipment now. It is illogical to believe that Congress intended to compel a costly addition to a voting system under the imprimatur of the ADA when it established the means for doing so under HAVA. Indeed, Voting Systems Chief Paul Craft – who serves on the committee drafting HAVA standards for voting systems – testified without contradiction that any audio ballots procured at this time to accommodate disabled voters would have to be updated or replaced because existing standards will have to be modified to comply with HAVA standards, which have not yet been formulated. [TR168 93-94, 160-61, 173] In short, the rationale for dismissal in Nelson v. Miller is made more compelling due to HAVA.

II. THE TRIAL COURT ERRED IN CONCLUDING THAT STAFFORD'S PROCUREMENT OF AN OPTICAL SCAN VOTING SYSTEM VIOLATED THE ADA.

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

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

First, optical scan voting systems, which are used in fifty-two Florida counties (and thousands throughout the United States), are "readily accessible and usable"[32] with third party assistance under Florida law. Indeed, the trial court held as much in ruling against Plaintiffs on their claim that the lack of touchscreens/audio ballots violated 28 C.F.R. § 35.160, which requires appropriate "auxiliary aids." As the trial court concluded:

> "… ***All three individual Plaintiffs have been able to vote with third-party assistance***. While the visually impaired Plaintiffs testified to concern about whether their votes were accurately reflected, ***there is***

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

> ***no evidence to suggest that their votes were not accurately communicated via third-party assistance***. Similarly, there is evidence that visually and manually impaired voters have consistently been able to vote in Duval County elections using third-party assistance, which indicates that ***visually and manually impaired voters have been afforded an equal opportunity to participate in and enjoy the benefits of voting***."[33]

[R23] That Plaintiffs were "afforded an equal opportunity to participate in and enjoy the benefits of voting" compels the conclusion that the voting system in Duval County complies with the statutory language of the ADA itself.

That certain disabled persons must disclose their votes to a third party in using an optical scan voting system does not constitute an ADA violation. In its October 16, 2002 dismissal order, the trial court held that neither the ADA nor the Florida constitutional right to a direct and secret vote is violated by third party assistance provided in Florida, given the substantial statutory protections for right. Dismissal of Plaintiffs' ADA claim was *with prejudice*. [R42 21 & 37-38] As such, it was error that Plaintiffs' amended ADA theory (i.e., that an optical scan system fails to provide disabled voters with an "independent" voting experience) be resurrected. Phrases such as "voting 'independently'" or "denial of access" are simply different euphemistic ways of saying "voting in secret without third party assistance," which was the ADA theory that was dismissed with prejudice. No

[33] [R216 23] (emphasis added).

evidence or precedent suggests that the ADA establishes a right to "absolute secrecy" in the voting experience under the rubric of "accessibility."

Notably, the Office of Civil Rights, Department of Justice, has specifically held that Florida's statutory program of third party assistance meets ADA standards.[34] For instance, in a Letter of Findings dated August 25, 1993, the Department addressed whether the failure to provide blind voters in Pinellas County, Florida with an electronic method of voting violated the ADA. The complainant asserted that blind voters were not provided a method of voting that allowed a secret ballot. The Department stated that the supervisor of elections, who followed Florida law by providing assistance to blind voters, was in compliance with the Act. The Department stated:

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

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

electronic voting in order to enable individuals with vision impairments to vote without assistance.[35]

As the highlighted language indicates, the Division viewed Florida's voter assistance statute as an "effective" method of enabling the visually impaired to vote while preserving the secrecy of their votes. Moreover, the Division recognized that, under the ADA a public entity is not required to provide "identical services" in order to meet legal requirements. Instead, the longstanding interpretation of the ADA is that a public entity must provide "equally effective communications to individuals with disabilities" that includes "equivalent, as opposed to identical, services." Id.[36]

Finally, no ADA standards for voting equipment or systems exist to date. Paul Craft, Division of Elections, and Jack Gillrup both testified that they consulted with Department of Justice ADA experts who said that no standards exist in this area. Mr. Craft testified:

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

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

> As to voting systems, I think the phrase ADA compliant has no meaning. One of the things that I did when we started researching these standards was to go to people in the Department of Justice who are specialists in ADA and start working with them trying to find, you know, what would be standards that could apply. They were -- I wasn't able to find anything, they weren't able to give me anything. … The results were no one could point me to a clear standard that I could use.

[TR168 164, 165] Likewise, after Mr. Gillrup was contacted by Plaintiff O'Conner, he reviewed his ADA Technical Manuals and found no standards. He then contacted the Department, which advised that the provision of third party assistance, absentee voting, and curbside voting satisfies the ADA. [TR171 65-66] Given the lack of ADA standards, and because the optical scan system at issue, combined with third party assistance under Florida law, is readily accessible and usable by the Plaintiffs, the trial court erred in concluding that the ADA was violated.

B. The Trial Court Erred In Concluding that 28 C.F.R. § 35.151(b) Is Applicable.

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

The ADA provides that "… no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Here, the trial court specifically ruled – and the evidence fully supports – that no Plaintiff was denied

an equal opportunity to participate in or derive the benefits of voting in Duval County. Because Plaintiffs were not excluded from or denied the benefit of voting under the ADA's statutory language itself, their regulatory claim under 28 C.F.R. § 35.151(b) based upon the same conduct must fail. Alexander v. Sandoval, 532 U.S. 275, 291, 121 S. Ct. 1511, 1522 (2001) ("'[T]he language of the statute and not the rules must control' … language in a regulation" cannot "conjure up a private cause of action that has not been authorized by Congress.") (citation omitted).

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

Alternatively, the trial court erred in holding that the purchase of optical scan voting equipment is an "alteration" to an existing "facility" (i.e., voting system) that violates 28 C.F.R. § 35.151(b) of the ADA. The specific type of "accessibility" at issue is "***program*** accessibility***"*** referred to in Subpart D of the regulations. *See* Addendum. The gist of these regulations is that a public entity's failure to make a "facility" [37] physically accessible amounts to "exclusion from

[37] *See* 28 CFR § 35.104 ("Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.").

participation in, or the denial of the benefits of, the program, service or activity" occurring within the "facility" itself.

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

Unlike buildings, ramps, elevators and other semi-permanent structures commonly understood as "facilities" that are susceptible to being "designed and constructed" or "altered" to provide physical access to public programs, services and activities, a voting system in Florida[38] is a "method" of casting votes via an amalgamation of computer hardware/software, voting booths, and other portable

[38] Under Florida law, a "voting system" means "a method of casting and processing votes that functions wholly or partly by use of electromechanical or electronic apparatus or by use of paper ballots and includes, but is not limited to, the procedures for casting and processing votes and the programs, operating manuals, tabulating cards, printouts, and other software necessary for the system's operation." § 97.021(38), Fla. Stat. (2003), *as amended by* Chapter 2003-415, Laws of Florida.

items that are designed to be transportable and thereby not permanently affixed or installed at any one location or site.[39]

Indeed, while the regulatory definition of "facility" is broad, it has not been stretched to extend beyond its common understanding, which is limited to elements that are permanently made part of a physical structure.[40] Every reported case under section 35.151(b) relates to an *alteration to an element made part of a permanent physical structure*, such as curb cuts or ramps on a sidewalk or road, elevators and restrooms in buildings, and alarm boxes/ticket vending machines affixed to public buildings.[41] Addition of these types of elements to a permanent physical structure

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

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

[41] Kinney v. Yerusalim, 9 F.3d 1067 (3rd Cir. 1993) (resurfacing of city street was alteration that required installation of curb ramps); Panzardi-Santiago v. Univ. of Puerto Rico, 200 F. Supp. 2d 1 (D. Puerto Rico 2002) (public pathway); Association for Disabled Americans v. City of Orlando, 153 F. Supp. 2d 1310, 1319 (M.D. Fla. 2001) (restrooms and seating); Ability Center of Greater Toledo v. City of Sandusky, 133 F. Supp. 2d 589 (N.D. Ohio 2001) (curb cuts); Deck v. City (Continued …)

can be done during the construction or alteration stage more cheaply (compared to adding them later) and are distinguishable from voting machines, which are portable and not affixed to a permanent structure. It is one thing to require a simple, inexpensive "curb cut" or ramp to a sidewalk that is being altered; it is quite another to compel the disproportionate cost and burdens of the voting technology the trial court has compelled under section 35.151(b) in this litigation.

Notably, the lack of any regulatory guidelines under the ADA for voting systems speaks volumes. Detailed and voluminous ADA regulatory standards and technical/engineering specifications exist for many types of physical or structural alterations.[42] None exists for voting systems or equipment,[43] and for good reason

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of Toledo, 29 F. Supp. 2d 431 (N.D. Ohio 1998) (curb ramp); Anderson v. Pa. Dept. of Public Welfare, 1 F. Supp. 2d 456, 463-64 (E.D. Pa.,1998) (alteration of office buildings); Schonfeld v. City of Carlsbad, 978 F. Supp. 1329, 1339 (S.D. Cal. 1997) (restrooms and curb ramps); *see also* Molloy v. Metropolitan Transp. Authority, 94 F.3d 808, 812 (2nd Cir. 1996) ("The installation of a TVM [ticket vending machine] constitutes a *physical* modification to the station. It also requires additional wiring and communication lines which feed into the LIRR's central TVM monitoring facility.") (emphasis added).

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

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

due to the complexity, portability and pervasive regulation under state and federal election law of voting systems. For all these reasons, the trial court erred in concluding that section 35.151(b) applies to the purchase of optical scan voting equipment at issue.

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

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

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

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

28 C.F.R. § 35.151(b) (emphasis added). While section 35.151(a) requires that facilities be "designed and constructed" to be "readily accessible to and usable by" the disabled, section 35.151(b) is more limited and requires that alterations to a facility be "readily accessible to and usable" by persons with disabilities only to the "maximum extent feasible."

In other words, the duty under § 35.151(b) is not that an alteration renders a facility "readily accessible." Instead, the duty is to make the alteration in a way that makes the facility – to the extent it can be accomplished under the circumstances – "readily accessible." This limiting phrase means that alterations need not be made if they exceed existing technical ability, involve unreasonable costs, or impose risks or burdens that are disproportionate to the accessible feature sought. Indeed, the term "feasible" is most reasonably understood with this "practical" or "reasonable" interpretation[44] rather than the extreme position the

[44] *See* NEW SHORTER OXFORD DICTIONARY, 926 (1993) ("Feasible: n., Practical, possible, manageable, convenient; serviceable."). Synonyms of feasible include (Continued …)

Plaintiffs advocated and the trial court applied, which transformed this regulatory *limitation* into the judicial *compulsion* of a flawed voting system without regard to its usability or cost.[45]

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

In this regard, the district court clearly erred in concluding that state certification alone is sufficient to support a finding of "feasibility" by "ensur[ing] that a system is not a substandard voting system." [RE7/R215 17-18] The court overlooked the official government reports and evidence demonstrating that the ESS system was not only substandard, but resulted in the most calamitous election experiences in Florida in 2002. Indeed, even Plaintiff AAPD conceded that the failure of the ESS System in Miami-Dade in 2002 resulted in the disaster/emergency management team being brought in to run elections, the mobilization of thousands of additional county workers to ensure the system worked, millions of extra funds expended, the unprecedented step of the governor keeping the polls open later, and the loss of the supervisor's job. [TR171 10-18;

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doable, practicable, reasonable, viable, workable. *See* ROGET'S ONLINE THESAURUS at http://thesaurus.reference.com (visited November 15, 2003).

[45] The Plaintiffs advocated that section 35.151(b) applied, but urged it was a stricter, higher standard. *See, e.g.,* [R27 24, 41, & 42-46] (hearing transcript of February 28, 2002); R124 14 n.5]

see TR172 17-23]] Plaintiff AAPD also acknowledged that in Broward County, Florida "problems" existed with the ESS system to the point that efforts were made to replace it with an optical scan system. [TR171 11-13, 26] Thus, by the Plaintiffs' own admissions, the ESS system was problematic, costly, and subject to administrative glitches that rendered it an undesirable choice – despite it being "certified." Given that certification is only an assurance as to technical standards (with no consideration of the usability/affordability standards deemed critical in the 2001 Governor's Task Force Report), it was clear error to conclude that state certification ensures a system meets a particular jurisdiction's needs, is economically viable, or administratively desirable.

2. The Trial Court Erred in Concluding That Stafford Should Have Bought the ESS System Simply For Its Audio Ballot.

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

As discussed in the previous section, the trial court ignored that the ESS system directly caused an unprecedented election fiasco in Miami-Dade. Buying the ESS system with its problems simply to have the first-ever audio ballot would have been foolhardy and a recipe for disaster. Stafford was prescient in rejecting

the ESS system as undesirable on numerous technical, administrative and economic grounds. Yet, the trial court engaged in judicial second-guessing by concluding that Stafford violated the ADA by not procuring that system simply because it had the only audio ballot available.

3. The Trial Court Erred as to the Economic Feasibility of Touchscreens, Particularly the ESS Touchscreen System.

The trial court erred as to the economic feasible of touchscreen/audio ballot systems. First, by the court's own findings, the direct cost of touchscreens for use in Duval County was from $5,844,000.00 to $13 million with annual maintenance[46] of $107,140.00. [RE7/R215 9] In sharp contrast, the optical scan system purchased for use in Duval County was $1.8 million with annual maintenance of $45,000.00. [RE7/R215 7 & 9] As such, the direct cost of a touchscreen system was ***three to five times more expensive*** than an optical scan system. The trial court also ignored the substantial costs the ESS system imposed on other counties such as the 4,500 extra pollworkers, the $5 million of extra expense, and the loss of voter confidence in Miami-Dade County. [TR171 10-18; Stafford Ex. 12 28-29; TR172 17-23 ("They had almost a complete breakdown of the system, just about everything that could do wrong did to wrong.")]

[46] Maintenance costs of touchscreen systems are substantially higher due to the larger number of those units required per precinct (versus one optical scan unit).

Second, the trial court erred in concluding that simply because the annual budget of the City of Jacksonville is substantial, that it must *ipso facto* be "feasible" for the City to pay whatever amount is necessary to procure voting equipment. This analysis is superficial and, indeed, no effort was made to review the more appropriate measure of financial feasibility: the actual budgets of the Supervisor of Elections Office for preceding years including what portions came from City funds. Using these budgets for comparison, the cost of a touchscreen voting system in 2002 far exceeded the ***entire budget*** of the Supervisor's Office for each of the past ten years.[47] In addition, a touchscreen system would cost in excess of ***ten times*** the City's portion of the annual budget (which is approximately 25% overall). Indeed, the share of state funds for the purchase of a voting system for

[47] From 1991 to 1999, the overall budget of the Supervisor of Elections office in Duval County has ranged from $1.84 million (1993-94) to $3.44 million (1998-99) with the City's general fund contributing between $539,097 (1991-92) to $672,023 (1999-2000). [Ps' Ex. 100; Stafford Ex. 2a-2k] The Supervisor's overall budget for fiscal year 2000-2001 was $2.6 million (of which $677,646 came from City funds). [Ps' Ex. 100] For fiscal year 2001-02, the budget was $3.25 million, of which $1.86 million was for personnel and $1.39 million was for operating expenses. [Stafford Ex. 2a-2k] For fiscal year 2002-03, the budget was $5.46 million reflecting $3.24 million in personnel (increase of $1.38 million for part-time and overtime due to three elections during 2002-03) and $2.23 million operating expenses (reflecting additional expense for voting system). Id.

Duval County in 2002 was $1 million,[48] [RE7/R215 7] an amount insufficient to purchase an optical scan system, let alone a touchscreen system. That counties felt they could not afford new voting systems (even with state funds) in part due to caps on millage for local tax revenues[49] and that Duval County financed its purchase of an optical scan system, both demonstrate the tight fiscal constraints that existed. [Stafford Ex. 31 40]

Third, the cost of just ***one*** touchscreen with audio ballot in each precinct (approximately $1 million)[50] would easily exceed the ***entire*** amount of the optical scan system in Duval County in 2002 ($1.8 million) by more than ***fifty percent***. Persuasive ADA regulations state that where the cost of a specific alteration exceeds the total cost of an overall alteration by 20 percent, it is disproportionate

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[48] Counties under 75,000 in population received a total of $7,500 per precinct while larger counties received a total of $3,750 per precinct. Chapter 2001-40, Laws of Florida, § 76.

[49] A major concern nationwide in 2001 was financing, particularly for new voting equipment with features for the disabled. GAO Report 02-107, "Voters with Disabilities: Access to Polling Places and Alternative Voting Methods," at 34 ("Most elections officials told us that limited funding is one of the main barriers to improving voting accessibility, especially with regard to providing more accessible voting equipment.").

[50] *See* Report of 2002 Florida Governor's Task Force on Election Procedures, Standards and Technology 24, 57 (Dec. 30, 2002) (estimating $934,500 for Duval County); Stafford Ex. 12.

and not required.[51] Here, the deployment of one touchscreen/audio ballot in each precinct would exceed 50 percent of total alteration costs and is thereby unwarranted (not to mention the costs of maintaining two types of voting systems and training workers on each).

Fourth, the trial court ignored Florida legislation in 2002 setting standards for voting equipment for the disabled to be used in each precinct *once funding is appropriated for that purpose.* Ch. 2002-281, Laws of Florida. The amount of such funding was set as "$8.7 million or such other amounts as it determines and appropriates for the specific purpose of funding this act." Id. § 21. This enactment is a tacit acknowledgement by the Florida Legislature itself that this specialized voting equipment is economic infeasibility without state financial assistance to the counties. Likewise, the trial court ignored that the enactment of HAVA in 2002, which provides funding for voting equipment for disabled voters, supports a similar conclusion that Congress deemed this equipment economically infeasible without such funds.

[51] *See, e.g.,* 28 C.F.R. § 36.403(f); Coalition of Montanans Concerned With Disabilities, Inc. v. Gallatin Airport Auth., 957 F. Supp. 1166, 1170-71 (D. Mont. 1997) ("under the Justice Department's interpretation of its rules, the Authority must install an elevator unless the cost would exceed 20 percent of the total cost of the alteration.").

Finally, the trial court clearly erred in concluding that twenty-four of Florida's sixty-seven counties used touchscreen systems in 2002 thereby inferring the feasibility of those systems in Duval County. Voting Systems Chief Paul Craft testified that, although perhaps twenty-nine counties had "touchscreen *capability*" [TR168 50-51], only *fifteen* counties in Florida *actually used* precinct-based touchscreens, and that he did not know whether any, other than Pasco County, used audio ballots at the precinct level. [TR168 151] As such, the order misstates by almost double the extent to which touchscreen usage existed in Florida in the Fall 2002 elections. Given that neither touchscreens nor audio ballot were used in Florida prior to 2002, and had limited use during 2002 (some of the experiences disastrous), it was clear error to infer that such systems were required in Duval County in 2002 under the ADA.

4. The Trial Court Made Inapt Comparisons With Systems Not Certified in Florida.

The trial court misapplied the concept of feasibility by making inapt comparisons with systems used in Georgia and Harris County, Texas, neither of which was certified in Florida. In addition, neither situation is remotely comparable to the state of affairs in Florida in 2002. Georgia is the first and only state to fully fund and require by law the implementation of a unified touchscreen/audio ballot system on a statewide basis (it chose a Diebold system). [TR167 130-31] Unlike Florida, every local jurisdiction in Georgia purchased the

requisite touchscreen/audio ballots without adverse fiscal effects. Because Georgia is so different as to its standards and funding, it is a particularly inappropriate comparison for feasibility purposes.

Similarly, Harris County, Texas used the Hart Intercivic system, which is not certified in Florida system and, indeed, is not even a touchscreen.[52] The choice of the Hart system was unique because its manufacturer was based in Harris County and expended substantial time and resources to market and implement it there. [TR167 84-85] Both Georgia and Harris County, Texas phased in their systems as of the late Fall 2002, which was ***after*** Florida counties had already procured their voting systems. *See* Addendum (Chronology). As such, their voting systems could not have served as examples of "feasibility" in Florida in late 2001/early 2002. For all these reasons, the trial court clearly erred in considering Georgia and Harris County, Texas systems in determining "feasibility" in Florida.

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

Finally, Stafford's decision to use three audio ballots on a trial basis at a centralized location was reasonable and not an ADA violation. Instead, it was

[52] Harris County chose a system with buttons/knobs rather than touchscreens due to maintenance and financial concerns. [TR167 72; Kaufman 35-39] ("task force felt that touch screen technology was delicate, easily damaged and would require a lot of maintenance which could be expensive.").

consistent the Duval County Elections Task Force's recommendation of a "centralized voting facility for extraordinary access" to use the equipment on an experimental basis for possible future use on a precinct basis. [Stafford Ex. 1] It was also consistent with the 2001 Governor's Task Force Report, which recommended consideration of technology that might become certified and proven in the field.[53] Indeed, Stafford sought to accommodate disabled voters in his procurement decision. [TR170 62-63; Stafford 91 ("We decided that back in – I want to say December 2001 – that when we bought a system, we wanted that capability, for touchscreen with audio.")] No evidence suggests that the unexpected lack of certification for Diebold's audio ballot was attributable to Stafford, who (along with other counties) kept in contact with and pressured Diebold regarding the status of certification. [TR171 75-76, 110; Stafford 98-99] Further, Secretary Cox in Georgia and Beverly Kaufman in Harris County, Texas made clear the importance of their pilot projects for testing new voting equipment on a limited, trial basis before deploying it fully. [TR167 100-106 (Cox) & 68-70, 80-82 (Kaufman)] Thus, it was reasonable for Stafford to have the opportunity to

[53] [Stafford Ex. 31 38] To facilitate this possibility, Stafford negotiated a option in the Diebold/Global contract whereby optical scan equipment may be traded at full value for new touchscreens thereby enabling a more effective and affordable transition to that technology, if practicable. [Stafford Ex. 9A/9B)]

do so without violating the ADA. The trial court's conclusions to the contrary are erroneous.

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

The trial court erred in concluding that Stafford violated the ADA as to the manually disabled Plaintiff by not purchasing a touchscreen system. No voting system has ever been certified in Florida for use by persons with manual disabilities including the use of mouth sticks. [TR168 145-46; State Ex. 3 & 4] Voting Systems Chief Paul Craft testified that his office does not certify touchscreens for this use because "there is no assurance that a given voter with a given mouth stick isn't going to have difficulty with [a touchscreen]. It has not been tested nor certified for that specific accommodation." [TR168 145-46] He stated that absent "regulating the mouth sticks used by people, which I think would be very undesirable, then it's going to be very difficult to bring that particular interface into certification." [TR168 146] As such, it was error for the trial court to find an ADA violation when Florida counties cannot even purchase certified equipment for use by manually disabled voters including those who may use mouth sticks.

That the one manually disabled Plaintiff was able to utilize his mouth stick on a particular manufacturer's touchscreen at trial[54] is irrelevant given the lack of certification for that type of use. The trial court's findings – that "mouth sticks would not have to be certified" and "manually impaired voters may vote with a mouth stick on an ES & S … touch screen machine *if they are able*" – are likewise irrelevant and begs the question of whether certified machines are available for such use. [RE7/R215-6] Given the lack of any official, objective standards by which to assess "mouth stick-accessible" equipment, it was error legally and factually for the trial court to find an ADA violation, particularly given that no class or sub-class was defined or certified for this use (*see* Section IV *infra*).

III. THE TRIAL COURT ERRED IN RULING THAT HAVA DOES NOT MOOT PLAINTIFFS' CLAIMS.

The trial court erred in concluding that HAVA[55] did not moot the Plaintiffs' claims. It is well settled that the exercise of federal jurisdiction depends on the existence of a "case or controversy" and federal courts are without

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[54] Notably, Plaintiffs' amended complaint pleaded a subclass of manually disabled voters who are precluded "from manipulating a writing instrument" and specifically stated that Plaintiff Bell "cannot manipulate a writing instrument *or a touchscreen with his hands"* – but it was not alleged that he could use a mouth stick on a touchscreen for this purpose. [R47 ¶¶ 16, 24, 35]

[55] On October 29, 2002, President Bush signed HAVA, which is codified at 42 U.S.C. 15301 to 15545.

authority to issue opinions on moot questions.[56] Because mootness is a "threshold jurisdictional inquiry" and because a party's claims must remain viable throughout litigation, it is appropriate to raise mootness at any stage of a proceeding.[57] A case is rendered moot when events occurring *after* the commencement of a lawsuit "create a situation in which the court can no longer give the plaintiff meaningful relief."[58]

Here, the precise relief that Plaintiffs sought – "at least one voting system" in each precinct in Duval County for disabled voters[59] – was legislatively mandated

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[56] John Roe, Inc. v. United States, 142 F.3d 1416, 1420-21 (11th Cir. 1998) (*citing* Church of Scientology v. United States, 506 U.S. 9, 12, 113 S. Ct. 447 (1992) & North Carolina v. Rice, 404 U.S. 244, 92 S. Ct. 402 (1971)).

[57] *See,* Brooks v. Georgia State Bd. Of Elections, 59 F.3d 1114, 1119 (11th Cir. 1995) ("case or controversy" requirement "mandates that the case be viable at all stages of the litigation; it is not sufficient that the controversy was live only at its inception.") (citation and quotations omitted).

[58] Jews For Jesus, Inc. v. Hillsborough County Aviation Auth., 162 F.3d 627, 629 (11th Cir. 1998); *see also* Atlanta Gas Light Co. v. FERC, 140 F.3d 1392, 1401 (11th Cir. 1998) (case becomes moot when issues presented are no longer "live").

[59] Plaintiffs' prayer for relief sought injunctive relief "requiring Defendants to provide, in each polling place in Duval County, at least one voting system that is accessible to voters with visual impairments and voters with manual impairments." [R47 at 23; *see also* Dickson at 64 ("We are simply asking that there be one accessible machine in each polling place.")]

on a nationwide basis via Congress's enactment of HAVA.[60] Any relief the trial court might have ordered, such as requiring Duval County to purchase specific voting equipment for disabled voters, would merely duplicate what Congress had already required to be done for elections after January 1, 2006 (with certain hardship exceptions). As such, no "meaningful relief" existed in this lawsuit beyond what Congress already had mandated. The trial court's refusal to dismiss the action as moot was erroneous.[61]

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[60] HAVA provides that for elections after January 1, 2006 every polling place must have "at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities[.]" 42 U.S.C.A. § 15481(a)(3) & (d). This voting equipment must meet HAVA standards to be "accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters[.]" Id. § 15481(a)(3).

[61] In addition, the trial court, per Judge Nimmons, expressed mootness concerns after the enactment of section 101.56062, Florida Statutes (requiring voting machines for disabled voters), which might "satisfy or ameliorate the Plaintiffs' concerns which prompted the assertion of their ADA and Rehabilitation Act claims." [R42 32-35] He stated that if Plaintiffs "desire to continue this litigation … a substantial repleader or amended complaint [taking section 101.56062 into account] would be in order." Id.

IV. THE REMEDY AND LACK OF CLASS CERTIFICATION WARRANT REVERSAL.

A. The Relief Ordered By The Court Is Flawed.

The relief ordered by the trial court is facially defective in two respects, First, the requirement that touchscreen/audio ballots be placed in 20% of Duval County's precincts creates the potential for equal protection, ADA, RA and state law violations. Under Florida law, a voter may cast a vote in person only in his or her precinct[62] or at the downtown main office.[63] For this reason, voters whose precincts do not have touchscreen/audio ballots may not cast a vote at another polling location. As a result, voters in 57 polling locations would have two voting technologies, one with a paper trail subject to manual recounts (optical scan) and one without a paper trail and not subject to manual recounts (touchscreens).[64]

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[62] *See* § 101.045(1), Fla. Stat. (2003) ("No person shall be permitted to vote in any election precinct or district other than the one in which the person has his or her legal residence and in which the person is registered.").

[63] *Id*.§ 101.657(2) ("supervisor of elections may allow an elector to cast an absentee ballot in the main or branch office of the supervisor …" whose results are not made known until the close of the polls on election day.").

[64] See Div. of Elec. Op. DE 04-02, State of Florida, (February 12, 2004) (letter to supervisors in fifteen touchscreen counties that Florida law does not permit manual recounts on touchscreens). This lack of a "paper trail" with touchscreens is the subject of at least one lawsuit in Florida and a number of legislative proposals, both national and state. *See* Wexler v. Theresa LePore, et. al. Case No. CV-04- (Continued …)

Voters in the remaining 228 polling locations will vote on the optical scan system, with disabled voters using third party assistance potentially asserting federal equal protection, ADA, RA and state law violations.[65] Further, that the votes in some Duval County precincts will be counted differently in a recount from those in other precincts raises constitutional problems. *See, e.g.,* Bush v. Gore, 531 U.S. 98, 107-08, 121 S. Ct. 525 (2000) (noting equal protection problems where manual recounts of undervotes/overvotes handled differently). For these reasons, the relief sought is flawed thereby justifying reversal.

B. The Failure to Certify A Class Was Prejudicial Error.

Second, the trial court ordered countywide relief that is improper absent an appropriate class certification hearing and specific findings under Rule 23 as to subclasses, neither of which was done below. In this regard, a "court must – at an early practicable time – determine by order whether to certify the action as a class action." Rule 23(c)(1)(A), Fed. R. Civ. P. (2004). Indeed, the trial court itself

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80216 (S.D. Fla. filed March 8, 2004); *see, e.g.,* S. 1980 (amending HAVA to require a voter-verified permanent record or hardcopy); H.R. 2239 (same).

[65] *See, e.g.,* American Association for People with Disabilities, et. al. v. Kevin Shelley, as Secretary of the State of California, et. al., Case No. CV04-1526 FMC (PJWx) (filed March 23, 2004) (asserting violations of federal equal protection clause, ADA, RA and state law).

indicated that "there would have to be a separate proceeding" for class certification and voiced concerns such as whether Plaintiffs could show commonality.[66]

Yet, no class certification hearing was scheduled or held. No class was certified, nor were classes or subclasses defined. No findings as to the numerosity, typicality, commonality and adequacy of representation factors were made, nor was the appropriateness of class relief under Rule 23(B)(2)(b) established. Notably, the court ordered countywide relief based on a particular disability (i.e., manually disabled who can use a mouth stick) but made no findings as to this purported sub-class. This lack of class certification procedures and findings constitutes prejudicial error that warrants reversal.[67]

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[66] [TR166 5-6] ("I do think there could be commonality issues because -- well, I regard, you know, anything as a disability is a partial disability and that runs a great gamut. You know, there's significant matters of degree and I don't know that you're going to find a testimony plate that would fit every visual impairment case and every physical impairment case ….").

[67] *See* Baxter v. Palmigiano, 425 U.S. 308, 312, 96 S. Ct. 1551, 1555 (1976) ("Without such certification and identification of the class, the action is not properly a class action."); Bieneman v. City of Chicago, 838 F.2d 962, 964 (7th Cir. 1988) ("It is … difficult to imagine cases in which it is appropriate to defer class certification until after decision on the merits. … When the district judge (to whom this case was transferred some two years after its filing) recognized that there was an unresolved class allegation, he should have requested the views of the parties and postponed decision of the merits."); Paxton v. Union Nat. Bank, 688 F.2d 552, 559 (8th Cir. 1982) ("…deferral of the (class) determination until full trial on the merits … is fraught with serious problems of judicial economy, and of fairness to both sides.") (citation omitted).

CONCLUSION

Based on the foregoing, the district court's order should be reversed with directions that judgment be entered in favor of Supervisor Stafford.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by facsimile to J. Douglas Baldridge, Esq., Howrey, Simon, Arnold & White, LLP, 1299 Pennsylvania Avenue, N.W., Washington, D.C. 20036; Elaine Gardner, Esq., Washington Lawyers' Committee for Civil Rights and Urban Affairs, 11 DuPont Circle, NW, Suite 400, Washington, D.C., 20036, and George Waas, Senior Asst. Attorney General & Dawn K. Roberts, Asst. Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050, on this 12th day of May, 2004.

Attorney