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

REPLY BRIEF OF APPELLANT STAFFORD

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CERTIFICATE OF TYPE/VOLUME

Appellant certifies that this Reply Brief is presented in Times New Roman style, 14-point size and contains 6,861 words.

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It bears noting some remarkable voids in the Plaintiffs' brief.[1] The first and most notable is the Plaintiffs' failure to cite a recent important case of national prominence in which their identical arguments were rejected resoundingly. American Ass'n of People with Disabilities v. Shelley, 324 F. Supp. 2d 1120 (C.D. Cal. July 6, 2004). What makes this oversight remarkable is that *Plaintiff AAPD was the lead party* in that case *with the same legal counsel herein*. In denying relief, the trial court rejected each of the Plaintiffs' arguments and found they "established ***no*** *likelihood of success on the merits* of their Americans With Disabilities Act claim." Id. at 1126 (emphasis added).[2] This highly relevant case, which came out over a month before Plaintiffs served their answer brief, is discussed throughout this brief due to its relevance on a number of key issues.

The second most notable void is that Plaintiffs make no mention in their argument of audio ballots or "sip and puff" technology, which were the key focal

[1] Stafford disagrees with much of the Plaintiffs' characterization of the facts, but only the most notable will be addressed herein given space limitations.

[2] The district court cited the decision under review in this case for the general proposition that the ADA applies to the activity of voting, but rejected the same arguments made by the Plaintiffs and legal conclusions reached by the trial court below. 324 F. Supp. 2d at 1125-1126.

points below.[3] Instead, their arguments focus exclusively on *touchscreen* technology, inferring that touchscreens solve the voting privacy concerns of disabled voters and were widely used and accepted around the country and in Florida. Touchscreens alone, however, provide no certified means for blind or manually disabled voters to vote without assistance. By ignoring audio ballots, Plaintiffs disregard the evidence showing they were problematic, were used in only a very few jurisdictions on a trial or limited basis before possible full deployment, and continue to have a number of shortcomings,[4] collectively demonstrating *no* track record at the time in late 2001/early 2002 when voting equipment was procured in Florida. [IB 7, 16-17] Sip and puff technology for manually disabled

[3] Plaintiffs make only two very minor passing references to audio ballots in their entire thirty-six pages of argument [AB 28, 49 n. 25] and no reference to sip and puff technology whatsoever.

[4] Notably, in Troiano v. Supervisor Of Elections In Palm Beach County, Florida, 2004 WL 1941055 (11th Cir. Sept. 1, 2004) this Court recently upheld on mootness grounds the dismissal the claims of disabled plaintiffs that an audio ballot had not been provided in violation of the ADA. The defendant/supervisor of elections had initially decided, in large part, that "if the audio component was used in every precinct, non-impaired voters would have to wait too long for the people using the audio component to finish." Id. Because of this unacceptable wait time and administrative problems associated with the audio ballots, she limited their use (and was sued), but subsequently decided that ballot length would not be a factor (even though it took 20-25 minutes for a blind voter to cycle through the ballot in November 2002). These types of considerations make the purchase of a particular touchscreen irresponsible fiscally before they are resolved.

voters has not been certified in Florida and has little meaningful track record nationwide. [IB 50] By making touchscreens their only focus, the Plaintiffs make them appear more feasible than they were at the time, and entirely sidestep the relevant focus, which is the shortcomings of or lack of certification for audio ballots and sip and puff devices for disabled voters.

The third is that Plaintiffs have attempted to recast significantly the standard by which a "facility" under the ADA is defined and the standards by which an "*alteration*" to a "facility" is adjudged under 28 C.F.R. § 35.151(b).[5] Even if voting equipment is somehow deemed a "facility" subject to being "altered" under § 35.151(b), it is improper to apply the strict and heightened standard for "new" facilities that Plaintiffs advocate on appeal. [AB 25-27] Plaintiffs confuse the standard under § 35.151(a) for new "facilities" with the more lenient feasibility standard for "alterations" under § 35.151(b). The reason for doing so is that the standard for an "alteration" is the more deferential "feasibility" standard that considers the overall financial, technical, and administrative feasibility of a proposed "alteration" to a facility.

Finally, the Plaintiffs tacitly acknowledge that this case is more properly cataloged and analyzed as an "auxiliary aids/effective communications" case

[5] The trial court specifically limited its order and final judgment solely to a regulatory claim under 28 C.F.R. § 35.151(b). [R215 30 ¶ 1; R216]

suitable for review under 28 C.F.R. § 35.160 versus an "alterations" to "facilities" case under § 35.151(b) because each section has a "different focus" and different "obligations" for compliance. [IB 41] Indeed, it takes a convoluted interpretive path to conclude that portable computer voting systems are in the same category as permanent physical structures commonly understood to be "facilities." Instead, the more natural reading and understanding of the "program accessibility" regulations in § 35.151 is that they do not apply to voting systems, and that such systems are more appropriately subject to review under the "auxiliary aids/effective communications" provisions of § 35.160, upon which the trial court found no violation.[6]

I. THE ADA DOES NOT SUPPLANT FEDERAL ELECTION LAWS OR CREATE A FEDERAL RIGHT OF VOTING SECRECY

Stafford's argument has never been that the ADA does not apply to the activity of voting, which surely it does. Instead, Stafford's argument is that the ADA does not supplant the specific federal voting laws related to *voting systems* and that no ADA violation exists where compliance with such laws is shown. *See, e.g.*, Nelson v. Miller, 170 F.3d 641 (6th Cir. 1999), *affirming on other grounds*,

[6] This result is also consistent with the Department of Justice's representations and advice, which is that no ADA standards exist for voting equipment and that the provision of third party assistance, absentee voting, and curbside voting satisfies the ADA. [TR168 164, 165; TR171 65-66]

950 F. Supp. 201 (W.D. Mich. 1996). As both the appellate court and the trial court in Nelson v. Miller concluded (as well as a recent California case, AAPD v. Shelley, the ADA does not create a federal right to a program of "secret and independent voting." As such, they concluded that the refusal to provide technologies that enabled unassisted voting is neither discriminatory nor an ADA violation where third party assistance is provided. Dismissal was the result in Nelson v. Miller, as it should have been in this case.

Plaintiffs rely exclusively on the decision in National Org. on Disability v. Tartaglione, 2001 WL 1231717 (E.D. Pa. Oct. 11, 2001), which does not even reference the Sixth Circuit's decision in Nelson v. Miller. Indeed, Tartaglione is neither binding nor persuasive within the Eastern District of Pennsylvania itself, another judge having reached a different result. *See* NAACP v. Philadelphia Bd. of Elections, 1998 WL 321253 at *4 (E.D. Pa. 1998).

Plaintiffs fail to make reference to AAPD v. Shelley, which made a number of rulings adverse to their position, including the adoption of the reasoning of Nelson v. Miller:

> … ***the ADA does not require accommodation that would enable disabled persons to vote in a manner that is comparable in every way with the voting rights enjoyed by persons without disabilities. Rather, it mandates that voting programs be made accessible, giving a disabled person the opportunity to vote. Nothing in the Americans with Disabilities Act or its Regulations reflects an intention on the part of Congress to require secret, independent voting.*** Nor does

> such a right arise from the fact that plaintiff counties attempted to provide such an accommodation.

324 F. Supp. 2d at 1126 (emphasis added) (footnote omitted). The emphasized language is precisely the position that Stafford has advocated throughout this litigation.

Notably, the instant case is far removed from Shotz v. Cates, 256 F.3d 1077 (11th Cir. 2001) and Tennessee v. Lane, 124 S. Ct. 1978 (2004) where the disabled persons in those cases literally had to drag themselves into or through courthouse facilities in order to access the judicial functions therein. Those cases were about permanent facilities that posed architectural and physical barriers to those plaintiffs, who desired to access the programs or activities inside. Indeed, the Supreme Court in Tennessee v. Lane emphasized that "architectural" barriers that limit "physical accessibility" are the focus of 28 C.F.R. § 35.151 Title II of the ADA. 124 S. Ct. at 1993.

In sharp contrast, this case has nothing to do with these types of burdensome access and architectural barriers to physical facilities.[7] Instead, it involves solely

[7] Plaintiffs attempt to make it sound as if they faced intractable barriers by stating that they "*somehow manage to vote* using Duval County's optical scan system" and that that they were "*forced* to vote in a manner rife with burdens not faced by non-disabled voters." [AB 21 (emphasis in original)] Their assertions are not supported by the trial court's order, which found no such barriers and held they had "an equal opportunity to participate in and enjoy the benefits of voting." [R215 23]

the *type of voting system* temporarily placed for use inside the physical facilities where voting occurs, through which persons *communicate* their votes. In short, the voting system is the *program or activity*, the physical structures where voting occurs are the *facilities* to be accessed. In this regard, the Plaintiffs have accessed their polling places and voted on multiple occasions without physical impediment including all elections since the inception of their lawsuit. Indeed, the trial court concluded that "visually and manually impaired voters have been afforded an equal opportunity to participate in and enjoy the benefits of voting" thereby confirming the lack of an ADA violation. [R215 23]

In summary, this case is not about physical facilities and entry barriers. It is about the *method of communicating* one's vote once within voting facilities. Given the federal and state voting laws (including HAVA) that occupy this area of the law, it was error for the trial court to apply the ADA under the circumstances and to find a regulatory violation (discussed next).

II. THE PROCUREMENT OF AN OPTICAL SCAN VOTING SYSTEM IN 2002 DID NOT VIOLATE THE ADA.

Plaintiffs have recast the issues in this section and thereby made it difficult or confusing to directly address those that Stafford actually raised. Each response is addressed in the order presented in Stafford's initial brief.

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

Plaintiffs does not meaningfully respond to Stafford's argument in this subsection, which is that an optical scan system does not violate the ADA if sufficient accommodations, such as third party assistance, are made to ensure that disabled voters are afforded an equal opportunity to participate in and enjoy the benefits of voting (as the trial court ruled [R 216 23]). No ADA standards exist for voting systems and the Department of Justice has stated that the provision of third party assistance and curbside voting are effective means that satisfy ADA requirements.

The recent decision in AAPD v. Shelley also confirms that no ADA violation arises from third party assistance in voting, even if a more desirable method exists.

> For example, in discussing the obligation to provide voting services to the disabled, the Title II Technical Assistance Manual explains that a blind voter is not entitled to cast a ballot in Braille, even though this method would allow him to vote in private. Because the County "can demonstrate that its current system of providing assistance is an effective means of affording an individual with a disability an equal opportunity to vote, the County need not provide ballots in Braille." Title II Technical Assistance Manual, § 7.1100.

324 F. Supp. 2d at 1126 n. 3. In light of Shelley, Plaintiffs' lengthy and somewhat inaccurate discussion of 28 C.F.R. § 35.151(b) is misplaced.[8]

B. 28 C.F.R. § 35.151(b) Is Inapplicable and Was Not Violated.

1. Plaintiffs Were Not Excluded from or Denied The Benefit of Voting.

The recent (but unmentioned) decision in AAPD v. Shelley is instructive because it rejected a § 35.151(b) claim by Plaintiff AAPD. At issue was a state directive decertifying touchscreens that had been certified and used in prior elections in a number of California counties. Plaintiff AAPD contended that "decertification of touch-screen voting machines will alter the voting system and make the right to vote less accessible to disabled persons, citing 28 C.F.R. § 35.151(b)." 324 F. Supp. 2d at 1125. It also asserted that the elimination of touchscreens with audio ballots "discriminate by reason of disability, amounting to state action that disproportionately burdens the disabled because of their unique needs." Id.

The trial court rejected AAPD's argument and ruled consistent with Stafford's position as follows:

[8] Plaintiffs have also wrongly claim that Stafford "admitted" a range of matters in this section of their brief and elsewhere [IB 2, 3, 9, 24, 26, 27, 28, 33, 36, 37, 44] making it appear he has all but confessed error.

> ***The evidence does not support the conclusion that the elimination of the DREs would have a discriminatory effect on the visually or manually impaired.*** Although it is not disputed that some disabled persons will be unable to vote independently and in private without the use of DREs, it is clear that they will not be deprived of their fundamental right to vote. … ***The evidence establishes that long before the conditional certification of DREs, counties utilized a number of programs to provide handicapped persons with ready access to voting equipment.***

Id. at 1125-26 (emphasis added). Specifically, the court found that a *return* to using voting systems with third party assistance, such as optical scan, did not violate the ADA. The court followed the reasoning of Nelson v. Miller stating:

> … ***the ADA does not require accommodation that would enable disabled persons to vote in a manner that is comparable in every way with the voting rights enjoyed by persons without disabilities. Rather, it mandates that voting programs be made accessible, giving a disabled person the opportunity to vote. Nothing in the Americans with Disabilities Act or its Regulations reflects an intention on the part of Congress to require secret, independent voting.***

Id. at 1126 (emphasis added) (footnote omitted). By analogy, the failure to provide a secret, independent voting experience does not violate the ADA where each Plaintiff was afforded an equal opportunity to participate in and enjoy the benefits of voting. [R216 23]

2. Voting Systems Are Not "Facilities" Under § 35.151(b), Which Is Limited To Architectural and Physical Barriers.

Plaintiffs overlook that the Supreme Court in Tennessee v. Lane made clear that "***architectural***" barriers that limit "physical accessibility" are the focus of 28 C.F.R. § 35.151. The Court stated that "[i]n the case of facilities built or ***altered***

after 1992, the regulations require compliance with specific ***architectural*** accessibility standards. 28 C.F.R. § 35.151 (2003).” 124 S. Ct. at 1993 (emphasis added).

Despite this pronouncement from the Supreme Court and the rejection of their § 35.151(b) claim in Shelley, the Plaintiffs totally ignore the difference between the concept of “Program Accessibility” set forth in Subpart D of the regulations and the concept of “Communications” set forth in Subpart E” of the regulations. [*see* IB Ex. A] The former, which includes § 35.151(b), applies to *architectural* and other barriers that impede physical accessibility. The latter applies to *communications* barriers and *auxiliary aids* as described in § 35.160. This dichotomy is consistent with the organic statute, which provides for the “removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services” that enable the participation in government programs and services. 42 U.S.C.A. § 12131. Despite Plaintiffs’ claim to the contrary [AB 30-31], this common sense dichotomy is reflected in the caselaw, which establishes that every case applying § 35.151(b) involves a physical alteration to a permanent structure thereby undermining the concept that a portable piece of voting equipment is a “facility” subject to “architectural” alterations. [IB 39-40]

Finally, Stafford clearly did not "ignore" the word "equipment" in 28 C.F.R. § 35.104 as Plaintiffs claim [AB 31 n. 14]. Indeed, unlike the Plaintiffs who left out the entire regulation except the word "equipment" [AB 30], Stafford set out the regulation in full in his brief. [IB 37 n.37] ("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."). As the caselaw applying § 35.151(b) reflects, the meaning of "equipment" in this context must be understood in conjunction with these other terms. In this manner, the meaning of "equipment" within the definition of a "facility" is best understood as applying to elevators, escalators and other types of "equipment" that are architectural components that become physical modifications to a permanent structure or site. Voting equipment does not meet this definition.

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

Plaintiffs attempt to make this a case about a "new" voting system [AB 38 n19, 42 n.21 & 45] when, by both their own stipulation and the trial court's ruling, it is about an "*alteration*" to an *existing* voting system. The applicable regulation, § 35.151(b), applies only to "alterations" to existing "facilities"; it does not apply to the "construction" of a "new" facility, which is governed by the stricter requirements of section 35.151(a).

An "alteration" to an *existing* facility has a more deferential "feasibility" standard compared to "new" facilities. Stafford was not required to "design" or "construct" a new "facility" to be "readily accessible to and usable by individuals with disabilities" as section 35.151(a) requires. He was only required to make alterations to the greatest extent practicable under the circumstances. Plaintiffs wholly confuse this point in their brief [AB 25-26] by making the "new" and "alteration" standards seem similar, and seem to suggest that both section 35.151(a) and 35.151(b) somehow apply. [AB 25-26] ("these strict regulations [sic] require that alterations be completed in a nondiscriminatory manner that provides full access to all qualified voters.")

Notably, Plaintiffs claim, with no citation of authority, that the financial, administrative and technological burdens of a voting system are "legally irrelevant."[9] [AB 26-27, 37 n.18 & 38] They go so far as to say the feasibility standard in § 35.151(b) "has nothing to do with reasonableness." [AB 29] Stafford agrees that Plaintiffs' interpretation of § 35.151(b) has "nothing to do with reasonableness." It is contrary to the common meaning of the term "feasible" to

[9] Ironically, Plaintiffs' counsel directly established the relevance of administrative feasibility by asking Stafford whether "we can agree, can we not, … that management matters in elections, doesn't it?" to which Stafford responded "Yes." [TR 170 25]

preclude consideration of whether a proposal is financially, administratively or technically practical or reasonable.[10]

1. Technical Certification Does Not Assure Overall "Feasibility"

Plaintiffs gloss over the fact that the only certified system with a touchscreen and audio ballot was the ill-fated ESS system that was untested in an actual election. That system was "certified" to perform technical functions, but it was disastrous in its actual use from a technological, financial and administrative perspective. [IB 18-19] Stafford and his staff knew the ESS system was faulty and were correct to reject it. The Governor's Task Force Report also made clear that a voting system must meet two sets of standards: *technical* certification standards and *usability/affordability* standards. [IB 11-12] Plaintiffs totally ignore this second set of standards, which were "high in the minds of the voters and Elections Supervisors" in Florida. [Stafford Ex. 31 35]

2. Contrary to Plaintiffs' Claim, Only One Touchscreen/Audio Ballot Was Available in Florida.

Plaintiffs claim that a wide array of certified touchscreen/audio ballot "systems" were available in late 2001/early 2002, by misstating that more than one option existed at that time. [AB 12 ("There were *at least two* Florida-certified touchscreens systems at the time Appellant was considering which voting system

[10] Synonyms of "feasible" include "practicable" and "reasonable." [IB 42 n.44]

the County would purchase."), 19 (claiming "*numerous* options" existed), & 35 (claiming "*multiple* options" existed)]

As the district court found, however, only *one vendor's* touchscreen/audio ballot was certified at that time, that of ESS,[11] which had the first and only certified audio ballot in Florida [R215 at ¶ 24], but which also experienced the massive problems discussed in the Miami-Dade Inspector General reports and the Governor's Task Force Reports. [IB 43-44; *see* Ps' Ex. 1 at 65; Stafford Ex. 12 at 65] No touchscreen system or audio ballot was used in Florida *until* the Fall 2002 election cycle, which was long *after* Stafford had made his procurement decision and after the Diebold system had been delivered and prepared for use in that same election cycle. [IB 17]

In this regard, the Plaintiffs' statement that "the record is replete with evidence demonstrating that touch screen technology was not only certified, but was *used successfully throughout Florida* and the country *at the very same time, and even before* [Stafford] decided to purchase the optical scan system" [AB 34] is

[11] Each vendor had various *versions* of their voting systems, but they each had only one version of their component hardware (i.e., optical scanners, touchscreens). For this reason, the six *versions* of ESS systems mentioned in the trial court's order all use the same touchscreen/audio ballot unit, but were packaged with different software upgrades. [R 215 5 ¶16]

categorically untrue.[12] Likewise, the representation that Stafford "concede[d] at least fifteen counties in Florida purchased and *used* touch screen voting systems *at the same time* [Stafford] purchased the optical scan system is likewise demonstrably untrue. [AB 34] As such, Plaintiffs severely embellish the fact that only one choice, and an unacceptable one, was available, ESS.

3. The Trial Court's Financial Feasibility Analysis Was Flawed.

The superficial nature of the trial court's financial feasibility "analysis" is emphasized by its sole reliance on one piece of evidence: the cover page of a multi-page document obtained from the Internet, entered into evidence during trial over objection, that contained only the amount of the City of Jacksonville's proposed overall budget for fiscal year 2002-03. Ps' Ex. 139. Plaintiffs presented no other "evidence" of financial feasibility as to the City beyond this lone document, which was not produced or referred to prior to the close of discovery. Instead, it was first presented as an item on Plaintiffs' exhibit list shortly before trial. [R127] Plaintiff presented no witness to explain it or otherwise demonstrate

[12] Stafford decided on the Diebold System in January 2002, it was procured that same month, and thereafter delivered beginning in April 2002. [IB 17 and record citations therein] It was used in the September primary and November general election in 2002. Plaintiffs clearly err in perpetuating the notion that the Diebold system was "purchased" in October 2002. [AB 29]

how it was relevant.[13] Stafford had not seen it, and merely testified that it "appears to be" from the City's official website. [TR 170 30-31]

Merely presenting evidence that a jurisdiction has a large proposed annual budget is legally insufficient because it says nothing about whether a particular proposal is practicable or required under an ADA regulation, thereby failing to establish an element of Plaintiffs' prima facie case. As the United States Supreme Court made clear in Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 603, 119 S. Ct. 2176, 2188 (U.S. 1999), simply comparing the cost of a proposed change in a particular service to a government's overall budget *for that service or program* "***would leave the State virtually defenseless*** once it is shown that the plaintiff is qualified for the service or program she seeks.'" 527 U.S. at 603, 119 S. Ct. at 2188) (emphasis added); *see also* Pascuiti v. New York Yankees, 87 F. Supp. 2d 221, 225 (S.D.N.Y. 1999) (erroneous to "simply comparing a proposed

[13] Indeed, Plaintiffs embellish the document by referring (for the first time on appeal) to a "general fund of nearly $750 million" that purportedly exists. [AB 16] ("… in addition to a $700 million general fund, the County is armed with a $1.2 billion budget."). No such fund exists. Instead, the single sheet of paper summarizing the City's *total budget* (Plaintiffs' Ex. 139 p1.) reflects approximately $750 million for the "General Fund ***Budget***." This purported "fund" was not mentioned in the trial court's order and is presented as "fact" for the first time on appeal. In addition, Plaintiffs' math is off. [AB 37] (percentages off by a factor of 100).

modification with the state's overall mental health budget" (*quoting* Olmstead). This error is precisely what occurred below.

Olmstead and the case upon which Plaintiffs rely [AB 37] both make clear that the appropriate comparison is to the "overall budget *for the service or program*" at issue – not a government's overall budget.[14] The trial court's analysis is clear error in this regard because it merely cited to the City's overall budget for fiscal year 2002-03 (i.e., *after* the Diebold system had been procured). [R215 10 ¶31] No effort was made to demonstrate that any portion of the City's proposed annual budget *for elections services and programs* was available for the purchase of the ESS touchscreen voting system. Under the proper analysis required by Olmstead, the cost of the voting system that Plaintiffs' sought to impose exceeded the ***entire annual budget*** of the Supervisor of Election's Office for each of the ten years through the end 2003 thereby demonstrating lack of feasibility.[15]

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[14] As the Supreme Court in Olmstead stated: "If the expense entailed in placing one or two people in a community-based treatment program is properly measured for reasonableness against the State's entire mental health budget, it is unlikely that a State, relying on the fundamental-alteration defense, could ever prevail." 527 U.S. at 603, 119 S. Ct. at 2188.

[15] *See* [IB 46 n.47] (overall budget of the Supervisor of Elections office ranged from $1.84 million to $3.44 million from 1991 to 2002).

The trial court also erred in placing the burden of financial infeasibility on Stafford, when Plaintiffs failed to demonstrate that the costs of a touchscreen system, facially, did not clearly exceed its benefits. *See, e.g.*, Pascuiti, 87 F. Supp. 2d at 223 (prima facie case requires plaintiffs to show "the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits."). Here, the cost of a touchscreen/audio ballot system was from $6.5 to $12 million, which is three to six times the cost of an optical scan system, and thereby facially disproportionate to its possible benefits (not to mention the intangible costs of lost voter confidence due to the failed ESS system). [*See* IB 21-22] Given that Plaintiffs could only identify approximately 35 persons countywide who might potentially benefit from a touchscreen/audio ballot [R227 3],[16] the incremental cost per disabled voter is from approximately $134,285.72 to $291,428.57[17] for a

[16] Notably, at most four persons used or attempted to use an audio ballot in all of Palm Beach County in the September 2002 primary election. Troiano v. Supervisor Of Elections In Palm Beach County, Florida, 2004 WL 1941055, *2 (11th Cir. 2004) ("… in the September 2002 primary election two individuals in Palm Beach County used the audio component to vote and two others triggered the audio mode, but did not complete the voting process.").

[17] These numbers are the cost of a touchscreen system minus the cost of the optical scan system divided by 35 voters: ($6.5 - $1.8 million)/35 voters & ($12 – $1.8 million)/35 voters.

precinct-based touchscreen system and $28,571.43 for a blended system[18] in which one touchscreen/audio ballot is placed in each precinct.[19] These numbers far exceed the average cost of $6.13 per registered voter in Duval County. [Stafford Ex. 1 at 34]

Finally, Plaintiffs misstate Stafford's testimony as to financial feasibility. They claim he "admitted" that the City "had the money and financing" that was "readily available and inexpensive" to purchase a touchscreen/audio ballot system. [AB 37 citing [R169 107-08]] To the contrary, Stafford stated he did not have knowledge about such matters and specifically answered "I wouldn't know" when asked if the interest rate on the City's financing was a good rate. [TR169 107-08] He and his staff made clear throughout their testimony and analysis that the cost of

[18] Plaintiffs and the trial court erroneously conclude that Stafford "did not investigate the cost of putting one touch screen machine in each precinct (as opposed to a voting system comprised entirely of touch screen machines)." [AB 38-39; R215 9] Stafford testified that his office had considered "blended systems" but rejected the faulty and highly criticized ESS system, which had the only system capable of blending a touchscreen and optical scan unit at that time. [TR169 158-59] (ESS would be "last" system to consider because of its shortcomings). Further, only a very few jurisdictions in the nation had ever used a blended system of any type at that time through the present. [TR168 118-19 & 122-23; TR 167 55-56] At the time of trial, only one small county in Florida was *believed* to use a blended system. [TR168 52] (Highlands County). Palm Beach County uses a countywide touchscreen system [Stafford Ex. 34 2], not a blended system as Plaintiffs assert. [AB 14]

[19] This number is the incremental cost of 285 touchscreens (about $1 million) divided by 35 voters.

a touchscreen/audio ballot system was unduly expensive at the time, a conclusion buttressed by the Governor Task Force and the Duval County Elections Task Force, both of which recommended optical scan with a transition to touchscreens as they became more financially, technologically, and administratively feasible. [IB 9-13]

4. Touchscreen Systems Not Certified in Florida Are Irrelevant.

Plaintiffs offer no meaningful response to the argument that the voting systems certified and used in Georgia (touchscreen/audio ballot) and Harris County, Texas (eSlate system with audio ballot and "sip and puff" technology) are irrelevant legally. [AB 34-35] They ignore that Stafford could not use these systems in Duval County due to lack of Florida certification. They ignore that neither system was even certified until *after* Florida counties had already made their procurement decisions. They ignore that neither system was used until the Fall 2002 elections thereby providing no track record upon which Florida counties could base their procurement decisions in late 2001/early 2002. In short, these systems were neither "widespread" nor did they provide Stafford with "multiple options for procuring an accessible system" as Plaintiffs claim. [AB 35]

5. The Use of Touchscreens/Audio Ballots for Centralized Short Term Evaluation Was Reasonable.

Again, the decision in AAPD v. Shelley is relevant, this time on the reasonableness of Stafford's decision to use touchscreens with audio ballots on a

short term evaluation basis at elections headquarters before possible deployment countywide. In Shelley, the court held that the entire *discontinuation* of touchscreens with audio ballots established no likelihood of an ADA violation because the "decision to suspend the use of DREs pending improvement in their reliability is certainly a rational one, designed to protect the voting rights of the state's citizens." 324 F. Supp. 2d at 1128. Further, the court found that the decision "to withhold further certification until [Shelley] is satisfied that manufacturers and counties have complied with specified conditions is a reasonable one. It is based on studies conducted and information gathered which convinced him that the voting public's right to vote is not adequately protected by the systems currently in place." 324 F. Supp. 2d at 1132. Likewise, Stafford's decision to evaluate touchscreen/audio ballots at a centralized location is a reasonable one that does not constitute an ADA violation. *See also* Troiano v. Supervisor Of Elections In Palm Beach County, Florida, 2004 WL 1941055 (11th Cir. Sept. 1, 2004) (limited use of audio ballots in Fall 2002 general election due to their unacceptable wait time and administrative problems).

D. No Certified Voting System Exists in Florida for Manual Disabilities.

The fact that no voting system has ever been certified in Florida for use by persons with persons with manual disabilities (including the use of mouthsticks) is both irrelevant and a "red herring" according to the Plaintiffs. [AB 40] This

modification of their position is notable. Throughout the litigation, the Plaintiffs vigorously claimed that the State of Florida had violated the ADA by wrongly denying certification for the Hart eSlate system with a "sip and puff" device for use by the manually disabled (including Plaintiff Bell who demonstrated it at trial).

As it became evident that the State did not act unreasonably in denying certification for the Hart system, the Plaintiffs were left with no claim that Stafford failed to purchase a certified system for the manually disabled. As a result, they shifted to the theory that touchscreens, which are ***not*** certified for use by the manually disabled, ought to have been procured for this uncertified use. As discussed in Stafford's initial brief, the trial court's factual and legal findings as to this uncertified use are clearly erroneous. [IB 52-53] No evidence was adduced that any voting equipment has been certified (or can be certified with sufficient objectivity) for this type of use. Indeed, if a disabled voter happens to be able to vote on a voting system with other "body parts," as Plaintiffs suggest [AB 40] that would be fortuitous. The system should not, however, be compelled by law where no state certification for such a use exists.

III. HAVA MOOTS PLAINTIFFS' ADA CLAIM.

The trial court's construction of HAVA was error. Contrary to Plaintiffs' assertions, the fact that 42 U.S.C. § 15545[20] of HAVA provides for the preservation of existing laws does not establish that an ADA claim exists under the circumstances. Instead, HAVA's legislative history makes clear that section 15545 was included specifically *to preserve* ***existing*** *standards and guidelines promulgated under the ADA*, the Voting Rights Act, and other listed acts. The fear was that the HAVA standards the Election Assistance Commission (EAC) is required to develop could become "safe harbors" despite being below or inconsistent with ***existing*** guidelines promulgated under the ADA, the Voting Rights Act, and other listed acts by the Department of Justice, the Federal Elections Commission, or other agencies authorized to construe these laws.[21]

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[20] Section 15545 provides that "nothing in this Act may be construed to authorize or require conduct prohibited under any of the following laws, or to supersede, restrict, or limit the application of such laws" referring to the Voting Rights Act of 1965, the Voting Accessibility for the Elderly and Handicapped Act, the Uniformed and Overseas Citizens Absentee Voting Act, the National Voter Registration Act of 1993, the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973.

[21] *See* H.R. Rep. 107-329, Help America Vote Act of 2001 (December 10, 2001) (a purpose of section 15545 is to "continue[] unchanged the role of the Department of Justice (DOJ) as the agency responsible for authoritatively construing the ADA and promulgating regulations. … While the Committee anticipates that the Commission will take great care to create voluntary standards in a manner that

(Continued …)

Indeed, section 15545 was added so that the HAVA standards[22] the EAC adopts would **"**not replace accessibility regulations and technical assistance provided by the DOJ for individuals with disabilities. Rather, these standards must be consistent with DOJ's regulations, and not serve as authorization for a level of accessibility lower than required by the regulations."[23]

The critical point is that section 15545 was not adopted, as Plaintiffs assert, as a way of validating or protecting their novel ADA regulatory claim. Instead, it was designed simply to ensure that HAVA standards are not inconsistent with or below those *actually adopted* under the ADA or RA. *Given that no ADA standards, guidelines or regulations yet exist as to voting systems*, section 15545 has no application in this context. Should the EAC develop a HAVA standard that

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conforms to existing law, compliance with the Commission's standards cannot provide any 'safe harbor' against liability under the ADA or other applicable laws").

[22] Contrary to Plaintiffs' claims [AB 47], the EAC's standards, though termed "voluntary," are not "voluntary" in the ordinary sense, as the legislative history reflects. Id. ("If a state accepts election fund payments, the [HAVA] bill *requires* the state to certify its compliance with the voluntary standards for voting systems.") (emphasis added). State and local jurisdictions must comply with HAVA standards or lose substantial and necessary HAVA funds. Plaintiffs state categorically that "HAVA will *require* Defendant Appellant [sic] to place at least one touch screen machine in every Duval County polling place" [AB 50], yet contradict themselves by claiming that HAVA standards are voluntary. [AB 47]

[23] Id.

conflicts with or is below an *existing* ADA standard, the HAVA standard would not be a safe harbor and have no superceding effect.[24]

Further, contrary to Plaintiffs' claims [AB 46], the Department of Justice has not "directed" the implementation of voting equipment for disabled voters at this time. Rather, the highly informal letter to Plaintiff AAPD upon which they rely merely states that the Department "***encourage[s]*** all jurisdictions to implement the requirements of Section 301 [of HAVA] ***as soon as practical***, particularly the disability provision, to help ensure that disabled voters are able to fully participate in the election process to the maximum extent possible." Letter from Civil Rights Division to AAPD (December 12, 2003) (emphasis added) [R193 Ex. A] Far from being compulsion or a directive, the Division's statement merely ***encourages*** implementation of voting equipment under ***HAVA*** for disabled voters if ***practical***. Importantly, the letter applies to HAVA and is silent as to any purported obligation under the ADA. Id.

Despite the letter upon which they rely, Plaintiff AAPD recently argued unsuccessfully in AAPD v. Shelley that the provisions of HAVA should be applied *now* to prevent the decertification of touchscreens in California. 324 F. Supp. 2d at

[24] Plaintiffs fail to explain their assertion that "HAVA does not mandate that the [sic] touch screens meet any other requirements" [AB 48] when it is irrefutable that the EAC has been charged with and will be promulgating such standards.

1127. This argument conflicts with their argument in this appeal [AB 46], and undermines their claimed right to touchscreens/audio ballots for the Fall 2004 election cycle under the ADA. The trial court in Shelley rejected Plaintiffs' arguments as "speculative" and "moot" by stating:

> Plaintiffs also insist that DREs will not be certified in time to allow them to vote independently in the November 2004 presidential election. If this prediction is accurate, it is unfortunate. However, given its effective date of January 1, 2006, HAVA does not compel a different result.

Id. 1126-27. Likewise, no elections will be held in Duval County after the November 2004 presidential election until Spring 2006, after HAVA's effective date of January 1, 2006.

The dispositive point is that the *entire relief* Plaintiffs seek was been granted legislatively by Congress via HAVA thereby rendering their lawsuit moot. Where courts can no long provide claimants with meaningful relief beyond what they have demanded, no case or controversy exists and this matter is moot. *See* Jews For Jesus, Inc. v. Hillsborough County Aviation Auth., 162 F.3d 627, 629 (11th Cir. 1998). Given that no meaningful relief existed below, or exists at this point in the litigation, the Plaintiffs' claims should be dismissed or vacated. The trial court erred in not dismissing this action as moot, and its order to the contrary should be reversed or vacated. *See also* Troiano v. Lepore, supra (affirming dismissal of ADA claims based on mootness).

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

Stafford could not have waived issues regarding the trial court's order of compelling touchscreens/audio ballots in only 20% of Duval County's 285 precincts because this remedy was first known only upon issuance of the trial court's order on March 24, 2004.[25] Indeed, Stafford soon thereafter raised these issues in a motion for stay pending appeal. [R219] Likewise, he could not have waived class certification issues when the trial court nowhere indicated it was dispensing with these important requirements. As to class certification, Plaintiffs present only a few scattered cases that do not reflect the general principles regarding the need for certification of class claims in this type of litigation. The lack of class certification is prejudicial to Stafford, particularly as to the purported class of manually-disabled voters for which no commonality or typicality of claims or remedy exist. [IB 57-58]

[25] Paper trials for and manual recounts on touchscreens remain uncertain given a recent order in a Florida administrative proceeding, which held that the State exceeded its rule-making authority in abolishing manual recounts for touchscreen systems. ACLU of Florida, et. al. v. Department of State, DOAH Case No. 04-2341RX (August 27, 2004).

CONCLUSION

Based on the foregoing, the trial court's legal conclusions are erroneous and its findings clearly erroneous based on the record as a whole. The district court's order should be vacated or 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 Richard A. Ripley, 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 __ day of September, 2004.

Attorney