UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

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

Plaintiffs,

v. Case No.:3:01-CV-1275-J-Alley/HTS

Glenda Hood, as Secretary of State for the State of Florida; Edward C. Kast, as Director, Division of Elections; and John Stafford, as Supervisor of Elections, Duval County.

Defendants.
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**MOTION OF SUPERVISOR JOHN STAFFORD FOR STAY PENDING APPEAL**

Pursuant to Rule 62, Federal Rules of Civil Procedure, Supervisor John Stafford, requests a stay pending appeal[1] of this Court's final judgment dated March 26, 2004, which imposes mandatory injunctive relief. The judgment compels a substantial alteration to the existing voting system in Duval County by requiring that currently uncertified equipment for visually and manually disabled voters be purchased and implemented for use by the August 31, 2004 presidential primary. A stay should be granted given (a) the strong public interest in avoiding intrusion into the election process and its administration, (b) the expense and administrative burdens of procuring, testing and implementing supplemental, judicially-compelled voting equipment only five months before a national election (including training poll

[1] Supervisor Stafford filed his notice of appeal on March 31, 2004. Dkt. 217. References to the Trial Transcript are [Tr. *:#], where * is volume number and # is page number. Docket entries are [Dkt. *:#] where * is docket number and * is page number. Because Plaintiffs do not seek money damages, a bond is unnecessary for a stay and would otherwise be a waste of taxpayer funds.

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workers/department employees and educating voters), (d) the likelihood that Supervisor Stafford will prevail on appeal given the novelty and lack of precedent for Plaintiffs' ADA regulatory claim, (e) the lack of any tangible harm to any Plaintiff from third-party assistance at the polls, and (f) the public interest in avoiding unequal applications of the law. *See* Bush v. Gore, 531 U.S. 98, 109 (2000) (staying Florida recount process to hear case and render an expedited decision.); Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 919 (9th Cir. 2003) (vacating injunctive relief and stating "[i]nterference with impending elections is extraordinary ..."); Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981) ("stay procedure of [Rule 62] affords interim relief where relative harm and the uncertainty of final disposition justify it.").[2] Each of these considerations is discussed sequentially below.

**LEGAL ARGUMENT**

Under the "balance of the equities" test applicable to a motion for stay pending appeal, four factors are considered: (1) whether the movant has presented a substantial case on the merits; (2) whether, absent a stay, the movant will suffer irreparable harm; (3) whether the adverse party will suffer no substantial harm from a stay; and (4) whether the public interest is served by a stay. Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986). The test in this Circuit is not whether a movant meets each factor, but whether the four factors collectively weigh in favor of a stay. Id. (finding some factors favored government while others did not, but that balance of equities favored a stay). Here, each of the four factors are met and support a stay in this case: (1) Supervisor Stafford has presented a substantial case

[2] *See* Bonner v. City of Prichard, 661 F.2d 1206, 1207 (5th Cir. 1981) ("decisions of the former Fifth Circuit prior to September 30, 1981, are "binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit.").

on the merits on the novel and unprecedented ADA regulatory claim at issue; (2) the election system and process in Duval County will be irreparably harmed absent a stay; (3) issuance of a stay will cause no meaningful harm to any Plaintiff; and (4) the public interest in avoiding interference in elections favors a stay. Whether viewed individually, or considered in their totality, these factors weigh disproportionately in favor of a stay pending appeal. *Id.* at 1456 ("We find that, viewing the totality of the circumstances, the balance of equities on this question lies with the government.").

A. Supervisor Stafford Has Presented A Substantial Case on the Merits,

As to the first factor, in this circuit a movant need not show a "probability" or likelihood of success on the merits in order to obtain a stay. Instead, a movant must show only that he has presented a "substantial case on the merits" and that, on balance, the equities under the remaining three factors favor a stay. Garcia-Mir v. Meese, 781 F.2d at 1453; *see* Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981) ("We ... hold that on motions for stay pending appeal the movant need not always show a "probability" of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay."); Isaly Co. v. Kraft, Inc., 622 F. Supp. 62, 63 (M.D. Fla. 1985) (same). Here, Supervisor Stafford has presented a substantial case on the merits on an unprecedented ADA claim under 28 C.F.R. section 35.151(b).[3]

[3] A stay ordinarily should be granted solely on this factor if "the possibility of error ... is so high as to constitute clear error suggesting probable likelihood of success on appeal." Garcia-Mir v. Meese, 781 F.2d 1450, 1454 (11th Cir. 1986); *cf.* Isaly Co. v. Kraft, Inc., 622 F. Supp. 62, 63 (M.D. Fla. 1985) ("Having decided for Plaintiff on the facts and the law, I am obviously not disposed to find that the Defendant now enjoys a likelihood of success on the (Continued ...)

1. *Applicable Law is Contrary to the Court's Decision*

At the outset, it is important to note that the order cites no caselaw in support of the unprecedented injunctive and declarative relief rendered under section 35.151(b) of the ADA regulations. The reason is that none exists. Instead, the only federal appellate court decision that has considered the interplay between the ADA and the federal elections laws is to the contrary. *See* Nelson v. Miller, 170 F.3d 641 (6th Cir. 1999) (dismissing ADA/RA claims). In Nelson v. Miller, the Sixth Circuit specifically held that the refusal "to provide [Plaintiffs] with voting assistance other than that already extended to them under [Michigan third party assistance statute] does not discriminate against them in violation of the ADA and/or the RA." Id. at 653.[4] As the trial court in Nelson v. Miller stated:

> Nothing in *Lightbourn*[5] or in anything submitted by the Plaintiffs demonstrate that Congress intended that the ADA or RA should be read so broadly as to require states with statutory provisions regarding a secret ballot to provide blind voters with voting privacy free from third party assistance. Similar to the Voting Rights Acts,

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appeal."). However, a stay is warranted where a movant "will present substantial issues on its appeal" and the balance of the equities favors a stay. *See* Isaly Co., 622 F. Supp. at 63 (Hodges, J.).

[4] *See also* Nelson v. Miller, 950 F. Supp. 201, 204 (W.D. Mich. 1996) ("Neither the ADA nor the RA indicate that voting privacy for blind voters was a 'benefit' Congress sought to protect or a 'discrimination' that Congress sought to prevent."), *aff'd,* 170 F.3d 641 (6th Cir. 1999); NAACP v. Philadelphia Bd. of Elections, 1998 WL 321253 at *4 (E.D. Pa. 1998) ("Defendants are not required to provide the specific procedures authorized under the VAEH [Voting Accessibility of the Elderly and Handicapped Act], but the decision to do so is a reasonable modification to comply with the ADA.... The defendants' provision of the alternative ballot procedures [authorized by the VAEH] to qualified individuals with disabilities fulfills their obligation under the ADA....").

[5] This citation is to the trial court's decision in Lightbourn v. County of El Paso, Tex., 904 F. Supp. 1429 (W.D. Tex. 1995), which held that the system of voting in Texas did not comport with the ADA and discriminated against the disabled. The Fifth Circuit, however, reversed that decision. *See* Lightbourn v. County of El Paso, Tex., 118 F.3d 421 (5th Cir. 1997).

> Congress intended that blind voters have access to the voting booth and freedom from coercion within the voting booth, not complete secrecy in casting a ballot. This Court will not rewrite the ADA or RA to require such a privacy right.

Nelson v. Miller, 950 F. Supp. 201, 205 (W.D. Mich. 1996). The Eleventh Circuit is likely to consider the reasoning and holdings of these cases to be persuasive as to the ADA claim under section 35.151(b) at issue in this case.

The order is also at odds with every reported case under section 35.151(b), each of which involved an *alteration to an element 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 on public buildings.[6] These types of ***permanent** architectural or structural barriers* can be remedied at relatively little cost and involve little or no discretion in their ongoing administration thereby distinguishing them from voting equipment and systems, which are ***portable***, require extensive and complex ongoing administration and oversight, and are extremely expensive to modify. As the highlighted language emphasizes, not a single reported case under section 35.151(b) involves a portable/transportable item such as a voting machine or system; rather, each addresses an alteration to a permanent structure.

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

The point is simply that the reasoning in Nelson v. Miller (that the ADA is not violated by third party assistance) is further buttressed by the cases interpreting section 35.151(b) and limiting it to alterations of permanent physical facilities.

2. *The Relief Ordered By The Court Is Flawed.*

Second, the relief ordered demonstrates the adage that the "medicine" imposed (i.e., a limited, one-time rollout of (currently uncertified) touchscreen audio ballots in sixty of about 300 precincts only for the elections in Fall 2004) can be far worse than the ultimate "cure" (i.e., methodical deployment of technology for disabled voters in all polling places nationwide under HAVA for elections in 2006). For example, the judgment creates the potential for equal protection and due process violations for which a stay is necessary to avoid unequal application of the law. *See* Bush v. Gore, 531 U.S. 98, 109 (2000) (staying order to hear case and render expedited decision because recount process underway probably conducted in an unconstitutional manner). The order compels the purchase of touchscreens with audio ballots to be implemented in 20% of the polling locations in Duval County, which is approximately 60 precincts.[7] Under Florida law, a voter may cast a vote in person only in his or her precinct[8] or at the downtown main office.[9] For this reason, a voter may not travel to

[7] The precise number of polling places is 285, such that 57 would constitute 20% of the total.

[8] *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.").

[9] *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."); *see also* Div. of Elec. Op. 02-13 (Aug. 19, 2002) (voter who goes to wrong precinct may not be given absentee ballot for correct location).

any other polling locations to cast a vote directly. Under the final judgment, voters in 20% of polling locations will have two voting technologies on which to vote, one with a paper trail subject to manual recounts (optical scan) and one without a paper trail and not subject to manual recounts (touchscreens).[10] Voters in the remaining 80% of polling locations will vote on the optical scan system implemented in 2002. Disabled voters in these precincts will not be able to vote on touchscreens or use audio ballots and will, instead, use third party assistance. They will not have the independent, secret voting experience they may seek and thereby could claim federal equal protection, ADA, RA and state law violations.[11] That 80% of polling places will not have touchscreens/audio ballots and that the votes in some Duval County precincts will be counted differently in a recount from those in other precincts both raise potential legal problems that justify a stay. *See, e.g.,* Bush v. Gore, 531 U.S. 98, 107-08 (2000) (noting equal protection problems where manual recounts of undervotes/overvotes handled differently).

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[10] See Div. of Elec. Op. DE 04-02, State of Florida, (February 12, 2004) (letter to supervisors in fifteen touchscreen counties that manual recounts on touchscreens are not permitted under Florida law) (http://election.dos.state.fl.us/opinions/new/2004/de0402.pdf). 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, Supervisor of Elections, Palm Beach County, Kay Clem, Supervisor of Elections for Indian River County, and Glenda Hood, Secretary of State, State of Florida, Case No. CV-04-80216 (S.D. Fla. filed March 8, 2004); S. 1980 (amending HAVA to require a voter-verified permanent record or hardcopy); H.R. 2239 (same); S. 2045 (same); Fla. H.B. 1037 (requiring voter-verified permanent paper record with manual audit capacity); & Fla. S. B. 2390 (same) & Fla. S.B. 2870 (same/similar).

[11] *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).

3. *HAVA Renders Plaintiffs' ADA Claim Moot or Nonactionable.*

The judgment compels relief now that is not required until after January 1, 2006 under HAVA in every other jurisdiction nationwide. The Eleventh Circuit is likely to view this issue as a substantial one, particularly the questions of (a) whether an ADA claim even exists and (b) whether such as claim, if it exists, was rendered non-actionable or moot under HAVA. In addition, an appellate court is likely to view the hurried imposition of unnecessary and burdensome court-ordered voting equipment as the type of "judicial second-guessing" that comprehensive federal and state voting laws were designed to avoid. *See* Weber v. Shelley, 347 F.3d 1101, 1107 (9th Cir. 2003) ("[I]t is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems. So long as their choice is reasonable and neutral, it is free from judicial second-guessing.").

4. *The Scope of Relief Granted Is Unwarranted.*

Finally, the order accords relief on a (partial) countywide basis that is unavailable to the Plaintiffs individually absent an appropriate class certification hearing and specific findings under Rule 23. 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 Court at trial itself indicated that "there would have to be a separate proceeding" regarding class certification and voiced concerns regarding certain issues such as whether Plaintiffs could show commonality. [Tr. 1:5-6] ("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, so I will simply set that aside."). Here, no class

certification hearing was scheduled or held.[12] No class has been certified, nor have classes or subclasses been defined. No findings as to the numerosity, typicality, commonality and adequacy of representation factors have been made, nor has the appropriateness of class relief under Rule 23(B)(2)(b) been established. This lack of class certification procedures and findings constitutes prejudicial error that also justifies a stay.[13] For all these reasons, Supervisor Stafford has presented a substantial case on the merits that weighs disproportionately in favor of a stay.

B. Irremediable Harm Will Result Absent A Stay.

Under the second factor, a stay is in the best interests of the entire community to avoid irremediable harm to, confusion in, and irrecoverable costs arising from interference with

[12] Plaintiffs may claim that Supervisor Stafford sought to hold class certification in abeyance, but that would be only partially correct. In opposition to class certification, Supervisor Stafford sought to "defer ruling until the resolution of the pending motions to dismiss" directed to the *initial* complaint. [Dkt. 29] This Court resolved that motion by order dated October 16, 2002 dismissing with prejudice all claims in the initial complaint in substantial part. [Dkt. 42] Plaintiffs took no action on their class certification motion since that time, and their proposed findings of fact and conclusions of law and post-trial brief do not address class certification. *See* Dkt. 178 & 179.

[13] *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.") (*quoting* Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 275 (4th Cir. 1980) (footnote omitted)).

the 2004 election process that is already underway.[14] The interest of Supervisor Stafford as well as the State of Florida in administering and implementing error-free elections is a weighty one that has local, state and national implications in this presidential election year. Implementation of the judgment creates a substantial likelihood that harm will result by injecting the potential for error in the election administration process in Duval County. A judicially-compelled alteration to an existing voting system that requires currently uncertified[15] voting equipment for visually and manually disabled voters creates an untenable risk of harm, error and lost taxpayer dollars for which a stay is appropriate.

*1. Judicial Alteration of an Election System Should Await Appellate Review.*

Judicial intervention into a critical governmental process – here, the voting and election administration process – creates precisely the type of harm that a stay is intended to prevent. In issuing an emergency stay in Garcia-Mir v. Meese, which involved court-ordered immigration hearings pursuant to a judicially-approved plan, the Eleventh Circuit found that the "actual implementation of the required plan ... does create a likelihood of injury to the

[14] The Presidential Preference Primary was held on March 9, 2004 in Florida.

[15] No certification currently exists for a touchscreen that is compatible with the Diebold system used in thirty Florida counties. Likewise, no certification exists for voting equipment for use by manually disabled voters including those that have the ability to use certain "mouth sticks." "Sip and puff" and "jelly switch" technology is not certified and, as Paul Craft testified, the State of Florida does not certify touchscreens for use by the manually disabled 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." [Tr. 3:145-46] Further, absent "regulating the mouth sticks used by people, which I think would be very undesirable, then it's going to be very difficult to bring that particular interface into certification." [Tr. 3: 146] For these reasons, no Florida county can purchase certified equipment for use by manually disabled voters including those who may use mouthsticks.

government. As we noted above, [the government's] interest in supervising the immigration process is 'weighty' and that interest is largely entrusted to the sovereign prerogative of the political branches." 781 F.2d at 1455-56. Specifically, the Court found that the cost and burden of implementing the immigration hearings at issue would be irretrievable lost without a stay. As the Eleventh Circuit stated:

> The actual process of according hearings for these people will result in costs irrevocable, both of time and of money. [FN3] ***We are chary of imposing on the government the not inconsiderable burden of actually conducting these hearings until such time as this Court has passed on the merits. Accordingly, we find that the balance of equities here tips toward the government.***

Id. at 1456 (emphasis added). The government's interest in administering the voting and election process is equally weighty, if not more so, in the context of an impending presidential election. And the cost of purchasing and implementing judicially-compelled voting equipment (including necessary training for poll workers, voter education, and other ancillary requirements) is substantial. Based on the Eleventh Circuit holding, a trial court should avoid imposing such burdens until after the appellate court itself has ruled on the merits of the case. Likewise, the cost and burden of implementing the Court's judgment will be at least hundreds of thousands of taxpayer dollars, likely to be irretrievable lost without a stay. *See also* Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981) (staying court order compelling prison administrators to prepare & implement plans for prison conditions).[16]

[16] Supervisor Stafford's request for a stay extends to the planning process itself as set forth in the final judgment. *See* Ruiz v. Estelle, 650 F.2d 555 (5th Cir. 1981) (staying preparation of certain planning activities). Alternatively, he seeks a stay as to the implementation of any plan that might result from the final judgment. *See* Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986) (denying stay as to formulation of judicial plan, but staying implementation).

*2. Irreparable Harm Will Result Even If DieboldTouchscreens Become Certified and Available.*

Irreparable harm will result whether certified touchscreens with audio ballots become available or not. Even if the Diebold touchscreen with audio ballot were certified by the State before May 14, 2004, it would be instantaneously antiquated and have to be replaced by 2006 under HAVA. Paul Craft of the Division of Elections testified without contradiction that any system procured at this time to accommodate disabled voters would have to be updated or replaced because Florida's voting system standards will have to be modified to comply with HAVA standards, which have not yet been formulated. [Tr. 3:93-94, 160-61, 173] Further, it is doubtful that HAVA funds will be available for a judicially-compelled system that will have to be replaced or substantially modified. For this reason, any expenditure of tax dollars now will simply be wasted on immediately out-dated equipment that is not HAVA-compliant. This consideration alone is sufficiently grave to justify a stay.

*3. Use of a Blended System is Impossible or Impracticable Under the Court's Time Constraints.*

If Diebold's touchscreen audio-ballot is not certified by May 14, 2004, the Court's judgment requires the purchase of touchscreen/audio ballots from ESS or Sequoia that are currently not certified for use with the Diebold optical scan system thereby making it technologically impossible to marry any two vendors' systems.[17] Paul Craft testified that no

[17] As the United States Supreme Court recognized in Bush v. Gore, 531 U.S. at 110, any equipment or software to be used as a part of an election system in Florida must be evaluated and certified by the Secretary of State under section 101.015, Florida Statutes.

certified voting system in Florida ever has blended ***different***[18] vendors' equipment. [Tr. 3:118-19 & 122-23][19] He testified as follows:

> Q. All right. Now, let me ask you this. When a county chooses a vendor such as ES&S, to take an example, and that system has been submitted for certification and been certified --
> A. Uh-huh.
> Q. -- ***is it possible for those counties to get equipment from another vendor and -- and -- which is certified and then mix the two up in the sense of using components from the equipment of one vendor with the components of the -- the other system without that connectability having been certified?***
> ***A. No, that's not possible.***

[Tr. 3:118-19] (emphasis added). For this reason, Supervisor Stafford cannot separately purchase Sequoia or ESS touchscreens with audio ballots due to their lack of a certified technological method of becoming compatible with the Diebold system at issue. [Tr. 3:122-23 & 5:94-95] While this technological incompatibility may possibly be rectified in the future if vendor cooperation increases and Division of Elections certification ensues, it remains a major barrier to mixing different vendors' equipment presently. [Tr. 3:122-23]

In addition, as the Court has noted in its findings, the State's certification process is cumbersome thereby making the relief compelled impossible unless the Division of Elections somehow certifies a vendor-blended voting system that complies with the requirements of the Court's order and timeframes. And Duval County can hardly be expected to integrate a blended system on its own. As Paul Craft testified, "it's going to be difficult for [counties] to pull together a blended system on their own" and that the "biggest obstacle to [blended

[18] The "blended" system in Highlands County is that of a *single vendor*, ES&S. [Tr. 3:52-53]; *see also* Div. of Elections, Florida Department of State, Voting Systems http://election.dos.state.fl.us/votemeth/systems/syssearch1.asp.

systems] has been that, frankly, vendors don't want to play" [i.e., cooperate]. [Tr. 3:119-20] He also testified that:

> ... Florida counties have historically found it preferable to work with a single vendor. Obviously if you're working with a single vendor, you have a single point for a warranty service and technical assistance. And the ability to get technical assistance during an election cycle is a big area of risk that the counties want to reduce ...

[Tr. 3:122-23] Given this strong preference for single vendor systems, it is unsurprising that only two or three jurisdictions *nationwide* have vendor blended systems at this time. [Tr. 5:148-49] For this reason, it is highly unlikely that the first ever certified vendor-blended system in Florida could be accomplished in the next few months to comply with the Court's order in Duval County.

Notably, the order holds that the ES&S system should have been procured for use in Duval County in 2002 simply because it was the first and only certified voting system that had a touchscreen with audio ballot available for the Fall 2002 elections. Order at 8, ¶ 24. Yet, the ES&S touchscreen/audio ballot system is the most maligned and problematic of all certified voting systems in Florida, causing dramatic increases in costs, voter confusion, and accountability in Miami-Dade County. *See* Plaintiffs' Exhibit 1 (citing Miami-Dade Auditor General's Reports condemning ES&S system).[20] The purchase of ES&S touchscreen equipment in Miami-Dade County for the 2002 elections resulted in a true election fiasco, including (a) emergency management officials having to run the election, (b) over $5 million

[20] *See generally* Plaintiffs' Exhibit 1 (citing Miami-Dade Office of Inspector General report critical of ESS system); Office of Inspector General, Miami-Dade County, http://www.miamidadeig.org/archives/Sept102002election.pdf (initial report); http://www.miamidadeig.org/reports/voting%20final%20report.pdf (final report).

of additional tax dollars spent on just the general election, (c) having to boot up thousands of machines the night before and keep them under police supervision overnight, and (d) the loss by the election supervisor of his job. [Tr. 7:17-23] ES&S was simply not a technologically and administratively adequate system either then or presently. Likewise, a Sequoia touchscreen is not feasible under the circumstances (due to the lack of blended-vendor certification). The order also permits little or no opportunity to test or implement whatever equipment might be available in a deliberative, cost-effective and administratively feasible manner.[21]

4. *The Cost of the Remedy is Irrecoverable and Disproportionate.*

Finally, the harm to Duval County in terms of substantial irrecoverable cost weighs heavily in favor of maintaining the status quo. Even if one Diebold touchscreen with audio ballot can be certified, procured and used technologically and administratively in a partial deployment in only 20% of the precincts, the out-of-pocket cost of that equipment alone would be approximately $210,000 (i.e., 60 units times $3,500). Stafford Ex. 6 & 12 (2002 Governor's Task Force estimates $934,500 based on 267 units). More importantly, the cost of a Diebold touchscreen/audio ballot in every precinct (about $1 million) would be **more than 50%** of the $1.8 million budget for the entire voting system in Duval County in 2002.[22]

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[21] Indeed, even Georgia and Harris County, Texas – cited in the Court's order – each had well over a year to solicit, procure and test their DRE equipment to gain consensus and experience in choosing a vendor and implementing the new technology.

[22] It would also be about 10% of recent overall budgets or, more relevant, about 20% of budgets for operating expenses. 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). [Plaintiffs' Ex. 100; Stafford Ex. 2a-2k] The Supervisor's overall budget for (Continued ...)

Persuasive ADA regulations indicate that where the cost of a specific alteration exceeds the cost of the overall alteration by 20 percent, it is disproportionate and not required. *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."). If an elevator is unwarranted where it exceeds 20 percent of total alteration costs, surely the deployment of touchscreens with audio ballots in precincts in Duval County in 2002 is unwarranted where its cost would exceed 50 percent of total alteration costs. In summary, the potential for substantial irremediable harm – both in terms of actual equipment and administration costs justifies a stay pending appeal.

C. Plaintiffs Will Incur No Harm With A Stay.

As this Court has found, Plaintiffs will not be denied an equal opportunity to vote under Florida's system of third party assistance. The Court stated unequivocally that:

> ***All three individual Plaintiffs have been able to vote with third-party assistance.*** While the visually impaired Plaintiffs testified to concern about whether their votes were accurately reflected, ***there is no evidence to suggest that their votes were not accurately communicated via third-party assistance.*** Similarly, ***there is evidence that visually and manually impaired voters have been afforded an equal opportunity to participate in and enjoy the benefits of voting.***

Order at 23 (emphasis added). The highlighted language makes clear that no risk exists whatsoever that any Plaintiff has been or will be denied "an equal opportunity to participate

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fiscal year 2000-2001 was $2.6 million (of which $677,646 came from City funds). [Plaintiffs' 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.

in and enjoy the benefits of voting" by voting with third party assistance on Duval County's current voting system. The Court's order itself emphatically demonstrates that no substantial harm will befall the Plaintiffs by voting with third party assistance. As such, this factor for a stay is met based on the Court's findings.

Plaintiffs will claim that having to disclose their vote to a third party, the method by which they and all others similarly situated have voted for decades in Florida and nationwide, constitutes sufficient "harm" to justify the remedy. But, each Plaintiff has voted in this manner in the four/five[23] elections held in Duval County since they instituted their lawsuit in 2001. Yet they ***never sought preliminary injunctive relief*** to prevent this "harm" and, instead, passively allowed an optical scan system to be proposed, procured and implemented in Duval County without once seeking to protect themselves in the interim from this "harm." Equity does not favor those who fail to act with diligence in protecting their asserted rights. Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151, 104 S. Ct. 1723, 1726 (1984) ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence.").

With a stay, the Plaintiffs will merely be required to disclose their votes to third parties who assist them at the polls (or in filling out an absentee ballot), such parties being subject to criminal penalties should they disclose Plaintiffs' choices.[24] This "harm" is minimal or non-

[23] The optical scan system was used in the five elections held on September 10, 2002 (primary), November 5, 2002 (general), April 15, 2003 (primary/local), May 13, 2003 (general/local) and March 9, 2004 (presidential preference primary).

[24] As a specific deterrent against violation of voting secrecy, Florida law provides that "[a]ny election official or person assisting any elector who willfully discloses how any elector voted, except upon trial in court, is guilty of a felony of the third degree", which is (Continued ...)

existent in contrast to the substantial impact of a judicially-compelled alteration to a voting system on the eve of a presidential election. Further, Plaintiffs' alleged "harm" in the Fall 2004 election cycle is de minimis and fleeting given that HAVA requires voting equipment for disabled voters in *every* polling location nationwide for elections after January 1, 2006. As such, a stay is equitable and will merely require that Plaintiffs vote in the 2004 election cycle in the same manner they have throughout this litigation and as will millions of other voters throughout Florida[25] (indeed, nationwide) this Fall.[26]

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punishable under Florida law by imprisonment up to five years and fine up to $5,000. § 104.23, Fla. Stat. (2003).

[25] The Court's order erroneously states that 29 Florida counties "use touchscreen voting systems" (p. 13, ¶ 41) when only fifteen actually **use** touchscreens. Paul Craft specifically testified that, although perhaps 29 counties had "touchscreen ***capability***" [Tr. 3:50-51], only ***fifteen*** counties in Florida ***actually use*** precinct based touchscreens, and that he did not know whether any, other than Pasco County, used audio ballots at the precinct level:

> A: ... ***there are 15 of those [counties] that are using the touch-screen device as a primary voter interface device in their precincts.***
> Q. Not 29?
> A. ***Not 29.***
> Q. And -- and then of those 15, how many other than Pasco have a touch screen available at the -- with audio component at the precinct level?
> A. ***I do not know.***

[Tr. 3:151 (emphasis added)] As such, the order misstates significantly by almost double the extent to which touchscreen usage exists in Florida. In addition, the use of audio ballots is limited to only about half of the 15 counties with touchscreens, some not using audio ballots in all precincts. *Id.*

[26] *See* Elections Data Services Report (Feb. 12, 2004) (estimating that 32.20% of the nation will vote on optical scan, 28.94% on DRE/touchscreen technology, 18.64% on punchcards, 12.82% on lever machines, 6.79% on mixed systems and 0.6% on paper ballots) http://www.electiondataservices.com/EDSInc_VEstudy2004.pdf. The 28.94% figure represents both old-style DREs that replicate lever machines (about half the total) and newer touchscreen technology (e.g., Diebold Accuvote TS (4.65%), Sequoia AVC Edge (4.5%) and ES&S Votronic (2.57%)). *Id.*

Importantly, this Court dismissed *with prejudice* (a) the claim that third party assistance violated the Florida Constitution's "direct and secret" voting clause and (b) the ADA/RA claims to the extent they were based on a right to an independent, secret voting experience. *See* 227 F. Supp. 2d at 1297-98 (M.D. Fla. 2002). As such, the "harm" that Plaintiffs claim from third party assistance is not cognizable in this proceeding. It is odd that Plaintiffs' claims for a secret, independent voting experience were dismissed under Florida and federal law, yet they somehow continue to have a right to this experience under the Court's order.

Finally, it bears emphasis again that the Plaintiffs filed this lawsuit in 2001 *prior to* Duval County purchasing its current optical scan voting system. Yet they never once pursued preliminary injunctive relief. If Plaintiffs were being subject to substantial harm during this period, they surely had an obligation to seek interim relief. They failed to do so. They filed their lawsuit, did not seek to enjoin the purchase and implementation of the optical scan system upon which they have subsequently voted in five elections, and thereby undermined any reasoned argument that they will be subject to "substantial harm" in the Fall 2004 election cycle with a stay of this Court's order.

D. The Public Interest Strongly Favors a Stay.

Lastly, and perhaps most significantly, the public interest clearly lies in granting a stay of the order under the circumstances. The potential for unforeseeable problems, confusion and error in the hurried certification, procurement, deployment, and implementation of a court-ordered technological alteration to an established voting system in an election cycle only months away is obvious. As the Ninth Circuit en banc recently stated in a case challenging voting equipment, a "federal court cannot lightly interfere with or enjoin a state election. ... The decision to enjoin an impending election is so serious that the Supreme

Court has allowed elections to go forward even in the face of an undisputed constitutional violation." Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003) (citations omitted). In that case, which involved an injunction that interfered with a pending election, the court stated:

> In this case, ***hardship falls not only upon the putative defendant, the California Secretary of State, but on all the citizens of California, because this case concerns a statewide election***. The public interest is significantly affected. For this reason ***our law recognizes that election cases are different from ordinary injunction cases. See, e.g., Reynolds v. Sims,*** 377 U.S. at 585, 84 S. Ct. 1362.

Id. at 919 (emphasis added). In short, the public interest is served by maintaining the status quo and permitting the appellate court to review and issue a ruling on the disputed ADA regulatory claim at issue. *See* Garcia-Mir v. Meese, 781 F.2d 1450, 1456 (11th Cir. 1986) (finding public interest equities in support of government due to court-ordered implementation of immigration hearings).

## CONCLUSION

A stay is warranted in the public interest given the balance of equities. Supervisor Stafford requests that this Court stay its order pending review in the appellate court.

Respectfully Submitted,
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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; Lois G. Williams, 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 6th day of April, 2004.

Attorney