

No. 05-13990-B

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**THE NATIONAL FEDERATION OF THE BLIND, THE NATIONAL  
FEDERATION OF THE BLIND OF FLORIDA, KATHERYN DAVIS,  
JOHN DAVID TOWNSEND, CHAD BUCKINS, PETER CERULLO,  
AND RYAN MANN,**  
*Plaintiffs/Appellants*

v.

**VOLUSIA COUNTY, and ANN McFALL, as Supervisor of Elections of  
Volusia County,**  
*Defendants/Appellees*

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**APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA**

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**AMICI CURIAE BRIEF OF ELECTRONIC FRONTIER  
FOUNDATION, HANDICAPPED ADULTS OF VOLUSIA COUNTY,  
VERIFIEDVOTING.ORG, COMPUTER PROFESSIONALS FOR  
SOCIAL RESPONSIBILITY, AND VOTERS UNITE! IN SUPPORT  
OF APPELLEES AND AFFIRMANCE**

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**UNITED STATES COURT OF APPEALS  
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KATHERYN DAVIS, JOHN  
DAVID TOWNSEND, CHAD  
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CERULLO, AND RYAN  
MANN,**

Docket No. 05-13990-B  
  
APPEAL

Plaintiffs/Appellants,

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Defendants/Appellees.

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT**

Amici Curiae Electronic Frontier Foundation, Handicapped Adults of Volusia County, Verifiedvoting.Org, Computer Professionals For Social Responsibility, and Voters Unite! hereby disclose the following pursuant to FRAP 29-2 and FRAP 26.1:

Judge

The Honorable James I. Cohn, United States District Judge, United States District Court, Southern District of Florida

Parties

National Federation of the Blind, *Plaintiff/Appellant*

National Federation of the Blind of Florida, *Plaintiff/Appellant*

Katheryn Davis, *Plaintiff/Appellant*

John David Townsend, *Plaintiff/Appellant*

Chad Buckins, *Plaintiff/Appellant*

Peter Cerullo, *Plaintiff/Appellant*

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Amicus Curiae in Support of Appellants

American Association of Persons With Disabilities, *Amicus Curiae*

Amici Curiae in Support of Appellees

Electronic Frontier Foundation, *Amicus Curiae*

VerifiedVoting.org, *Amicus Curiae*

Handicapped Adults of Volusia County, *Amicus Curiae*

Computer Professionals For Social Responsibility, *Amicus Curiae*

Voters Unite!, *Amicus Curiae*

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## **STATEMENT OF THE ISSUES**

The issues presented are:

1. Whether this appeal is moot because the court cannot grant any meaningful relief on Plaintiffs-Appellants' Motion for Preliminary Injunction.
2. Whether the District Court abused its discretion in denying Plaintiffs-Appellants' Motion for Preliminary Injunction as to their claims under the Americans With Disabilities Act.
3. Whether the District Court abused its discretion in denying Plaintiffs-Appellants' Motion for Preliminary Injunction as to their claims under Florida Statutes section 101.56062.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

On July 5, 2005, Appellants began a legal campaign to force the Volusia County government into acquiring paperless touchscreen voting machines at the expense of the County and its voters. A “collective and representative voice of blind Americans and their families,”<sup>1</sup> Appellants ignored the dissenting voices of local disability advocates, the well-founded concerns regarding the accuracy and reliability of touchscreen technology, and the County’s ongoing efforts to acquire voting equipment that was both accessible and reliable before a federal deadline of January 1, 2006. Instead, Appellants launched an eleventh hour challenge that restyled their delay in bringing suit as proof of the immediacy of their concerns.

Let there be no mistake: Appellants appear before this Court seeking to sacrifice the integrity of upcoming elections in order to accommodate their concerns. Appellants have repeatedly argued that local officials need at least two-and-a-half months of lead-time in order to properly perform necessary machine maintenance, train pollworkers, and educate the public. With this deadline long since past, Appellants now inexplicably ask the Court to ignore their own grave warnings and to mandate their preferred voting equipment, regardless of the consequences.

Amici are civil rights, technology advocacy, grassroots, and disability rights organizations supportive of technology development, election

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<sup>1</sup> [DE6, par.5]



integrity and security, and accessibility. Amici urge the Court to affirm the District Court’s decision and permit the County to continue to do its job of protecting the rights of all of its voters. We do so based on three arguments:

First, Amici agree with the analysis of the District Court and of Appellees. The ADA does not mandate the irrevocable relief that Appellants seek. Moreover, Florida law does not require the County to purchase paperless touchscreen voting equipment before the October 11<sup>th</sup> municipal election. Consequently, Appellants’ appeal must fail.

Second, the Court simply cannot give Appellants the relief that they seek. Any attempt to accommodate Appellants at this late stage will force the County to sacrifice the integrity of upcoming elections.

And third, the touchscreen electronic voting technology without a paper or audit trail has a long and growing record of malfunction and error that has led to the disruption of elections across the country. This underscores the need for, and reinforces the rationale behind, the careful and deliberative process undertaken by the County.

### **INTERESTS OF AMICI**

Amicus Electronic Frontier Foundation (“EFF”) is a donor-supported membership organization working to protect fundamental rights regardless of technology; to educate the press, policymakers, and the general public about civil liberties issues related to technology; and to act as a defender of those liberties. EFF currently has approximately 1,000 members in Florida. Among its various activities, EFF opposes misguided legislation, initiates

and defends court cases preserving individuals' rights, launches global public campaigns, introduces leading edge proposals and papers, hosts frequent educational events, engages the press regularly, and publishes a comprehensive archive of digital civil liberties information at one of the most linked-to web sites in the world. Given the significance of the issues before the Court and the impact an adverse decision would have on EFF's mission, and on the integrity of the voting process for all of Florida's citizens, EFF seeks to have its perspective brought to the Court's attention.

Amicus Handicapped Adults of Volusia County ("HAVOC") is a private 501 (c) (3) non-profit corporation, made up of residents of Volusia County, that is a long-time advocate for all members of the disabled community. Founded in 1977, the group's original purpose was to sponsor athletic and social activities and to provide peer support for the physically disabled. Over the years, the role of HAVOC has changed to broadly advocate for individuals with all disabilities and has taken on a greater advocacy role in educating, changing attitudes, and raising awareness about barriers that challenge the disabled and their quality of life. HAVOC has been especially interested in the effort to bring to Volusia County voting equipment that is accessible, secure, and auditable. This case squarely impacts the interests of HAVOC members and the interests of the disabled population of Volusia who we seek to protect. As Appellants (as well as Defendant Ann McFall) have repeatedly invoked the interests of the disabled as justification for their urgent demand for the purchase and implementation

of paperless touchscreen voting machines, HAVOC believes that it is imperative for the Court to understand that Appellants do not speak for the disability community as a whole.

Amicus VerifiedVoting.org is a nonpartisan nonprofit organization championing reliable and publicly verifiable elections. Founded by Stanford University Computer Science Professor David Dill, the organization supports a requirement for voter-verified paper trails on electronic voting machines allowing voters to inspect individual permanent records of their ballots and election officials to conduct meaningful recounts as needed. Over 8,000 computer science professionals and others have signed an informal resolution in support of more secure voting at the organization's website at [www.verifiedvoting.org](http://www.verifiedvoting.org).

Amicus Computer Professionals for Social Responsibility is a public interest alliance of computer scientists and others concerned about the impact of computer technology, including electronic voting, on the public.

Amicus Voters Unite! is a national non-partisan organization dedicated to fair and accurate elections. It focuses on distributing well-researched information to elections officials, elected officials, the media, and the public, as well as providing activists with information they need to work toward transparent elections in their communities. Voters Unite!'s website is at <http://www.votersunite.org>.

## ARGUMENT

### I. Appellants' Appeal is Moot

#### A. The Deadline By Which to Purchase Voting Equipment for the October 11<sup>th</sup> Election Has Passed.

“Unless the County sends the machines’ manufacturer a purchase order by July 25, 2005, it will be too late to have the machines in place for the next election, scheduled to take place October 11, 2005.”<sup>2</sup>

Rarely does an appeal so clearly fail elementary justiciability requirements. Having emphatically and repeatedly represented to both this Court and to the District Court below that a cushion of over two months between the acquisition of voting equipment and the holding of an election was absolutely necessary, Plaintiffs now come before this Court – without the vaguest explanation – seeking an injunction forcing the expenditure of nearly three-quarters of a million dollars on voting equipment that could not possibly be used in upcoming elections.

Depending on the court,<sup>3</sup> Appellants have represented that any order granting their desired relief would need to be made at minimum between 11 and 12 weeks before an election, including one to two weeks for Diebold to

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<sup>2</sup> Emerg. (Appellate) Motion for Prelim. Injunct. p. 2.

<sup>3</sup> In support of their Motion for Preliminary Injunction, Appellants submitted a declaration from a representative of a single voting equipment vendor, Diebold, asserting that an equipment order would have to be placed on July 15<sup>th</sup> before the County’s “drop dead” date of July 29<sup>th</sup> in order to be able to make a timely delivery. [DE12-2, p.1] Following the District Court’s rejection of their preliminary injunction argument, Appellants were somehow able to independently negotiate with Diebold on behalf of Volusia County for more time: the new purchase order deadline was moved back to July 25<sup>th</sup>. [Emerg. (Appellate) Motion for Prelim. Injunct. p. 2.]

deliver the voting machines followed by approximately 10 weeks to “program accessible voting machines, train Volusia County Department of Elections staff and pollworkers how to use them, and educate the public.”<sup>4</sup> The relief sought by Appellants in their Complaint – injunctive relief “to ensure that accessible voting machines are in place in time for the October 11, 2005 municipal election” – necessitates a timetable of barely a third the required length.

A case is moot when it no longer presents a live controversy with respect to which the Court can give meaningful relief. *See, e.g., Pacific Ins. Co. v. General Dev. Corp.*, 28 F.3d 1093, 1096 (11th Cir. 1994); *Ethredge v. Hail*, 996 F.2d 1173, 1175 (11th Cir.1993). Absent an applicable exception to the mootness doctrine, the Court must dismiss any appeal that no longer presents a viable case or controversy. *See, e.g., Princeton Univ. v. Schmidt*, 455 U.S. 100, 102, 102 S.Ct. 867, 869 (1982) (“We do not sit to decide hypothetical issues or to give advisory opinions”); *Pacific Ins. Co.*, 28 F.3d. at 1096; *Hogan v. Mississippi Univ. for Women*, 646 F.2d 1116, 1117 n. 1 (5th Cir. 1981).

The core issue before this Court is whether the District Court applied the law correctly in denying Appellants’ motion for preliminary injunctive relief. This Court simply cannot grant Appellants their desired relief. Accordingly, the appeal must be denied.

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<sup>4</sup> [DE7-1, p4]; [DE7-2, Exh. C.]

**B. Injunctive Relief Mandating Accessible Equipment For Future Elections Is Improper.**

Faced with no viable injunctive relief, Appellants now apparently seek to alter the contours of this lawsuit. While the Complaint seeks an order implementing accessible machines in time for the October municipal election, Appellants have now retreated to a less clear objective in order to escape the mootness problem: Appellants now seek a “preliminary injunction requiring Volusia County to deploy *during its next election* at least one accessible voting machine at each precinct.”<sup>5</sup> This entreaty must also fail.

1. **The Deadline By Which to Purchase Voting Equipment for the November 8<sup>th</sup> Election Has Passed.**

The next municipal election in Volusia County following the previously cited October 11<sup>th</sup> election – the only remaining election before the January 1, 2006, accessibility deadlines imposed by Help America Vote Act are triggered – is scheduled to take place on November 8, 2005. The only evidence in the record indicates that the acquisition deadline for both the October 11<sup>th</sup> and November 8<sup>th</sup> elections was the same: July 29<sup>th</sup>, over a month and a half before the filing of this amicus brief.<sup>6</sup> Even assuming that

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<sup>5</sup> Appellants’ Brief at p.30-31 (emphasis added).

<sup>6</sup> “I informed [our regional representative from Diebold] that at your direction we met on June 30, 2005 to discuss and determine what the drop dead date would be. I shared with Mr. Pickett that we determined that July 29, 2005 is the drop dead date to successfully prepare for the municipal elections of October 11 and November 8, 2005 and that date is contingent upon receiving the touchscreen equipment not later than the drop dead date and a firm commitment from the vendor to provide professional support in

the ordinary 11-12 week timeline otherwise indicated was the appropriate one by which to evaluate injunctive relief for the November election, Appellants are still over three weeks too late as of the date of the filing of this amicus brief.

2. Volusia County Has Indicated That It Will Have Accessible Voting Equipment In Place By 2006.

Even assuming that Appellants are seeking an eleventh hour shift of their desired relief from an October 11<sup>th</sup> election target to an indefinite “next election” that would occur in 2006, Appellants’ appeal must still fail. Volusia County has repeatedly recognized January 1, 2006, as the HAVA deadline mandating accessible voting equipment.<sup>7</sup> Appellants can point to no evidence that Volusia County intends anything other than full compliance with these requirements that will mandate the use of accessible voting systems – the essence of the relief Appellants purportedly seek. Any argument regarding future elections is entirely hypothetical and based on conjecture contrary to the evidence in the record.

**II. Appellants’ Requested Relief Would Necessarily Harm Volusia County and Its Voters**

Appellants have repeatedly represented throughout this case that their required 11-12 week injunction timeline was contingent on two factors, the

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the areas of training both staff and the poll workers and in the creating and programming the ballots, both audio and print.” [Emerg. (Appellate) Motion for Prelim. Injunct. Exh. C. (July 7, 2005, e-mail from Tim Augustine to Ann McFall).]

<sup>7</sup> See, e.g., Appellees’ Brief at p.6; [DE20-1, pg.3]

1-2 weeks of lead time needed by the vendor to supply the machine and the 10 weeks required by the County “to program accessible voting machines, train Volusia County Department of Elections staff and pollworkers how to use them, and educate the public.”<sup>8</sup> Appellants have not yet identified whether equipment programming or pollworker training or perhaps public education efforts should be sacrificed in order to accommodate their requested relief, but their ill-conceived appeal leaves no alternative; if Appellants still seriously contend that the use of touchscreen voting machines be mandated for the October 11<sup>th</sup> election, then the integrity of that election must necessarily be compromised.

Appellants incredibly assert that “Defendants will suffer no harm by being ordered to implement the machines.”<sup>9</sup> In addition to being forced to irrevocably spend nearly \$700,000 of state funding that might instead go to certified equipment that better meets the needs of *all* Volusia County voters (such as accessible machines that produce voter-verified paper trails), Appellants’ requested relief will require the County to cut corners on machine programming, abbreviate pollworker training, and limit public information about this eleventh hour equipment change. Nothing could be more irresponsible.

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<sup>8</sup> [DE7-1, p4]; [DE7-2, Exh. C.]

<sup>9</sup> Appellants’ Brief at p.29.



### **III. The Electronic Voting Machines At Issue In This Case Have A History of Malfunctioning**

Every voting system used in Florida during and since the 2000 presidential election, electronic or not, was certified by the state. Nevertheless, serious problems have arisen across the board implicating the accuracy of vote tallies and the ability of election officials to detect or prevent errors and manipulation. As this Court is intimately aware, a breakdown of certified election equipment and associated procedures in the 2000 presidential election led to perhaps the most serious electoral crisis in this country's history. Never has the need for demonstrably accurate and truly auditable election technology been more obvious.

DRE voting systems – including the Diebold machines identified in this case – have been aggressively marketed and sold to Florida counties and other jurisdictions across the nation as superior replacements for discredited punch card voting machines and other voting systems. While such machines show promise in eliminating some of the problems created by punch cards, serious problems have arisen in connection with DRE voting systems used in Florida elections as well as elections nationwide. Across the country, election officials and voters alike have discovered that this type of DRE introduces a broad range of problems and subjects elections to substantial risk of error through machine malfunctions, mistakes, or negligence in the operation of these machines by electoral officials. They also create risks of intentional mischief by malicious persons.

Examples of recent touchscreen voting system malfunctions include the following:

**Broward County, Florida (March 2005)**

ES&S touchscreen machines omitted one of the two items that should have appeared on the ballots for 13-14% of voters.<sup>10</sup>

**Miami-Dade County, Florida (March 2005)**

On a one-item ballot, computer errors caused almost 500 votes to be recorded as completely blank – that is, thrown out – because voters failed to press the red “VOTE” button. The machines were supposed to count such votes anyway, but the defective software didn’t save the votes. The same software was used in five other municipal elections in the previous year, casting the results of those elections into doubt.<sup>11</sup>

**Miami-Dade County, Florida (November 2004)**

Evidence shows both phantom votes and lost votes in the November election. The number of voters reported by election workers didn’t match the number of ballots cast in 260 (35%) of Miami-Dade’s 749 polling places. Some showed more votes than voters (“phantom votes”); others showed significantly more voters than ballots cast. While some of the discrepancies can be traced to sloppy procedures and training, others are evidence of problems not yet explained. A volunteer observer who was at a polling place on Nov. 2, said in an interview that as a poll worker was closing down one of the iVotronic machines at the end of the day, an error message popped up on the machine’s digital screen saying: “Internal malfunction/unit closed to save date/vote data corrupted.”<sup>12</sup>

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<sup>10</sup> Ellen H. Brodsky, *First “Grass Roots” Parallel Election Project*, March 8, 2004, at <http://www.ecotalk.org/FirstParellelElection.htm>.

<sup>11</sup> Tere Figueras Negrete and Noaki Schwartz, *Voting Glitches Found In 6 Recent Elections*, Miami Herald, March 31, 2005, at <http://www.miami.com/mld/miamiherald/news/11271837.htm>.

<sup>12</sup> Jessica M. Walker, *Elections Discrepancies Found in 35 Percent of Miami-Dade Precincts*, Daily Business Review, May 6, 2005, at [http://www.dailybusinessreview.com/news.html?news\\_id=34733](http://www.dailybusinessreview.com/news.html?news_id=34733)

### **Montgomery County, Maryland (November 2004)**

A post-election report produced by the Montgomery County Board of Elections revealed widespread problems with Diebold equipment on election day. 180 voting units (7% of the total) failed on election day, while an additional 122 units were found to be suspect based on the number of votes captured. Of the 180 units that failed, 106 units experienced screen freezes, generally when voters attempted to cast their ballots, leading to great confusion on the part of judges and voters who had little confidence that their votes were counted.<sup>13</sup>

### **Mahoning County, Ohio (November 2004)**

Twenty to thirty voting machines were recording votes for one candidate as votes for another. The machines had to be recalibrated in the middle of the election. Another twelve machines froze during voting and had to be reset.<sup>14</sup>

### **Snohomish County, Washington (November 2004)**

Voters in at least four polling precincts in Snohomish County said that they encountered problems with the Sequoia electronic voting machines. When they touched the screen to vote for a candidate, an indicator showed they had selected the opposing candidate. In some instances, it took at least four attempts before the indicator showed the correct candidate.<sup>15</sup>

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(subscription only); Noaki Schwartz, *Discrepancies Found in Votes, Signatures*, Miami Herald, May 7, 2005, at <http://www.miami.com/mld/miamiherald/news/local/11586356.htm?template=contentModules/printstory.jsp>

<sup>13</sup> IT Report to the Montgomery County Election Board, *2004 Presidential Election General Review*, at

[http://www.truevotemd.org/Resources/Lessons\\_Learned.pdf](http://www.truevotemd.org/Resources/Lessons_Learned.pdf).

<sup>14</sup> Vindicator, *Errors plague voting process in Ohio, PA.*, November 3, 2004, at <http://www.vindy.com/basic/news/281829446390855.php>.

<sup>15</sup> King5 News, *Scattered Reports of Voters Being Blocked and Machine Malfunctions*, November 2, 2004, at [http://www.king5.com/topstories/stories/NW\\_110204ELBelectronicvotingproblemsLJ.1aac5fda.html](http://www.king5.com/topstories/stories/NW_110204ELBelectronicvotingproblemsLJ.1aac5fda.html).

### **New Orleans Parish, Louisiana (November 2004)**

In Louisiana, state election officials received about 200 complaints of problems with machines, including two confirmed reports of Sequoia AVC Advantage machines in New Orleans Parish that were not working, according to Scott Madere, press secretary for the Louisiana Secretary of State.<sup>16</sup>

### **Craven County, North Carolina (November 2004)**

Votes were counted twice for 9 out of 26 precincts in the county. A computer override was supposed to correct such a problem, but it failed. When the mistake was corrected, it changed the outcome for one of the races.<sup>17</sup>

### **Prince George County, Maryland (September 2004)**

The modem at the central facility malfunctioned, and voters in one precinct weren't able to vote the Democratic ticket on the paperless machines so they instead wrote their choices on a piece of paper.<sup>18</sup>

### **Sacramento, California (August 2004)**

During a demonstration for state senate staffers, the paper-trail-enabled electronic voting system failed to accurately record votes to its internal memory, an error that was only discovered by comparing the electronic data to the paper trail.<sup>19</sup>

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<sup>16</sup> Paul Roberts, *E-voting Problems Reported As Election Gets Under Way*, IDG News Service, November 2, 2004, at <http://www.itworld.com/Tech/2987/041102evoteprobs/>.

<sup>17</sup> Sue Book, *Election Problems Due To a Software Glitch*, Sun Journal, November 5, 2004, at

<http://www.newbernsj.com/SiteProcessor.cfm?Template=/GlobalTemplates/Details.cfm&StoryID=18297&Section=local>

<sup>18</sup> Ovetta Wiggins, *Johnson Aide Wins Democratic Primary*, Washington Post, September 15, 2005, at <http://www.washingtonpost.com/wp-dyn/articles/A22014-2004Sep14.html>.

<sup>19</sup> Kim Zetter, *Wrong Time For An E-vote Glitch*, Wired News, August 12, 2004, at <http://www.wired.com/news/evote/0,2645,64569,00.html>.

### **Morris County, New Jersey (June 2004)**

The Sequoia vote tabulating computer could not read the voting results data recording the votes cast on individual machines off of the removable memory cards that are used to transport the voting results data from individual DRE machines to the vote tabulating computer.<sup>20</sup>

### **Miami-Dade County, Florida (May 2004)**

An election official reported that the audit log from an ES&S iVotronic machine failed to show 162 ballots cast on five different machines in the election. Although the manufacturer asserts that the votes were accurately tabulated, this is questionable given the conflicting audit data.<sup>21</sup>

### **San Diego County, California (March 2004)**

Poll workers saw unfamiliar Windows screens, frozen screens, strange messages, and login boxes, none of which they'd been trained to expect. A report released by Diebold Election Systems shows that 163 of 763 devices known as voter-card encoders failed on election day because of hardware or software problems or both, with only a minority of problems attributable to poll worker training.<sup>22</sup> At another polling place, ten votes were inexplicably lost, with the Diebold technician who was there able to offer no explanation.<sup>23</sup>

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<sup>20</sup> *Montville and Chatham Mayors Ousted*, New Jersey Star-Ledger, June 9, 2004.

<sup>21</sup> Matthew Haggman, *New Questions Arise About Touch-Screen Voting Machines*, Miami Daily Business Review, May 27, 2004, at <http://nylaywer.com/news/04/05/052704i.html>.

<sup>22</sup> Ian Hoffman, *Diebold Reports Multiple Problems: Registrar Wants Reason for E-voting*, Tri-Valley Herald, April 13, 2004, archive at <http://www.votersunite.org/article.asp?id=2390>.

<sup>23</sup> Jeff McDonald and Luis Monteagudo Jr., *Poll Workers, Voters Cite Tied-Up Hotline, Poor Training, Confusion*, Union Tribune, March 7, 2004, at <http://www.signonsandiego.com/news/politics/20040307-999-1n7vote.html>.

### **San Bernardino County, California (March 2004)**

In San Bernardino County, officials waited three hours for their new Sequoia vote tabulating computer to process the results from individual Sequoia DRE voting machines before resorting to shutting down the computer and starting over.<sup>24</sup>

### **Broward Counties, Florida (January 2004)**

In a special election for the State House District 91 seat, with only one item on the ballot, ES&S electronic voting machines showed a total of 134 undervotes – that is, 134 ballots in which voters did not select a candidate even though it was a single-race election. The winner, Ellyn Bogdanoff, received 12 more votes than the runner-up.<sup>25</sup>

### **Boone County, Indiana (November 2003)**

Electronic vote-tabulation equipment by vendor Microvote reported that 140,000 votes had been cast in a county of 50,000 residents. Only 19,000 of those residents were registered to vote and only 5,352 voted. The tabulation machine had not been initialized and it was set to give excessive numbers to call attention to the error. The county clerk said it was obvious the numbers were wrong since the county is small, but she wondered<sup>26</sup> if the error would have been noticed in a large county.

### **Fairfax County, Virginia (November 2003)**

Some voters using Advanced Voting Solutions DREs watched as the ‘X’ they put beside the name of Republican School Board Member, Rita Thompson, dimmed out and moved to her

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<sup>24</sup> Elise Ackerman, *Election Officials Report Some E-Voting Glitches*, San Jose Mercury News, March 4, 2004 at [http://www.mercurynews.com/mld/mercurynews/news/special\\_packages/election2004/8103056.htm](http://www.mercurynews.com/mld/mercurynews/news/special_packages/election2004/8103056.htm).

<sup>25</sup> Jeremy Milarsky and Lisa J. Huriash, *Electronic Vote Recount Stumps Broward Officials*, Sun-Sentinel, January 10, 2004.

<sup>26</sup> Grant Gross, *Voting Machine Glitch Shows Thousands of Extra Votes*, IDG News Service, November 13, 2003, at <http://www.itworld.com/Tech/2987/031113votingglitch/>.

Democratic opponent. Ms. Thompson complained and one machine was tested. Surprised officials watched as the machine subtracted approximately 1 out of 100 votes for Ms. Thompson.<sup>27</sup>

### **Johnson County, Kansas (April 2003)**

In the April 2002 municipal elections, results were misreported in six races. The system miscounted hundreds of votes, and a recount was ordered. Diebold investigated the problem and said in a news released issued at the time that a software error had led to the election night problem.<sup>28</sup>

### **Bernalillo County, New Mexico (November 2002)**

Insufficient memory capacity for the software used to tabulate the votes caused about 25% of the votes not to be counted in the initial tally. Although about 48,000 people voted on 212 DREs, the initial tally given to the commissioners indicated that no race—not even for governor—showed a total of more than about 36,000 votes. Apparently, the software used to report votes had a capacity of only 64 kilobytes of data at a time.<sup>29</sup>

### **Hillsborough County, Florida (April 2002)**

The voting results data recording the votes cast on individual machines could not be read off of the removable memory cards that are used to transport the voting results data from individual Sequoia DRE machines to the vote-tabulating computer.<sup>30</sup>

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<sup>27</sup> Cho, *Fairfax Judge Orders Logs Of Voting Machines Inspected*, Washington Post, November 6, 2003, at B01, at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A6291-2003Nov5&notFound=true>.

<sup>28</sup> Finn Bullers, *New Voting Technology is Questioned: Computer Systems Can Be Tampered With, Critics Say*, September 1, 2003, The Kansas City Star, at <http://kansascity.com/mld/kansascity/news/6821316.htm>.

<sup>29</sup> Frank Zoretich, *Election Results Certified After Software Blamed*, Albuquerque Tribune, November 19, 2002, at [http://www.abqtrib.com/archives/news02/111902\\_news\\_vote.shtml](http://www.abqtrib.com/archives/news02/111902_news_vote.shtml).

<sup>30</sup> *Officials Still Searching For Election Glitch*, St. Petersburg Times, April 6, 2002, at

### **Palm Beach County, Florida (March 2002)**

In a voting precinct using Sequoia AVC Edge voting machines, Councilman Al Paglia lost by 4 votes on a one-race ballot, but 78 ballots registered as blank. Voters also reported erratic behavior of the touch screens.<sup>31</sup>

### **Riverside County, California (November 2000)**

During the 2000 presidential election, a Sequoia vote tabulating computer began dropping votes cast on Sequoia DRE voting machines from the official vote tally.<sup>32</sup>

The notion that because Florida has issued minimum standards required for election equipment used within the state then this automatically “means that [touchscreen voting machines] are accurate and reliable”<sup>33</sup> is ludicrous. Volusia County, having experienced firsthand suspect election results and malfunctioning certified technology, continues to explore equipment options that would promote accessibility as well as ensure as best possible the accuracy and integrity of the ballot of every voter. Attempting to *exceed* the low equipment integrity bar set by the state and by HAVA is cause for applause, not condemnation.

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[http://www.sptimes.com/2002/04/06/Hillsborough/Officials\\_still\\_searc.shtml](http://www.sptimes.com/2002/04/06/Hillsborough/Officials_still_searc.shtml)

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<sup>31</sup> Wyatt Olson, *Out of Touch: You Press the Screen. The Cachine Tells You That Your Vote Has Been Counted. But How Can You Be Sure?* New Times, April 24, 2003, at <http://www.newtimesbpb.com/issues/2003-04-24/feature.html/1/index.html>

<sup>32</sup> Elise Ackerman, *Electronic Voting's Hidden Perils*, San Jose Mercury News February 1, 2004, at [http://www.mercurynews.com/mld/mercurynews/news/special\\_packages/election2004/7849090.htm](http://www.mercurynews.com/mld/mercurynews/news/special_packages/election2004/7849090.htm).

<sup>33</sup> Brief of Amicus Curiae American Association of People With Disabilities in Support of Appellants at p.15. *See also* Appellants' Brief at p.8, 29.



## **CONCLUSION**

Appellants waited until the last possible minute to rush a decision for injunctive relief that could have serious negative consequences for voters across Volusia County. Nothing prevented them from bringing an ADA challenge months or even years before they did, yet they chose to wait until an election was imminent in order to assert that time was of the essence. Appellants could have chosen to work with the County towards finding solutions that mutually promote both accessibility and auditability, values embraced by advocates and voters across the political spectrum. Instead, Appellants have emerged willing to sacrifice election integrity and redirect nearly \$700,000 of County funds, all to move up the accessibility deadline by less than two months.

Thankfully, Volusia County understands that the choice of voting technology does not represent a zero-sum proposition. Instead, viable options exist (such as ballot marking systems) that would protect both interests and the larger interests of the voting public. Even if a certified system is not available by the end of the year, the County should be encouraged to continue its deliberative process until that fact becomes clear, not attacked for exploring all of its options.

Amici respectfully requests that this honorable Court affirm the decision of the District Court.

Dated: September 13, 2005

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,519 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 version 9 in Times New Roman, 14-point font.

Dated: September 13, 2005

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 13<sup>th</sup> day of September, 2005, the undersigned served two (2) true and correct copies of the foregoing AMICI CURIAE BRIEF OF ELECTRONIC FRONTIER FOUNDATION, HANDICAPPED ADULTS OF VOLUSIA COUNTY, VERIFIEDVOTING.ORG, COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY, AND VOTERS UNITE! IN SUPPORT OF APPELLEES AND AFFIRMANCE on the interested parties in said cause by Federal Express, to the persons at the addresses set forth below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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