Case No. 05-13990-B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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 MAN,

Plaintiffs/Appellants,

v.

VOLUSIA COUNTY and ANN MCFALL,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION
NO. 6:05-CV-997-ORL-28-DAB

APPELLANTS' BRIEF

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Dated: August 12, 2005

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for Plaintiffs-Appellants certify that the following is a full and complete list of all trial judges, attorneys, persons, associations, firms, partnerships or corporations (including those related to a party as a subsidiary, conglomerate, affiliate, or parent corporation) having either a financial or other interest that could be affected by the outcome of this particular case:

Akerman Senterfitt, Counsel for Defendants-Appellees

Antoon, John II, United States District Court Judge

Baker, David A., United States Magistrate Judge

Brown, Goldstein & Levy, LLP, Counsel for Plaintiffs-Appellants

Buckins, Chad, Plaintiff-Appellant

Cerullo, Peter, Plaintiff-Appellant

Davis, Katheryn, Plaintiff-Appellant

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Mann, Ryan, Plaintiff-Appellant

McFall, Ann, Defendant-Appellant

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National Federation of the Blind of Florida, Plaintiff-Appellant

Rodriguez, Diego “Woody”, Counsel for Defendant-Appellant

Schreiber, Martin H. II, Counsel for Plaintiffs-Appellants

Townsend, John David, Plaintiff-Appellant

Volusia County, Defendant-Appellee

Young, David, Counsel for Defendant Appellant

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument to aid this Court in its consideration of this appeal. Counties throughout the State of Florida now are in the process of updating their voting machines to comply with a new state law requiring voting systems to be handicap accessible. But some county officials are resisting the updates because they want to be able to continue having hand re-counts of paper ballots. Oral argument will assist the Court in analyzing the interplay between the new Florida voting machine statute, the Americans with Disabilities Act, and the desire of some county officials not to update their voting machines. Because the next election in Volusia County is scheduled for October 11, 2005, this case needs to be decided promptly, and oral argument will help the Court render a prompt decision. On July 25, 2005, the Court ordered that this appeal be expedited and directed the Clerk to "expedite submission of this appeal for consideration by the next available oral argument panel."

TABLE OF CONTENTS

Note: This Brief uses the following designations:

- References to the Record Excerpt are [RE *] (* = page number).
- References to Transcript are [TR *] (* = page number).

TABLE OF AUTHORITIES

Cases **Page**

Page

Page

Session Laws

Federal Statutes and Regulations

State Statutes

Page

Other

STATEMENT OF JURISDICTION

This is an interlocutory appeal from the denial of a preliminary injunction by the United States District Court for the Middle District of Florida on July 21, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). Plaintiffs timely filed a notice of appeal on July 21, 2005.

The district court had jurisdiction based on 28 U.S.C. §§ 1331 (federal question) and 1343 (civil rights).

STATEMENT OF THE ISSUES

1. Did the District Court erroneously conclude that the Plaintiffs are not substantially likely to prevail on their claim under the Americans with Disabilities Act that the Defendant has discriminated against them in the operation of its voting program?

2. Did the District Court erroneously conclude that the Plaintiffs are not substantially likely to prevail on their claim the County violated Florida law when it refused to acquire handicap accessible voting machines?

3. Are the Plaintiffs entitled to a preliminary injunction directing the County to deploy accessible voting machines in each precinct at the next election, considering that (1) Plaintiffs are likely to prevail on the merits of their claim, (2) Plaintiffs would suffer irreparable harm if no injunction were to issue, (3) the

County already has received a grant to pay for handicap accessible voting machines, and (4) vindication of the rights protected by the ADA and Florida law is in the public interest?

STATEMENT OF THE CASE

After the Volusia County Council violated the Americans with Disabilities Act, the Rehabilitation Act and Section 101.56062(2) of the Florida Statutes by refusing to purchase voting machines that enable the blind to vote independently, blind voters in Volusia County, Florida and groups that advocate for the blind brought this action to require the County to do so. The trial court erroneously concluded that Plaintiffs had not shown a substantial likelihood of prevailing on the merits and denied the motion for preliminary injunction. This appeal followed.

I. Procedural History

On July 5, 2005, five blind Volusia County voters and two organizations that advocate for the blind filed this suit in the U.S. District Court for the Middle District of Florida. The Complaint alleged that Volusia County and its Supervisor of Elections, Ann McFall, violated Title II of the Americans with Disabilities Act ("ADA"), the Rehabilitation Act, and Section 101.56062(2), Florida Statutes by refusing to acquire accessible voting machines that blind people can use

independently.[1] The Plaintiffs also moved for a preliminary injunction ordering Volusia County and the Supervisor of Elections to acquire accessible voting machines in time for the next election.[2]

On July 13, 2005, the County opposed the motion for preliminary injunction.[3] Relying on the affidavit of County Council Chairman Frank Bruno, the County said it wanted to preserve its ability to conduct hand re-counts of paper ballots.[4] The County would not be able to perform hand re-counts of paper ballots if it purchased handicap accessible voting machines certified for use in the State of Florida, because Florida has not certified any accessible machines that generate contemporaneous paper ballots.[5]

The Supervisor of Elections disagreed with the County. She filed an Answer admitting that 101.56062(2) of the Florida Statutes required the County to purchase the handicap accessible voting machines, and asking the district court to grant the injunction and order the County to acquire the machines.[6] The County then moved to strike all papers filed by the Supervisor of Elections,[7] and the

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[1] RE-11.
[2] RE-23.
[3] RE-145.
[4] RE-182, ¶ 3.
[5] *Id.*, ¶¶ 3, 4; RE-143.
[6] RE-177-78.
[7] RE-221.

district court granted the County's motion to strike,[8] except as to the declaration of the chief of Florida's Bureau of Voting Systems Certification.[9]

On July 15, 2005, the district court heard oral argument on the motion for preliminary injunction but did not take any testimony.[10] The evidentiary record consisted solely of the affidavits and exhibits that the parties filed before the hearing.[11] Because Plaintiffs did not submit evidence showing the funding required for a Rehabilitation Act claim, Plaintiffs pressed their request for preliminary injunctive relief only under the ADA and Florida law.[12]

On July 21, 2005 the district court denied the motion for preliminary injunction.[13] It held that the Plaintiffs failed to show a substantial likelihood of prevailing on their ADA claim because the "state of the law" is unsettled as to whether the ADA requires handicap accessible voting machines.[14] The district court also concluded that the Florida Election Code authorizes, but does not require accessible voting machines at each precinct. Thus, the district court concluded, the

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[8] RE-227; RE-257.
[9] TR 31-34; RE-197.
[10] RE-48, ¶ 4.
[11] During oral argument, the district court admitted into evidence the affidavits and exhibits filed by the Supervisor of Elections, even though the district court had stricken her pleadings.
[12] TR 10.
[13] RE-232.
[14] *Id.* at 5, RE-236.

Plaintiffs were not likely to prevail on their claim that Volusia County was obligated by Florida law to provide handicap accessible electronic voting machines.[15]

On July 21, 2005, the same day the district court denied their motion for preliminary injunction, the Plaintiffs filed a notice of appeal in the district court,[16] followed by an Emergency Motion for Preliminary Injunction in this Court on the grounds that time was running out for the County to acquire handicap accessible voting machines in time for the next election.

On July 25, 2005, this Court denied the emergency motion but expedited this appeal by shortening the briefing deadlines and ordering oral argument before the next available panel.

II. Statement of Facts

In 1995, Volusia County installed and began using the "Accu-Vote" optical scan voting system for all elections.[17] This system requires voters to read and mark a printed paper ballot.[18] Because they cannot see the paper ballots, blind citizens in Volusia County have been unable to vote independently and secretly; instead,

[15] *Id.*
[16] RE-238.
[17] RE-130, ¶ 4.
[18] *Id.*

third-parties read the ballots to them, and blind voters, in turn, reveal their voting selections to third-parties and rely on those third-parties to cast their votes.[19]

In April 2002, the Volusia County Supervisor of Elections — at that time, Ms. Deanie Lowe[20] — recommended that the County purchase an electronic "touchscreen" voting machine for each Volusia County precinct to supplement the County's existing voting system.[21] These machines, which resemble automatic teller machines, have a headphone jack that can audibly tell blind voters all the information on the ballot and provide a keypad for blind voters to make their selections secretly and independently.[22] The County, however, did not follow Ms. Lowe's recommendation.

Also, in 2002, the Florida Election Code was amended to establish a requirement of "at least one accessible [voting machine] at each precinct."[23] Counties were not required, however, to comply with this requirement immediately. Instead, this portion of the code would become effective one year

[19] RE-126, ¶ 4.
[20] RE-129, ¶ 3.
[21] RE-130, ¶ 5.
[22] *Id.*; RE-54, ¶ 6.
[23] Fla. Stat. § 101.56062(2). *See* Addendum.

after the Florida legislature appropriated funds for counties to purchase the accessible voting machines.[24]

On July 1, 2004, the Florida Legislature appropriated funds for counties to acquire the accessible voting machines required by the new law, [25] and the State afforded Volusia County a $699,884 grant to purchase the machines. [26] If Volusia County does not use the grant to buy accessible voting machines, it will have to refund the money to the State.[27]

By virtue of the previous year's appropriation, on July 1, 2005, the new requirement in Section 101.56062(2) – that there be at least one accessible voting machine at each polling place – became effective.

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[24] A footnote to § 101.56062, Fla. Stat. explains:

> Section 12, ch. 2002-281 created § 101.56062, effective, pursuant to § 22, ch. 2002-281, "one year after the legislature adopts the general appropriations act specifically appropriating to the Department of State, for distribution to Counties, $8.7 million or such other amounts as it determines and appropriates for the specific purposes of funding this act." Line item 2871I of the 2004-2005 General Appropriations Act appropriates $11.6 million for distribution to the counties for one disability compliant machine per polling place. For purposes of the effect of ch. 2002-281, 1 year after adoption of this appropriation would be July 1, 2005.

Fla. Stat. § 101.56062 n.1.

[25] *Id.*; RE-58
[26] RE-55, ¶ 10; RE-130, ¶ 6.
[27] RE-130, ¶ 6.

To comply with Section 101.56062(2), on June 29, 2005, the Volusia County Council held a special session to consider a contract to purchase 210 handicap

accessible touchscreen voting machines manufactured by Diebold Election Systems, Inc.[28] The Florida Secretary of State, after rigorous testing, had certified these machines for use in all Florida elections.[29] Nevertheless, some Council members were dissatisfied that the touchscreen machines did not contemporaneously generate a paper ballot that would be available for hand re-counts after the election.[30]

During the June 29, 2005, Council session, the County Attorney, Daniel Eckert, unequivocally advised the Council that they must approve the contract to purchase the machines or the County would be violating the law. He told the Council, on the record:

> Your policy is not to set federal law. You're not the Congress . . . . You're not the Legislature. The Legislature has determined the course for the law here. The Council's role is not to establish the voting standards for the State of Florida. It is to provide for the electors certified systems and to comply with the law as it is written. . . . [B]ecause I believe that you are controlled by the law, I will say to you that this is the only policy, the only legal option that you have at

[28] RE-130, ¶ 7; RE-55, ¶ 12; RE-117.
[29] RE-130, ¶ 8; RE-141.
[30] RE-182, ¶ 3.

this point.[31]

Nonetheless, the County Council voted not to purchase the handicap accessible voting machines.[32]

The next day, Florida Attorney General Charlie Crist advised the Chair of the County Council that the County's refusal to purchase accessible voting machines for the upcoming election was illegal, explaining that

> Florida law requires counties to have at least one accessible voting device installed in each precinct for the first election after July 1, 2005.
>
> ***
>
> . . .While the county council is concerned about this voting system not recording the votes in a paper format, these concerns do not relieve the county council of its obligation under section 101.56062, Florida Statutes, to have a system in place that is accessible for voters with disabilities by the time of the first election after July 1, 2005.
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> While section 101.5602, Florida Statutes, does not itself prescribe a penalty for violation of its terms, the Florida Election Code contains [criminal] penalties for violations of its provisions. Moreover, interference with the ability of a voter with a disability to exercise his or her right to vote unassisted could subject the county to liability for a civil rights violation under state law.[33]

The next election in Volusia County – for municipal offices – is scheduled to take place on October 11, 2005.[34]

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[31] RE-55-56, ¶ 13.
[32] RE-182, ¶ 3.
[33] RE-143-144 (footnotes omitted).
[34] RE-56, ¶ 14.

STATEMENT OF THE STANDARD OF REVIEW

Ordinarily, an appellate court reviewing the grant or denial of a preliminary injunction considers whether the trial judge abused his discretion. However, that is not the case if the lower court's decision turns on an erroneous interpretation of law. Then, review is plenary and the appellate court considers the matter de novo.[35] And where, as here, the trial judge made fact determinations solely on affidavits, with no live record, the appellate court is in as good a position to decide factual matter as the trial court.[36] Indeed, when the further passage of time may moot the requested relief, the appellate court may do more than vacate and remand for further proceedings, it may direct the district court to grant the injunction.[37]

Because the factual record here consists of affidavits, because the trial judge made an error of law in determining Plaintiffs' likelihood of ultimate success on the merits, and because time is running out before the occurrence of the next election in Volusia County, this Court has the duty to determine de novo whether

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[35] *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1246 (11th Cir. 2002); *Tepper v. Miller*, 82 F.3d 989, 993 (11th Cir. 1996); *Tally-Ho, Inc. v. Coast Comty. Coll. Dist.*, 889 F.2d 1018 (11th Cir. 1990).

[36] *Jack Kahn Music Co., Inc. v. Baldwin Piano & Organ Co.*, 604 F.2d 755, 758 (2d Cir. 1979); *see Phila. Marine Trade Ass'n*, 909 F.2d 754, 756 (2d Cir. 1990) (holding that review is broader where facts are conceded).

[37] *See Tally-Ho, Inc.*, 889 F.2d at 1029 (reversing district court's denial of preliminary injunction and remanding with instructions to enter the same); *see also Southeastern Promotions, Ltd. v. City of Mobile*, 457 F.2d 340, 341 (5th Cir. 1972).

Plaintiffs have sufficiently demonstrated their right to injunctive relief and, if so, to direct the district court to issue the appropriate order.

SUMMARY OF THE ARGUMENT

This case arises from the refusal of a governmental entity to comply with federal and state dictates prohibiting discrimination against disabled persons because of its concerns about the features of available voting machines. Although the Americans with Disabilities Act and Florida law require Volusia County to make accessible voting machines available to its blind voters so that they may vote on the same terms as sighted voters, that is, without the additional burdens of third-party assistance and disclosing ballot decisions, the County determined to delay the acquisition of accessible voting machines because it desired a feature, the generation of a contemporaneous paper record, that was not available on the machines certified by the state. Neither Congress nor the Florida Legislature have required such a feature as a requirement for certification of voting machines.

To be entitled to a preliminary injunction regarding the installation of accessible voting machines, Plaintiffs had the burden of showing that they were substantially likely to prevail on the merits of their claim at trial, that they were irreparably injured, that their injury outweighed any harm to the Defendants and that the injunction was in the public interest. In denying the injunction, the trial court considered only the first issue. The district court's conclusion that Plaintiffs

had failed to show that they were substantially likely to prevail on the merits of their ADA claim stemmed from its mistaken belief that when the state of the law is unsettled, federal courts may not issue preliminary injunctive relief. When Title II of the ADA is applied to the facts of this case, it is apparent that Plaintiffs are substantially likely to prevail on the merits under the general discrimination prohibition of the ADA, the new construction and alteration of existing facilities provisions of the title's implementing regulations, and even under the existing facilities provision of those regulations.

The district court erred in determining that Plaintiffs were not substantially likely to prevail on their claim under Florida law, because the district court mistakenly believed that a 1973 provision of the Florida Election Code somehow limited the scope of Section 101.56062, Florida Statutes, which was enacted in 2002. In fact, the newer law guarantees all disabled Florida voters the right to cast a secret, independent and verifiable ballot at all elections held after July 1, 2005.

Although the trial court did not to consider the remaining factors determining whether a preliminary injunction should issue, this Court can and should decide these matters. The record before the trial court was exclusively a paper record, and the remaining factors are in this instance more questions of law than fact. Burdens on voting have been held to be irreparable injury, as are

violations of statutory rights. Injury to the County from the grant of an injunction would be negligible: the record demonstrates that the County has received a State grant to acquire the machines without cost. Finally, the vindication of rights guaranteed by a federal statute is in the public interest. Because an election is upcoming, and because the Circuit Court has a record from which it may resolve this matter, this Court should vacate the decision of the trial court, and remand with instructions to enter a preliminary injunction requiring Volusia County to deploy at least one accessible voting machine at each precinct for its next election.

ARGUMENT

I. THE DISTRICT COURT INCORRECTLY CONCLUDED THAT THE PLAINTIFFS WERE NOT SUBSTANTIALLY LIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIMS.

A. The District Court incorrectly concluded that Plaintiffs were not substantially likely to prevail under the Americans with Disabilities Act.

1. The district court applied the wrong legal standard in holding that the plaintiffs were not likely to prevail on their Americans with Disabilities Act claim.

To secure a preliminary injunction, a movant must show that (1) it is likely to prevail on the merits; (2) absent the injunction, the plaintiff will suffer irreparable injury; (3) the irreparable injury will outweigh any harm to the

defendant flowing from the grant of the injunction and (4) the injunction serves the public interest.[38]

The district court addressed only the first factor. It believed that although another judge in the same district had held that a neighboring county's failure to provide accessible voting machines violated Title II of the ADA,[39]the existence of seemingly contrary holdings elsewhere[40] prevented it from concluding "that the state of the law is such that there is a substantial likelihood that Plaintiffs will prevail in their action under the ADA."[41] Because the court expressed no view as to the correctness of any of the prior decisions, it appeared to conclude that a preliminary injunction may not issue when the law is unsettled or where there are conflicts among the persuasive authority. Such a bright-line rule, however, would sharply and improperly curtail preliminary injunctive relief.[42]

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[38] *Univ. of Texas v. Camenisch*, 451 U.S. 390, 392, 101 S.Ct. 1830, 1832 (1981).
[39] *Am. Ass'n of People with Disabilities v. Hood*, 310 F. Supp. 2d 1226, 1241 (M.D. Fla. 2004).
[40] *Nelson v. Miller*, 170 F.3d 641 (6th Cir. 1999); *Am. Ass'n of People with Disabilities v. Shelley*, 324 F. Supp. 2d 1120 (C.D. Cal. 2004).
[41] RE-236.
[42] 11A Charles Allen Wright, Arthur A. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.3 (2d. 1995) ("Limiting the preliminary injunction to cases that do not present significant difficulties would deprive the remedy of much of its utility.").

Plaintiffs have the burden of persuasion to show that they have a substantial likelihood of prevailing on appeal.[43] To meet that standard "[a]ll courts agree that plaintiff must present a prima facie case but need not show that he is certain to win."[44] And, because the "most compelling reason in favor of (granting a preliminary injunction) is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act,"[45] the stronger the plaintiffs' arguments with respect to the balance of harms and the public interest, the lower the standard they must meet with respect to the likelihood of prevailing on the merits.[46] As demonstrated below, Plaintiffs are indeed substantially likely to prevail on the merits of their claim under the Americans with Disabilities Act ("ADA").

2. Plaintiffs are substantially likely to prevail under the ADA.

Title II of the ADA treats as discrimination the unequal treatment of disabled persons because of their disabilities in the administration of governmental services,

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[43] *Canal Auth. v. Fla.*, 489 F.2d 567, 572 (5th Cir. 1974) (adopted by the 11th Circuit as precedent); *Ne. Fla. Chapter v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990).

[44] Wright, *et al., supra*, § 2948.3 (footnotes omitted); *Univ. of Tex.*, 451 U.S. at 394, 101 S.Ct. at 1833-34.

[45] *Canal Auth.*, 489 F.2d. at 573.

[46] *Id.* at 576; *cf. Garcia-Mir v. Meese*, 781 F. 2d 1450, 1453 (11th Cir. 1986) (holding that when the balance of harms and public interest weigh in favor of the appellant, a lesser showing of substantial likelihood of prevailing on appeal is

programs and activities.[47] One of the activities that the ADA addresses is voting.[48] Indeed, the ADA's statement of findings singled out "voting" as a "critical area" in which "discrimination against individuals exist."[49] As a result, nearly all courts that have addressed the issue have held that a public entity's failure to provide accessible voting machines states a claim under Title II of the ADA.[50]

Volusia County's refusal to provide voting machines that are readily accessible to the blind violates the general discrimination prohibition of Title II, which prohibits a public entity from discriminating in the provision of services, programs and activities.[51] To prevail on such a claim, Plaintiffs must establish that (1) they are qualified individuals with disabilities (2) who are discriminated against by Volusia County in connection with voting conducted by that county, (3) by

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required to grant stay).

[47] 42 U.S.C. § 12132.

[48] *Tenn. v. Lane*, 541 U.S. 509, 524, 124 S.Ct. 1978, 1989 (2004); *Am. Assoc. of People with Disabilities v. Hood*, 278 F. Supp. 2d 1345, 1356 (M.D. Fla. 2003).

[49] 42 U.S.C. § 12101(a)(3).

[50] *Westchester On the Move, Inc. v. County of Westchester*, 346 F. Supp. 2d 473 (S.D.N.Y. 2004); *Am. Assoc. of People with Disabilities v. Hood*, 310 F. Supp. 2d 1226, 1241-42 (M.D. Fla.), *appeal docketed*, No. 04-115666 (11th Cir. Apr. 20, 2004); *Troiano v. LePore*, No. 03-80097-Civ-Middlebrooks/Johnson, slip op. at 8-10 (S.D. Fla. May 1, 2003); *Nat'l Org. on Disability v. Tartaglione*, 2001 WL 1231717 (E.D. Pa. Oct. 11, 2001); *Lightbourn v. County of El Paso*, 904 F. Supp. 1429 (W.D. Tex. 1995), *rev'd on other grounds*, 118 F.3d 421 (5th Cir. 1997); *but see, Nelson v. Miller*, 170 F.3d 641 (6th Cir. 1999); *Am. Assoc. of People with Disabilities v. Shelley*, 324 F. Supp. 2d 1120 (C.D. Cal. 2004).

[51] 42 U.S.C. § 12132.

reason of their disabilities.[52] The record establishes that (1) they are blind; hence, they are qualified individuals with disabilities, (2) that sighted voters in Volusia County are afforded the opportunity to vote secretly and independently and without third-party involvement, and (3) because of their blindness, they are denied the right to do the same.[53]

That blind voters can vote in Volusia County with third-party assistance does not satisfy Volusia County's obligations under the general discrimination prohibition. A public entity must make its activities "readily accessible."[54] Unlike sighted voters in Volusia County, the burden on the blind in Volusia County who wish to vote is substantial. Each individual Plaintiff must (1) depend on a third party to read the ballot accurately, (2) disclose her selections to a third party and then (3) depend on that third party to record those selections accurately and cast her ballot.[55] In this instance, the solution is readily at hand, accessible machines have been certified by the State of Florida for use and the legislature has

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[52] *Nat'l Org. on Disability*, 2001 WL 1231717 at *8; *see Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001) (setting forth the elements of a claim under 42 U.S.C. § 12132).

[53] *See* Statement of Facts, *supra* at 5-6.

[54] 28 C.F.R. § 35.150; *see Shotz*, 256 F.3d at 1080 (explaining that Title II's requirement that a program be "readily accessible" is not satisfied where access is possible but heavily burdened); *Westchester Disabled On The Move, Inc.*, 346 F. Supp 2d. at 478 (holding that where polling places are physically inaccessible, absentee ballots are not an inadequate substitute).

appropriated funds with which to purchase such machines.[56] On these facts, Plaintiffs have demonstrated a substantial likelihood of prevailing on their claim that Volusia County has violated the general discrimination prohibition of Title II.

Plaintiffs are also likely to prevail under either the new facilities or altered facilities regulations promulgated pursuant to Title II, which apply to facilities constructed or altered after January 26, 1992.[57] In this instance, Volusia County acquired an optical scan voting system in 1995.[58] And voting equipment is a covered facility.[59] It is a nice question whether the voting equipment should be considered a new facility or an alteration of Volusia County's existing voting program. But Volusia County satisfies neither the stringent new construction requirement nor the alteration requirement. Considered as a new facility, Volusia County's voting equipment is simply required to be "readily accessible to and usable by individuals with disabilities."[60] Volusia County's current voting equipment is not. If, however, the current voting equipment is considered an alteration of the voting system made after January 26, 1992, then the facility must be altered "to the maximum extent feasible" so that the facility is readily accessible

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[55] RE-21, ¶ 4.
[56] RE-130, ¶¶ 6, 8; RE-141; 2004 Fla. Law 347.
[57] 28 C.F.R. § 35.151(a), (b).
[58] RE-130, ¶ 4.
[59] 28 C.F.R. § 35.104; *Hood*, 310 F. Supp. 2d at 1235.

to and usable by individuals with disabilities.[61] Making the voting machines accessible is both technologically feasible—such machines exist and have been certified by Florida's Secretary of State—and economically feasible—the Florida legislature has appropriated funds for their purchase.[62] As another court explained, "Plaintiffs are unable to vote using the [system] without third-party assistance. If it was feasible for [the county] to purchase a readily accessible system, then the Plaintiffs' rights under the ADA . . . were violated."[63]

Even if Volusia County's voting system were somehow considered an unaltered existing facility, Plaintiffs are nonetheless likely to prevail. Existing facilities must be made readily accessible to and usable by persons with disabilities when that goal is readily achievable.[64] Again, because the State has appropriated funds for the purchase of accessible machines and has certified accessible machines for use, accessibility is readily achievable. While Volusia County would have the opportunity to claim that accessible voting machines fundamentally alter

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[60] 28 C.F.R. § 35.151(a).
[61] 28 C.F.R. § 35.151(b).
[62] RE-130, ¶¶ 6, 8; RE-141; 2004 Fla. Laws 347.
[63] *Hood*, 310 F. Supp. 2d at 1235.
[64] 28 C.F.R. § 35.150.

voting or impose an administrative burden,[65] the present record shows no reasons why this might be so or any impediment to Plaintiffs prevailing on these issues.

The district court cited two cases it believed diminished Plaintiffs' likelihood of prevailing, *Nelson v. Miller*,[66] and *American Assoc. of People with Disabilities v. Shelley*.[67] Plaintiffs' claims in *Nelson* were quite different from those raised here. There, no claim was made under the ADA's generic proscription against discrimination under the requirements for new or altered facilities. Moreover, the theory of the *Nelson* plaintiffs was that there was a right to a secret vote guaranteed by the Michigan Constitution.[68] *Shelley* relied on a provision of the Department of Justice's Technical Assistance Manual explaining that Braille ballots are not required as evidence that blind persons are not entitled to vote in private when sighted people are afforded that opportunity.[69] In fact, the manual explains that a Brailled ballot is not required because "[a] Brailled ballot . . . would have to be counted separately and would be readily identifiable, and thus *would not*

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[65] *Id.*
[66] 170 F.3d 641 (6th Cir. 1999)
[67] 324 F. Supp. 2d 1120 (C.D. Cal. 2004).
[68] *Accord Troiano* at 12 (holding *Nelson* "readily distinguishable," because "the complaint in *Nelson* was single-issue in scope and narrowly aimed at plaintiffs' allegedly being denied access, because of their disability, to the so-called 'secret voting program' mandated by the Michigan Constitution").
[69] 324 F. Supp. 2d at 1126 n3.

resolve the problem of ballot secrecy."[70] And perhaps because the case arose against the background of California's Secretary of State having decertified the one available accessible voting machine, the *Shelley* court did not discuss the obligation of the defendant to make voting equipment accessible "to the maximum extent feasible."

Because Plaintiffs' ADA claim rests upon recognized theories of recovery and are well-grounded in the law, Plaintiffs are substantially likely to prevail on their ADA claim.

B. The District Court incorrectly concluded that plaintiffs were not substantially likely to prevail under Florida Law.

In 2002, the Florida Legislature enacted a voter accessibility bill that codified the recommendations of the Florida Secretary of the State's Select Task Force on Voting Accessibility.[71] The purpose of that bill was to "provide greater accessibility for disabled voters."[72] Thus, the Florida Election Code was amended to require, among other things, alternative formats for voter registration, polling places that were fully accessible to disabled voters, and, notably, voting machines that would be "fully accessible to all voters, regardless of ability or disability, so

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[70] Department of Justice, Title II Technical Assistance Manual, § 7.1100 (Supp. 1994) (emphasis supplied). *See* Addendum.
[71] House Committee on Rules, Ethics & Elections, 2002 Summary of Passed Legislation, at 15. *See* Addendum.
[72] *Id.*

that all voters may cast a secret, independent, and verifiable ballot."[73] To ensure that last requirement, the Florida Election Code was amended to require "at least one accessible voter interface device installed in each precinct."[74] A voter interface device is any device that communicates voting instructions and ballot information to a voter and allows the voter to select and vote for candidates and issues.[75]

To allow compliance with these provisions, the Legislature assigned various effective dates. Training programs to be conducted by county supervisors of elections for dealing with voters with disabilities became effective November 30, 2002,[76] while the requirement that all polling places in each county be physically accessible did not become effective until July 1, 2004.[77] The Florida Legislature determined, however, that one year after it had appropriated funds for the counties to purchase accessible voting machines, the requirement that each county have accessible voting machines at each precinct would become effective.[78] Pursuant to that determination, this requirement became effective July 1, 2005.[79]

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[73] *Id.*
[74] Fla. Stat. § 101.56062(2). *See* Addendum.
[75] Fla. Stat. § 97.021(36).
[76] 2002 Fla. Laws, ch. 2002-281, § 18.
[77] *Id.* at § 16.
[78] Fla. Stat. § 101.56062 n.1.
[79] *Id.*

Not only is the statute clear, but so is the legislative history. As the Senate Committee on Ethics and Elections explained: "The committee substitute ***requires*** each polling place to have at least one disability-friendly voting machine in each precinct . . . one year after a specific appropriation by the Legislature for that purpose."[80] Likewise, the House of Representatives explained the purpose of section 101.56062 as:

> providing standards for accessible voting systems; ***requiring any voting system to have one accessible voter interface device installed in each precinct***; authorizing the Department of State to adopt rules; providing legislative intent with respect to meeting or exceeding minimum federal requirements for voting systems and accessibility of polling places.[81]

Those charged with implementing and executing the laws have appropriately concluded that each county is obligated after July 1, 2000, to conduct elections with at least one accessible voting machine in each precinct. Volusia County's own attorney so advised his client just before the County Council failed to conform to the law.[82] Volusia County's Supervisor of Elections similarly advised the County Council that the law required accessible voting machines for the next

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[80] 2002 Summ. Major Legis. Passed 106 (Off. of the Sec'y, ed., 2002) (emphasis added). *See* Addendum.

[81] Journal H.R. 34th Reg. Sess., at 3124 (Fla. 2002)(emphasis added). The Senate's legislative history contains an identical statement. Journal Sen., 34th Reg. Sess., at 1640 (Fla. 2002).

election.[83] The next day, the Attorney General of Florida likewise explained to the Defendant that it was violating the law, raising the specter of criminal prosecution for the failure of County officials to acquire the machines.[84] Paul Craft, Chief of the Bureau of Voting Systems Certification of the Florida Department of State shares the same understanding of the law.[85] And recently, a panel of this Court noted that "[t]he City [of Jacksonville, Florida] has conceded that Florida law requires that at least one disabled-compliant voting machine be in each precinct for any election held after July 1, 2005."[86]

The district court, however, came to a different conclusion based on a strained interpretation of the statute that neither party had even proffered. Instead of referring to the statute at issue, Florida Statute Section 101.56062, the district court referred to Florida Statute Section 101.5602, the old "Purposes" section from the original 1973 enactment of Florida's Electronic Voting Systems Act ("EVSA"),

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[82] RE-55-56, ¶ 13.
[83] RE-56 at ¶ 14.
[84] RE-143-144.
[85] RE-198-199, ¶ 7. Mr. Craft refers in his declaration to certain municipal and mail ballot elections being excepted from the voting machine provision. Those exceptions have to do with municipal bond elections and have no relevance to this case. Fla. Stat. § 100.311.
[86] *Am. Ass'n of People with Disabilities v. Hood,* No. 04-1156-AA (11th Cir. Aug. 8, 2005) at p. 3. *See* Addendum.

which says that the EVSA "authorize[s] the use of electronic . . . voting systems."[87] From that, the district court reasoned that Section 101.56062 only applies if the County has purchased electronic voting machines.[88] Because the Judge mistakenly believed that Volusia County's optical scan system was not an electronic system, he declared the requirements of Section 101.56062 to be irrelevant.

The lower court's conclusion is wrong on several counts. First, the optical scan system used in Volusia County is an electronic system.[89] Thus, if the court were correct that Section 101.56062 applies only to counties with electronic systems, it is applicable. It may be that the court thought that only touchscreen systems, which Volusia County does not have, are electronic.

Second, the trial court appeared to believe that the section authorizing counties to acquire electronic voting systems was enacted so that Florida would comply with the Help America Vote Act of 2002 ("HAVA").[90] But the Florida

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[87] Fla. Stat. § 101.5602.
[88] RE-236.
[89] "'Electronic or electromechanical voting system' means a system of casting votes by use of voting devices or marking devices and counting ballots by employing automatic tabulating equipment or data processing equipment, and the term includes touchscreen systems." Fla. Stat. § 101.5603(4). Volusia County's system automatically scans voters' ballots, tabulates the results and transmits them to the main computer that compiles the results. RE-53 ¶ 3.
[90] RE-233.

statute on which the district court relies, authorizing the purchase of electronic machines was enacted in 1973 and HAVA was not enacted until 2002.

Third, the trial court ignored the plain language of Section 101.56062(2), which contains no limitation or reference to electronic voting machines and mandates that voting systems "must include" voting machines that are accessible to the blind in each precinct. The district court's holding cannot be reconciled to the statute.

In response to the request for preliminary injunction, the County asserted that the effective date must be HAVA's effective date of January 1, 2006, claiming that funding for accessible voting machines continues until that time.[91] But the effect of the effective date is to make the statute applicable to elections occurring after July 1, 2005. Because not every county is going to have an election between July 1, 2005 and January 1, 2006, it makes perfect sense for the Legislature to have made funds available up to that later date.

The County also attempts to rely on the State of Florida HAVA Plan to argue that the mandate of Section 101.56062 is not triggered until HAVA's effective date. The County's position fails for several reasons. First, this document cannot trump the plain language of Section 101.56062, or its legislative history.

[91] RE-157.

Second, that Plan was drafted in June 2004 before the effective date of Section 101.56062 was determined.[92] Third, the County fails to mention that the Plan itself indicates that the triggering date for accessible machines is ***the earlier*** of either the effective date for HAVA or the effective date for Section 101.56062: "The HAVA Planning

Committee has recommended that the Florida Legislature take advantage of federal funding and bring Florida into compliance and make Section 101.56062, *Florida Statutes*, effective by January 1, 2006 or one year after general appropriations are made, ***whichever is earlier***."[93]

The trial court erred in concluding that Plaintiffs failed to show a substantial likelihood of prevailing under Florida law. The language of the statute is clear, as is the statutory history. Plaintiffs are entitled under Florida law to use accessible voting machines at the next election in Volusia County.

II. THIS COURT SHOULD DIRECT THE ISSUANCE OF A PRELIMINARY INJUNCTION.

The district court, having concluded that Plaintiffs could not show a likelihood of prevailing on appeal, did not to address the remaining criteria for the issuance of a preliminary injunction. This court, however, is in as good a position

[92] RE-165

[93] Florida Dep't. of State, State of Florida HAVA Plan Update at 53 (June 2004).

to address these issues as was the district court. To the extent the issues involve matters of fact, the record consists exclusively of affidavits and documentary exhibits. And, of course, the Court reviews issues of law *de novo*.

Moreover, the Court should address these issues. Time is running out before the next election, currently scheduled to occur on October 11, 2005. In these circumstances, an appellate court may and should direct the district court to grant the preliminary injunction.

The record clearly demonstrates that the Plaintiffs have satisfied the remaining elements.

A. Plaintiffs will suffer irreparable harm without an injunction.

Where a constitutional right is at stake, irreparable injury is presumed.[94] Limiting a citizen's full participation in the election process constitutes irreparable harm.[95] The inability of a disabled voter to gain access to the polls, despite the availability of the alternative of an absentee ballot, has been held to be irreparable

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See Addendum.

[94] *Elrod v. Burns*, 427, U.S. 347, 373-74, 96 S. Ct. 2673, 2690 (1976); *see generally* 11A Charles Allen Wright, Arthur A. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1, at n.21 (2nd ed. 1995).

[95] *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005); *Johnson v. Mortham*, 926 F. Supp. 1540, 1543 (N.D. Fla. 1996) (three-judge panel).

harm.[96] Moreover, Title II of the ADA explicitly authorizes injunctive relief for statutory violations.[97] Thus, Defendants' refusal to let Plaintiffs vote independently and secretly with accessible touchscreen voting machines at the next Volusia County election will cause irreparable harm to the Plaintiffs.

B. The harm Plaintiffs will suffer without an injunction outweighs any harm to the County.

In contrast to the irreparable harm Plaintiffs will suffer without accessible voting machines, Defendants will suffer no harm by being ordered to implement the machines. The money to purchase accessible voting machines already has been provided by the State of Florida, and Volusia County will have to refund the money if the County does not use it to purchase the accessible machines.[98] While Volusia County would apparently prefer to wait until such time, if ever, as accessible machines provide a contemporaneous paper trail and are certified by the State of Florida, that interest has not found expression in the standards for certification of election systems established by Congress and the Florida Legislature. Both legislatures have been exceedingly specific as to the criteria for

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[96] *Westchester Disabled on the Move v. County of Westchester,* 346 F. Supp. 2d 473, 478 (S.D.N.Y. 2004).
[97] 42 U.S.C. § 12133.
[98] *Cf., Am. Assoc. of People with Disabilities v. Hood*, No. 3:01cv1275, 2004 Westlaw 1041536 at *2 (M.D. Fla. Apr. 16, 2004) (staying order to purchase accessible voting machines, pending appeal, because county would have to use its

voting machines to be used, respectively, in federal and state elections, but neither has required a contemporaneous paper trail.[99] By contrast, the interest in accessible machines, has been embodied by the federal government and Florida as an enforceable civil right.

C. An injunction would benefit the public interest.

An injunction that protects citizens' access to voting "is without question in the public interest."[100] Furthermore, as Congress declared in enacting the ADA, its purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[101] Especially in this case – where Congress and the Florida Legislature have enacted laws to give disabled people full access to public voting facilities – an injunction that Volusia County comply with those laws is in the public interest.[102]

CONCLUSION

For the reasons set forth herein, Appellants respectfully request that the

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own funds to purchase the machines).

[99] *See* 42 U.S.C. § 15481; Fla. Stat. § 101.56062(1)(a-n).

[100] *Charles H. Wesley Educ. Found.*, 408 F.3d at 1355.

[101] 42 U.S.C. § 12101(b)(1).

[102] *See* 11A Charles Allen Wright, Arthur A. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948.4 at 207 (2nd ed. 1995) (where congress has enacted a statute declaring the public interest, ordering compliance with the statute benefits the public interest).

Court vacate the order of the district court and remand with instructions to enter a preliminary injunction requiring Volusia County to deploy during its next election at least one accessible voting machine at each precinct.

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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 5,678 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 proportionally spaced typeface using Microsoft Word 2002 with 14 point Times New Roman font.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Appellants were served by E-mail and Federal Express this 12th day of August, 2005, upon:

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