UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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,

v. CASE NO.: 6:05-CV-00997-JA-DAB

VOLUSIA COUNTY, and ANN McFALL, as Supervisor of Elections of Volusia County,

Defendants.
_____/

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Defendants, the COUNTY OF VOLUSIA and the Supervisor of Elections of Volusia County, ANN McFALL[1], in her official capacity, through their undersigned counsel, hereby file their Opposition to Plaintiffs' Motion for a Preliminary Injunction:

PRELIMINARY STATEMENT

On July 5, 2005, Plaintiffs sued Defendants, the COUNTY OF VOLUSIA and the Supervisor of Elections of Volusia County, for injunctive and declaratory relief under the

[1] Volusia County operates under a Home Rule Charter approved by the voters. (Ch. 70-966, Laws of Florida (Sp. Acts), Art. I, § 101.) Under the Home Rule Charter, the constitutional office of Supervisor of Elections was abolished and its duties were transferred to the Department of Elections run by an elected department head, currently Ann McFall. (Ch. 70-966, Laws of Florida (Sp. Acts), Art. VI, § 601.1; Res. No. 76-89, Amend Nos. 3, 8, 9-16-76; Res. No. 96-121, Amend. No. 1, 6-20-96.) In any legal action involving the County of Volusia or its departments, the County of Volusia is the proper party, and the County of Volusia should be substituted for the supervisor of elections. (Ch. 70-966, Laws of Florida (Sp. Acts), Art. XIII, § 1306.) Therefore, Ann McFall, as an individual, is not a proper party.

Americans with Disabilities Act (ADA), the Rehabilitation Act (RA), and Section 101.56062, Florida Statutes. Simultaneous with their Complaint, Plaintiffs filed their Motion for a Preliminary Injunction and Incorporated Memorandum of Law. For the reasons that follow, Plaintiffs are not entitled to a preliminary injunction on their ADA, RA, or Section 101.56062 claims.

FACTS

Plaintiffs—two organizations which claim to represent the interests of the blind and five registered blind voters in the County of Volusia—allege that Defendants have violated their rights because the County on June 29, 2005 did not purchase certain "touch screen" voting equipment made by Diebold Election Systems, Inc. Specifically, Plaintiffs claim that Defendants have denied them their right to vote "independently and secretly" by not purchasing such machines.

Since 1995, the County has used an optical scan voting system called "Accu-vote" which is manufactured by Diebold. With this optical scan system, voters mark paper ballots which are tabulated through machines. The ballots used with this optical scan system create a "paper trail" to verify that ballots are accurately recorded and subject to later verification through a recount. [Declaration of Deanie Lowe.]

In the past few years, the County has been required to utilize this "paper trail" to verify and correct the results of Presidential and local elections. In the 2000 Presidential election, computerized voting equipment malfunctioned in the County and more than 10,000 votes were incorrectly counted. The County was only able to correct these voting errors in a recount because the County had paper ballots for verification purposes. The

County also experienced other problems during that election that required the County to resort to using paper ballots for verification purposes. In addition, the County has had several municipal elections, which were decided by just a few votes and which resulted in mandatory recounts under State law. A recent Ponce Inlet election was decided by one vote, and two elections in South Daytona and Deltona were tie votes, which were ultimately decided by a coin flip. [Declaration of Frank T. Bruno, Jr.]

Following the events of the 2000 Presidential election, the United States Congress passed the Help America Vote Act of 2002 (HAVA), 42 U.S.C. Section 15301, which required *inter alia* that voting systems used in elections for federal office must—by January 1, 2006—be accessible for individuals with disabilities "in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters." See 42 U.S.C. Section 15481. In order to assist in compliance with the January 1, 2006 accessibility requirements, Congress authorized federal grants to assist states and counties in acquiring such equipment. Although it includes accessibility requirements, HAVA specifically provides that it has no effect on other laws, including the ADA or the RA. See 42 U.S.C. Section 15545.

In order to comply with HAVA and to receive the federal grants that would be available under HAVA, the State of Florida enacted many accessibility reforms. See e.g. Section 101.56063, Florida Statutes ("It is the intent of the Legislature that this state be eligible for any funds that are available from the Federal Government to assist states in providing or improving accessibility of voting systems and polling places for persons having a disability.") During the 2004 Session, the Florida Legislature made HAVA

funds available to counties through the Department of State, and the Florida Legislature provided that any county that receives such funds and that is not in compliance with the accessibility requirements of HAVA by January 1, 2006, shall be required to return those funds to the State. See Section 101.56062; see also State of Florida HAVA Plan <http://election.dos.state.fl.us/hava/pdf/revisedHAVAplan.pdf> (pages 13-15). (See Exhibit 1 attached.) As part of these federal HAVA grants, the State provided the County a grant of $699,884 to purchase voting equipment to comply with the federal and state HAVA requirements.

In a good faith attempt to comply with the new federal and state HAVA requirements, the County Council conducted hours of research and review of available voting equipment, including several public meetings, exploring the merits of various manufacturers' election equipment. The County Council considered "touch screen" voting machines made by Diebold. Although the Diebold touch screen equipment is certified by the State, the Diebold touch screen does not provide for any "paper trail" for use in a recount. [Declaration of Frank T. Bruno, Jr.]

The County Council also considered AutoMARK voting equipment, which provides disabled voters with the ability to vote independently and in privacy (similar to the Diebold equipment) but which has the added advantage of having a verifiable paper ballot. Automark provides an optical scan ballot marker designed for use by people who are unable to personally mark an optical scan ballot due to physical impairments or language barriers. With an Automark system, a voter is able to carry out the voting process using a "touch screen," a puff-sip device, or by following audio prompts along

with a keypad. Additionally, there is a screen privacy option voter so that visually impaired users can be assured that their voting remains private. The AutoMARK equipment satisfies the major concerns of both disabled and non-disabled voters. The AutoMARK system has been federally certified, and since receiving federal certification, Automark has submitted three applications (two on June 29, 2005 and one on July 6, 2005) to the Florida Department of State, Division of Elections, to have the AutoMARK ballot marking system certified for use with voting equipment in Florida elections, including the equipment currently used by the County. Pursuant to the Florida Voting System Standards, the Division of Elections is required to provide Automark with responses to each of its applications within 10 business days of filing. State certification is required before the equipment can be purchased, and the manufacturer is pressing the Florida Division of Elections to certify this equipment. The AutoMARK system has already been accepted for use in several states and has received the support of many individuals and organizations representing the interests of the disabled, such as the National Federation of the Blind in Computer Science—a division of the National Federation of the Blind. [Declaration of Frank T. Bruno, Jr.; Declaration of Robert Resauli.] See also National Federal of the Blind website <http://www.voiceofthenationsblind.org/transcripts/80/automark-voter-assist-terminal-demonstration> ("The AutoMARK Voter Assist Terminal is a machine designed to allow voters who are blind, voters who need an audio presentation of a ballot, or voters who need a ballot in a language other than English to cast an optically-scanned ballot, using the same ballot as sighted voters."). (See Exhibit 2 attached.)

Many disabled individuals and organizations representing disabled individuals participated in the County's research and review process. For example, the Handicapped Adults of Volusia County (HAVOC), a long time organization advocating the rights of handicapped Volusia County citizens, including blind citizens, actively participated in the County Council's meetings dealing with the voting equipment issue. This organization opposed the purchase of the Diebold equipment because it would not provide for both private and independent voting and a vote that is verifiable by a paper ballot for handicapped citizens. [Declaration of Frank T. Bruno, Jr.]

On June 29, 2005, the Volusia County Council voted 4 to 3 to reject a contract with Diebold to provide electronic "touch screen" voting equipment. The Diebold "touch screen" equipment was rejected because the Volusia County Council determined that it had an obligation to Volusia County voters—both disabled and non-disabled—to have election equipment which is accurate and reliable and provides for a "paper trail" to verify that ballots are accurately recorded and subject to later verification through a recount. Numerous Volusia County voters—including blind and disabled voters and organizations—have expressed their desire to have a "paper trail" for all votes cast in the County so that they can have confidence in their election system and that their vote will be counted. [Declaration of Frank T. Bruno, Jr.]

By not entering the contract to purchase the Diebold "touch screen" equipment on June 29, 2005, the County has preserved its options to consider the Diebold equipment and any other equipment—including the AutoMARK system—which may be approved by the State prior to January 1, 2006. Automark has informed the County of Volusia that

it can provide the County with enough AutoMARK machines to satisfy its needs for upcoming elections once the AutoMARK system is certified in Florida. In the event that the AutoMARK system is not timely certified by the Division of Elections, Automark has informed the County that it can provide the County with sufficient ADA IVotronic "touch screen" voting equipment—which is already certified for use in Florida—to meet their needs for upcoming elections. [Declaration of Frank T. Bruno, Jr.; Declaration of Robert Resauli.]

The County will be in compliance with the federal and state HAVA requirements as required by law. Since the County Council's decision on June 29, 2005, the County's voting system remains certified by the State, and the State has taken on action to decertify the County's voting system.

ARGUMENT

Plaintiffs are not entitled to a preliminary injunction on their ADA, RA, or Section 101.56062 claims because they are not substantially likely to prevail on the merits as no violation of law has occurred (and any alleged violation is speculative); the Plaintiffs will not suffer any irreparable injury; the damage to the County would outweigh the alleged threatened injury to Plaintiffs; and the relief sought by Plaintiffs is adverse to the public interest of providing election equipment which is accurate and reliable and provides for a "paper trail" to verify that ballots are accurately recorded and subject to later verification through a recount for the benefit of all Volusia County voters—both disabled and non-disabled.

A district court may grant injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. See Siegel v. Lepore, 234 F.3d 1163, 1176 (11th Cir. 2000); McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998); Nnadi v. Richter, 976 F.2d 682, 690 (11th Cir. 1992). In the Eleventh Circuit, a "preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion'" as to each of the four prerequisites. McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998); see also Texas v. Seatrain Int'l, S.A., 518 F.2d 175, 179 (5th Cir. 1975) (grant of preliminary injunction "is the exception rather than the rule," and plaintiff must clearly carry the burden of persuasion). Plaintiffs cannot carry the burden of persuasion as to any of these factors on their three claims, and, therefore, Plaintiffs' motion must be denied.

POINT I

PLAINTIFFS CANNOT DEMONSTRATE A "SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS" ON THEIR CLAIMS UNDER THE ADA, RA, OR SECTION 101.56062, FLORIDA STATUTES.

Although not fully set forth in their Motion for a Preliminary Injunction, Plaintiffs' basis for their motion is their claim that the County's decision not to purchase certain Diebold election equipment on June 29, 2005 will deprive them as blind individuals of the right to vote "independently and secretly" in municipal elections in

October 2005 in violation of the ADA, RA, and Section 101.56062, Florida Statutes. Nothing in the ADA or the RA grants Plaintiffs the right to vote "independently and secretly." See American Association of People with Disabilities v. Shelley, 324 F. Supp.2d 1120, 1125-1126 (C. D. Cal. 2004); Nelson v. Miller, 950 F. Supp. 201, 204 (W. D. Mich. 1996) aff'd on other grounds Nelson v. Miller, 170 F.3d 641 (6th Cir. 1999). Section 101.56062 is part of the State's HAVA compliance rules, and it addresses the obligation of the Department of State to certify accessible voting systems by July 1, 2005. Such section does not require the County to purchase any particular voting equipment by a date certain, and, indeed, the State's HAVA compliance requirements—like the federal HAVA requirements—do not take effect until January 1, 2006. See State of Florida HAVA Plan (June 2004 Update) <http://election.dos.state.fl.us/hava/pdf/revisedHAVAplan.pdf> (pages 13-15). Accordingly, no violation of the ADA, RA, or Section 101.56062 has occurred, and Plaintiffs' speculative claims cannot prove that they are entitled to a preliminary injunction.

As to their ADA and RA claims, Plaintiffs cannot demonstrate a substantial likelihood of success on the merits. Plaintiffs are not claiming that they have been or will be denied the right to vote in violation of the ADA or the RA as they have voted in elections in the County in the past. Rather, their sole claim is that they will not be able to vote "independently and secretly" i.e., without assistance, in the future. Although the ADA applies to all programs, services, and activities of state and local governments including elections, the ADA does not grant (nor does the RA grant) blind individuals the right to vote "independently and secretly." See Shelley, 324 F. Supp.2d at 1125

("Nothing in the Americans with Disabilities Act of its Regulations reflects an intention on the part of Congress to require secret, independent voting."); Nelson v. Miller, 950 F. Supp. at 204 ("Nothing in *Lightbourn* 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, 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."). Contrary to Plaintiffs' assertions, the ADA regulations cited by Plaintiffs expressly provide that an entity may satisfy its access requirements by providing the "assignment of aides to beneficiaries . . . or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities." See 28 C.F.R. Section 35.150(b)(1). Indeed, in discussing the right to vote, the Title II Technical Assistance Manual, Section 7.1100, "explains that a blind voter is not entitled to cast a ballot in Braille, even though this method would allow him to vote in private. Because the County 'can demonstrate that its current system of providing assistance is an effective means of affording an individual with a disability an equal opportunity to vote, the County need not provide ballots in Braille." See Shelley, 324 F. Supp.2d at 1125 n.3.

The right to vote with "privacy and independence" is a requirement of HAVA, which does not apply until January 1, 2006. Plaintiffs cannot obtain an injunction based on a requirement which is not yet in effect. Nor can Plaintiffs bootstrap this HAVA requirement into the ADA or the RA because HAVA expressly provides that it has no

effect on those acts. Moreover, the fact that Congress included such "privacy and independence" requirements in HAVA demonstrates that Congress determined that neither the ADA nor the RA required governments to allow blind or other disabled individuals to vote with "privacy and independence."

Further, Plaintiffs cannot prove that Defendants violated either the ADA or the RA because Defendants did not purchase the Diebold equipment on June 29, 2005. The County Council's action merely preserved its right to consider other available voting technology—including potentially the AutoMARK systems which are in the process of certification—to determine which system serves the interests of all Volusia County voters, both disabled and non-disabled. And it is the responsibility of the County to choose voting systems. See Section 101.5604, Florida Statutes.

(Although not addressed herein due to the expedited nature of this proceeding, Defendants reserve the right to challenge the organizational and individual standing of all Plaintiffs in this matter because they have not identified in which municipal elections, if any, the named Plaintiffs intend to vote in October. Further, the County is not conceding nor waiving it right to assert that Plaintiffs have failed to join all indispensable parties to this matter i.e. the municipalities. See e.g. Westchester Disabled on the Move v. County of Westchester, 436 F. Supp. 2d 473 (S.D. N.Y) (finding municipalities indispensable parties in election case)).

In support of their position, Plaintiffs point to American Association of People with Disabilities v. Hood, 310 F. Supp.2d 1226 (M.D. Fla. 2004), appeal docketed, No. 04-11566 (11th Cir. April 20, 2004), in which accessibility violations of the ADA and RA

were found based upon the right to vote in private and without assistance. As shown above, no such right exists under the ADA or the RA. Further, the decision in American Association of People with Disabilities v. Hood, 310 F. Supp.2d 1226 (M.D. Fla. 2004) cites to no case law for its proposition that the ADA or RA accessibility requirements were violated. The decision also fails to address the previously cited ADA regulations and the Title II Technical Assistance Manual, which establish that third party "assistance" for the blind voters constitutes sufficient access under the ADA. See Shelley, 324 F. Supp.2d at 1125 n.3. (Significantly, in the Shelley case, the district court denied a preliminary injunction prior to the 2004 Presidential election.) Notably, in the Hood case, Senior District Judge Wayne Alley, after conducting a full bench trial and concluding a violation occurred, noted that the "Defendant presented a substantial case on the merits." Therefore, he stayed any injunctive relief pending appeal, despite the fact that the 2004 Presidential elections were upcoming. See American Association of People with Disabilities v. Hood, Case No. 3:01-cv-1275-J-Alley/HTS (M.D. Fla. April 16, 2004) (Order granting Motion for Stay Pending Appeal).

Plaintiffs also have not stated a claim under Section 101.56062. In this regard, Plaintiffs rely upon Section 101.56062(2), which provides "Such voting system must include at least one accessible voter interface device installed in each precinct which meets the requirements of this section, except for paragraph (1)(d)." Taking this provision out of context, Plaintiffs claim that this subsection requires the County to have purchased the Diebold equipment no later than July 1, 2005. However, reading Section 101.56062, it is clear that this section addresses the obligations of the Department of

State to approve accessible voting systems. Nowhere in Section 101.56062 does it expressly state that counties must have purchased such equipment by July 1, 2005. (Also, nothing in this section creates an individual right to proceed against the County.)

Any suggestion that this provision required purchase by July 1, 2005 is rebutted by the fact that the grant monies made available by the State for the purchase of equipment was made available until January 1, 2006. Clearly, if the County was required to make a purchase by July 1, 2005, it would be illogical to make the money available until January 1, 2006.

Finally, the State of Florida HAVA Plan produced by the Division of Elections and the Florida Secretary of State addresses when counties should be in compliance with the federal and state HAVA requirements. See State of Florida HAVA Plan (June 2004 Update) <http://election.dos.state.fl.us/hava/pdf/revisedHAVAplan.pdf> (pages 13-15). Therein, the HAVA Planning Committee—after the Florida Legislature triggered the accessibility requirement in Section 101.56062—recommended that "all voting systems in use **as of January 1, 2006** should be required to be both certified to meet, and be deployed in a configuration that meets, the requirements of Section 101.56062 and Section 101.5606, Florida Statutes." Indeed, the Division of Elections HAVA Planning Committee went on to recommend that the Legislature also approve a HAVA Implementation Bill requiring all voting systems "in use on or after January 1, 2006" to meet the requirements of Section 101.56062. Such recommendation clearly indicates that the Division of Elections and the HAVA task force assigned to reviewing and implementing Section 101.56062, Florida Statutes have determined that this provision

does not go into effect until at January 1, 2006. Further, the HAVA Planning Committee recommendation strongly suggests that the State Division of Election was well aware that without further legislation, Section 101.56062 could not be enforced against entities such as the County. At a minimum, Plaintiffs' claims are clearly premature. Accordingly, Plaintiffs cannot demonstrate that any violation of Section 101.56062 has occurred or that Plaintiffs are substantially likely prevail on any such claim.

For the foregoing reasons, Plaintiffs cannot demonstrate a substantial likelihood of prevailing on any of their claims and their motion for preliminary injunction must denied.

POINT II

PLAINTIFFS CANNOT DEMONSTRATE THAT THEY WILL SUFFER IRREPARABLE INJURY UNLESS AN INJUNCTION IS ISSUED.

In their motion, Plaintiffs assert that they will suffer irreparable harm if an injunction is not issued. As noted above Plaintiffs have not and cannot demonstrate that they have suffered or will imminently suffer any injury due to the County Council's decision not to purchase the Diebold equipment on June 29, 2005 because Plaintiffs cannot prove any violation under the ADA, RA, or Section 101.56062, Florida Statutes. Given that the County has no obligation to implement a voting system similar to the Diebold equipment until January 1, 2006, Plaintiffs' allegations of irreparable injury are wholly speculative as to what equipment will be purchased and implemented by that time. Even assuming Plaintiffs' claims relating to the October 2004 municipal elections were true, Plaintiffs' claims are speculative as the County has been assured by vendors that it will have available sufficient equipment for such elections if necessary.

Plaintiffs also have not pointed to any case where a preliminary injunction was granted based upon irreparable injury under the facts presented to the Court. The cases cited by Plaintiffs involve an individual who was being deprived of the right to vote altogether (Charles H. Wesley Educ. Foundation, Inc. v. Cox, 408 F.3d 1349 (11th Cir. 2005)) and a case where a party was seeking a stay pending appeal and not a preliminary injunction (Johnson v. Mortham, 926 F. Supp. 1540 (N.D. Fla. 1996). Plaintiffs are not being denied the right to vote; they are asserting that the law should be extended so that they can vote with "privacy and independence." Importantly, even in the Hood case upon which Plaintiffs rely, the Court issued a stay of its decision pending appeal. Accordingly, no case law supports Plaintiffs' claims of irreparable injury.

Plaintiffs claims that they may be burdened in voting does not demonstrate a violation of law or irreparable injury. As noted in the Shelley decision, the United States Supreme Court has determined that lesser burdens imposed by election laws are typically justified by important regulatory interests. See e.g. Buckley v. American Constitutional Law Foundation, 525 U.S. 182, 208 (concurring opinion). In the Shelley decision, the court noted that the decertification of Diebold DRE voting systems—the same type of systems not purchased by the County—because they lacked "an accessible voter-verified paper audit trail which would permit voters to independently verify the accuracy of their votes" and "they do not permit meaningful recounts" was a sufficient regulatory interest to justify an alleged restriction on the right to vote. See Shelley, 324 F. Supp. 2d at 1127-1128. Likewise, Plaintiffs in this case cannot demonstrate that they are being deprived of the right to vote. Assuming (but not conceding) that they could show a violation of their

rights, the lesser burden of having assistance to vote—as they have used presumably numerous times in past elections—would not be irreparable injury. In any event, any such burden would be justified by the significant interest of the County in ensuring that there is a "paper trail" for all votes cast in the County so that both disabled and non-disabled voters can have confidence in their election system and that their votes will be counted.

POINT III

PLAINTIFFS CANNOT DEMONSTRATE THAT THE THREATENED INJURY TO THEM OUTWEIGHS WHATEVER DAMAGE THE PROPOSED INJUNCTION MAY CAUSE THE COUNTY.

In their motion, Plaintiffs assert that the County will suffer no harm by being ordered by the Court to spend its one time $699,884 grant to purchase the Diebold equipment—without any form of verifiable "paper trail"—and that the alleged harm to Plaintiffs outweighs any injury to the County and its other voters. However, Plaintiffs' claims are belied by their own references to the actions of Senior Judge Alley in the Hood case. In this regard, Judge Alley after a full bench trial stayed any injunctive relief pending appeal and stated:

> "Clearly the citizens of Duval county would be greatly impacted to the potential expenditure of monies to purchase voting machines that might be rendered useless in the event Defendant Stafford prevails on appeal. County budgets are zero-sum games. With only a finite amount to be spent on all County services, expending monies toward an effort that is subsequently determined to be unnecessary deprives the public of other government services, perhaps in areas of crucial importance." American Association of People with Disabilities v. Hood, Case No. 3:01-cv-1275-J-Alley/HTS (M.D. Fla. April 16, 2004) (Order granting Motion for Stay Pending Appeal).

Likewise, in this case, the harm of requiring the County to expend a one time $699,884 grant on equipment which the County may ultimately have to replace greatly outweighs the alleged injury to Plaintiffs, especially considering that Plaintiffs could continue to vote in the same fashion as they had in previous elections. Plaintiffs' attempts to style this one time grant as money "provided by the State of Florida" ignores the practical reality that once such monies are spent, the County—and its voters—could not recoup such expenditure from Diebold. Once this grant money is spent, the County would have to pay for any replacement equipment from its own funds if it ultimately determines that other voting equipment is required.

Moreover, the relief sought by Plaintiffs would also seriously impair the County's ability to protect other voters—both disabled and non-disabled—from election problems. In this regard, after conducting various hearings and other inquiries, the County Council has concluded that Volusia County voters—both disabled and non-disabled—want their elections to be conducted with verifiable "paper trails." The equipment that the Plaintiffs seek to have the Court order the County to purchase does not satisfy this need. Given the problems in the Presidential elections and that the County has had recent municipal elections which were decided by just one vote and tied elections, each and every vote cast in these elections is important. And, the relief sought by Plaintiffs would eliminate the possibility of a full "paper trail" manual recount in these jurisdictions, thereby, adversely affecting the rights of other Volusia County voters.

POINT IV

AN INJUNCTION WOULD BE ADVERSE TO THE PUBLIC INTERESTS.

As part of showing their entitlement to a preliminary injunction, Plaintiffs must demonstrate that an injunction would not be adverse to the public interest. Plaintiffs cannot meet such burden as the facts clearly demonstrate that the public interest and the rights of the voters of Volusia County would be prejudiced by a preliminary injunction. The County's goal is to obtain voting equipment which complies with the January 1, 2006 HAVA requirements regarding access for the blind and provides for an accurate and verifiable "paper trail." The Volusia County Council has thoughtfully and in good faith reviewed and investigated the options available and intends to continue to do so. In this regard, a preliminary injunction would cut short the County's research and review of the appropriate voting equipment for its citizens.

The process for certifying voting equipment and systems in ongoing. Other voting systems—such as the AutoMARK system—which may more appropriately meet the concerns of Volusia County voters for a "paper trail" are in the certification process and may soon be approved. Also, other organizations advocating the rights of handicapped and blind citizens have supported the County's decision not to agree to the Diebold contract, and the County has an obligation to these citizens to explore its options before expending a one time grant totaling nearly three quarters of a million dollars. By granting a preliminary injunction, those citizens participating in upcoming elections will lose the right to have full "paper trail" manual recount.

Simply stated, by not accepting the Diebold contract on June 29, 2005, the County made a decision to fully investigate its options in the light of the needs and concerns of Volusia County voters—both disabled and non-disabled. The public interest in ensuring that the County explores all of its options and purchases the best voting equipment possible for its citizens will be compromised by issuing a preliminary injunction. Accordingly, Plaintiffs have not and cannot demonstrate that an injunction would not be adverse to the public interests.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction must be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 13, 2005, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: **DE LA O & MARKO**, 3001 S.W. 3rd Avenue, Miami, Florida 33129, **Brown, Goldstein & Levy**, LLP, 120 E. Baltimore Street, Suite 1700, Baltimore, Maryland 21202, and Diego "Woody" Rodriguez, counsel for Non-Party Ann McFall, 233 South Semoran Boulevard, Orlando, Florida 32807.

s/ David A. Young
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