Case No. 05-13990-B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

THE NATIONAL FEDERATION OF THE BLIND, THE NATIONAL FEDERATION OF THE BLIND IN 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

BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES IN SUPPORT OF APPELLANTS

Danielle R. Foley
Ari N. Rothman
Maria Georges
VENABLE LLP
575 Seventh Street, N.W.
Washington, D.C. 20004
(202) 344-4000

Counsel for *Amicus Curiae* American Association of People with Disabilities

Dated: August 23, 2005

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2 and 26.1-3, counsel for *Amicus* AAPD hereby submits the following Certificate of Interested Persons:

1. AAPD has no parent corporation.
2. AAPD is not a corporation and as such has no issued stock.
3. The following individuals have an interest in the outcome of this appeal:
    a. Akerman Senterfitt, Counsel for Defendants-Appellees;
    b. Antoon, John II, United States District Court Judge;
    c. Baker, David A., United States Magistrate Judge;
    d. Brown, Goldstein & Levy, LLP, Counsel for Plaintiffs-Appellants;
    e. Buckins, Chad, Plaintiff-Appellant;
    f. Cerullo, Peter, Plaintiff-Appellant;
    g. Davis, Katheryn, Plaintiff-Appellant;
    h. de la O, Miguel, Counsel for Plaintiffs-Appellants;
    i. de la O & Marko, Counsel for Plaintiffs-Appellants;

j. Foley, Danielle R., Counsel for *Amicus* AAPD;

k. Georges, Maria, Counsel for *Amicus* AAPD;

l. Goldstein, Daniel F., Counsel for Plaintiffs-Appellants;

m. Kornreich, David V., Counsel for Defendants-Appellees;

n. Mann, Ryan, Plaintiff-Appellant;

o. McFall, Ann, Defendant-Appellant;

p. National Federation of the Blind, Plaintiff-Appellant;

q. National Federation of the Blind of Florida, Plaintiff-Appellant;

r. Rodriguez, Diego "Woody", Counsel for Defendant-Appellant;

s. Rothman, Ari N., Counsel for *Amicus* AAPD;

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

u. Townsend, John David, Plaintiff-Appellant;

v. Venable LLP, Counsel for *Amicus* AAPD;

w. Volusia County, Defendant-Appellee; and

x. Young, David, Counsel for Defendant Appellant.

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IDENTITY OF THE AMICUS

American Association of People with Disabilities ("AAPD") is a non-profit association dedicated to advocating for and enabling persons with disabilities. AAPD has several hundred members throughout Florida and 55 members in Volusia County, Florida. AAPD's members include visually or manually impaired voters in Volusia County.[1] Like the Appellants, these citizens have been discriminated against, and without intervention by this Court, will continue to be discriminated against by Volusia County in violation of the Americans with Disabilities Act ("ADA").

AAPD submits this brief *amicus curiae* in support of Appellants' appeal of the district court's denial of its motion for preliminary injunction. The district court made a fundamental error when it ruled: "this Court cannot conclude that the state of the law is such that there is a substantial likelihood that Appellants will prevail in their action under the ADA." (RE-236.)[2] To the contrary, binding precedent mandates reversal of the district court's decision.

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[1] Hereinafter, unless otherwise noted, "visually or manually impaired voters" shall be collectively referred to as "disabled voters."

[2] In this brief, references to RE are to the Record Excerpt. References to "Volusia Dkt. XX, p. YY" are to additional materials in the Record on Appeal. Where helpful, references to the Record on Appeal in *Hood,* docketed as *AAPD v.*

AAPD is uniquely positioned to advise the Court with regard to the burdens and discrimination imposed upon disabled voters when they are forced to vote using an optical scan voting system as AAPD prevailed in a similar action against Duval County, Florida – *American Association of People with Disabilities, et al. v. Hood*, 310 F. Supp. 2d. 1226 (M.D. Fla. 2004), *appeal docketed*, Case No. 04-11566-JJ.[3] AAPD is also uniquely positioned to advise the Court with regard to the legal precedent and ample factual support for *Hood,* as well as the current status of the case, which the district court fundamentally misapprehended in rendering its decision.

STATEMENT REGARDING ORAL ARGUMENT

AAPD feels that its unique knowledge would render its participation at oral argument helpful with the resolution of the issues raised in this appeal. *Amicus* AAPD has moved pursuant to Federal Rule of Appellate Procedure 29(g) to participate in oral argument.

Stafford, Case No. 04-11566-JJ are also included and appear as "Hood Dkt. XX, p. YY."

[3] The undersigned was co-counsel at the trial in *Hood.*

STATEMENT OF THE ISSUES

The issues presented are:

1. Did the district court err in concluding that there was not a substantial likelihood that Plaintiffs would prevail on the merits of their action under the ADA, based, in part, on the complete misapprehension that the decision in *American Ass'n of People with Disabilities v. Hood*, 310 F. Supp. 2d 1226 (M.D. Fla. 2004), is "tentative" and undermined by decisions of other courts?

2. Will manually impaired voters, who face unique burdens when voting in Volusia County that were not considered by the district court, be discriminated against in violation of the ADA by Volusia County's refusal to provide touch screen voting systems that are readily accessible to and usable by manually impaired voters?

SUMMARY OF ARGUMENT

The district court erred in concluding that the "state of the law" is such that there is not a "substantial likelihood that Plaintiffs will prevail in their action under the ADA." (RE-236.)

To the contrary, the legal precedent overwhelmingly supports Appellants' position that the ADA is violated when disabled voters are forced to rely on third

parties to cast their ballots. The plain language of the ADA and binding Supreme Court and Eleventh Circuit precedent mandate this decision. Moreover, *Hood* definitively and unambiguously supports the position that Volusia County has violated the ADA.

In addition, Volusia County's actions have not only discriminated against visually impaired voters, but have also discriminated against manually impaired voters. There simply is no way in which a manually impaired voter, who does not have the use of his or her hands or the manual dexterity necessary to grip a pen and fill in a small circle on a ballot, can vote independently on Volusia County's optical scan voting system. Instead, manually impaired voters are forced to vote in a materially different and more burdensome manner than non-disabled voters do.

This is not the way it has to be. Instead, Volusia County could provide touch screen voting systems that have been certified and used in Florida and throughout the country that would enable disabled voters to vote in the same manner as non-disabled voters do. Unless enjoined by this Court, disabled voters in Volusia County will continue to be forced to vote in this discriminatory manner prohibited by the ADA.

ARGUMENT

The district court erred in concluding that there is not a substantial likelihood Appellants will prevail on the merits of their ADA claim.

I. THE *HOOD* DECISION IS MANDATED BY LEGAL PRECEDENT, SUPPORTED BY AMPLE EVIDENCE, AND IS NOT TENTATIVE

A. Overview of The Issues Presented in *Hood*

Hood was filed on behalf of visually or manually impaired voters[4] registered to vote in Duval County, Florida. 310 F. Supp. 2d at 1228. The plaintiffs challenged the decision of John Stafford, Supervisor of Elections for Duval County, to purchase a new optical scan voting system as violating the ADA because the machines that Stafford purchased were not readily accessible to disabled voters to the maximum extent feasible, as the ADA mandates. *Id.* at 1235.

Plaintiffs specifically alleged that, by virtue of Duval County's decision to purchase a new optical scan voting system without also providing one accessible

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[4] Hereinafter, unless otherwise noted, "visually or manually impaired voters" shall be collectively referred to as "disabled voters."

touch screen voting system per polling place,[5] they had been discriminated against by:

> (a) being *forced* to reveal their votes to a third-party; (b) risking having (and actually having) their votes revealed by the third-party to other people; (c) risking having (and actually having) the *third-party attempt to influence their candidate choice*; (d) having to vote in a manner that singles them out in the polling place; (e) having to *wait long periods of time* until a third-party is available to assist the voter; (f) having to incur the burden and impediment of *traveling to the Office of Elections' headquarters* to use the three accessible voting machines in the event Duval County ever purchases such machinery; and (g) having to suffer *embarrassment* and *distress* during the voting process for each of the foregoing reasons and the fact that they are required to vote in a manner *materially different* from, and *substantially more burdensome* than, the manner in which non-disabled voters cast their votes in Duval County.

Am. Ass'n of People with Disabilities v. Hood, 278 F. Supp. 2d 1345, 1351 (M.D. Fla. 2003) (emphasis added) (hereinafter "Hood I").[6]

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[5] To vote on the optical scan voting system, a voter fills in a bubble or otherwise marks a paper ballot with a pen or pencil, which is then fed through an optical scan ballot reader. A voter must be able to grip a pencil and see to use these machines. In contrast, a touch screen system has a computer screen, and enables a voter to select a candidate by pressing on the candidate's name on the screen. An auxiliary audio component, which is often referred to as an audio ballot, can be used by visually impaired voters to navigate through the ballot screens with pre-recorded instructions played through headphones. Manually impaired voters can use a mouth stick or other device to press the screen. *Hood,* 310 F. Supp. 2d at 1230; *Wexler v. Lepore,* 342 F. Supp. 2d 1097, 1100 (S.D. Fla. 2004).

[6] Duval County proposed that all disabled voters could travel downtown to the Supervisor of Elections' office to vote on three touch screen machines – which were not even certified. Because Duval County is a large land county with tens-

Duval County argued that (1) the ADA did not apply to voting systems; (2) even if the ADA applied to voting, Duval County did not violate the ADA because plaintiffs managed to vote – albeit in an admittedly more burdensome manner; and (3) Duval County did not violate the ADA because it was not "feasible" for it to have purchased an accessible voting system. The district court rejected each of these arguments.[7]

At the conclusion of trial, the court found that plaintiffs' rights under the ADA were violated because the optical scan voting system purchased by Duval County is not readily accessible to disabled voters, and it was technologically and financially feasible for the county to provide touch screen voting machines. *Hood,* 310 F. Supp. 2d at 1235-36.

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of-thousands of disabled voters who would need to travel via the county's paratransit system – which could take four to five hours each – the court found that this "plan" did "not bring Stafford into compliance with the ADA...." *Hood,* 310 F. Supp. 2d at 1236.

[7] In addition to rejecting Duval County's arguments at trial, the court rejected Duval County's motion to dismiss the ADA claim, *Am. Ass'n of People with Disabilities v. Smith,* 227 F. Supp. 2d 1276 (M.D. Fla. 2002) (Jim Smith was Glenda Hood's predecessor as Florida Secretary of State), and rejected Duval County's motion for summary judgment on the ADA claim. *Hood I,* 278 F. Supp. 2d 1345.

B. *Hood* Correctly Applied the ADA to Duval County's Purchase of an Inaccessible Optical Scan System

The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Duval County argued that the ADA does not apply to voting, and that even if it did, Duval County did not violate the ADA because plaintiffs had not been completely prevented from voting but "are able to vote with assistance." *Smith,* 227 F. Supp. 2d at 1290.

The court rejected both of these contentions. First, citing unambiguous legislative history, the court concluded that "voting is one area that Congress intended the ADA to affect." *Hood I,* 278 F. Supp. 2d at 1354 (citing 42 U.S.C. § 12101(a)(3) ("Congress finds that discrimination against individuals with disabilities persists in such critical areas as voting")). Second, the court concluded that the ADA is not restricted to those situations in which "a disabled person is completely prevented from enjoying a service, program, or activity," but that the ADA "more generically proscribe[s] disability 'discrimination' by the pertinent public entities." *Smith,* 227 F. Supp. 2d at 1292. Both of these conclusions are mandated by Supreme Court and Eleventh Circuit precedent. *Tennessee v. Lane,* 124 S. Ct. 1978, 1989 (2004) (noting court findings under the ADA of a "pattern

of unequal treatment in the administration of a wide range of public services, programs, and activities, *including...voting*") (emphasis added) (citations omitted); *Shotz v. Cates*, 256 F.3d 1077 (11th Cir. 2001).

This latter conclusion is perhaps most aptly illustrated by *Shotz.* In *Shotz,* plaintiffs with physical impairments brought suit against the chief judge of a state court and the county sheriff for failing to remove barriers that would make the courthouse accessible and usable by individuals with disabilities. 256 F.3d at 1079. This Court held that a "violation of Title II . . . [of the ADA] does not occur only when a disabled person is completely prevented from enjoying a service, program or activity." *Id.* at 1080. Therefore, the court explained that if wheelchair ramps leading to the courthouse are steep or the bathrooms are not usable, then the trial is not "'readily accessible,' regardless whether the disabled person manages in some fashion to attend the trial." *Id.* The same rationale dictates that the ADA is violated because the process of voting is not readily accessible to disabled voters when they are *forced* to vote in a manner rife with burdens not faced by non-disabled voters. *Hood,* 310 F. Supp. 2d at 1228-29, 1235-36.

Hood is not alone in applying this rationale to voting systems. For example, in *National Organization on Disability v. Tartaglione*, No. 01-1923, 2001 U.S. Dist. LEXIS 16731 (E.D. Pa. Oct. 11, 2001) – a case that is completely analogous

to *Hood* and that the district court in this case did not even cite – disabled plaintiffs challenged the City of Philadelphia's purchase of new voting equipment that did not include accessible voting machines because it meant they were forced to vote using third-party assistance. *Id.* at *11-*13. The court denied the City's motion to dismiss and held:

> Defendants' argument that Plaintiffs cannot state claims for relief [under the ADA and Rehabilitation Act] because Plaintiffs have not been prevented from voting mischaracterizes the Complaint . . . . Plaintiffs claim to have been discriminated against in the process of voting because they are not afforded the same opportunity to participate in the voting process as non-disabled voters. The Complaint alleges that assisted voting . . . is substantially different from, more burdensome than, and more intrusive than the voting process utilized by non-disabled voters . . . . The Complaint alleges that the . . . Plaintiffs . . . cannot participate in the program or benefit of voting in the same manner as other voters but, instead, must participate in a more burdensome process . . . [T]he Court concludes that the Complaint states a claim for discrimination in the process of voting. . . .

Id.; accord Troiano v. LePore, No. 03-80097-Civ-Middlebrooks/Johnson, slip op. at 14 (S.D. Fla. May 1, 2003).[8]

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[8] The *Troiano* court later granted summary judgment because the record demonstrated that Palm Beach County had used touch screen machines with audio ballots in each of the seven elections since November 2002, "with at least one machine available in each precinct"; thus the plaintiffs could not demonstrate "injury in fact." 2003 U.S. Dist. LEXIS 25850, at *6 (S.D. Fla. Nov. 3, 2003). By contrast, in Duval County, no such machines have been used anywhere – much less in every precinct.

Finally, like Appellees here, Duval County argued that the decision in *Nelson v. Miller* somehow rendered the ADA inapplicable to its failure to provide accessible voting equipment. To the contrary, it is *Nelson* that is inapplicable to *Hood* and the current appeal. First, the claims in *Nelson* were legally distinct from the claims advanced in *Hood* and in the current appeal. *Nelson* did not involve a claim under the ADA's generic proscription against discrimination. 170 F.3d 641, 650 (6th Cir. 1999). Thus, the court did not even consider whether the additional burdens imposed upon disabled voters by inaccessible voting systems violate the ADA – which is the fundamental question at issue in *Hood* and this appeal.

Second, the Sixth Circuit's decision *did not* hold that the Michigan voter assistance statute complied with the ADA or that the ADA did not create a secret right to vote. Instead, the Sixth Circuit framed the issue as whether the Michigan Constitution "requires more secrecy than the Michigan legislature has provided for in [the Michigan voter assistance statute]." *Id.* at 650. The Sixth Circuit observed that the Michigan Supreme Court could reasonably answer that question either way. Given these two plausible interpretations, the Sixth Circuit – for reasons completely unrelated to the ADA – picked the interpretation that held the voter assistance statute constitutional. *Id; accord Troiano*, No. 03-80097-Civ-Middlebrooks/Johnson, slip op. at 12 (holding *Nelson* to be "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"). Nelson simply does not support the conclusion that a county can choose to provide only inaccessible voting systems without violating the ADA.[9]

C. The *Hood* Conclusion that it was Feasible for Duval County to Provide Accessible Touch Screen Voting Machines is Supported by Ample Evidence

Because Duval County purchased the optical scan voting system in 2002 to replace its outmoded "punch-card" voting system, the *Hood* court analyzed the county's actions under the "heightened standard" of accessibility when public entities choose to alter existing facilities or construct new ones. [10] "When a public entity independently decides to alter a facility, it 'shall, to the maximum

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[9] These same considerations distinguish *American Association. of People with Disabilities v. Shelley*, 324 F. Supp. 2d 1120 (C.D. Cal. 2004), which challenged the California Secretary of State's decision to decertify certain touch screen voting systems.

[10] Duval County also argued that voting equipment, such as voting systems, do not constitute "facilities" under the ADA implementing regulations. The *Hood* court rejected this argument and concluded that "voting equipment plainly falls within the expansive definition of 'facility' contained in the regulations...." *Hood,* 310 F. Supp. 2d at 1235. This ruling is firmly grounded in the plain language of the regulations and is consistent with the decision of every court that has addressed this issue. 28 C.F.R. § 35.104 (2003); *Troiano*, No. 03-80097-Civ-Middlebrooks/Johnson, slip op. at 9-11; *Tartaglione*, 2001 U.S. Dist. LEXIS 16731, at *17-*18.

extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities.'" *Kinney v. Yerusalim*, 9 F.3d 1067, 1071 (3d Cir. 1993) (quoting 28 C.F.R. § 35.151(b)); *see also Ass'n for Disabled Ams. v. City of Orlando*, 153 F. Supp. 2d 1310, 1317 (M.D. Fla. 2001). Thus, as the *Hood* court properly framed the issue, "[i]f it was feasible for Duval County to purchase a readily accessible system, then the plaintiffs rights under the ADA ... were violated." 310 F. Supp. 2d at 1235. The record evidence clearly supports the court's answer to this question in the affirmative that: "[a]t the time the City purchased the optical scan system, it was technologically and financially feasible" for the county to have provided an accessible touch screen voting system instead. *Id.*

This conclusion was supported by extensive evidence that touch screen voting systems had been certified and used by other Florida counties and hundreds of jurisdictions throughout the country before Duval County purchased the optical scan system.[11] By the time of trial, the use of touch screens had grown

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[11] Certification means a voting system "has been tested to the highest standards of accuracy and reliability and can be relied upon to be dependable and to be a fairly good investment in terms of durability." *Hood,* 310 F. Supp. 2d at 1235. Certification also "establishes that the [voting] system met accuracy and reliability standards and the requirement of the Federal Election Commission and the Florida Voting System Standards.... The stringent certification standards and process in Florida ensure that a certified voting system is not a substandard voting system." *Id.* at 1235.

exponentially with "the majority of the State's voters" and voters in California, Georgia, Texas, Colorado, Ohio, Maryland, Arizona, South Carolina, and the District of Columbia having used touch screen machines in actual elections. *Id.* The evidence presented at trial also demonstrated that the use of these touch screen voting systems has not only been successful, but has been affordable, as well. *E.g., Id.* at 1236 ("other jurisdictions' (both in Florida and around the county) acquisition of touch screen voting systems indicated the financial feasibility of such a system" and noting that the county had received money from the state to replace its voting system and could have afforded the additional cost of one touch screen per polling place). On this substantial record, the court properly concluded that Duval County violated the ADA. *Id.* at 1235.

D. *Hood* is Not Tentative

The district court appears to have determined that *Hood* is "tentative" based on the fact that the court's order for the county to place at least one touch screen voting machine in 20% of its polling places was stayed pending appeal. (RE-236.) The district court overlooked the fact that the *Hood* decision was not tentative, but was a final decision reached after eight days of trial. That the decision has been appealed does not alter the precedential value of the decision. *FTC v. Portcelli*, 325 B.R. 868 (M.D. Fla. 2005) (citing *Deposit Bank v. Bd. of Councilmen*, 24 S.

Ct. 154 (1903) ("the fact that the Final Judgment of the District Court ... [is] on appeal ha[s] no effect on the finality or binding effect of the District Court's holding...."); MOORE'S FED. PRAC. & PROC. CIVIL § 131.30 ("Finality ... is not affected by the fact that the appeal is taken with a stay or supersedes; these suspend execution of the judgment, but not its conclusiveness in other proceedings"). This Court has not reversed the district court's decision or held that any part of the decision was in error. The only part of the decision that is being considered is whether the county is finally doing what the ADA mandates and the court ordered them to do over a year ago – employ accessible touch screen voting machines – thereby possibly reducing the need for appellate review.[12] This does not alter the fact that *Hood* is a well-reasoned final decision, mandated by applicable precedent, and supported by credible evidence. *Hood* clearly supports the conclusion that there is a substantial likelihood that Appellants will prevail on the merits of their ADA claim.

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[12] On August 8, 2005, this Court issued a limited remand for the district court to determine whether the County has actually implemented an accessible touch screen voting system.

II. VOLUSIA COUNTY WILL CONTINUE TO VIOLATE THE ADA UNLESS THE DISTRICT COURT'S ORDER IS REVERSED

Volusia County employs the same type of optical scan voting system Duval County employs. (RE-232; *see also Hood*, 310 F. Supp. 2d at 1235.) In addition to the visually impaired voters whose concerns have been addressed in Appellants' brief, voters with manual disabilities, such as individuals who lack the use of their hands or the manual dexterity to grip a pencil to fill in small circles on a ballot, will be forced to rely on third-parties to cast their votes on this optical scan system. Such voters are forced to wait for poll workers to assist them and are forced to reveal their candidate choices in front of other people. *E.g., Hood*, 310 F. Supp. 2d at 1228-29. Importantly, neither the district court nor Appellees considered the specific needs of manually impaired voters, who have been discriminated against, and will continue to be discriminated against, unless the county employs touch screen voting systems.

Manually impaired voters can vote independently and in the same manner as non-disabled voters when touch screen voting systems are employed. For example, Mr. Bell, a plaintiff in *Hood* who was born without arms or legs, demonstrated during trial how he could vote, easily and without any assistance, on a touch screen voting system. Mr. Bell used the mouth stick he uses to operate his motorized wheelchair and other devices to navigate the touch screen voting

system. (*Hood,* 310 F. Supp. 2d at 1236; Hood Dkt. 166, p. 93:6-96:2.) A manually impaired person is not limited to voting using a mouth stick, instead a person can use a variety of items to operate a touch screen, including other body parts. (*See, e.g.,* Hood Dkt. 145:17-20.)[13]

Volusia County could easily provide one of six touch screen voting systems that are certified for use in Florida – including the one manufactured by the same company that provides its optical scan system. (RE-199 ¶ 8; RE-233.) Many other counties in Florida have already provided disabled voters with such systems – either providing entire touch screen voting systems or a blended system of one touch screen and an optical scanner in each polling place. *Hood,* 310 F. Supp. 2d at 1235; *Troiano*, No. 03-80097-Civ-Middlebrook/Johmsom, slip op., at 8-10. There is no reason Volusia County cannot do the same.

Volusia County's argument that the touch screen systems are somehow inherently unreliable as compared to a system with a "paper trail" is a red-herring and does not excuse its violation of the ADA. First, these touch screen systems have been certified for use in Florida, which means that they are accurate and reliable. *See supra* n.11. Second, federal and state courts in Florida have expressly rejected legal challenges to touch screen voting machines based on

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[13] Some touch screens can even be operated through the use of a sip and puff or jelly switch device. *Hood*, 310 F. Supp. 2d at 1236.

arguments that these machines do not produce paper receipts of the ballots cast. *See Wexler*, 342 F. Supp. 2d 1097; *Wexler v. Lepore*, 878 So.2d 1276 (Fla. 4th Dist. Ct. App. 2004). Indeed, touch screen voting machines create and store images of the ballots cast, which can be retrieved and printed out if necessary for a recount. *Wexler*, 342 F. Supp. 2d at 1102, 1108; *accord Weber v. Shelly*, 347 F.3d 1101, 1105 (9th Cir. 2003) (rejecting equal protection challenge to the use of a touch screen voting system that did not provide voter-verified paper trail because there was no evidence that the touch screen system at-issue "is inherently less accurate, or produces a vote count that is inherently less verifiable, than other systems").

Finally, Volusia County's "plan" to one day procure the "AutoMARK" device, if ever certified for use in Florida, does not excuse Volusia County's current and ongoing violation of the ADA and will not remedy the burdens imposed on manually impaired voters. Even if the AutoMARK technology is ever certified, which there is no guarantee it will be, manually impaired voters will still be forced to rely on third-party assistance and otherwise be unnecessarily burdened in order to vote using the device. The AutoMARK is not a touch screen voting system but instead is merely a ballot marking device with a touch screen interface. (Volusia Dkt. 21, Attachment 1 - Decl. of Resuali, ¶ 3.) A manually impaired voter would still be *forced* to wait for third-party assistance; *forced* to

rely on a third-party to feed the optical scan ballot into the AutoMARK; *forced* to rely on a third-party to remove the ballot from the machine – which could reveal his or her vote; and *forced* to rely on a third-party to place the ballot into the optical scanner. (Volusia Dkt. 21, Attachment 1, Ex. C to Resuali Decl., 1-2.) None of these additional burdens are imposed when a touch screen system is used.[14]

Thus, the only way to remedy Volusia County's current violation of the ADA is to reverse the district court's order.

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[14] A "plan" to comply with the ADA is not compliance at all. *Kinney*, 9 F.3d at 1072 (city's transition plan for the installation of curb cuts on existing streets did not negate city's obligation to provide curb cuts whenever it undertook to construct new streets or alter existing ones); *Engle v. Gallas*, No. 93-3324, 1994 U.S. Dist. LEXIS 7935, at *9 (E.D. Pa. June 10, 1994) (unimplemented plan is insufficient to remedy an ADA violation because "[g]ood intentions, in this regard, are of little help to one who must endure the hardship of a disability").

CONCLUSION

The record clearly demonstrates that the district court erred in denying Appellants' motion for a preliminary injunction. Appellees have violated, and unless enjoined by this court, will continue to violate, the ADA by refusing to provide accessible voting systems for Volusia County's disabled voters so they can vote in the fully accessible manner enjoyed by voters in hundreds of jurisdictions throughout the country and Florida. Thus, this Court should reverse the district court's decision.

Respectfully submitted,

Danielle R. Foley

Danielle R. Foley
Ari N. Rothman
Maria Georges
VENABLE LLP
575 Seventh Street, N.W.
Washington, D.C. 20004
(202) 344-4000

Counsel for *Amicus* AAPD

CERTIFICATE OF COMPLIANCE

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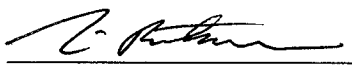


Danielle R. Foley
Ari N. Rothman
Maria Georges
VENABLE LLP
575 Seventh Street, N.W.
Washington, D.C. 20004
(202) 344-4000

Counsel for *Amicus* AAPD

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of *Amicus* AAPD were served by facsimile and regular U.S. Mail this 23rd day of August, 2005, upon:

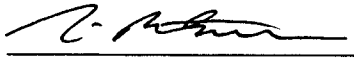
Miguel M. de la O
DE LA O & MARKO
3001 S.W. 3rd Avenue
Miami, Florida 33129

Daniel F. Goldstein
Martin H. Schreiber II
BROWN, GOLDSTEIN & LEVY, LLP
120 E. Baltimore Street, Suite 1700
Baltimore, Maryland 21202

David V. Kornreich
David A. Young
AKERMAN SENTERFIT
Citrus Center, 17th Floor
255 South Orange Avenue
Orlando, FL 32801-3483

Diego "Woody" Rodriguez
MARCHENA & GRAHAM
233 S. Semoran Blvd.
Orlando, FL 32807-3232

Daniel Eckert
County Attorney's Office
123 W. Indiana Ave.
Deland, FL 32720-4615



Attorney for *Amicus* AAPD

ADDENDUM OF STATUTES, REGULATIONS, AND LEGISLATIVE MATERIALS

STATUTES

42 U.S.C. § 12132. Discrimination (ADA)

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

REGULATIONS

28 C.F.R. § 35.104 Definitions.

For purposes of this part, the term --

Act means the Americans with Disabilities Act (Pub. L. 101-336, 104 Stat. 327, *42 U.S.C. 12101*-12213 and *47 U.S.C. 225* and 611).

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids and services includes --

(1) Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(2) Qualified readers, taped texts, audio recordings, Brailed materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

Complete complaint means a written statement that contains the complainant's name and address and describes the public entity's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of this part. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

Designated agency means the Federal agency designated under subpart G of this part to oversee compliance activities under this part for particular components of State and local governments.

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(1)(i) The phrase physical or mental impairment means --

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;

(B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(iii) The phrase physical or mental impairment does not include homosexuality or bisexuality.

(2) The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) The phrase has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) The phrase is regarded as having an impairment means --

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.

(5) The term disability does not include --

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

Drug means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act *(21 U.S.C. 812).*

Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

Historic preservation programs means programs conducted by a public entity that have preservation of historic properties as a primary purpose.

Historic Properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under State or local law.

Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act *(21 U.S.C. 812).* The term illegal use of drugs does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Individual with a disability means a person who has a disability. The term individual with a disability does not include an individual who is currently

engaging in the illegal use of drugs, when the public entity acts on the basis of such use.

Public entity means --

(1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

Qualified individual with a disability means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Qualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 *(29 U.S.C. 794)),* as amended.

State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

28 C.F.R. § 35.151 New construction and alterations.

(b) Alteration. Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.