DOCKET 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 OF FLORIDA, KATHERYN DAVIS, JOHN DAVID TOWNSEND, CHAD BUCKINS, PETER CERULLO, and RYAN MANN,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.
_____/

Appeal from the United States District Court
For the Middle District of Florida

BRIEF OF DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1, 26.1-1, 26.1-2, 26.1-3 and 27-1, Counsel for Defendants-Appellees hereby certify that the following persons and entities have an interest in the outcome of this case:

County of Volusia, Florida, Defendant-Appellee below and on appeal;

Supervisor of Elections of Volusia County, Ann McFall, Defendant-Appellee below and on appeal;

National Federation of the Blind, Plaintiff-Appellant below and on appeal;

National Federation of the Blind of Florida, Plaintiff-Appellant below and on appeal;

Chad Buckins, Plaintiff-Appellant below and on appeal;

Peter Cerullo, Plaintiff-Appellant below and on appeal;

Katheryn Davis, Plaintiff-Appellant below and on appeal;

Ryan Mann, Plaintiff-Appellant below and on appeal;

John David Townsend, Plaintiff-Appellant below and on appeal;

The Honorable John Antoon II, United States District Judge for the Middle District of Florida, trial judge below;

David V. Kornreich, , Attorney for Defendants-Appellees below and on appeal;

Daniel D. Eckert, Attorney for Defendants-Appellees below and on appeal;

David A. Young, Attorney for Defendants-Appellees below and on appeal;

Akerman Senterfitt, Attorney for Defendants-Appellees below and on appeal;

Miguel de la O, Attorney for Plaintiffs-Appellants below and on appeal;

de la O & Marko, Attorney for Plaintiffs-Appellants below and on appeal;

Daniel F. Goldstein, Attorney for Plaintiffs-Appellants below and on appeal;

Martin H. Schreiber II, Attorney for Plaintiffs-Appellants below and on appeal;

Brown, Goldstein & Levy, LLP, Attorney for Plaintiffs-Appellants below and on appeal.

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STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellees do not believe that the decisional process would be significantly aided by oral argument. As such, Defendants-Appellees assert that oral argument is unnecessary.

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CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used herein is 14-point Times New Roman.

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STATEMENT OF JURISDICTION

The Court has jurisdiction of the instant appeal pursuant to 28 U.S.C. §1292(a)(1).

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STATEMENT OF THE ISSUES

I. WHETHER THIS APPEAL IS MOOT BECAUSE THE COURT CANNOT GRANT ANY MEANINGFUL RELIEF ON PLAINTIFFS-APPELLANTS' MOTION FOR PRELIMINARY INJUNCTION.

II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS-APPELLANTS' MOTION FOR PRELIMINARY INJUNCTION AS TO THEIR CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT.

III. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS-APPELLANTS' MOTION FOR PRELIMINARY INJUNCTION AS TO THEIR CLAIMS UNDER SECTION 101.56062, FLORIDA STATUTES.

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STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

On July 5, 2005, Plaintiffs-Appellants—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 (hereinafter collectively "Plaintiffs")—filed their three count Complaint against Defendants-Appellees—the County of Volusia and the Supervisor of Elections of Volusia County Ann McFall in her official capacity (hereinafter collectively "Defendants"). [DE1-1-10.][1] Therein, Plaintiffs alleged that under the Americans with Disabilities Act (ADA), the Rehabilitation Act (RA), and Section 101.56062, Florida Statutes, Defendants are required to provide voting machines which enable blind persons to vote "secretly and independently." [DE1-1-10.] Plaintiffs claim that Defendants violated such laws on June 29, 2005 when the Volusia County Council voted 4 to 3 not to enter into a contract to purchase certain electronic "touch screen" voting equipment and that as a result of such action they were entitled to injunctive and

[1] Pursuant to 11th Cir. R. 28-4, the references to the record in the District Court below are cited as follows [DE(Docket Entry Number)-(Page Number(s) or Document Title)].

declaratory relief. [DE1-1-10.] Simultaneous with the filing of their Complaint, Plaintiffs filed their Motion for a Preliminary Injunction seeking to require Defendants to provide such voting machines prior to the next municipal elections scheduled for October 11, 2005. [DE7-1-10.] On July 13, 2005, Defendants filed their Opposition to Plaintiffs' Motion for a Preliminary Injunction. [DE20(1)-1-20; DE20(2)-1-7; DE20(3)-1.] On July 15, 2005, United States District Judge John Antoon II conducted a hearing on Plaintiffs' Motion for a Preliminary Injunction. [DE34; DE48-1-37.] During this hearing, Plaintiffs dropped their claim for preliminary injunctive relief on their RA claims. [DE38-1; DE48-10; Appellants' Brief (hereinafter "Pl. Brief") p. 10] Plaintiffs also asserted during the hearing that July 29, 2005 was the deadline to have "machines in the hands" of Defendants. [DE48-14.] Subsequently, on July 19, 2005, the District Court conducted an additional telephonic hearing with the parties on Plaintiffs' Motion for a Preliminary Injunction. [DE35.][2]

On July 21, 2005, the District Court issued its Order denying Plaintiffs' Motion for Preliminary Injunction on the grounds that Plaintiffs had failed to show a substantial likelihood of success on the merits of either their ADA or Section 101.56062 claims. [DE38-1-6.] That same day, Plaintiffs filed their Notice of

[2] This hearing has not been transcribed for the record on appeal.

Appeal of the District Court's Order and thereby initiated this interlocutory appeal. [DE40-1-8] At 12:36 a.m. on July 22, 2005, Plaintiffs faxed to Defendants their Emergency Motion for a Preliminary Injunction and Incorporated Memorandum of Law (hereinafter "Pl. Emergency Motion"). [p. 1-13.] Therein, Plaintiffs requested that this Court issue a preliminary injunction in this matter, and Plaintiffs asserted that their motion will "be moot if not decided by July 25, 2005" and that the manufacturer "must receive a signed purchase order by July 22 in order to get the machines to Volusia County by the July 29 'drop dead date.'" [Pl. Emergency Motion p. 2, 5, 12.] Thereafter, Plaintiffs filed their Correction to Emergency Motion asserting that July 25, 2002 was the deadline for a preliminary injunction. On July 22, 2005, Defendants filed their Response in Opposition to Emergency Motion for a Preliminary Injunction (hereinafter "Def. Opp. to Emergency Motion). [p. 1-18.] On July 27, 2005, this Court issued its Order denying Plaintiffs' Emergency Motion and holding that the motion sought greater relief than Plaintiffs could obtain should they prevail on the merits. Therein, the Court on its own motion also expedited this appeal and established the current briefing schedule.

B. Statement of the 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 and those of blind persons because the County on June 29, 2005 did not purchase certain "touch screen" voting equipment made by Diebold Election Systems, Inc. [DE1-1-10.] Specifically, Plaintiffs claim that Defendants have denied them their right to vote "independently and secretly" in forthcoming October 11, 2005 municipal elections by not timely purchasing such machines. [DE1-1-10.]

Since 1995, the County has used an optical scan voting system called "Accu-vote" which is manufactured by Diebold. [DE5-2.] With this optical scan system, voters mark paper ballots which are tabulated through machines. [DE5-2; DE7-2.]

In the 2000 Presidential election, the County's computerized voting equipment suffered various malfunctions and as a result more than 10,000 votes were incorrectly counted. [DE23(2)-2.] The County was only able to correct these voting errors during the recount because the County's "Accu-vote" voting machines had paper ballots for verification purposes. [DE23(2)-2.] In addition, several municipal elections in the County have been decided by just a few votes which resulted in mandatory recounts under State law. [DE23(2)-2.] For example,

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. [DE23(2)-2.]

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 *et seq.*, which provides federal assistance to states "for activities to improve administration of elections." [DE38-2.] With respect to voting by disabled individuals, HAVA requires that voting systems used in elections for federal office must—by January 1, 2006—"be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, 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(a)(3)(A). [DE38-2.] 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. [DE38-2.]

Under Florida law, the "use of electronic and electromechanical voting systems in which votes are registered electronically or are tabulated on automatic tabulating equipment or data processing equipment" is authorized and governed by Florida's Electronic Voting Systems Act ("EVSA"). See Section 101.5601 *et seq.*,

Florida Statutes. [DE38-2.] In order to comply with HAVA and to receive the federal grants that would be available under HAVA, the State of Florida enacted several reforms to the EVSA in 2002. 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.").

Under the EVSA, electronic voting systems must be certified by the Florida Department of State prior to purchase or use by a county, and the new sections added to the EVSA in 2002 set forth criteria that the Department of State must follow for certification of voting systems, including the accessibility of the systems for persons with disabilities. See Section 101.56062, Florida Statutes. [DE38-2.] Pursuant to 2002 Fla. Laws, Chapter 2002-281, the criteria to be followed by the Department of State in Section 101.56062 were not scheduled to go into effect until one year after the Florida Legislature adopted the general appropriation to fund the grants to the counties. See Section 101.56062 n.1. Nowhere in Section 101.56062 (or any of the other revisions enacted in 2002) is there any statement or requirement that a county is required to purchase accessible voting systems by any date certain.

In Line item 2871I of the 2004-2005 General Appropriations Act, the Florida Legislature provided for the distribution of HAVA funds to Florida's counties on July 1, 2004. [DE33(2)-2.] In addition to providing for the distribution of these funds, the Florida Legislature specifically provided: "Any county that receives funds from Specific Appropriation 2871I that is not in compliance with the accessibility requirements in Section 301(a)(3) of the Help America Vote Act by January 1, 2006, shall be required to return those funds to the State." [DE33(2)-2.] Of these funds, the County received a grant of $699,884. [DE5-2; DE38-2.]

In a good faith attempt to comply with the new federal and state HAVA requirements, the Volusia County Council conducted hours of research and review of available voting equipment, including several public meetings, exploring the merits of various manufacturers' election equipment. [DE23(2)-1-2.] The County Council considered "touch screen" voting machines made by Diebold, which—although certified by the State—do not provide for any "paper trail" for use in a recount. [DE23(2)-1-2.] Disabled individuals and organizations representing disabled individuals—such as the Handicapped Adults of Volusia County (HAVOC), a long time organization advocating the rights of blind and handicapped Volusia County citizens—actively participated in the County

Council's meetings dealing with the voting equipment issue. [DE23(2)-1-2.] This organization opposed the purchase of the Diebold equipment because such equipment would not provide for both private and independent voting and a vote that is verifiable by a paper ballot for handicapped citizens. [DE23(2)-1-2.]

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. [DE23(2)-1-2.] 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. [DE21(2)-1-2] The AutoMARK system has been federally certified and is seeking state certification from the Florida Department of State, Division of Elections. [DE20(3); DE21(2)-1-2; DE23(2)-1-2.]

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. [DE23(2)-1-2.] 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. [DE23(2)-1-2.] Numerous Volusia County voters—including blind 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. [DE23(2)-1-2.] By not entering the contract to purchase the Diebold "touch screen" equipment on June 29, 2005, the County 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. [DE23(2)-1-2.]

The next elections in Volusia County are municipal elections scheduled for October 11, 2005. In preparation for these elections, the Supervisor of Elections prepared an "Implementation Schedule" and a "Training Schedule," which show that to meet testing and training requirements all voting equipment must be in place roughly ten weeks prior to an election. [DE12(3)-3.] Based upon these schedules, the "drop dead date" for the purchase and implementation of the Diebold voting equipment for use in the October 11, 2005 elections was July 29, 2005. [DE12(3)-3-5; DE12(8)-4-5.] On July 8, 2005, Dave Bird, Vice President of Operations for Diebold Elections Systems, Inc., declared that Diebold would have to have a signed contact with the County by July 15, 2005 for Diebold to

provide the County with Diebold voting equipment by July 29, 2005. [DE12(2)-1-2.] In Plaintiffs' Emergency Motion to this Court, Plaintiffs represented that Diebold could deliver voting equipment by July 29, 2005 if it received a signed contract by July 25, 2005. [Pl. Emergency Motion p. 2.]

C. Standard of Review

This Court's review of the District Court's Order denying the motion for preliminary injunction is an abuse of discretion standard. The grant or denial of a preliminary injunction is within the sound discretion of the district court and will not be disturbed absent a clear abuse of discretion. See Siegel v. Lepore, 234 F.3d 1163, 1178 (11th Cir. 2000) (en banc); Cafe 207, Inc. v. St. Johns County, 989 F.2d 1136, 1137 (11th Cir. 1993). This Court reviews a district court's findings of fact for clear error, and its application of the law de novo. See Johnson & Johnson Vision v. 1-800 Contacts, 299 F.3d 1242, 1246 (11th Cir. 2002). The clearly erroneous standard is appropriate in cases in which the evidence is primarily documentary. See id. The abuse of discretion standard of review recognizes that for the matter in question there is a range of choice for the district court and so long as its decision does not amount to a clear error of judgment this Court will not reverse such decision. See McMahon v. Toto, 256 F.3d 1120, 1128 (11th Cir. 2001). A district court has substantial discretion in weighing the four relevant

factors to determine whether preliminary injunctive relief is warranted. See Siegel, 234 F.3d at 1178.

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).

SUMMARY OF THE ARGUMENT

This Court should dismiss this appeal as moot because the deadline for the implementation of the voting equipment at issue (July 29, 2005) has passed, and, therefore, this Court cannot grant Plaintiffs' any meaningful relief on their preliminary injunction motion.

As to the merits of the appeal, the District Court did not abuse its discretion in finding that Plaintiffs had failed to clearly establish any entitlement to a preliminary injunction on their claims under the ADA and Section 101.56062, Florida Statutes. As to their ADA claims, the District Court found that it "cannot conclude that the state of the law is such that there is a substantial likelihood that Plaintiffs will prevail in their action under the ADA." [DE38-5.] The crux of Plaintiffs' claim under the ADA is not that they are being denied the right to vote but that they cannot vote "independently and secretly" using the existing voting equipment. However, the ADA does not grant blind individuals the right to vote "independently and secretly." Further, Plaintiffs cannot demonstrate that the ADA or its regulations regarding "facilities" apply to the voting equipment at issue.

Therefore, Plaintiffs' arguments about these regulations do not show that they are substantially likely to succeed on the merits.

Two courts (Nelson v. Miller, 170 F.3d 641 (6th Cir. 1999) and American Ass'n of People with Disabilities v. Shelley, 324 F. Supp. 2d 1120 (C.D. Cal. 2004)) have expressly rejected the position advocated by Plaintiffs, and in the only decision supporting their position (American Ass'n of People with Disabilities v. Hood, Case No. 3:01-cv-1275-J-Alley/HTS (M.D. Fla. April 16, 2004)), the trial court stayed any injunctive relief pending appeal of that case to this Court because the defendants in that matter presented "a substantial case on the merits." Based on the record facts and the case law presented, the District Court correctly concluded that Plaintiffs were not entitled to a preliminary injunction as the ADA law is unsettled and contrary to the position of Plaintiffs, and Plaintiffs have not demonstrated that such conclusion was an abuse of discretion.

As to their Section 101.56062 claim, Plaintiffs cannot demonstrate that the District Court abused its discretion in denying their motion for preliminary injunction. Nowhere in Section 101.56062 does it expressly state that counties must have purchased accessible voting equipment by July 1, 2005, and Plaintiffs have not and cannot point to any express authority that supports their position. Plaintiffs' claim that such voting equipment was to be implemented by July 1,

2005 is rebutted by the fact that the Florida Legislature—in the same appropriations act where it allocated the money to purchase such equipment—expressly provided that the counties had until January 1, 2006 to use the grant funds to purchase such voting equipment. Accordingly, Plaintiffs have not demonstrated that they are substantially likely to prevail upon their Section 101.56062 claim, and the District Court did not abuse its discretion in denying their motion for preliminary injunction. Therefore, the District Court's Order in this matter should be affirmed.

ARGUMENT AND CITATION OF AUTHORITY

POINT I

THIS APPEAL SHOULD BE DISMISSED AS MOOT BECAUSE THIS COURT CANNOT GRANT ANY MEANINGFUL RELIEF.

This Court should dismiss the instant appeal as moot because this Court cannot grant any meaningful relief on Plaintiffs' motion for preliminary injunction as the deadline for action has already passed. A case is moot when events subsequent to the commencement of a lawsuit create a situation in which the court can no longer give a plaintiff meaningful relief. See Jews for Jesus v. Hillsborough County Aviation Authority, 162 F.3d 627 (11th Cir. 1998). The appeal of a preliminary injunction is moot where the effective time period for action has passed. See Brooks v. Georgia State Bd. of Elections, 59 F.3d 1114, 1119 (11th Cir. 1995); see also Tropicana Products Sales, Inc. v. Phillips Brokerage Co., 874 F.2d 1581 (11th Cir. 1989).

In this case, Plaintiffs repeatedly represented to the District Court below and to this Court that the "drop dead date" to purchase and implement the Diebold voting equipment for use in the October 11, 2005 elections was July 29, 2005. [DE12(2)-1-2; DE12(3)-3-5; DE12(8)-4-5; Pl. Emergency Motion p. 2; 5, 12; DE48-14.] Indeed, in their Emergency Motion filed with this Court, Plaintiffs

expressly represented that their motion—which substantively is not different than this appeal—"will be moot if not decided by July 25, 2005." The "Implementation Schedule" and "Training Schedule" included in the record facts show that all voting equipment must be in place roughly ten weeks prior to an election (in this case July 29, 2005) to meet pre-election testing and training requirements. [DE12(3)-3.] Accordingly, the record facts conclusively demonstrate that Defendants could not possibly comply with an injunction requiring the purchase and implementation of voting equipment for the October 11, 2005 elections. Therefore, no meaningful relief can be granted, and any opinion on the merits would be purely advisory. See Brooks v. Georgia State Bd. of Elections, 59 F.3d 1114, 1119 (11th Cir. 1995). Notably, Plaintiffs made no reference whatsoever in their Appellants' Brief as to the deadline for action, presumably because they recognize as well that the time for action has long passed. Accordingly, this appeal must be dismissed as moot.

POINT II

THE DISTRICT COURT'S ORDER SHOULD BE AFFIRMED BECAUSE IT DID NOT ABUSE ITS DISCRETION IN DENYING TO ISSUE A PRELIMINARY INJUNCTION ON PLAINTIFFS' ADA CLAIM.

In their Appellants' Brief, Plaintiffs argue that the District Court abused its discretion by denying their motion for preliminary injunction under the ADA on the grounds that Plaintiffs had failed to demonstrate a substantial likelihood of success. In this regard, Plaintiffs assert that abuse of discretion occurred because the District Court—which considered the background of contradictory cases and the tentativeness of the sole decision supporting Plaintiffs' position—could have issued a preliminary injunction and instead erroneously concluded that conflicts in persuasive authority and unsettled ADA law precluded the issuance of an injunction, as a matter of law. [Pl. Brief. p. 14.] In addition, Plaintiffs assert that abuse of discretion occurred because they had shown that they were substantially likely to prevail on their ADA claims. Plaintiffs' arguments are without merit, and, therefore, the District Court's Order should be affirmed.

As to the first issue, Plaintiffs cannot show abuse of discretion by the fact that the District Court considered the facts presented by the parties, the unsettled nature of the law, cases contradictory to Plaintiffs' position, and the tentativeness

of the support for their position in determining that Plaintiffs had failed to carry their burden. To the contrary, such considerations demonstrate that the District Court's decision falls within its lawful range of its discretion, and no basis exists for this Court to disturb the District Court's proper weighing of the relevant factors to determine whether preliminary injunctive relief is warranted. See Siegel, 234 F.3d at 1178.

Plaintiffs have asserted that the District Court erroneously applied a "bright-line rule" that it could not, as a matter of law, issue an injunction "where the law is unsettled or where there are conflicts among the persuasive authority." [Pl. Brief p. 14.] Such argument misstates the District Court's opinion. The District Court did not state that it was following any "bright-line" rule or that it was precluded from issuing a preliminary injunction. Rather, the District Court stated that it "cannot conclude that the state of the law is such that there is a substantial likelihood that Plaintiffs will prevail in their action under the ADA." [DE38-5.]

As noted above, 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., 147 F.3d at 1306; Texas v. Seatrain Int'l, S.A., 518 F.2d at 179 (grant of preliminary injunction "is the exception rather than the rule," and plaintiff must clearly carry the burden

of persuasion).[3] Plaintiffs had the heavy burden of proving that they were entitled to this extraordinary remedy. Based on the record facts and case law presented, the District Court concluded that they had failed to meet such burden.

And, Plaintiffs have not demonstrated that such conclusion was an abuse of discretion. Although Plaintiffs assert that the District Court "expressed no view as to the correctness of any of the prior decisions," it is clear that the District Court considered and analyzed the facts and law presented by the parties. [Pl. Brief. p. 14; DE38-3-5.] Aside from misstating the District Court's opinion, Plaintiffs have not established any abuse of discretion because they had not shown that the District Court applied an incorrect legal standard, followed an improper procedure, made any findings of fact that are clearly erroneous, or misapplied the law to the facts. See Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1096 (11th Cir. 2004). Accordingly, Plaintiffs have failed to show that the District Court abused its discretion, and, therefore, the District Court's Order must be affirmed.

[3] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981)(en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent the decisions of the former Fifth Circuit issued before October 1, 1981.

As to the second issue, Plaintiffs' claims that they proved that they were substantially likely to prevail on their ADA claims are without merit. The ADA does not grant blind individuals the right to vote "independently and secretly," and, therefore, Plaintiffs cannot demonstrate any discrimination whatsoever. Further, Plaintiffs' claims that Defendants must purchase the voting equipment at issue to meet the "readily accessible" requirements for "facilities" are without merit. Voting equipment does not constitute a "facility" under the ADA, and, in any event, Plaintiffs have not shown that purchase of the particular equipment at issue is required by the ADA.

Assuming (but not conceding) that it could be argued that the District Court followed an improper bright light rule, Plaintiffs have not demonstrated that the District Court abused its discretion as they failed to demonstrate a substantial likelihood of success on the merits. In this case, Plaintiffs are not claiming that they have been or will be denied the right to vote in violation of the ADA as they have voted in elections in the past. Rather, their claim is that they will not be able to vote "independently and secretly," i.e., without assistance, in the future . [DE1-5.] (¶21 "The State of Florida has certified new "touchscreen" voting machines that enable blind voters to vote independently and secretly, like non-disabled voters.") This allegation underpins all of Plaintiffs' claims. In this regard, Plaintiffs claim

that they "want parity with non-disabled voters," which they assert requires "privacy" and "independence." [DE48-8, 15.]

Plaintiffs cannot demonstrate substantial likelihood of success based upon such claims because the ADA does not 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. Moreover, the fact that Congress included such "privacy and independence" requirements in HAVA demonstrates that Congress determined that the ADA did not require governments to allow blind or other disabled individuals to vote with "privacy and independence."

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 were found based upon the right to vote in private and without assistance. As shown above, no such right exists under the ADA. 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 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 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.) Further, 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).

Similarly, Plaintiffs' arguments about the "general discrimination prohibition of Title II," which prohibits a public entity from discriminating in the provision of services, programs, and activities, are also without merit. See 42 U.S.C. Section 12132. In this regard, Plaintiffs assert that "sighted voters in Volusia County are afforded the opportunity to vote secretly and independently and without third-party involvement" and that Plaintiffs "are denied the right to do

the same" because of their blindness. [Pl. Brief. p. 16-17.] Such argument simply restates their claim of the right to vote "independently and secretly," which is not cognizable under the ADA. See Shelley, 324 F. Supp.2d at 1125; Nelson v. Miller, 950 F. Supp. at 204.

In addition, Plaintiffs have not demonstrated that they are substantially likely to prevail on their ADA claims regarding new facilities, altered facilities, or unaltered existing facilities. In this regard, Plaintiffs claim that Defendants' voting equipment constitutes a "facility" which must meet the new construction and alteration standards set forth in 28 C.F.R. Sections 35.151(a)-(b). Such argument is without merit as the "touch screen" voting machines at issue are not the type of buildings or physical structures that constitute a "facility." See e.g. 28 C.F.R. Section 35.104; Panzardi-Santiago v. Univ. of Puerto Rico, 200 F. Supp. 2d 1 (D. Puerto Rico 2002) (public pathway); Association for Disabled Americans v. City of Orlando, 153 F. Supp. 2d 1310 (M.D. Fla. 2001) (restrooms and seating); Ability Center of Greater Toledo v. City of Sandusky, 133 F. Supp. 2d 589 (N.D. Ohio 2001) (city walkways).

Even if the voting equipment at issue could be considered a facility as alleged by Plaintiffs, Plaintiffs cannot even demonstrate that 28 C.F.R. Sections 35.151(a)-(b) are applicable because Plaintiffs have not demonstrated that any

alteration or construction of a facility occurred which would have required implementation of the Diebold "touch screen" voting equipment. Based on the record facts, the County has maintained its "Accu-Vote" optical scan system since 1995, and the Plaintiffs have not presented any evidence that the "touch screen" voting equipment they now seek was available in 1995. [DE5-2.] As such, Plaintiffs have not presented any evidence that "touch screen" were feasible or even available at that time, which is in contrast to the facts in American Association of People with Disabilities v. Hood, 310 F. Supp.2d 1226 (M.D. Fla. 2004) and Troiano v. LePore, Case No. 03-80097-Civ-Middlebrooks/Johnson (S.D. Fla. 2003) (Order Granting in Part and Denying in Part Motion to Dismiss) cited by Plaintiffs.

Assuming (but not conceding) that Plaintiffs could show that 28 C.F.R. Sections 35.151(a)-(b) were applicable, it is unclear whether the Diebold equipment sought would satisfy either the "readily accessible" or "maximum extent feasible" standards as such equipment does not provide a verifiable paper ballot for use in a recount. The lack of a "paper trail" exposes blind voters—unlike non-disabled voters—to risks that their votes may be lost permanently due to equipment failure, and the use of such equipment accordingly may place them in a

different and less advantageous standing with respect to their voting rights than non-disabled voters.

As to their arguments based upon 28 C.F.R. Section 35.150 that unaltered facilities must be made accessible, Plaintiffs' claims are without merit. As demonstrated above, Defendants satisfy the accessibility requirements under 28 C.F.R. Section 35.150 through the use of third party assistance. Therefore, Plaintiffs have not demonstrated and cannot demonstrate that they are substantially likely to prevail on their facilities claims under the ADA.

Further, Plaintiffs cannot prove that Defendants violated the ADA 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.

For the foregoing reasons and all of the reasons given by the District Court, the District Court's Order denying Plaintiffs' motion for preliminary injunction should be affirmed.

POINT III

THE DISTRICT COURT'S ORDER SHOULD BE AFFIRMED BECAUSE IT DID NOT ABUSE ITS DISCRETION IN DENYING TO ISSUE A PRELIMINARY INJUNCTION ON PLAINTIFFS' SECTION 101.56062, FLORIDA STATUTES, CLAIM.

In their Appellants' Brief, Plaintiffs argue that the District Court abused its discretion by denying their motion for preliminary injunction as to their claims based upon Section 101.56062, Florida Statutes. In this regard, Plaintiffs assert that abuse of discretion occurred 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." [Pl. Brief p. 12.] Based on their assertions that the District Court was confused about the amendment dates of the EVSA, Plaintiffs assert that the District Court misinterpreted the "plain language" of Section 101.56062. [Pl. Brief p. 26.] Plaintiffs arguments are without merit because nowhere in Section 101.56062 is there any statement or requirement that a county is required to purchase accessible voting systems by any date certain. Accordingly, the District Court did not abuse its discretion in denying Plaintiffs' motion for preliminary injunction as to their

claims under Section 101.56062, Florida Statutes. Therefore, the District Court's Order should be affirmed.

In Florida, the EVSA authorizes and governs the "use of electronic and electromechanical voting systems." See Section 101.5601 *et seq.*, Florida Statutes. [DE38-2.] In 2002, Florida Legislature enacted reforms to the EVSA, including Section 101.56062, to comply with HAVA and to receive the federal grants that would be available under HAVA. See Section 101.56063, Florida Statutes. In Section 101.56062, the Legislature set forth criteria that the Department of State must follow for certification of voting systems, including the accessibility of the systems to persons with disabilities. See Section 101.56062, Florida Statutes. [DE38-2.] Pursuant to 2002 Fla. Laws, Chapter 2002-281, the criteria to be followed by the Department of State in Section 101.56062 were not scheduled to go into effect until one year after the Florida Legislature adopted the general appropriation to fund the grants to the counties. See Section 101.56062 n.1. Contrary to Plaintiffs' "plain language" arguments, the Legislature did not make any statement in Section 101.56062 that counties were required to purchase any particular voting equipment by any date certain. Thereafter, in the appropriations bill where the Florida Legislature allocated the HAVA funds to the counties, the Florida Legislature specifically provided: "Any county that receives funds from

Specific Appropriation 2871I that is not in compliance with the accessibility requirements in Section 301(a)(3) of the Help America Vote Act by January 1, 2006, shall be required to return those funds to the State." [DE33(2)-2.] Such statement shows that the Legislature intended that the counties would have at least until January 1, 2006 to use their grant funds to purchase accessible voting equipment.

As to Section 101.56062, the District Court found that this statute was passed by the Florida Legislature to comply with the Help America Vote Act of 2002 ("HAVA") and to receive any potential federal funds which would become available under HAVA. [DE38-2.] Interpreting this statute, the District Court concluded that Section 101.56062 "quite apart from imposing an obligation on counties to purchase electronic voting systems by a date certain" authorized the purchase of such systems and provides "criteria for certifying such systems *in the event that they are purchased*." (Emphasis in original.) [DE38-5.] The District Court also noted that "if the Florida legislature had intended to place a legal obligation on counties to purchase electronic voting systems, it would have clearly expressed as much in the language of the EVSA. It did not do so." [DE38-5.] Simply stated, the District Court found that the language of the Section 101.56062

did not impose any obligation on the County to purchase machines by a date certain.

In an attempt to show abuse of discretion, Plaintiffs assert that the District Court reached several erroneous conclusions. In this regard, Plaintiffs assert that the District Court found Section 101.56062 did not apply because "the Judge mistakenly believed that Volusia County's optical scan system was not an electronic system." [Pl. Brief p. 25.] Such assertion is wholly unfounded because the District Court did not make any finding or statement that the Defendants' "Accu-Vote" system was not an electronic system or not subject to the EVSA.

In addition, Plaintiffs also make the unsupported assertion that the District Court concluded that "Section 101.56062 applies only to counties with electronic systems." Such assertion misstates the District Court's holding. The District Court found that the Florida legislature placed no obligation in Section 101.56062 on counties to purchase electronic voting systems by a date certain, and the District Court found that the certification criteria in Section 101.56062 would not apply unless a voting system was purchased. Because the issue raised by Plaintiffs in their motion for preliminary injunction is the County Council's June 29, 2005 vote *not* to purchase any machines until further consideration of its options, Section 101.56062 does not apply.

In an attempt to bolster their claim that the District Court reached erroneous conclusions, Plaintiffs assert that the District Court must have misunderstood or misapplied the EVSA because the EVSA was originally passed in 1973 and, therefore, cannot have any relationship to HAVA which was passed in 2002. Specifically, Plaintiffs claim "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." Such argument is a red herring. Section 101.56062 is clearly a 2002 amendment to the EVSA, and it is clear from Section 101.56063 that the 2002 amendments to Florida law were made in contemplation of HAVA. Further, as part of complying with HAVA and receiving federal funds, the State of Florida was required to develop its own HAVA Plan demonstrating how it would comply with HAVA. This HAVA Plan produced by the Division of Elections and the Florida Secretary of State also clearly indicates throughout that the Section 101.56062 amendment to the EVSA was made in contemplation of HAVA.

Plaintiffs also assert that the District Court erroneously ignored the "plain language" of Section 101.56062. To the contrary, nothing in the plain language supports the position advocated by Plaintiffs. Therefore, Plaintiffs have not shown that the District Court abused its discretion.

In addition to attempting to bolster their claim that the District Court reached erroneous conclusions by the District Court, Plaintiffs have presented several argument in support of their interpretation of Section 101.56062. Plaintiffs assert that legislative history supports their interpretation. In this regard, Plaintiffs rely upon the 2002 Session Summary of Major Legislation Passed to assert that voting machines were required to be implemented by July 1, 2005. [Pl. Brief p. 23.] However, such summary is not legislative history because they are merely compilations, and as noted by the Secretary of the Senate with respect to session summaries: "This summary is provided for information only and *does not represent the opinion of any Senator, Senate Officer, or Senate Office.*" See Florida Senate 2002 Session Summary Index (Appendix 1). (Emphasis added.) Plaintiffs also cite to the 2002 journals of the Florida House and Senate (Journal H.R. 34th Reg. Session p. 3124 and Journal Sen. 34th Reg. Session p. 1640 (Appendix 2, 3)) and claim that the language in these provisions indicate that Defendants were required under Section 101.56062 to purchase voting machines by July 1, 2005. However, neither the House nor Senate journal even discuss the specific implementation dates at issue. Again, in all of the supposed legislative history from 2002 identified by Plaintiffs, they have not pointed to any specific requirement that counties had to purchase specific voting equipment by July 1,

2005. Moreover, the last legislative statement regarding the implementation dates of Section 101.56062 is the appropriations bill where the Florida Legislature allocated the HAVA funds to the counties and specifically provided that any county not in compliance with HAVA by January 1, 2006 would have to return the grant funds. This provision rebuts any claim that any purchase was required by July 1, 2005 because the legislature made the grant funds for the purchase of equipment until January 1, 2006. Clearly, if Defendants were required to make a purchase by July 1, 2005, it would be illogical to make the money available until January 1, 2006. Accordingly, Plaintiffs have not identified any legislative intent in support of their position.

As to the issue of the Florida legislature providing that the counties would have until January 1, 2006 to use their grant funds, Plaintiffs assert that this is window of opportunity provided by the legislature to the counties because "not every county is going to have an election between July 1, 2005 and January 1, 2006." [Pl. Brief p. 26.] Such argument is nonsensical. And, it must be noted that such statement is an admission by Plaintiffs that Section 101.56062 does not require all counties to purchase voting equipment by July 1, 2005. Plaintiffs' argument is that only those counties with elections before January 1, 2006 had to purchase equipment by July 1, 2005. Neither the language of Section 101.56062

nor any other legal authority cited by Plaintiffs support such argument. Indeed, if that was the legislature's intent, it clearly would have stated as much. Accordingly, Plaintiffs arguments are without merit.

As the State of Florida's HAVA Plan and its statements contrary to Plaintiffs' position, Plaintiffs assert that the HAVA Plan is irrelevant because the HAVA Plan was "drafted before the effective date of Section 101.56062 was determined" and that the HAVA Plan cannot override the clear provisions of Section 101.56062. Such argument is without merit as the HAVA Plan itself discusses that the "Florida Legislature during the 2004 Session triggered the accessibility standards found in Chapter 2002-281 by making HAVA funds available to counties through the Department of State." [DE20(2)-6.]

Further, the State of Florida HAVA Plan produced by the Division of Elections and the Florida Secretary of State does not override Section 101.56062 but addresses when counties should be in compliance with the federal and state HAVA requirements. 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."

[DE20(2)-6.] (Emphasis added.) The Division of Elections HAVA Planning Committee also "recommended" 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, determined that this provision did not go into effect until at January 1, 2006. Further, this HAVA Planning Committee recommendation strongly suggests that the State Division of Election was well aware that without further legislation, Section 101.56062 is not enforceable against the counties.

In their Appellant Brief, Plaintiffs point to another "recommendation" of the HAVA Planning Committee to the legislation which they claim indicates Section 101.56062, Florida Statutes, requires counties to take action by "January 1, 2006 or one year after general appropriations are made, whichever is earlier." [Pl. Brief p. 27.] Plaintiffs misstate the HAVA Plan, and the statement referenced by Plaintiffs is a recommendation. Contrary to Plaintiffs' claims, this recommendation demonstrates that the State Division of Elections recognized that Section 101.56062 did not require counties to purchase equipment by any date certain without further implementing legislation. Accordingly, Plaintiffs cannot

demonstrate that any violation of Section 101.56062 has occurred or that Plaintiffs are substantially likely to prevail on any such claim.

Plaintiffs also attempt to rely on various statements by individuals regarding the interpretation of Section 101.56062. The statements of Attorney General Charlie Crist cited by Plaintiffs do not constitute any formal opinion, and the personal opinion of Paul Craft, Chief of the Bureau of Voting Systems Certification, is irrelevant. Such statements were considered by the District Court and rejected, and Plaintiffs have not provided any basis for deferring to such statements. Accordingly, the District Court did not abuse its discretion in denying Plaintiffs' motion for preliminary injunction as to their Section 101.56062, Florida Statutes, claims.

For the foregoing reasons and all of the reasons given by the District Court, the District Court's Order denying Plaintiffs' motion for preliminary injunction should be affirmed.

CONCLUSION

Based on the foregoing facts and authorities in addition to all of the reasons stated in the District Court's Order dated July 21, 2005, the Order of the District Court denying Plaintiffs' request for a preliminary injunction should be affirmed in its entirety.

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NATIONAL FEDERATION OF THE BLIND v. VOLUSIA COUNTY

DOCKET NO: 05-13990-B

CERTIFICATE OF COMPLIANCE REQUIRED BY FRAP 32(a)(7)(C)

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 8,831 words.

s/ David A. Young
David A. Young

NATIONAL FEDERATION OF THE BLIND v. VOLUSIA COUNTY

DOCKET NO: 05-13990-B

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 1, 2005, that a true and correct copy of the foregoing has been provided to the following via U.S. Mail: Miguel de la O**, DE LA O & MARKO**, 3001 S.W. 3rd Avenue, Miami, Florida 33129, Daniel F. Goldstein, **Brown, Goldstein & Levy**, LLP, 120 E. Baltimore Street, Suite 1700, Baltimore, Maryland 21202, and Diego Rodriguez, counsel for Non-Party Ann McFall, 233 South Semoran Boulevard, Orlando, Florida 32807.

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NATIONAL FEDERATION OF THE BLIND v. VOLUSIA COUNTY

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APPENDIX

1. Florida Senate 2002 Session Summary Index
2. Journal H.R. 34th Reg. Session p. 3124
3. Journal Sen. 34th Reg. Session p. 1640