Case No. 05-13990-B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

THE NATIONAL FEDERATION OF THE BLIND,
THE NATIONAL FEDERATION OF THE BLIND OF FLORIDA,
KATHERYN DAVIS, JOHN DAVID TOWNSEND,
CHAD BUCKINS, PETER CERULLO, AND RYAN MAN,

Plaintiffs/Appellants,

v.

VOLUSIA COUNTY and ANN MCFALL,

Defendants/Appellees.

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

REPLY BRIEF OF APPELLANTS

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CERTIFICATE OF TYPE/VOLUME

Appellant certifies that this Reply Brief of Appellants is presented in Times New Roman style, 14-point size and contains 1,921 words.

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Note: This Brief uses the following designations:

- 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)].

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REPLY ARGUMENT

I. The Appeal is Not Moot

Defendants have not yet acquired voting machines that will afford the Plaintiffs the opportunity to vote as do their sighted fellow citizens in Florida—secretly and independently. Until such time as Defendants have done so, neither this case nor the motion for preliminary injunction is moot.

Amicus Electronic Frontier Foundation ("EFF") and Defendants argue that it is now too late to have accessible machines in place for the primary election scheduled in Volusia County for October 11, 2005. If the Court finds that Plaintiffs are entitled to accessible machines, then the date of Volusia County's election may have to be briefly postponed to enable it to comply with this Court's Order. While such a postponement is undesirable, the date of the election is not sacrosanct and cannot trump Plaintiffs' statutorily guaranteed federal rights.

In any event, the preliminary injunctive relief Plaintiffs seek is not limited to the October 11, 2005 election. Paragraph 3 of Plaintiffs' Proposed Order provides that Volusia County be ordered to have at least one accessible voter interface device certified under Florida law in each precinct for use at Volusia County's municipal election on October 11, 2005 "and each election thereafter . . . ."[1]

[1] *See* DE32-Proposed Order at ¶3.

Neither Volusia County nor EFF have claimed that relief would be moot as to the geneal elections scheduled in Volusia County for November 8, 2005.

Because a preliminary injunction could still afford relief to Plaintiffs, the cases cited by Volusia County concerning mootness are inapt. *Brooks v. Georgia State Bd. Of Elections*[2] involved an appeal of the district court's refusal to approve a settlement of a Voting Rights Act case that required, by dates preceding the disposition of the appeal, certain acts to have been completed. Thus, had the Circuit Court vacated the district court and directed entry of the settlement, it could no longer have been performed pursuant to its terms. Similarly, *Tropicana Products Sales, Inc. v. Phillips Brokerage Co.*[3] involved a request for a preliminary injunction to enforce a noncompete clause for a period of time that had passed by the time of appellate review. By contrast to these cases, if this Court were to vacate the order of the district court and remand for entry of a preliminary injunction, even if it were to do so after the October 11, 2005 election, a portion of the relief sought—voter accessible interface devices for subsequent elections—may still be granted and is not moot.

As matters stand, Volusia County insists that neither the ADA or Florida law require it to acquire voting machines accessible to the blind. It has not purchased or

[2] 59 F.3d 1114 (11th Cir. 1995)
[3] 874 F.2d 1581 (11th Cir. 1989)

taken any steps to purchase such machines. Accordingly, the request for preliminary injunction is not moot.

II. The District Court Erred in Refusing to Issue a Preliminary Injunction Based on Plaintiffs' ADA Claim

The trial judge's interpretation of the law is reviewed de novo.[4]

Judge Antoon concluded that because there was case law both in favor of and against the Plaintiffs on the merits of its ADA claim, Plaintiffs had not met the burden, necessary to a grant of a preliminary injunction, of showing a likelihood of prevailing on the merits. Judge Antoon did not attempt to independently analyze whether the ADA requires Volusia County to offer blind voters the same benefits of voting, secrecy and independence, that it offers the sighted. In failing to do so, the court misunderstood its task. In the absence of controlling precedent there may often be conflicting indications in cases on a particular matter. The mere presence of such conflict cannot alone disqualify a plaintiff faced with irreparable injury from injunctive relief. This Court and the trial courts regularly go to great pains in reviewing prayers for preliminary injunctions to make an accurate determination of the law as it applies to the facts of those cases. If Judge Antoon is correct that he need only observe that there is arguable conflicting authority on a point, all that work by this Court and others would be unnecessary. Litigants deserve to have

[4] *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1246 (11th Cir. 2002)

trial courts decide matters, including whether the law, in the considered view of a particular trial court, makes it likely that the Plaintiff will ultimately prevail on the merits.

Volusia County asserts that Plaintiffs' claim is invalid because the ADA does not grant blind individuals the right to vote "independently and secretly." Volusia County mischaracterizes Plaintiffs' claim. Title II of the ADA guarantees that a disabled individual shall not be excluded from the benefits of the programs of a public entity.[5] One of the benefits that Volusia County affords sighted voters is the opportunity to vote secretly and independently. The ADA requires it, therefore, to do likewise for the disabled registered voters of that county.

Volusia County also asserts that voting equipment is not a "facility" under the ADA. However, as thoroughly discussed in *Am. Assoc. of People with Disabilities v. Hood*,[6] voting systems are facilities within the definitions set forth in the regulations.

Volusia County, like the district court, mistakenly relies on *Nelson v. Miller*[7] and *Am. Assoc. of People with Disabilities v. Shelley*.[8] As explained in Plaintiffs' main brief, *Nelson* addressed theories for relief neither made in this case nor

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[5] 42 U.S.C. §12132.
[6] 310 F. Supp. 2d 1226 (M.D. Fla), *appeal docketed*, No. 04-115666 (11th Cir., Apr. 20, 2004).
[7] 170 F.3d 641 (6th Cir. 1999)
[8] 324 F.Supp.2d 1120 (C.D. Cal. 2004).

applicable to it. As Michigan's constitution has no application to this case, neither does *Nelson.* Similarly, *Shelley* did not address the ADA's requirement, with respect to altered facilities, to make voting equipment accessible to the maximum extent feasible.[9]

Volusia County asserts that since HAVA guarantees "privacy and independence" in voting to persons with disabilities, the ADA must not, because Congress does not grant a right in a statute that it has already granted in another fashion. If this novel proposition were true, that the same right may not be guaranteed by two different pieces of legislation, then a particular action could not be a basis for, say, a securities action under the 1933 Act when it is also addressed under the 1935 Act, or if an action is prohibited by the Clayton Act, it could not be within the purview of the earlier Sherman Act. The courts frequently encounter conduct falling within, for example, both the ADA and the FMLA, or the ADA and the Fair Housing Act. Not surprisingly, Volusia County cites no law to support this unusual canon of statutory construction. In any event, HAVA is clear that it may not be construed to supersede the application of the ADA to voting matters.[10]

Volusia County also argues that, if the new or altered facility requirement of the ADA does apply, there was no showing that accessible voting equipment was commercially available in 1995 when it acquired the Diebold system. There is no

[9] 28 C.F.R. §35.151(b).
[10] 42 U.S.C. §15545.

"commercially available" exception to the ADA; indeed, much that is technologically feasible may not be commercially available until the demand is created by the need to comply with the ADA. Volusia County, moreover, remains required to alter facilities to the maximum extent feasible to make the equipment accessible and there is no question that accessible machines are available today (and Volusia County does not claim otherwise).

Both Volusia County and EFF labor mightily to try to shoehorn into the ADA the fact that the accessible machines currently certified by Florida for use in elections lack a contemporaneous paper ballot. The federal government and the State of Florida, however, have each determined what standards to apply to voting machines and what machines qualify under those standards. The standards do not include a requirement for contemporaneous paper ballots or receipts, perhaps because of the long history of fraud associated with paper ballots. Both Florida and the federal government have certified machines that meet their respective standards that are accessible to blind voters. If Volusia County believes that machines lacking verifiable paper audit trails ought not be certified, its remedy is in the ballot box itself—to vote out the state and federal legislators and executives who chose not to require this feature. But at that election, the blind, too, should be able to vote and on the same terms as everyone else.

III. Florida Law Requires Volusia County to Use Accessible Voting Machines at the Next Election

The gravamen of Volusia County's argument with respect to Florida law is its suggestion that nothing in the language of the law requires the County to acquire accessible voting machines at any time. The statute requires "at least one accessible voter interface device installed in each precinct,"[11] and the statute has an effective date of July 1, 2005.[12] Thus, it is clear that at elections after July 1, 2005 it is someone's responsibility to ensure that each precinct in Volusia County has at least one accessible voter interface device. While it is true that the statute does not literally identify the counties as the parties to install the machines in each precinct, Florida is a state in which each county selects and purchases its own voting machines and installs them in each precinct. As noted, Volusia County has received a grant from the Florida Legislature for the precise purpose of purchasing one accessible voter interface device for each precinct. Given the absence of a plausible alternative responsible party, it is clear that the manner in which each precinct is to have an accessible voting machine for the next election after July 1, 2005 is by the action of each Florida county. Volusia County has offered no alternative interpretation of how the statutory requirement for accessible machines in each precinct is to be met.

[11] Fla. Stat. §101.56062(2)
[12] Fla. Stat. §101.56062 n.1.

IV. The Remaining Factors Warrant the Entry of a Preliminary Injunction

In their opening brief, Plaintiffs addressed how their claim satisfies the remaining requirements for a preliminary injunction -- irreparable harm that outweighs the harm to the County and the public interest in vindicating federally guaranteed rights. Plaintiffs also noted that the record before the district court, consisted of pleadings and affidavits; thus, the Circuit Court is in as good a position to weigh these factors as the trial court had been. Volusia County chose in its opposition brief to contest none of these points. Accordingly, if the Court is satisfied that Plaintiffs are likely to prevail on the merits of their claims at trial, it should vacate and remand with instructions to the district court to enter a preliminary injunction directing Volusia County to have at least one accessible voting machine at each precinct for the next election and for each election thereafter until further order of the court.

CONCLUSION

For the reasons set forth herein and in their opening brief, Plaintiffs respectfully request that the Court vacate the order of the district court and remand with instructions to enter an injunction directing Defendants to have at least one accessible voting machine at each precinct for the next election and for each election thereafter until further order of the court.

Respectfully submitted,

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I hereby certify that copies of the foregoing Reply Brief of Appellants were served by E-mail and Federal Express this 15th day of September, 2005, upon:

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