Case No. 04-11566-JJ

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, DANIEL W. O'CONNOR, KENT BELL, AND BETH BOWEN,

Plaintiffs/Appellees,

v.

JOHN STAFFORD,
Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION
No. 3:01-CV-1275-J-Alley/HTS

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CERTIFICATE OF INTERESTED PERSONS

PURSUANT TO ELEVENTH CIRCUIT RULE 26.1

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 26.1-2, counsel for Appellees hereby supplement their Certificate of Interested Persons and Corporate Disclosure Statement filed along with Appellees' Opposition to Appellant Stafford's Motion for Reconsideration or Modification of Jurisdictional Order by adding R. William Sigler, counsel for Appellees.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34 and Eleventh Circuit Rule 28-1(c), Appellees respectfully request that this appeal be placed on the oral argument calendar for submission and decision with oral argument. Appellees believe that oral argument would assist with the resolution of the issues raised by this appeal.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS PURSUANT TO ELEVENTH CIRCUIT RULE 26.1 i

STATEMENT REGARDING ORAL ARGUMENT i

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 2

STATEMENT OF THE CASE 4

I. STATEMENT OF PROCEEDINGS IN THE TRIAL COURT 4

II. STATEMENT OF FACTS 7

A. Appellant Altered Duval County's Existing Voting System When Punch Cards Were Outlawed By The Florida Legislature 7

B. Appellant Purchased A Voting System That Is Not Readily Accessible To Duval County's Disabled Voters 8

C. Duval County Could Have Purchased An Accessible Voting System In Lieu Of The Optical Scan System 11

1. Florida Certified Voting Systems Included Viable, Tested Technologies That Were More Accessible To Disabled Voters Than The Optical Scan System 11

2. The Available Accessible Voting Systems Were And Are Financially Feasible 16

STANDARDS OF REVIEW 17

SUMMARY OF ARGUMENT 18

ARGUMENT 20

I. THE TRIAL COURT PROPERLY CONCLUDED THAT THE ADA APPLIES TO THIS CASE 20

II. THE COURT PROPERLY FOUND THAT THE VOTING SYSTEM IN DUVAL COUNTY IS NOT READILY ACCESSIBLE TO AND USABLE BY DISABLED VOTERS TO THE MAXIMUM EXTENT FEASIBLE 24

A. The Trial Court Applied The Proper ADA Standard To Appellant's Conduct 25

B. The Trial Court Properly Concluded That Voting Equipment Is A Facility Under the ADA 30

C. It was Feasible for Appellant to Procure an Accessible Voting System 31

1. Touch screens were technologically feasible 32

2. Appellant could have afforded to place one accessible voting system in each polling place 36

D. The Trial Court Properly Concluded That Appellant Violated the ADA by Failing to Provide Touch Screen Voting Machines for Manually Impaired Voters 39

E. The Trial Court's Finding on Appellees' "Effective Communication" Claim Is Not Inconsistent With The Court's Finding That the Optical Scan System Is Not Accessible to the Maximum Extent Feasible 41

F. A 1993 DOJ Letter of Findings Does Not Undermine the Trial Court's Ruling 43

III. HAVA DOES NOT RENDER THIS LAWSUIT MOOT 45

IV. THE TRIAL COURT'S REMEDY PLAN IS AN APPROPRIATE RESPONSE TO APPELLANT'S ADA VIOLATIONS 48

A. The Trial Court's Order Will Not Subject Appellant to Equal Protection Violation Claims 48

B. Class Certification Is Not a Prerequisite to Injunctive Relief 52

CONCLUSION 54

CERTIFICATE OF COMPLIANCE 56

CERTIFICATE OF SERVICE 57

TABLE OF CITATIONS

CASES

Acree v. County Board of Education,

458 F.2d 486 (5th Cir. 1972) 49

Association for Disabled Americans v. City of Orlando,

153 F. Supp. 2d 1310 (M.D. Fla. 2001) 25

Bailey v. Patterson,

323 F.2d 201 (5th Cir. 1963) 52

Baxter v. Palmigiano,

425 U.S. 308, 96 S. Ct. 1551 (1976) 53

Bieneman v. City of Chicago,

838 F.2d 962 (7th Cir. 1988) 53

Bing v. Railway Express, Inc.,

485 F.2d 441 (5th Cir. 1973) 54

Bresgal v. Brock,

843 F.2d 1163 (9th Cir. 1987) 53

Bush v. Gore,

531 U.S. 98, 121 S. Ct. 525 (2000) 51, 52

Christensen v. Harris County,

529 U.S. 576, 120 S. Ct. 1655 (2000) 44

Craft v. Memphis Light, Gas & Water Division,
534 F.2d 684 (6th Cir. 1976), *aff'd*, 436 U.S. 1,
98 S. Ct. 1554 (1978) 53
Doe v. Bush,
261 F.3d 1037 (11th Cir. 2001).....54
Engle v. Gallas,
No. 93-3324, 1994 U.S. Dist. LEXIS 7935
(E.D. Pa. June 10, 1994).....29
Fairley v. Forrest County,
814 F. Supp. 1327 (S.D. Miss. 1993).....52
FDIC v. Verex Assurance, Inc.,
3 F.3d 391 (11th Cir. 1993).....48, 50
Fisher v. Oklahoma Health Care Authority,
335 F.3d 1175 (10th Cir. 2003).....37
Gonzalez v. Reno,
215 F.3d 1243 (11th Cir. 2000).....44
International Union of Bricklayers & Allied Craftsmen v. Meese,
616 F. Supp. 1387 (N.D. Cal. 1985).....53
Kemp v. Beasley,
352 F.2d 14 (8th Cir. 1965).....49

Kidder, Peabody & Co. v. Brandt,

131 F.3d 1001 (11th Cir. 1997) 18

* *Kinney v. Yerusalim*,

9 F.3d 1067 (3d Cir. 1993) 25, 26, 29, 31

Local 28 of Sheet Metal Workers International Ass'n v. EEOC,

478 U.S. 421, 106 S. Ct. 3019 (1986) 50

Meek v. Metropolitan Dade County,

985 F.2d 1471 (11th Cir. 1993) 18

* *National Organization on Disability v. Tartaglione*,

No. 01-1923, 2001 U.S. Dist. LEXIS 16731

(E.D. Pa. Oct. 11, 2001) 21, 22, 30

Nelson v. Miller,

170 F.3d 641 (6th Cir. 1999) 23, 24, 42

Pascuiti v. New York Yankees,

87 F. Supp. 2d 221 (S.D.N.Y. 1999) 37

Paxton v. Union National Bank,

688 F.2d 552 (8th Cir. 1982) 53

Sanford v. R.L. Coleman Realty Co.,

573 F.2d 173 (4th Cir. 1978) 53

* *Shotz v. Cates*,

256 F.3d 1077 (11th Cir. 2001).....20, 21, 25

Solomon v. Liberty County Commissioners,

221 F.3d 1218 (11th Cir. 2000).....17, 33, 39

Sun America Corp. v. Sun Life Assurance Co. of Canada,

77 F.3d 1325 (11th Cir. 1996).....18, 41, 43

* *Tennessee v. Lane*,

124 S. Ct. 1978 (2004) 18, 20

Troiano v. LePore,

No. 03-80097-Civ-Middlebrook/Johnson

(S.D. Fla. May 1, 2003).....14, 22, 24, 30

United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974).....52, 53

United States v. Secretary of HUD,

239 F.3d 211 (2d Cir. 2001).....50

Weber v. Shelly,

347 F.3d 1101 (9th Cir. 2003).....51

Wexler v. LePore,

319 F. Supp. 2d 1354 (S.D. Fla. 2004), *dismissed*,

(11th Cir. May 24, 2004), on appeal, No. 04-12826-II (11th Cir.

2004).....51

Wexler v. LePore,

No. 502004A000491XXXXMBA (Fla. Cir. Ct. 15th Cir. Feb 11,

2004), *aff'd*, No. 4D04-918 (Fla. 4th Dist. Ct. App. Aug. 6, 2004).....51

STATUTES

28 U.S.C. §1292(a)(1) (2002).....1

42 U.S.C. §§ 12101-12213 (2002) 1

42 U.S.C. § 15481 (2002) 3, 19, 48

42 U.S.C. § 15545 (2002) 45

REGULATIONS

28 C.F.R. § 35.104 (2003).....31

28 C.F.R. § 35.150 (2003).....25

28 C.F.R. § 35.151 (2003)..... *passim*

28 C.F.R. § 35.160 (2003).....41

LEGISLATIVE MATERIALS

H.R. Rep. No. 101-485(II), *reprinted in* 1990 U.S.C.C.A.N. 303 26

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Florida granted final judgment in favor of Appellees against Appellant under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 ("ADA"). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

The issues presented are:

1. Did the trial court commit clear error by concluding that it was feasible for Appellant to purchase one touch screen voting machine with audio ballot for every polling place in Duval County when he purchased new voting machines in 2002, where the trial record contained evidence that Florida had certified such systems at that time; that other Florida counties, including those of comparable size to Duval County, purchased these certified systems; that the cost of such a purchase would be approximately $1 million; and that Duval County's 2001 annual budget was over $1.2 billion, including a general fund of nearly $750 million?

2. Did the trial court commit clear error when it found that Appellant violated the ADA when he purchased an optical scan voting system in 2002 that is not readily accessible and usable by disabled voters to the maximum extent feasible, where the evidence demonstrated that Appellees, disabled voters, were unable to vote on the optical scan system unassisted in the same manner as non-disabled voters; the Appellant admitted that there were material differences in the manner that optical scan systems required disabled voters to vote as compared to the manner in which non-disabled voters voted using optical scan systems; and

Appellant conceded that disabled voters had a "legitimate complaint" regarding those material differences?

3. Did the trial court err when it held that the Help America Vote Act (HAVA), 42 U.S.C. § 15481, does not moot Appellees' ADA claims, where HAVA expressly disavows any limitation or restriction of the ADA; HAVA does not provide a remedy for Appellant's current violation of the ADA; the United States government has instructed all counties, including Duval County, to comply with HAVA's disability provisions "as soon as practical"; and Appellant failed to prove that it was impractical to comply with the deadlines set forth in the trial court's judgment?

4. Did the trial court err in the scope of the injunction that it entered against Appellant, where the conduct mandated – to provide at least one accessible voting machine in 20% of the polling places in Duval County by the August 2004 primary election – was substantially less than what Appellant could do voluntarily to the maximum extent feasible, and the lawsuit proceeded to judgment as an individual action, although Appellees moved for a class to be certified?

STATEMENT OF THE CASE

Appellees are Florida citizens who are visually or manually impaired voters[1] registered to vote in Duval County, Florida and a non-profit association dedicated to advocating for and enabling persons with disabilities. (**Dkt. 215**, ¶¶1-3.)[2] They challenged the Appellant's decision to purchase new voting systems as violations of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act ("RA") because the machines that Appellant purchased were not readily accessible to disabled voters to the maximum extent feasible, as those statutes mandate. (**Dkt. 215**, p. 15-16.)

I. STATEMENT OF PROCEEDINGS IN THE TRIAL COURT

Appellees provide a brief response and supplementation to certain portions of Appellant's "Statement of Proceedings and Disposition in the Court Below" to provide the court a complete recitation of the procedural history of this case.

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[1] Hereinafter, "visually or manually impaired voters" will be referred to collectively as "disabled voters."

[2] In this brief, references to the Record on Appeal, including trial transcripts, will be designated by their Docket Number, and Page and/or Paragraph reference, *e.g.*, "Dkt. X, p. YY." For the Court's convenience, Appellees have bold-faced **Dkt. 215**, which is the trial court's opinion. References to trial exhibits are prefaced as "PX" for Plaintiffs' Exhibits, and "DX" for the Appellant's or State Defendants' exhibits.

First, Appellant claims that, in ruling on his initial motion to dismiss, "the trial court dismissed [Plaintiffs'] ADA and RA claims *with prejudice* to the extent they claimed a right to a voting system that provided a 'direct and secret' voting experience without third party assistance." (Appellant's Brief ("Br.") 4.) This mischaracterizes the trial court's ruling. The Honorable Ralph W. Nimmons, Jr. upheld the Plaintiffs' ADA claims under both the program exclusion and generic discrimination proscriptions. (Dkt. 42, p. 29-30.) He dismissed Plaintiffs' ADA claim *only* to the extent that Plaintiffs claimed "they have been excluded from or denied the benefits of a program of direct and secret voting that does not permit the type of assistance provided for [in Florida's third-party assistance statute]." (*Id.* 37-38.) Indeed, Judge Nimmons specifically relied on this Circuit's precedent that the ADA is not restricted to those situations in which "'a disabled person is completely prevented from enjoying a service, program, or activity," and held that the ADA "more generically proscribe[s] disability 'discrimination' by the pertinent public entities." (*Id.* 26-27, 29.)

Second, Appellant characterizes the amended complaint (Dkt. 47) as merely "substitut[ing] the phrase 'cast independently a secret ballot' for the phrase 'cast a direct and secret ballot' and, as to their general discrimination claim, list[ing] various attributes of third party assistance that were allegedly intrusive as to their voting privacy such as 'being forced to reveal their vote to a third-party.'" (Br. 4.)

To the contrary, the amended complaint alleges not only discrimination flowing from third party assistance as the *only* option for disabled voters, (Dkt. 47, p. 9-10, 16-18), but also discrimination related to the additional burdens faced by Plaintiffs when voting that are not faced by non-disabled voters:

> The particular discrimination against Plaintiffs . . . manifests itself as follows: (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.

(*Id.* 17-18, (emphasis added); *see also id*. 9-10.)

Thus, the amended complaint is predicated on the burdens and discrimination imposed upon disabled voters in the County who are forced, despite the availability of several accessible options, to vote using third-party assistance, and is not, as Appellant contends, simply "another attack on Florida's third-party assistance statute." (Br. 4.)

Third, the trial court's final judgment was not, as Appellant contends, limited to "a single ADA regulatory claim under 28 C.F.R. section 35.151(b)…."

(Br. 5.) After finding for Appellees on their claim under 28 C.F.R. § 35.151(b), the court went on to review Appellees' claim under the generic proscription of the ADA, and found it to be "coterminous with its claim under 28 C.F.R. § 35.151." (**Dkt. 215**, p. 27.) The trial court stated that "the Court will not separately address this claim based upon the conclusion that it is to be resolved in the same manner as Plaintiffs' claim under 28 C.F.R. § 35.151." (*Id.* 27-28.)

II. STATEMENT OF FACTS

A. Appellant Altered Duval County's Existing Voting System When Punch Cards Were Outlawed By The Florida Legislature

In the Fall 2000 general elections, Duval County, like many Florida counties, utilized a punch card voting system. (**Dkt. 215**, ¶14.) In early 2002, Duval County, under the Appellant's supervision as the County's Supervisor of Elections, commenced the process to alter its voting facilities by replacing the punch card machines, which had been outlawed by the Florida legislature following the state's infamous "hanging chad" experience during the 2000 elections. (*See* **Dkt. 215**, ¶14.)

Under Florida law, any new voting system Appellant purchased had to have passed Florida's stringent certification process. (**Dkt. 215**, ¶10.) "Certification is an application and licensing process that determines if a voting system meets the

requirement of the Florida Election Code and the Florida Voting System Standards." (**Dkt. 215**, ¶11.) Florida's certification process is objective, rigorous and thorough; "a certified 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." (*Id.*) On September 25, 2001, the DOE Director specifically assured the Appellant that "[a] county choosing from among the certified systems can be confident that it is providing its voters with the highest standard in voting technology." (*Id.*; PX 142.)

B. Appellant Purchased A Voting System That Is Not Readily Accessible To Duval County's Disabled Voters

The new voting system that Appellant chose in January 2002 from among those certified for use in Florida was an optical scan voting system manufactured by Diebold.[3] (**Dkt. 215**, ¶20.) The City of Jacksonville, on behalf of the County, signed an agreement with Diebold on October 3, 2002; before that date, the County was free to change its choice of systems. (Dkt. 170, p. 124:14-23; PX 150, at 95:15-17.)

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

[3] The system bore the brand of Global Election Systems Accu Vote; Diebold purchased Global in or around February 2002. (**Dkt. 215**, ¶20 n.1.)

optical scan ballot reader. (Dkt. 166, p. 53:16-22; PX 148, at 33:5-17.) A voter must be able to grip a pencil and see to use these machines. (Dkt. 169, p. 155:20-156:7.) No auxiliary aids exist that would permit a disabled voter to vote in the same or similar manner as non-disabled voters using an optical scan voting system. (PX 150, at 79:25-80:6.) Not surprisingly, the Appellant admitted that "there are greater burdens imposed on visually or manually impaired voters under Duval County's optical scan system that are not placed on [non-disabled] voters" (Dkt. 169, p. 154:2-8; *see also id.* 153:16-19, 155:12-15; PX 150, at 51:6-10, 54:17-55:8); "visually or manually impaired voters vote in a materially different manner than non-disabled voters vote" in Duval County (Dkt. 169, p. 154:13-155:6); and that disabled voters "probably have a legitimate complaint" about these material differences in the way they vote. (Dkt. 169, p. 155:20-156:1.)

The trial testimony from disabled voters about the burdensome and humiliating process they have endured when casting their votes on Duval County's optical scan system confirms Appellant's concessions. Beth Bowen, who has been blind since birth (**Dkt. 215**, ¶1; Dkt. 167, p. 13:2-3), testified that she was put "on display" when she used third party assistance because she was required to vote in the middle of a large room where "there's people all around." (**Dkt. 215**, ¶7; Dkt. 167, p. 18:10-22.) Kent Bell, who was born without arms or legs (**Dkt. 215**, ¶2; Dkt. 166, p. 84:6-8), was forced to wait for two poll workers to assist him to vote

(at the "snack table") in the presence of non-disabled voters. (**Dkt. 215**, ¶6; Dkt. 166, p. 96:6-97:25.) On another occasion, Mr. Bell was forced to reveal his candidate choices in the presence of at least ten other people. (**Dkt. 215**, ¶6; Dkt. 166, p. 98:1-99:9.)

Dan O'Connor, who is legally blind (**Dkt. 215**, ¶1; Dkt. 166, p. 51:8-22), was taken to a "separate room" to vote where he could overhear other voters reveal their selections. (**Dkt. 215**, ¶5; Dkt. 166, p. 58:11-60:6.) The person assisting him "did not read [the] party affiliation [of] the candidates," which caused Mr. O'Connor to doubt whether his ballot had been properly cast. (**Dkt. 215**, ¶5; Dkt. 166, p. 61:2-16.) As Mr. O'Connor explained, "And even when the person went over the selections I made, you know, I didn't know for sure. I wasn't able to verify on my own whether that was actually accurate or not, like I had [with] the experience of the touch screen machines." (Dkt. 166, p. 61:2-16.) Likewise, Pamela Hodge testified that the poll worker providing her assistance could not even pronounce the words on the ballot accurately. (*Id*. 123:8-124:23.)

This evidence established that Appellant imposed upon tens-of-thousands[4] of disabled voters in Duval County a voting process that is fundamentally different from and more burdensome than the process by which non-disabled voters vote.

[4] Dkt. 166, p. 50:3-13; Dkt. 169, p. 132:13-134:15; Dkt. 170, p. 145:17-146:7; PX 13, at 159:13-16; PX 145.

There simply is no way for disabled voters to vote in a non-discriminatory manner on Duval County's optical scan system – instead, these voters are *forced* to rely on third party assistance. (**Dkt. 215**, ¶2, p. 17; Dkt. 166, p. 53:16-25, 84:23-85:10, 112:13-21; Dkt. 167, p. 14:3-13; Dkt. 169, p. 152:21-153:8; Dkt. 172, p. 88:24-89:3.) On the basis of this and other evidence at trial, the trial court found that the "optical scan voting system purchased by Duval County is not readily accessible to visually or manually impaired voters." (**Dkt. 215**, p. 17.)

C. Duval County Could Have Purchased An Accessible Voting System In Lieu Of The Optical Scan System

1. Florida Certified Voting Systems Included Viable, Tested Technologies That Were More Accessible To Disabled Voters Than The Optical Scan System

The County did not have to purchase an optical scan system. (**Dkt. 215**, p. 5-6, 8; *see also* Dkt. 169, p. 76:11-21.) Instead, Appellant could have procured a touch screen voting system equipped with an audio ballot, on which disabled voters can vote independently, as non-disabled voters do. (**Dkt. 215**, p. 8, 17-18.) 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. (DX 31, at 34.) 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. (Dkt. 166, p. 54:3-55:5; PX 150, at 56:20-25; PX 149, at 27:1-3, 43:11-44:11, 89:12-90:10.) As demonstrated at trial by Mr. Bell, at least some manually impaired voters can use a mouth stick or other device to press the screen. (**Dkt. 215**, p. 19; PX 150, at 57:9-16; Dkt. 166, p. 85:17-86:25; Dkt. 167, p. 52:7-19, 173:16-175:8.)

There were at least two Florida-certified touch screen systems at the time Appellant was considering which voting system the County would purchase: ES&S and Sequoia.[5] The ES&S touch screen voting system with audio ballot was certified and available for immediate purchase and use on August 16, 2001, more than a year before Appellant signed the contract with Diebold.[6] (**Dkt. 215**, ¶16; PX 132; *see also* Dkt. 169, p. 76:16-21; PX 150, at 103:19-104:3.)

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[5] Although the trial court concluded that only the ES&S was certified sufficiently in advance of the September 2002 primary election to have been used in that election by Appellant, the trial evidence demonstrated that Florida counties also used the Sequoia touch screen system in the September 2002 primary election. (Dkt. 172, p. 46:20-47:13; Dkt. 167, p. 46:14-47:5; Dkt. 168, p. 51:11-14.) Appellant testified that he had the options of "getting Diebold certified, or getting somebody else certified . . ." in addition to the options of purchasing the ES&S or Sequoia touch screen systems equipped with audio ballots. (Dkt. 169, p. 99:18-21; PX 150, at 103:19-104:3.)

[6] Because the certification occurred after the 2001 Governor's Select Task Force on Election Procedures, Standards, and Technology's recommendation, the ES&S system could not be part of the task force's recommendation. (DX 31, at 30.) As a result, the Recommendation was obsolete by the time Appellant purchased the County's voting system. Indeed, the 2002 Governor's Select Task Force recognized the new landscape that existed when it concluded that "[t]he current

During the period that Appellant was investigating which voting system to purchase, at least eleven Florida counties purchased and provided the ES&S touch screen in time for the 2002 elections. (PX 1, at 57.) For example, Pasco County, Florida, entered into a contract with ES&S for the purchase of a touch screen system that "accommodate[s] the sight impaired with audio assisted voting" in October 2001. (**Dkt. 215**, ¶42; Dkt. 167, p. 166:6-16, 167:23-25.) The system was delivered to Pasco County (1,455 machines in total) approximately two weeks from the time the contract was signed. (Dkt. 167, p. 167:23-168:4, 169:19-170:2.) By the time of trial, Pasco County had used its new touch screen system in three elections with "huge success." (**Dkt. 215**, ¶42; Dkt. 167, p. 170:6-171:5, 172:8-173:12; PX 81, PX 111.)

By the time of the trial in this matter, "the majority of the State's voters" had used Florida-certified touch screen machines in elections. (PX 1, at 23.) Touch screens were used in at least Dade, Broward, Hillsborough, Pasco, Nassau, Pinellas, and Indian River counties. (**Dkt. 215**, ¶41.) Highlands and Palm Beach counties have used systems comprising the specific relief ordered by the trial court

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technology" for meeting the needs of disabled voters "is the touch screen electronic voting machine with features such as audio that recites the ballot in a headset for blind and illiterate voters." (DX 12, at 23.)

– blended systems[7] of one touch screen and an optical scan system in each polling place. (**Dkt. 215**, ¶41; *Troiano v. LePore*, No. 03-80097-Civ-Middlebrook/Johmsom, slip op., at 8-10 (S.D. Fla. May 1, 2003).) Hillsborough implemented the Sequoia system with audio ballot one month after it was certified, in time for the September 2002 primary election. (Dkt. 167, p. 46:14-47:5, 49:9-20; Dkt. 168, p. 51:11-14; Dkt. 172, p. 46:20-47:13.)

The successful use of touch screen voting systems is not limited to Florida. Prior to purchasing the County's optical scan system, Appellant knew that 257 counties throughout the country used touch screen voting systems, representing at least 8.9% of the national popular vote. (Dkt. 169, p. 183:4-8; PX 11, at 10.) Between February 2001 and September 2003 the use of touch screens expanded to "about 500 counties with more than 200,000 units" throughout the country, including counties in California, Georgia, Texas, Colorado, Ohio, Maryland,

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[7] There is a distinction between the two types of "blended" systems described at trial. The first is a certified system comprised of an optical scan reader and a touch screen machine made by the same vendor. The other type of "blended" system is one comprised of an optical scan reader and a touch screen system made by two different vendors. Both types of blended systems are technologically feasible and used across the country. (Dkt. 170, p. 149:15-18 (Arapahoe County, Colorado, blends the Hart eSlate with the Sequoia optical scan); Dkt. 170, p. 149:19-150:1 (Tarrant County, Texas, blends the Hart eSlate with an ES&S optical scan); *see also* Dkt. 168, p. 69:12-17; 52:6-14).) The recent certification of the Diebold touch screen with audio ballot now means that the county could use a "blended" Diebold system for use in all of its polling places, and all training could be completed by Diebold within a month. (Dkt. 248; Dkt. 171, p. 109:9-110:4.)

Arizona, South Carolina, and the District of Columbia. (Dkt. 170, p. 142:9-14; Dkt. 167, p. 82:11-17, 117:23-121:20, 130:16-25, 172:8-173:12; Dkt. 168, p. 53:24-54:5; Dkt. 170, p. 142:15-143:5; Dkt. 171, p. 25:25-26:10.) Thus, the trial evidence established that touch screen systems "have performed superbly." (Dkt. 170, p. 143:10-22.)

Given the circumstances, the Florida Chief of the Bureau of Voting System Certification could offer no explanation why Duval County could not have procured an accessible voting system as these other jurisdictions had done: "I don't know of any reason that Duval County officials would not have the intelligence, management skills and other resources that it would take to do the same thing. . ." as other Florida counties did. (Dkt. 168, p. 26:19-27:7.)

2. The Available Accessible Voting Systems Were And Are Financially Feasible

The cost to make available one touch screen with audio ballot in every polling place in Duval County is approximately $1 million.[8] (**Dkt. 215**, ¶30; Dkt. 170, p. 25:25-26:14; Dkt. 172, p. 42:15-22; *see also* Dkt. 139, p. 24.) Duval County could well afford this expenditure. (**Dkt. 215**, p. 18.) The Duval County Task Force concluded that "with [a general fund] approaching $700 million,

[Duval County] could well afford the additional expenditures" required to remedy the years of neglect in Duval County's "outmoded" election equipment. (Dkt. 171, p. 171:2-6; PX 10, at 6-7, 19, 27, 34, 36.) Indeed, in addition to a $700 million general fund, the County is armed with a $1.2 billion budget. (**Dkt. 215**, ¶31; PX 139.) In fact, the County had sufficient resources that it could have paid cash for the Diebold system, rather than finance the acquisition. (Dkt. 169, p. 107:4-11.) Finally, financing for touch screen voting equipment was readily available and inexpensive. (Dkt. 169, p. 107:15-108:5.)

Furthermore, the purchase price of the touch screen system does not account for cost savings that the County would enjoy by using a paperless system. Pasco County determined that purchasing the ES&S touch screen system was not going to "put Pasco [County] in the poorhouse." (PX 99; Dkt. 167, p. 141:12-142:3.) The initial outlay of funds to acquire the ES&S touch screen voting system was offset by the long-term savings Pasco County would achieve from no longer having to print expensive paper ballots. (Dkt. 167, p. 149:14-150:22.) Similarly, Georgia performed an extensive cost analysis for twelve years into the future, and concluded that the touch screen system was a "better value . . . because the long-term costs were minimal compared to the escalating cost [for an] optical scan

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8 It would cost Appellant far less, only $210,000, to implement the trial court's order to place one touch screen with audio ballot in 20% of the polling places in

system." (Dkt. 167, p. 97:10-98:22.) The evidence demonstrated that Duval County would have saved as much as $400,000 per year in ballot printing costs alone by implementing a countywide touch screen system. (PX 13, at 21:12-24; PX 14, at 174:4-175:2.)

STANDARDS OF REVIEW

This Court must defer to the trial court's findings of fact if they are "'plausible in light of the record viewed in its entirety. . . . Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" *Solomon v. Liberty County Comm'rs*, 221 F.3d 1218, 1226-27 (11th Cir. 2000) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511 (1985)). In reviewing these factual findings, this Court must make all credibility choices in favor of the fact-finder's choice, in light of the record as a whole. *Meek v. Metro. Dade County*, 985 F.2d 1471, 1481 (11th Cir. 1993).

This Court reviews the trial court's conclusions of law *de novo*. *See Kidder, Peabody & Co. v. Brandt*, 131 F.3d 1001, 1003 (11th Cir. 1997); *SunAm. Corp. v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325, 1333 (11th Cir. 1996).

Duval County. (Dkt. 219, p. 15.)

This Court reviews the trial court's order granting declaratory and injunctive relief for a "clear error of judgment." *SunAm.,* 77 F.3d at 1333 (internal citations omitted).

SUMMARY OF ARGUMENT

Appellant's appeal is based upon arguments that were properly rejected by the trial court on no less than three separate occasions.

First, Appellant continues to argue that the ADA does not apply to voting. This argument ignores the legislative history of the ADA, and applicable federal case law, including the recent pronouncements of the United States Supreme Court in *Tennessee v. Lane*, 124 S. Ct. 1978, 1989 (2004). The ADA applies to voting programs generally and the Appellant's purchase of new voting systems for Duval County specifically.

Second, the Appellant's arguments that (1) he proposed an acceptable alternative for disabled voters in the County, (2) the purchase that Appellees seek would impose an undue administrative and financial burden, and (3) disabled voters are able to cast their votes – albeit in burdensome, discriminatory and in some cases humiliating way – are not only unsupported factual contentions that the trial court rejected in weighing the evidence, these arguments are immaterial as a matter of law under the applicable regulations.

Third, the trial court's factual conclusions that touch screen voting is "feasible" and a "readily accessible" facility are supported by credible trial evidence and thus entitled to due deference by this Court.

Fourth, Appellant's contention that HAVA, 42 U.S.C. § 15481, renders this case moot ignores not only the plain language of HAVA but also the position of the United States Department of Justice.

Finally, Appellant's legal challenges to the trial court's injunction are legally unsupportable.

The record is crystal clear that Appellant purchased an inaccessible optical scan voting system at a time when numerous options to meet the needs of disabled voters existed. Duval County's voting system imposes significant (and unnecessary) burdens on disabled voters that are not faced by non-disabled voters. This voting system is not – as the ADA demands – readily accessible to the maximum extent feasible. The trial court committed no error in reaching this conclusion.

ARGUMENT

I. THE TRIAL COURT PROPERLY CONCLUDED THAT THE ADA APPLIES TO THIS CASE

Appellant first asserts that the trial court erred as a matter of law when it held that Appellant violated the ADA (**Dkt. 215**, p. 17-20) because the ADA does

not apply to the impairment of disabled voters' rights when they are forced to vote using a more burdensome and discriminatory voting process than non-disabled voters do. (Br. 27-31.) Unfortunately for Appellant, the trial court's application of the ADA and its implementing regulations comports with Supreme Court and Eleventh Circuit precedent. *Shotz v. Cates*, 256 F.3d 1077 (11th Cir. 2001); *see also Tennessee v. Lane*, 124 S. Ct. at 1989 (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).

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." 256 F.3d 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*.

Thus, this Court has already effectively rejected Appellant's contention that there can be no ADA violation because Appellees somehow managed to vote using

Duval County's optical scan system. (Br. 32-33.) *Shotz* deems irrelevant to Appellees' ADA claim that the Appellees somehow manage to vote. The ADA is violated because the process of voting is not readily accessible to Appellees as they are *forced* to vote in a manner rife with burdens not faced by non-disabled voters. (**Dkt. 215**, p. 2-3.) Other federal courts join the trial court's application of the ADA to voting. For example, in *National Organization on Disability v. Tartaglione*, No. 01-1923, 2001 U.S. Dist. LEXIS 16731 (E.D. Pa. Oct. 11, 2001), disabled plaintiffs alleged that the City of Philadelphia violated the ADA and Rehabilitation Act when it entered into a contract for new voting equipment that did not include accessible voting machines. *Id.* at *5-6. Plaintiffs challenged the purchase of new voting equipment because they were forced to vote using third-party assistance in a manner that imposed burdens upon them not placed upon non-disabled voters. *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).[9] Finally, the federal government agrees that the ADA applies to the voting process. The Department of Justice has stated: "If reasonable modifications were available that would allow blind or visually impaired voters to cast their ballots without assistance *and* that would assure ballot secrecy, *the plain import of the ADA and its implementing regulations would require the state to adopt those modifications.*" (Dkt. 58, Ex. 2, p. 11-12 (emphasis added).)

Appellant's reliance on *Nelson v. Miller*, 170 F.3d 641 (6th Cir. 1999), is misplaced for multiple reasons. (Br. 27.) Most importantly, the Sixth Circuit's affirmance of the district court's dismissal was "so on grounds different from those advanced [by the district court] below." 170 F.3d at 645. Contrary to Appellant's statements, the Sixth Circuit *did not* embrace the district court's reasoning on which Appellant heavily relies, *i.e.*, that the Michigan voter assistance statute

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[9] The district court later granted summary judgment because the record demonstrated that Palm Beach County had used Sequoia 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 demonstrate "injury in fact." Slip op. at 8, 10. By contrast, in Duval County, no such machines have been purchased or used anywhere – much less in every precinct.

complied with the ADA, *compare id*. at 644 *with* Br. 28; that the ADA did not create a secret right to vote, *compare* 170 F.3d at 645 *with* Br. 29; and that Congress did not intend for the ADA to displace the Federal Voting Rights Act and Voting Accessibility for the Elderly and Handicapped Act, *compare* 170 F.3d at 644 *with* Br. 28. 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]." 170 F.3d 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*.

In addition, the claims in *Nelson* were factually distinct from the claims here. The plaintiffs there did not challenge as violative of the ADA the defendant's alteration of a facility. Instead, the *Nelson* plaintiffs sought an affirmative injunction forcing the State to modify a facility, *i.e.*, purchase new voting equipment. 170 F.3d at 644. Thus, *Nelson* did not involve the affirmative obligation and stringent standard that Appellant faces here.[10] Finally, *Nelson* did

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[10] When a public entity alters an existing "facility," it must make the altered facility readily accessible to the "maximum extent feasible." 28 C.F.R. § 35.151(b); *see infra* p. 25-30.

not involve a claim under the ADA's generic proscription against discrimination. For all these reasons, *Nelson* is inapposite. *Accord Troiano v. LePore*, No. 03-80097-Civ-Middlebrooks/Johnson, slip op. at 12 (S.D. Fla. May 1, 2003) (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").

II. THE COURT PROPERLY FOUND THAT THE VOTING SYSTEM IN DUVAL COUNTY IS NOT READILY ACCESSIBLE TO AND USABLE BY DISABLED VOTERS TO THE MAXIMUM EXTENT FEASIBLE

The trial court concluded that "[t]he Diebold optical scan voting system purchased by Duval County is not readily accessible to visually or manually impaired voters." (**Dkt. 215**, p. 17.) Indeed, Appellant himself admitted as much at trial. (*See supra* p. 8-9.) Specifically, Duval County's optical scan system requires disabled voters to vote in a materially different manner than the way non-disabled voters vote. (Dkt. 169, p. 154:13-155:19.)

A. The Trial Court Applied The Proper ADA Standard To Appellant's Conduct

The ADA's implementing regulations distinguish between existing facilities and those constructed or altered after January 26, 1992. 28 C.F.R. §§ 35.150 and

151 (2003). The regulations do not require public entities affirmatively to make changes to existing facilities. *Shotz*, 256 F.3d at 1080. However, the regulations do impose a "heightened standard" of accessibility when public entities choose to alter existing facilities or construct new ones. "When a public entity independently decides to alter a facility, it 'shall, to the maximum 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). This standard is "substantially more stringent" than the standard that applies to existing facilities. *Kinney*, 9 F.3d at 1071. These stricter regulations require that alterations be completed in a nondiscriminatory manner that provides full access to all qualified voters.[11] *Id.* at 1073. Thus, the trial court properly analyzed Appellees' ADA claims under the heightened standard of § 35.151(b), which obligated Appellant to

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[11] Indeed, Congress recognized that altered or new facilities presented "an immediate opportunity to provide full accessibility." *Kinney*, 9 F.3d at 1074. Accordingly, it required such changes to be made free of discrimination and to be usable by all. *Id*. at 1073. Congress also appreciated the importance of implementing advances in technology. The House Committee made it clear that "technological advances can be expected to further advance options for making meaningful and effective opportunities available." H.R. Rep. No. 101-485 (II), at 108 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 391. That Committee intended accommodations and services to "keep pace with the rapidly changing technology of the times." *Id*.

make Duval County's voting system accessible to the maximum extent feasible at the time he purchased the optical scan system. (**Dkt. 215**, p. 16-17.)

Appellant proffers several "excuses" in an attempt to justify his decision to purchase a wholly inaccessible voting system. For example, Appellant argues that there were certain features of the Diebold optical scan system he preferred over the ES&S optical scan system and that he did not like the "boot up" process of the ES&S touch screen.[12] (Br. 15-20.) Similarly, Appellant places great weight on the recommendations of the Duval County Task Force and the "research" of the staff of the Supervisor of Elections' office. (Br. 12-13, 15-18.) Appellant ignores that all of these purported excuses are legally irrelevant in light of the heightened standard imposed by § 35.151(b).

Indeed, the record demonstrates that neither the Duval County Task Force nor the Supervisor of Elections' office considered the admittedly "specific needs" of disabled voters when choosing the optical scan system, let alone ensured that the voting system Appellant procured was accessible to the maximum extent feasible, as compliance with §35.151(b) obligated them to do. (PX 74; PX 150, at 38:13-17.)

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[12] While Appellant did compare different optical scan voting systems, he admitted that he made *no* comparison of touch screen systems. (Dkt. 169, p. 150:12-151:6; Dkt. 170, p. 117:14-118:5.)

Appellant admitted that despite the fact he received requests to provide accessible voting equipment, he did no real analysis of what technology existed to meet the needs of disabled voters, and never sent out a request for proposals to investigate what technology existed. (Dkt. 169, p. 127:7-129:15, 145:1-5; Dkt. 170, p. 32:1-5; Dkt. 166, p. 63:14-64:18, 102:11-20, 115:13-117:25; Dkt. 167, p. 25:15-27:2; Dkt. 170, p. 11:5-15:10.) Similarly, the chairman of the Duval County Task Force admitted that the Task Force's conclusions were not based on "a detailed investigation" of issues faced by disabled voters. (Dkt. 171, p. 166:8-15.) Instead, the chairman testified that despite receiving testimony about the problems encountered by disabled voters, the Task Force did not regard the problems faced by disabled voters to be among the "top sixteen" issues that needed to be addressed. (Dkt. 171, p. 151:10-152:13.)

For similar reasons, Appellant's argument that his "plan" to place three touch screen voting machines with audio ballot in the Supervisor of Elections' downtown office does not satisfy the heightened standard of § 35.151(b). (**Dkt. 215**, p. 18-19.) This "plan" fails to "satisfy the accessibility standard" because "Duval County is a geographically large county," and would "requir[e] Plaintiffs, who already lack the mobility that non-disabled voters have, to travel downtown" instead of voting in their neighborhood polling places. (**Dkt. 215**, p. 19.) As the record demonstrates, this plan would require the tens-of-thousands of disabled

voters in the county to travel, up to five hours, on election day (**Dkt. 215**, ¶25; Dkt. 166, p. 62:10-63:1, 99:20-100:21; Dkt. 167, p. 22:21-23:9), through one of the nation's largest counties (Dkt. 169, p. 162:10-16) to Appellant's 10,000 square foot office (*id.* 179:4-23) to cast their votes on these three machines. (*Id.* 160:22-161:13.)

Appellant admitted that in formulating this "plan," he did no analysis of the travel issues faced by disabled voters in Duval County. (Dkt. 169, p. 164:19-167:10.) He has "no idea how long it takes for a visually or manually impaired person to travel on disabled transportation in Duval County." (*Id.* 165:7-10, 166:15-19.) Nor does he have any "knowledge regarding the reliability of ParaTransit in Duval County." (Dkt. 169, p. 165:11-13, 167:11-13.)

Appellant's argument that this "plan" was "reasonable" again ignores the standards imposed by the ADA. (Br. 50-52.) The applicable standard has nothing to do with reasonableness. To the contrary, the ADA required that Duval County's voting system be readily accessible and usable by disabled voters to the maximum extent feasible *at the time* the County purchased the system in October 2002. A plan to one day comply with the ADA does not constitute compliance at all.[13]

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[13] Appellant's plea for leniency on the grounds that the lack of certification of Diebold is not "attributable to [Appellant]" is disingenuous at best. (Br. 51.) As the trial court aptly described, "[Appellant] is solely responsible for having selected and purchased machines that had not yet been certified when other

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").

B. The Trial Court Properly Concluded That Voting Equipment Is A Facility Under the ADA

The threshold inquiry facing the trial court was whether the voting systems that Appellant purchased in 2002 constituted a "facility" under the ADA implementing regulations. (**Dkt. 215**, p. 17.) The trial court concluded that "voting equipment plainly falls within the expansive definition of 'facility' contained in the regulations….," because a voting machine is equipment, and equipment is, on its face, included in the definition of "facility" in the regulations. (**Dkt. 215**, p. 17; Dkt. 124, p. 14, n.5; Dkt. 42, p. 25, n.16.)

The trial court's ruling is firmly grounded in the plain language of the regulations. A "facility" is defined in part as "all or any portion of . . . *equipment* . . . ." 28 C.F.R. § 35.104 (2003) (emphasis added). (*See* **Dkt. 215**, p. 17; Dkt. 42,

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machines with similar capabilities had been certified by the State of Florida." (Dkt. 232, p. 3, n. 1.)

p. 25 n.16; Dkt. 124, p. 14 n.5.) Every court that has addressed this issue has held that voting machines constitute "facilities" under the ADA. *See Troiano v. LePore*, No. 03-80097-Civ-Middlebrooks/Johnson, slip op. at 9-11 (S.D. Fla. May 1, 2003); *Tartaglione*, 2001 U.S. Dist. LEXIS 16731, at *17-*18. Thus, this is not a "novel" conclusion, as Appellant advocates. (Br. 37-38.) Moreover, Appellant's contention that facilities are "limited to elements that are permanently made part of a physical structure" (Br. 39) is neither supported by any of the cases he cites nor consistent with the plain language of the regulations.[14] 28 C.F.R. § 35.104; *Kinney*, 9 F.3d at 1071.

C. It was Feasible for Appellant to Procure an Accessible Voting System

There is no dispute that disabled voters cannot vote using the optical scan voting system in the same or similar manner as non-disabled voters can, and that other, readily accessible, options were available at the time Appellant chose to procure the optical scan system. (*See supra* p. 8-17.) Thus, as the trial 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

[14] Appellant's assertion that "[e]very reported case under § 35.151(b) relates to an alteration to an element made part of a permanent physical structure," ignores *Tartaglione*. Appellant also appears to have ignored the word "equipment"

violated." (**Dkt. 215**, p. 17.) The record evidence clearly supports the trial 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 Appellant to have provided an accessible touch screen voting system instead. (**Dkt. 215**, p. 17-18.)

Appellant does not contest that § 35.151(b) requires that alterations to facilities must be readily accessible to and usable by people with disabilities to the maximum extent feasible. (Br. 42.) Instead, Appellant argues that the trial court imposed too broad a standard of feasibility that resulted in the "transforma[tion of] this regulatory *limitation* into the judicial *compulsion* of a flawed voting system without regard to its usability or cost." (Br. 43 (emphasis in original).) Appellant argues that "alterations need not be made if they exceed existing technical ability, involve unreasonable costs, or impose risks or burdens that are disproportionate to the accessible feature sought." (*Id.* at 42.) This standard, which contradicts the plain language of § 35.151(b), lacks any legal support. Moreover, as discussed below, the trial court's decision clearly took into account both the usability and cost of accessible voting equipment, and the record clearly supports the trial

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contained in the regulation's definition of "facilities." 28 C.F.R. § 35.104. (Br. 39.)

court's conclusion that procuring accessible voting machines was both technologically and financially feasible.

1. Touch screens were technologically feasible

Appellant challenges the trial court's conclusion that it was technologically feasible, "[a]t the time the City purchased the optical scan system," to provide an accessible touch screen voting system. (**Dkt. 215**, p. 17.) Specifically, Appellant contends the trial court "clearly erred" in this conclusion because (1) the court relied on state certification "alone," and (2) the ES&S touch screen "resulted in the most calamitous election experiences in Florida in 2002." (Br. 43.) The record supports neither of these assertions, and, given that the record demonstrates the trial court's findings were "plausible," this Court is constrained to defer to that conclusion. *Solomon*, 221 F.3d at 1226-27.

First, the trial evidence clearly supports the trial court's finding that certification by Florida 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." (**Dkt. 215**, ¶11.) Indeed, this was the uncontroverted testimony of Paul Craft, Chief of the Florida Bureau of Voting System Certification, who testified at length about the stringent certification process, and noted, in particular, that Florida's testing is far more

stringent than that employed elsewhere. (Dkt. 168, p. 15:8-16, 19:9-21:2; PX 142; *see also* Dkt. 168, p. 89:2-16, 103:20-105:24.) Assistant Duval County Supervisor of Elections, Dick Carlberg, conceded that Florida certification is a "pretty solid standard." (Dkt. 172, p. 90:16-18.)

Although there is nothing amiss about resting a technologically feasible finding solely on the fact that the system enjoyed certification by the State of Florida, that certification is not the only factual support for technological feasibility. The trial court also based its finding on the evidence that "other jurisdictions within Florida and outside of Florida provided accessible equipment around the same time. . . ." (**Dkt. 215**, p. 18.) Indeed, the record is replete with evidence demonstrating that touch screen technology was not only certified, but was used successfully throughout Florida and the country at the very same time, and even before, Appellant decided to purchase the optical scan system. Appellant admitted that 257 counties across the country used touch screen systems as of 2001, and as early as February 2001, Appellant himself advocated that the county take immediate steps to move to a touch screen system. (Dkt. 169, p. 183:4-8; PX 11, at 10; Dkt. 170, p. 113:21-114:19; PX 123, at 2-4.) Moreover, Appellant concedes that at least fifteen[15] counties in Florida purchased and used touch screen

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[15] Appellant tries to make much out of the trial court's conclusion that twenty-nine counties use touch screen technology. There is evidence in the record supporting

voting systems at the same time Appellant purchased the optical scan system. (Br. 49.) Finally, the record shows that the use of touch screen voting systems has grown exponentially, with "in the neighborhood now of 500 counties" using touch screen technology across the country. (Dkt. 170, p. 142:9-14.) That some of these counties use voting systems that were not certified in Florida (Br. 49-50), does not render their usage "irrelevant" or "inapt" for a determination of feasibility. Instead, it only strengthens the notion that touch screen technology was widespread and Appellant had multiple options for procuring an accessible system.

Similarly, the record flatly contradicts Appellant's contention that the trial court erred as to technological feasibility because the ES&S system "caused" problems during the September 2002 primaries. (Br. 43-44.) First, the record demonstrates that any problems encountered in Broward and Dade Counties during the 2002 primary election "stemmed from not permitting sufficient time for the large, multilingual ballots to boot up on the ES&S machines and logistical problems such as getting all of the machines to precincts and poll worker training," as opposed to any machine malfunction. (**Dkt. 215**, ¶43.) Indeed, all of the evidence demonstrates that the problems arose from mismanagement by the

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this number. (PX 135, PX 136, PX 137.) However, even if the number of counties using touch screens is fifteen instead of twenty-nine, Appellant fails to demonstrate how this difference undermines the conclusion that touch screens were technologically feasible.

elections supervisors in those counties, which has been fully corrected. (Dkt. 168, p. 76:6-11.) The Chief of the Florida Bureau of Voting System Certification, the only person to testify with first-hand knowledge of the situation, stated that "the problems [in Dade County] stemmed primarily from failure to allow enough time to open the precincts, [and] failure to understand how much time that would take." (**Dkt. 215**, ¶43; Dkt. 168, p. 74:5-17; *see also id.* 74:18-75:24.) He explained that the problems in Broward County were attributable to "logistics," "problems with training the poll workers," and problems "getting all the machines and all the supporting devices to the precincts." (**Dkt. 215**, ¶43; Dkt. 168, p. 75:13-17.) Tellingly, Appellant's argument even contradicts his own deposition testimony that the problems in Broward were attributable to the mismanagement of the Broward County elections supervisor, and that Dade Counties' "issue" was with the boot-up time of the machines, *alone.* (Dkt. 170, p. 25:5-24; PX 150, at 86:4-20.)[16] Finally, Appellant's contention on this issue is belied by the fact that the ES&S system was not decertified following the 2002 primary, and indeed remained

16 Appellant's description of Mr. Dickson's testimony about Miami Dade and Broward counties is incorrect. Mr. Dickson clearly testified, "My study and examination of the problems concurred with Mr. Craft. . . . The problems were election administratively related, poll worker training." (Dkt. 171, p. 14:2-7.)

certified and in use in these same counties subsequent to the 2002 primary. (Dkt. 169, p. 141:21-142:1.)[17]

2. Appellant could have afforded to place one accessible voting system in each polling place

The undisputed evidence established that it would have cost Duval County approximately $1 million to install a single touch screen voting machine in each polling place in the County. (**Dkt. 215**, ¶30.) The trial court found this cost to be feasible based on "the overall size of Duval County's resources" (**Dkt. 215**, p. 18), and this conclusion enjoys the support of credible trial evidence.[18]

First, the appropriate measure for this determination is all of the county's resources, not just the budget of the Supervisor of Elections' office as Appellant argues. *Fisher v. Okla. Health Care Auth.,* 335 F.3d 1175, 1182-83 (10th Cir. 2003) (consideration of all resources available to state and state's fiscal problem); *Pascuiti v. New York Yankees*, 87 F. Supp. 2d 221, 224 (S.D.N.Y. 1999) (assessing not only the budget of the Yankees, but also the budget of New York City Parks Department and all available resources). The County's fiscal year 2002-2003

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[17] Appellant was forced to admit that he "never questioned the accuracy of [the ES&S touch screen]," but rather his sole concern "was with the cartridge as far as uploading and downloading…." (Dkt. 170, p. 117:3-118:5.) He also admitted that "ES&S… would work." (Dkt. 169, p. 186:1-6.)

[18] Again, "undue financial burden" is not a defense to complying with § 35.151.

annual budget was $1,214,406,456, of which $749,954,179 represented the County's general fund. (PX 10, at 6, 36; PX 139.) This would make the purchase .0008% and .0013% of those budgets, respectively. Second, Appellant admitted that the county had the money and that financing for touch screen voting equipment was readily available and inexpensive. (Dkt. 169, p. 107:1-108:5.)

Third, the undisputed fact that numerous other jurisdictions have purchased touch screen voting systems further supports the trial court's conclusion and eviscerates Appellant's claim of financial infeasibility. (**Dkt. 215**, p. 18 ("other jurisdictions' (both in Florida and around the country) acquisition of touch screen voting systems indicates the financial feasibility of such a system").) Appellant admits that other Florida counties have already implemented touch screen voting systems. (PX 150, at 23:4-17.) Most of these Florida counties have provided touch screens for all voters, not just one machine per polling place. (*See supra* p. 14-15.) Even this expenditure, as described by Mr. Browning, Supervisor of Elections for Pasco County, Florida, did not put these jurisdictions "in the poorhouse."[19] (Dkt. 167, p. 139:2-5, 15-21.) Appellant put forth no evidence

[19] This evidence refutes Appellant's unsupported assertion that the unfunded Florida accessibility legislation is "a tacit acknowledgment by the Florida legislature itself that this specialized voting equipment is economic infeasibility without state financial assistance to the counties." (Br. 48.) Appellant also omits the fact that the Florida Legislature provided Duval County $1,005,000 to procure

demonstrating that Duval had less resources than these other Florida counties. Indeed, the record shows that counties of comparable size to Duval County, such as Hillsborough County, were able to implement touch screen voting systems at the same time Appellant chose to implement the inaccessible optical scan system. (Dkt. 169, p. 185:3-9, 20-22.)

Finally, all of Appellant's arguments about financial burden are irrelevant, as Appellant did no analysis of the cost of providing accessible voting technology. Appellant never evaluated the cost to place one touch screen machine in each polling place in Duval County. (**Dkt. 215**, ¶30; Dkt. 170, p. 25:25-26:3; Dkt. 172, p. 42:5-11, 80:6-9, 91:20-92:10.) He never considered a public bond offering or borrowing the funds necessary to place one accessible voting machine in each polling place. (Dkt. 170, p. 32:6-16.)

Given all of this evidence, the trial court's finding that it was financially feasible for the County to have purchased accessible touch screen technology was "plausible" and thus not "clearly erroneous." *Solomon*, 221 F.3d at 1226-27.[20]

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a new voting system. (**Dkt. 215**, ¶22; PX 3; Dkt. 169, p. 104:20-25, 107:4-11; PX 86, at 1; Dkt. 169, p. 103:14-22.)

[20] Appellant cites what he refers to as "[p]ersuasive ADA regulations [that] state that where the cost of a specific alteration exceeds the total cost of an overall alteration by 20%, it is disproportionate and not required." (Br. 47-48.) The regulation alluded to refers to a specific regulation regarding elevators promulgated

D. The Trial Court Properly Concluded That Appellant Violated the ADA by Failing to Provide Touch Screen Voting Machines for Manually Impaired Voters

The record similarly supports the trial court's determination that Appellant violated the ADA by failing to provide a touch screen voting system, because such a system "is accessible to at least some manually impaired voters." (**Dkt. 215**, p. 19-20.) Indeed, Plaintiff Bell, who has no arms or legs, demonstrated for the trial court how he could vote on a touch screen system by using his mouth stick. (Dkt. 166, p. 93:6-96:2.)

Appellant attempts to confuse the record by arguing that "[n]o voting system has ever been certified in Florida for use by persons with manual disabilities including the use of mouth sticks." (Br. 52.) This is nothing more than a red herring. As the trial court concluded, "[a] mouth stick would not have to be certified because mouth sticks are available to the general public." (**Dkt. 215**, ¶19.) Indeed Paul Craft, Chief of the Bureau of Voting System Certification, specifically testified that there is no hardware certification requirement for "a mouth stick," or any other items that a manually impaired person could use to press the touch screen and cast a ballot. (Dkt. 168, p. 68:20-69:11.) A mouth stick is something that is maintained by the disabled voter and used in every day activities.

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under Title III of the ADA. In contrast, the DOJ has promulgated no similar regulation for alterations under Title II.

It is not a part of any voting machine and is not something that is provided by the polling place. (*Id.* 145:24-147:7.) Indeed, a manually impaired person can use a variety of items to operate a touch screen, including other body parts, and is not restricted to voting only by the use of a mouth stick. (*Id.* 145:17-20.) This, in and of itself, demonstrates that the trial court properly concluded touch screen voting systems available in Florida are accessible, to the maximum extent feasible, to at least some manually impaired voters. (**Dkt. 215**, p. 19.)

E. The Trial Court's Finding on Appellees' "Effective Communication" Claim Is Not Inconsistent With The Court's Finding That the Optical Scan System Is Not Accessible to the Maximum Extent Feasible

Appellant challenges the trial court's conclusion that he violated 28 C.F.R. § 35.151(b) on the ground that it is inconsistent with the trial court's conclusion that Appellant did not violate the "effective communications" requirements of 28 C.F.R. § 35.160. (Br. 32-36.) This argument, however, is nothing more than a repackaging of Appellant's contention that no ADA violation exists because Appellees were able to vote (regardless of the burdens). Given the different focus and obligations provided under these two regulations, the trial court neither committed a "'clear error in judgment'" nor "applied an incorrect legal standard." *SunAm.*, 77 F.3d at 1333 (citation omitted).

28 C.F.R. § 35.160 requires that a public entity provide disabled persons with auxiliary aids and services to ensure that the person's communications with the public entity are "as effective as communications with others" and that the individual is afforded "an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by the public entity." 28 C.F.R. § 35.160(a)(b) (2003). Unlike Section 35.151 and the generic discrimination prohibition of the ADA, Section 35.160 does not govern the process of voting or require that the process by which a disabled voter casts his/her ballot be free from burdens that are not imposed on non-disabled voters. Instead, Section 35.160 requires that the voter be able to communicate his/her vote, and, in essence, seeks only to ensure that the voter was able to vote.

Thus, the trial court's analysis of the "effective communication" claim properly did not consider whether Appellees are forced to vote in a more burdensome manner than non-disabled voters. Instead, those issues are governed by 28 C.F.R. § 35.151(b) and the generic discrimination prohibition of the ADA. Thus, the mere fact that Appellant may have satisfied the requirements of Section 35.160 says nothing about whether Appellant complied with his other ADA obligations, which the record clearly demonstrates he did not.[21]

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[21] Appellant repeatedly mischaracterizes the trial court's orders in an attempt to make his argument more credible. For example, he argues that "[I]n its October

F. A 1993 DOJ Letter of Findings Does Not Undermine the Trial Court's Ruling

Appellant claims the trial court erred by not adopting a 1993 Department of Justice Letter of Findings ("Letter") that Appellant claims "specifically held that Florida's statutory program of third party assistance meets ADA standards." (Br. 34-35.) To the contrary, the trial court committed no "clear error in judgment" when it concluded that "[Appellant's] interpretation of the Letter is overly broad." (Dkt. 124, p. 21; *see SunAm.*, 77 F.3d at 1333.)

First, the Letter was written at a time when accessible voting systems did not exist. In reviewing Pinellas County's election practices eleven years ago, the DOJ concluded that, because no alternative for a blind voter to cast a ballot existed, third-party assisted voting allowed blind voters to participate in and enjoy the benefits of a service, program, or activity conducted by a public entity. (Dkt. 58, Ex. 1.) In a portion of the Letter notably absent from Appellant's brief, the DOJ found that "electronic systems of voting by telephone that meet the security

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16, 2002 dismissal order, the trial court held that neither the ADA nor the Florida constitutional right to a direct and secret vote is violated by third party assistance provided in Florida, given the substantial statutory protections for [sic] right." (Br. 33.) To the contrary, no court, not even *Nelson*, has ever held that a county's purchase of a *new* inaccessible voting system when other accessible systems were available comports with the ADA. The trial court repeatedly upheld Appellees' ADA claims that alleged Duval County's voting system imposed greater burdens on disabled voters than it did on non-disabled voters. (Dkt. 42, p. 29-30, 37-38; Dkt. 124, p. 12, 15; **Dkt. 215**, p. 18-19, 27-28.)

requirements necessary for casting ballots *are not currently available*." (*Id.* (emphasis added).) Consistent with this acknowledgement, as technology has changed so have the views of the DOJ.

More recently, as noted above, in its *amicus curiae* brief in *Nelson*, the DOJ stated: "If reasonable modifications were available that would allow blind or visually impaired voters to cast their ballots without assistance *and* that would assure ballot secrecy, *the plain import of the ADA and its implementing regulations would require the state to adopt those modifications*." (Dkt. 58, Ex. 2, p. 11-12 (emphasis added).) In 2002, electronic voting systems did exist and were readily available; thus Appellant's refusal to purchase these machines constitutes an ADA violation. (*See also* Dkt. 193, Hrg. Ex. A (encouraging jurisdictions to implement disability requirements of HAVA as soon as possible "to help ensure that disabled voters are able to fully participate in the election process to the maximum extent possible").)

Second, the trial court properly concluded that the 1993 Letter "is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 529 U.S. 576 (1984)." (Dkt. 124, p. 21-22.) This opinion letter is neither binding nor controlling authority. *Christensen v. Harris County,* 529 U.S. 576, 587, 120 S. Ct. 1655, 1662 (2000); *Gonzalez v. Reno*, 215 F.3d 1243, 1245 (11th Cir. 2000).

Third, as the trial court observed, "[T]he Letter only purports to evaluate whether the Pinellas County Supervisor of Elections provided equally effective communications to blind voters. Thus, to the extent that the Letter is relevant to this case, its relevance would appear limited to Plaintiffs' [Effective Communication] claims under 28 C.F.R. § 35.160." (Dkt. 124, p. 21.) Thus, whatever its accuracy or weight, the Letter has no bearing on Appellees' claims under the heightened altered facilities standard of 28 C.F.R. § 35.151(b).

III. HAVA DOES NOT RENDER THIS LAWSUIT MOOT

The trial court ruled that HAVA does not render this case moot because "HAVA makes clear that it is not to be construed as superseding or limiting the application of the ADA…." (**Dkt. 215**, p. 28 n.10; Dkt. 124, p. 20, n.9.) Appellant's argument to the contrary (Br. 54-55) ignores the plain language of the statute. On its face, HAVA explicitly provides that "nothing in this Act may be construed to … supercede, restrict, or limit the application of …. The Americans With Disabilities Act of 1990 (42 U.S.C. §§ 12101 *et seq*.)." 42 U.S.C. §15545(a)(5) (2002). Appellant even admitted at trial that he is "not suggesting that [his] plans under HAVA somehow excuse [him] from complying with the Americans With Disabilities Act." (Dkt. 169, p. 73:24-74:2.)

As the provisions of HAVA do nothing to remedy Appellant's past and current violations of the ADA, Appellant's contention that "no 'meaningful relief' exists in this lawsuit beyond what Congress already had mandated" in HAVA is without merit. (Br. 55.) HAVA does not alter the fact that without implementation of the trial court's order, disabled citizens in Duval County will be forced to vote in the upcoming 2004 August primary election, the November 2004 presidential election, and all elections thereafter in a discriminatory manner.

For the same reasons, Appellant's contention that "HAVA severely undermines the trial court's conclusion that the ADA is applicable" is without merit. (Br. 31.) There is no inconsistency with the Court's declaration that Appellant violated the ADA and must provide accessible voting equipment now, and HAVA's requirement that jurisdictions provide accessible voting equipment no later than January 1, 2006. (*See* Br. 31.) The trial court's order provides a remedy for Appellant's current violation of the ADA, while January 1, 2006, is the absolute latest date another county (which has not already violated the ADA by purchasing a new voting system) can wait to install accessible voting equipment.

Similarily, Appellant's insinuation that the county will have to buy new voting equipment in 2006 because the touch screens that are currently certified and in use in Florida and across the country may not meet the accessibility standards of HAVA is erroneous. (Br. 31.) First, the DOJ has directed counties to comply with

HAVA's disability provision "*as soon as practical*... to help ensure that disabled voters are able to fully participate in the election process to the maximum extent possible. This will ensure that disabled voters are provided access *as soon as possible.*" (Dkt. 193, Hrg. Ex. A (emphasis added).) It defies logic to argue that the DOJ would "encourage" jurisdictions to provide accessible voting equipment now, but then require these jurisdictions to buy new systems later.[22]

Next, to the extent Appellant argues there are no accessibility standards, the DOJ has also directed that until the HAVA commission promulgates standards, "the voluntary guidance of the Federal Election Commission on Voting System Standards can be used to determine the accessibility of voting machines." (Dkt. 200, Exs. A & B.) Thus, any of the touch screen voting systems currently meeting the FEC's voluntary standards – which Mr. Craft admitted "the vast majority of states," including Georgia, use (Dkt. 169, p. 66:20-67:25) – will also satisfy the accessibility requirements of § 301 of HAVA.[23]

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[22] Appellant's argument further implies that the at least 500 counties and the entire state of Georgia that have implemented touch screen systems (Dkt. 170, p. 142:9-14) have misunderstood or ignored this issue.

[23] This pronouncement by the DOJ also undermines Appellant's argument that there are no specific regulations governing voting systems under the ADA. (Br. 35-36.)

Finally, the to-be-crafted HAVA "standards" to which Appellant refers are *voluntary* – not mandatory. All HAVA requires is that a jurisdiction provide one voting machine per polling place that is "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." 42 U.S.C. § 15481(a)(3)(A) (2002). HAVA specifically states that this requirement can be met "through the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place." *Id*. at (a)(3)(B). HAVA does not mandate that the touch screens meet any other requirements. Thus, there is no need to wait for any regulations to be promulgated, because the touch screen voting systems certified and used in Florida already meet HAVA's requirement.

IV. THE TRIAL COURT'S REMEDY PLAN IS AN APPROPRIATE RESPONSE TO APPELLANT'S ADA VIOLATIONS

The trial court further committed no clear error in judgment or misapplication of the legal standard in granting injunctive relief for Appellant's violations of the ADA.

A. The Trial Court's Order Will Not Subject Appellant to Equal Protection Violation Claims

Appellant's assertion that the trial court's injunction raises Equal Protection concerns fails for several reasons. (Br. 56-57). First, Appellant failed to raise this argument before the trial court issued the Order, and, accordingly has waived this argument. *FDIC v. Verex Assurance, Inc.*, 3 F.3d 391, 395 (11th Cir. 1993). Appellant had ample opportunity to do so, as the trial court announced its tentative ruling and remedy at the January 14, 2004 hearing and specifically provided Appellant the opportunity to raise this issue. (Dkt. 193, p. 66:9-70:16.) Nowhere in Appellant's fifteen-page response did Appellant raise this Equal Protection argument. (Dkt. 197.)[24]

Second, contrary to Appellant's arguments, no violation of the Equal Protection Clause is created by the trial court's remedy plan.[25] It is axiomatic that

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[24] Moreover, at the January 14, 2004, hearing, counsel for Appellant told the trial court that if the Diebold machine was certified, the county would "probably get as many as eight, spread them out . . . making them available at more locations than just downtown…." (Dkt. 193, p. 64:20-65:2.) At no point during this announcement did Appellant indicate that there would be an Equal Protection issue with this plan.

[25] Appellant's reference to the AAPD's current lawsuit in California, challenging on ADA and Equal Protection grounds, several counties' purchases of inaccessible optical scan systems instead of touch screen machines with audio ballots, ignores that the California case does not challenge any judicial remedy of an ADA violation as violating the Equal Protection clause, but rather challenges the

the "phasing in" of a remedy in the civil rights context cannot properly result in liability. *Acree v. County Bd. of Educ.*, 458 F.2d 486, 488 (5th Cir. 1972) (enforcing court order requiring school district to implement a desegregation plan in three phases, commencing with only certain schools); *Kemp v. Beasley*, 352 F.2d 14, 14-17 (8th Cir. 1965) (affirming three step transitional plan period of school desegregation whereby only certain grade levels were provided the benefits of the plan during initial periods); *United States v. Sec'y of HUD*, 239 F.3d 211, 220-21 (2d Cir. 2001) (remedy requiring development of subsidized and public housing in specific areas did not violate Equal Protection); *see also, Local 28 of Sheet Metal Workers, Int'l Ass'n v. EEOC*, 478 U.S. 421, 476, 106 S. Ct. 3019, 3050 (1986) (rejecting Equal Protection argument, Supreme Court concluded that affirmative relief "may be necessary to dissipate the lingering effects of pervasive discrimination."). By December 31, 2006, HAVA will require Defendant Appellant to place at least one touch screen machine in every Duval County polling place. While bringing Appellant into compliance with the ADA, the court's judgment also has the practical effect of "phasing in" much needed relief consistent with the plans uniformly endorsed by courts in the civil rights context.

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purchase of optical scan systems as violations of both the ADA and Equal Protection clauses.

Third, Appellant's argument that an Equal Protection violation may arise because "the votes in some Duval County precincts will be counted differently in a recount from those in other precincts" because the touch screen machines have no paper audit trail is faulty,[26] and was rejected by the only federal appeals court to consider it on the merits.[27] (Br. 57.) In *Weber v. Shelly*, 347 F.3d 1101, 1105 (9th Cir. 2003), the Ninth Circuit rejected an 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 Sequoia touch screen system at-issue "is inherently less accurate, or produces a vote count that is inherently less verifiable, than other systems."[28]

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[26] Unrelated to the substance of this argument, Appellant did not raise this argument at trial, and therefore has not preserved it for appeal. *FDIC*, 3 F.3d at 395.

[27] At most, the County attempted to argue, based on hearsay contained in a newspaper article, that there was something inherently wrong with touch screen voting systems that do not provide the voter with a piece of paper to verify the voter's ballot choices. Mr. Craft resoundingly rejected this argument (Dkt. 168, p. 156:15-157:12). Furthermore, each touch screen machine generates paper confirmation of the total votes cast on the machine and an image of every ballot cast. (Dkt. 168, p. 143:12-144:17, 157:7-12.)

[28] Challenges to the use of touch screens in Florida because they lack a paper receipt have also been dismissed by both federal and state courts in Florida. *See Wexler v. LePore*, 319 F. Supp. 2d 1354 (S.D. Fla. 2004), *dismissed* (11th Cir. May 24, 2004), on appeal, No. 04-12826-II (11th Cir. 2004); *Wexler v. LePore*, No. 502004000491XXXXMBA slip op. (Fla. Cir. Ct. 15th Cir. Feb. 11, 2004), *aff'd*, No. 4D04-918 (Fla. 4th Dist. Ct. App. Aug. 6, 2004).

The only "precedent" cited by Appellant for his Equal Protection argument is the United States Supreme Court's decision in *Bush v. Gore,* 531 U.S. 98, 121 S. Ct. 525 (2000), the precedential value of which is questionable, at best, as the Supreme Court made it clear that its "consideration [was] limited to the present circumstances." 531 U.S. at 109, 121 S. Ct. at 532. Moreover, *Bush* does not support Appellant's argument. In *Bush*, the Supreme Court found an Equal Protection violation not because different voting machines used different methods for recounts, but rather because different, arbitrary standards were employed in the recounting of punch card ballots both within and among different jurisdictions across Florida. *Id.* at 105-106, 121 S. Ct. at 530. Appellant ignores that different machines were used by the various Florida counties in the 2000 election (including punch cards and optical scan), which necessarily involved different recount procedures without raising Equal Protection violations.

B. Class Certification Is Not a Prerequisite to Injunctive Relief

Appellant's second challenge to the trial court's injunction – that the unresolved class certification motion undermines trial court's injunction relief – is also without merit. In the civil rights context, where only injunctive and declaratory relief is sought, class certification is unnecessary because "the very nature of the rights [the plaintiffs] seek to vindicate requires that the decree run to

the benefit not only of the named plaintiffs but also for all persons similarly situated." *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach,* 493 F.2d 799, 812 (5th Cir. 1974); *see Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963); *Fairley v. Forrest County*, 814 F. Supp. 1327, 1329 (S.D. Miss. 1993). Indeed, here, as in *United Farm Workers*, "[e]ven with the denial of class action status, the requested injunctive and declaratory relief will benefit not only the [named plaintiffs]. . . but also all other persons subject to the practice under attack." 493 F.2d at 812; *see also Sandford v. R.L. Coleman Realty Co.*, 573 F.2d 173, 178 (4th Cir. 1978); *Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684, 686 (6th Cir. 1976) *aff'd* 436 U.S. 1, 98 S. Ct. 1554 (1978). Discrimination on the basis of disability should be accorded the same treatment as race discrimination, which "is by definition *class* discrimination." *United Farmwokers,* 493 F.2d at 812 (emphasis added) (citing *Huff v. N.D. Cass Co.*, 485 F.2d 710, 713 (5th Cir. 1973) (en banc)). *See also, Bresgal v. Brock*, 843 F.2d 1163 (9th Cir. 1987); *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 616 F. Supp. 1387 (N.D. Cal. 1985). Notably, Appellant cites no cases that support his contention that the trial court's judgment is fatally flawed because no class action was certified.[29]

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[29] Indeed, none of the cases Appellant cites even remotely discuss, let alone support, this proposition. For example, *Baxter v. Palmigiano*, 425 U.S. 308, 312, 96 S. Ct. 1551, 1555 (1976), only holds that the case was not properly a class action, not that the judgment was infirm for failing to certify the class. Similarly,

In addition, formal class certification is unnecessary because the class action nature of this case may be implied. *Doe v. Bush*, 261 F.3d 1037 (11th Cir. 2001); *Bing v. Ry. Express*, 485 F.2d 441 (5th Cir. 1973). As the court stated in *Doe*, when it found an implied class, Appellees "should not be penalized because the district court forgot to address the certification question sooner, or determined that it was not necessary to do so." 261 F.3d at 1051-52.

CONCLUSION

The trial court, in a thoughtful, detailed opinion, determined that Appellant has violated, and continues to violate, the ADA by refusing to provide accessible voting systems for Duval 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. The factual findings underlying this decision are supported by credible trial evidence and the legal principles on which the judgment is based

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Bieneman v. City of Chicago, 838 F.2d 962, 963 (7th Cir. 1988), did not hold that the decision of the district court to dismiss plaintiff's complaint was in error for failing to certify the class, but rather held that the case was not yet ripe for appellate review because the district court had identified the issue of class certification as needing resolution. Finally, *Paxton v. Union National Bank*, 688 F.2d 552, 559 (8th Cir. 1982), did not involve judgment for plaintiffs without class certification, but rather addressed the district court's improper refusal to certify a class – a far different scenario than presented here.

are sound. Thus, this Court should affirm the declaratory and injunctive relief granted to Appellees.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,504 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in Times New Roman 14 point font.

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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.

42 U.S.C. § 15481. Voting systems standards (HAVA)

(a) Requirements. Each voting system used in an election for Federal office shall meet the following requirements:

(1) In general.

(A) Except as provided in subparagraph (B), the voting system (including any lever voting system, optical scanning voting system, or direct recording electronic system) shall--

(i) permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;

(ii) provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error); and

(iii) if the voter selects votes for more than one candidate for a single office--

(I) notify the voter that the voter has selected more than one candidate for a single office on the ballot;

(II) notify the voter before the ballot is cast and counted of the effect of casting multiple votes for the office; and

(III) provide the voter with the opportunity to correct the ballot before the

ballot is cast and counted.

(B) A State or jurisdiction that uses a paper ballot voting system, a punch card voting system, or a central count voting system (including mail-in absentee ballots and mail-in ballots), may meet the requirements of subparagraph (A)(iii) by--

(i) establishing a voter education program specific to that voting system that notifies each voter of the effect of casting multiple votes for an office; and

(ii) providing the voter with instructions on how to correct the ballot before it is cast and counted (including instructions on how to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error).

(C) The voting system shall ensure that any notification required under this paragraph preserves the privacy of the voter and the confidentiality of the ballot.

(2) Audit capacity.

(A) In general. The voting system shall produce a record with an audit capacity for such system.

(B) Manual audit capacity.

(i) The voting system shall produce a permanent paper record with a manual audit capacity for such system.

(ii) The voting system shall provide the voter with an opportunity to change the ballot or correct any error before the permanent paper record is produced.

(iii) The paper record produced under subparagraph (A) shall be available as an official record for any recount conducted with respect to any election in which the system is used.

(3) Accessibility for individuals with disabilities. The voting system shall--

(A) 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;

(B) satisfy the requirement of subparagraph (A) through the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place; and

(C) if purchased with funds made available under title II [42 USCS §§ 15321 et seq.] on or after January 1, 2007, meet the voting system standards for disability access (as outlined in this paragraph).

(4) Alternative language accessibility. The voting system shall provide alternative language accessibility pursuant to the requirements of section 203 of the Voting Rights Act of 1965 (42 U.S.C. 1973aa-1a).

(5) Error rates. The error rate of the voting system in counting ballots (determined by taking into account only those errors which are attributable to the voting system and not attributable to an act of the voter) shall comply with the error rate standards established under section 3.2.1 of the voting systems standards issued by the Federal Election Commission which are in effect on the date of the enactment of this Act [enacted Oct. 29, 2002].

(6) Uniform definition of what constitutes a vote. Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.

(b) Voting system defined. In this section, the term "voting system" means--

(1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used--

(A) to define ballots;

(B) to cast and count votes;

(C) to report or display election results; and

(D) to maintain and produce any audit trail information; and

(2) the practices and associated documentation used--

(A) to identify system components and versions of such components;

(B) to test the system during its development and maintenance;

(C) to maintain records of system errors and defects;

(D) to determine specific system changes to be made to a system after the initial qualification of the system; and

(E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

(c) Construction.

(1) In general. Nothing in this section shall be construed to prohibit a State or jurisdiction which used a particular type of voting system in the elections for Federal office held in November 2000 from using the same type of system after the effective date of this section, so long as the system meets or is modified to meet the requirements of this section.

(2) Protection of paper ballot voting systems. For purposes of subsection (a)(1)(A)(i), the term "verify" may not be defined in a manner that makes it impossible for a paper ballot voting system to meet the requirements of such subsection or to be modified to meet such requirements.

(d) Effective date. Each State and jurisdiction shall be required to comply with the requirements of this section on and after January 1, 2006.

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. § 35.149 Discrimination prohibited.

Except as otherwise provided in § 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, 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 public entity.

28 C.F.R. § 35.150 Existing facilities.

(a) General. A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily

accessible to and usable by individuals with disabilities. This paragraph does not--

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(b) Methods--(1) General. A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery

of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of § 35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(2) Historic preservation programs. In meeting the requirements of § 35.150(a) in historic preservation programs, a public entity shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required because of paragraph (a)(2) or (a)(3) of this section, alternative methods of achieving program accessibility include--

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) Time period for compliance. Where structural changes in facilities are undertaken to comply with the obligations established under this section, such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible.

(d) Transition plan. (1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.

(2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

(3) The plan shall, at a minimum--

(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

(ii) Describe in detail the methods that will be used to make the facilities

accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

(4) If a public entity has already complied with the transition plan requirement of a Federal agency regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this paragraph (d) shall apply only to those policies and practices that were not included in the previous transition plan.

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

(a) Design and construction. Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(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.

(c) Accessibility standards. Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) (appendix A to 41 CFR part 101-19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) (appendix A to 28 CFR part 36) shall be deemed to comply with the requirements of this section with respect to those facilities, except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) of ADAAG shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(d) Alterations: Historic properties. (1) Alterations to historic properties shall comply, to the maximum extent feasible, with section 4.1.7 of UFAS or section 4.1.7 of ADAAG.

(2) If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of § 35.150.

(e) Curb ramps. (1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

(2) Newly constructed or altered street level pedestrian walkways must contain

curb ramps or other sloped areas at intersections to streets, roads, or highways.

28 C.F.R. § 35.160 General.

(a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

(2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

LEGISLATIVE MATERIALS

H.R. Rep. No. 101-485(II)

Counsel for Appellees were advised by the Clerk of Court on June 9, 2004, to omit from this addendum H.R. Rep. No. 101-485(II) due to its volume. Counsel for Appellees advised the Clerk of Court that it would promptly deliver to the Court a full copy of H.R. Rep. No. 101-485(II) should the Court request it.