IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 07-15004-C

American Association of People with Disabilities, Daniel W. O'Conner, Kent Bell, and Beth Bowen,

Plaintiffs/Appellees,

vs.

Jerry Holland, as Supervisor of Elections, Duval County.

Defendant/Appellant.

Appeal from the United States District Court,
Middle District of Florida, Jacksonville Division

REPLY BRIEF OF APPELLANT HOLLAND

RICHARD A. MULLANEY
GENERAL COUNSEL

ERNST D. MUELLER
Deputy General Counsel
Florida Bar No.: 164027
Office of General Counsel
117 West Duval Street, Suite 480
Jacksonville, FL 32202
(904) 630-1871 (Telephone)
(904) 630-1316 (Facsimile)
Attorneys for Appellant Holland

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REPLY ARGUMENT

I. The Court Properly Has Jurisdiction Over This Appeal

Plaintiffs argument that this Court does not have jurisdiction over this appeal is entirely without merit. The "finality" of the orders and judgments entered by the district court which are being appealed are not in question. Nor is the timeliness of the appeal. The Statement of Jurisdiction, set forth in the Supervisor of Elections' initial brief, which reads as follows, makes this plain as can be:

> This is an appeal by the Duval County, Florida, Supervisor of Elections ("Supervisor of Elections") from an order and judgment (Docs. 215, 216) entered by the district court in March 2004, which were rendered "final" pursuant to Fed.R.Civ.P. 54(b) on September 20, 2007, through entry of a judgment against other State of Florida defendants (Kurt S. Browning, Secretary of State, Amy Tuck, Director, Division of Elections) (Doc. 295).
>
> This appeal also seeks reversal of a December 3, 2007 district court order (Doc. 341) denying the Supervisor of Elections' Motion to Vacate the 2004 order and judgment (Docs. 215, 216) entered against him on grounds of mootness, which was entered after this appeal was initiated. This order (Doc. 341) was timely appealed through an Amended Notice of Appeal filed on December 4, 2007. See Doc. 342.

The foregoing quoted paragraphs speak for themselves.

The Supervisor concurs with Plaintiffs that this Court should not and cannot revisit its determination, made in the initial interlocutory appeal in this case, that the

case is moot. That is not an issue in this appeal. However, this Court clearly has the authority to review the district court's decisions and orders made ancillary to this Court's prior determination that the case is moot, which, as here, have been properly appealed.

Specifically, in this case, the district court denied the Supervisor's Motion (Doc. 315) to vacate the injunctive order and judgment (Docs. 215, 216), entered in this case, which it was required to do pursuant to the applicable case law on the doctrine of mootness. See Argument II, below. The failure to carry out its duty under the law in this respect has very tangible consequences because AAPWD is seeking $3,400,000 in attorney's fees in the case, even though it did not prevail, which it could not do if the order and judgment had been vacated, as required by the applicable case law. See Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 602-604 (2001).

In summary, for those reasons this Court clearly has jurisdiction over this appeal. Failure to recognize and accept same would permit the district courts below, in this and similar situations, to simply fail to carry out or ignore this Court's orders.

II. Because the Case is Moot the Judgment Must be Vacated

A. Plaintiffs Mischaracterize the Proceedings Below

Plaintiffs suggest in their brief that the Supervisor of Elections was operating

in violation of law from the time of the November 2002 elections onward, and that they somehow helped to correct this situation through this litigation. See Appellee's Brief, pp. 15, 19, 20, and 21. Nothing could be further from the truth, on either count.

In this connection, it is critical to remember and know the following. Plaintiffs initial Complaint in this case, which had been filed on November 8, 2001, was dismissed with prejudice on October 16, 2002. Doc. 42. Shortly thereafter, on October 29, 2002, the Help America Vote Act ("HAVA"), 42 U.S.C. §§ 15301-15545, was signed into law. Plaintiffs did not file their Amended Complaint until November 5, 2002, which was Election Day. Doc. 47. The Supervisor had commenced purchase of a new, reliable voting system long before that, consummating with signature of a contract in January 2002. See Doc. 170 (Tr. 5), pp. 124-125. By election time, of course, this system was in place. The notion that Plaintiffs' filing an Amended Complaint on Election Day in November 2002 had any impact or importance concerning that election, or rendered the Supervisor's conduct on that day illegal, is totally fatuous.

B. Significance of HAVA

Plaintiffs, when they filed the Amended Complaint (Doc. 47), sought two types of relief. First, they sought declaratory relief, and second, they sought injunctive relief. See "Prayer for Relief," Doc. 47, p. 22. As previously stated, HAVA had

already become law. Thus, there was no longer any question about whether the law required a disabled compliant voting system in each precinct which permitted visually impaired voters to vote independently, the object of the declaratory action. A new statute, 42 U.S.C. § 15481(a)(3), specifically required it.[1] Hence, whether this right existed no longer needed to be resolved by a declaratory judgment. Whether this right also conceivably existed under a federal regulation of questionable applicability, 28 C.F.R. § 35.151(b), in addition to existing under HAVA, was thus entirely academic, and moot, except for the effective date by which this right would be enforced. Plaintiffs wanted this right enforced instantly, but HAVA didn't require that it be provided until January 1, 2006. See 42 U.S.C. § 15481(d).

That is what the issue of injunctive relief in this case was about - - whether the Supervisor of Elections would have to comply with HAVA prior to the effective date of HAVA and companion State laws.[2] Apart from determining how to provide this relief, there has been no other issue on the merits of this case, since the Amended

---

[1] As the Court of Appeals was aware well prior to its declaration of mootness, this was also required by Florida law. See Doc. 343-9, pp. 1-2, par. 3, which had previously been filed in the Court of Appeals, and was relied upon by the Court in determining that the case was moot. Florida Statute 101.56062. See also Amended Declaration of Jerry Holland which was furnished to the Court in the prior appeal (copy attached as Exhibit A hereto).

[2] HAVA, as previously noted, required disabled compliant equipment in every precinct. The injunction entered in this case required disabled compliant equipment in only 1 of every 5 precincts. See Doc. 216.

Complaint was filed.

Plaintiffs suggest that the Supervisor of Elections, following the entry of the injunction and declaratory judgment (Docs. 215, 216) implemented same, rather than implementing HAVA. See Appellee's Brief, pp. 22, 33. This argument blindly ignores reality. The injunction entered by the district court was stayed. See Docs. 232, 267, 275. As the HAVA deadline neared, the Supervisor made arrangements to purchase and did purchase enough disabled compliant voting machines to provide one for every precinct, as required by HAVA, not just one for every fifth precinct, as required by the stayed injunctive order. No violation of any law or court order occurred in the process. Good faith in complying with the applicable federal law was manifested every step of the way.

As an example of "implementation" Plaintiffs cite the fact that, post-judgment, the Supervisor submitted reports to the Court related to the State certification of an audio-equipped Diebold touchscreen. See Appellee's Brief, p. 9. The reason for this, however, was that in Florida state certification of election machinery is required prior to its use by local governments. See Fla. Stat. §§101.294, 101.295. The State, through the time of the issuance of the injunctive orders in this case (Docs. 215, 216) had not certified the Diebold equipment for reasons which Diebold claimed did not have merit. The district court, in the judgment, had decreed that the Supervisor would

have to contract with a different vendor to purchase election machinery if the Diebold equipment was not certified by May 2004. The Supervisor had already contracted with Diebold, which he believed had the best equipment, and did not want this plan derailed by the district court for fear that it would result in having to replace the entire voting system already present in Duval County, rather than augmenting it with compatible equipment. Hence, the Supervisor was doing his best to persuade the State and Deibold to resolve their differences relative to the certification of the Diebold audio touchscreens. This was accomplished just barely within the time deadline the district court had established, in May 2004, was central to the Supervisor's complying with HAVA, and was reported to the district court.

A second example of asserted "implementation" of the district court's orders cited by Plaintiffs was the agreement with Plaintiffs on the identity of the one (1) of five (5) precincts which would be authorized to receive audio touchscreens pursuant to the district court's order, if it had been implemented, reached on September 30, 2004. This occurred only because on September 28, 2004, two days before, the district judge newly assigned to the case lifted the stay of the injunction which had been in place, just five weeks before the election. See Doc. 267. The Court of Appeals, however, reinstated the stay of the injunction just a week later, on October 5, 2004, thus ending the necessity to comply with the district court's order until the

resolution of the appeal. The argument that taking judicially required steps to implement the injunction amounted to voluntary compliance, under these circumstances, is simply farfetched.

In summary, the Supervisor always intended to comply with HAVA, which provided a workable timetable for the development, purchase, and installation of disabled-compliant voting equipment in every precinct. The injunction entered by the district court in March 2004, part of the way on the road to implementing HAVA, required only one fifth (1/5) of what HAVA required. Thus, of course, when HAVA was implemented by the Supervisor, voluntarily, the district court injunction was implemented also, and rendered moot. Accordingly, the proposition that the injunction, which was stayed, was the motivating factor, is simply inaccurate.

C. Vacating the Judgment is Required Because of the Mootness of the Case

As noted in the Supervisor's initial brief, in this judicial Circuit when a case becomes moot on appeal, the Court dismisses the appeal, vacates the district court's judgment and remands the case to the district court. IAL Aircraft Holding, Inc. V. Federal Aviation Administration, 216 F.3d 1304, 1305 (11th Cir. 2000). To the same effect, see National Advertising Co. v. City of Miami, 402 F.3d 1329, 1335 (11th Cir. 2005); Troiano v. Supervisor of Elections, 382 F.3d 1276, 1382 (11th Cir. 2004). An

additional more recent decision by this Court confirming the foregoing, but not yet discussed, is BankWest, Inc. v. Baker, 446 F.3d 1358 (11th Cir. 2006). In that case, payday loan stores and out of state banks sought a declaration of unconstitutionality with respect to certain Georgia statutes, and a preliminary injunction enjoining their enforcement. The district court denied the preliminary injunction request, a decision which was appealed to this Court. This Court concluded that the appeal was moot and stated:

> This conclusion compels us to dismiss this appeal *and* to vacate the district court's order, because "when an issue in a case becomes moot on appeal, [we] not only must dismiss as to the mooted issue, but [we must] also vacate the portion of the district court's order that addresses it." *De La Teja*, 321 F.3d at 1364; *see also Soliman v. United States*, 296 F.3d 1237, 1243 (11th Cir. 2002) ("Under our precedent, when a case becomes moot on appeal, [we] must not only dismiss the case, but also vacate the district court's order.").
>
> Our well-established practice of vacating the district court's order when we dismiss a moot appeal "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Soliman*, 296 F.3d at 1243.... Accordingly, we vacate our prior decision, *BankWest*, 411 F.3d 1289, we vacate the district court's May 13, 2004 order denying the motions for preliminary injunctive relief, ... and we dismiss this appeal as moot.

446 F.3d at 1368. The foregoing is a recent confirmation of the Court's prior

statements of the law on this subject.

The Court of Appeals in this case, although it declared the case moot, for reasons unstated, did not direct the vacating of either the operative injunctive order (Doc. 215) or the judgment (Doc. 216) at the conclusion of the interlocutory appeal. However, that did not relieve the district court of the responsibility for carrying out these clearly enunciated requirements of the law. Following this Court's ruling of mootness in August 2007, the district court was asked, by motion to do just that - - vacate the injunctive order and judgment. See Doc. 315. The district court denied the motion so requesting, and committed clear error in doing so. See Doc. 341. This Court should now correct this clear and egregious injustice and vacate the injunctive order and judgment, or order the district court to do so.

D. The District Court Injunction is Obsolete

Plaintiffs argue that the injunctive orders (Docs. 215, 216) have some intrinsic importance and need to be kept in place, notwithstanding that they have been declared moot by the Court. See Appellee's Brief, pp. 23-24, 38-40. This, obviously, is in total derogation of the declaration of mootness, and contravenes same. An order or judgment that has become moot, of necessity, must be vacated.

Both federal and state law require disabled compliant voting equipment and have for some time. Apart from that, at a practical level, the district court's order is

obsolete. The judgment requires "touch screen machines with audio ballet capabilities." See Doc. 216. The same language is set forth in the related court order. See Doc. 215, at 30. Florida law, however, is requiring new technology (not necessarily a touch screen), which will include the protection of having a resulting paper ballot available for recount purposes. See Florida Statutes §§ 101.56062, 101.56075, attached to the brief as Exhibit B.

The foregoing demonstrates that there is no intrinsic necessity for the injunction entered in this case, but rather, that the injunction will be in the way. Because the law relating to mootness requires it, because the Court's decree requires it, and for this practical reason also, the order (Doc. 215) and judgment (Doc. 216) must be vacated.

III. The ADA Does Not Supplant Federal Election Laws or Create a Federal Right to Vote Independently

As noted in the Supervisor's initial brief, because this case has been declared moot during the course of the prior interlocutory appeal, the arguments on the merits of the case cannot now be considered. However, the district court and Plaintiffs are acting, in part, as if no declaration of mootness has occurred. Accordingly, some of the arguments relating to the merits of the district court's initial decision discussed in Appellee's Brief, are addressed in the next several arguments.

With respect to the ADA, the Supervisor's argument has never been that the ADA does not apply to the activity of voting, which surely it does. Instead, his argument was that the ADA does not supplant the specific federal voting laws related to *voting systems* and that no ADA violation exists where compliance with such laws is shown. See, e.g., Nelson v. Miller, 170 F.3d 641 (6th Cir. 1999), *affirming on other grounds,* 950 F. Supp 201 (W.D. Mich 1996). As both the appellate court and the trial court in Nelson v. Miller concluded, the ADA does not create a federal right to a program of "secret and independent voting." As such, they concluded that the refusal to provide technologies that enabled unassisted voting is neither discriminatory nor an ADA violation where third party assistance is provided. Dismissal was the result in Nelson v. Miller, as it should have been in this case. To the same effect, see AAPD v. Shelley, 324 F. Supp 2d 1120 (C.D. Cal. 2004), a case litigated by the same lead Plaintiff and counsel who are litigating this case.

Plaintiffs rely on the decision in National Organization on Disability v. Tartaglione, 2001 WL 1231717 (E.D. Pa. Oct. 11, 2001), which does not even reference the Sixth Circuit's decision in Nelson v. Miller. Indeed, Tartaglione is neither binding nor persuasive even within the Eastern District of Pennsylvania itself, another judge having reached a different result. *See* NAACP v. Philadelphia Bd. of Elections, 1998 WL 321253 at 4 (E.D. Pa. 1998).

Plaintiffs, failed to make reference to AAPD v. Shelley, which made a number of rulings adverse to their position, including the adoption of the reasoning of Nelson v. Miller:

> ***... the ADA does not require accommodation that would enable disabled persons to vote in a manner that is comparable in every way with the voting rights enjoyed by persons without disabilities. Rather, it mandates that voting programs be made accessible, giving a disabled person the opportunity to vote. Nothing in the Americans with Disabilities Act or its Regulations reflects an intention on the part of Congress to require secret, independent voting.*** Nor does such a right arise from the fact that plaintiff counties attempted to provide such an accommodation.

324 F. Supp 2d at 1126 (emphasis added) (footnote omitted). The emphasized language is precisely the position that the Supervisor has advocated throughout this litigation.

The instant case is far removed from Shotz v. Cates, 256 F.3d 1077 (11th Cir. 2001) and Tennessee v. Lane, 124 S.Ct. 1978 (2004) in which the disabled persons literally had to drag themselves into or through courthouse facilities to access the judicial functions therein. Those cases were about permanent facilities that posed architectural and physical barriers to those plaintiffs, who desired to access the programs or activities inside. Indeed, the Supreme Court in Tennessee v. Lane emphasized that "architectural" barriers that limit "physical accessibility" are the

focus of 28 C.F.R. § 35.151 Title II of the ADA. 124 S.Ct. at 1993.

In sharp contrast, this case has nothing to do with access and architectural barriers to physical facilities. Instead, it involves solely the *type of voting system* temporarily placed for use inside the physical facilities where voting occurs, through which persons *communicate* their votes. In short, the voting system is the *program or activity*, the physical structures where voting occurs are the *facilities* to be accessed. In this regard, the Plaintiffs have accessed their polling places and voted on multiple occasions without physical impediment including all elections since the inception of their lawsuit. Indeed, the trial court concluded that "visually and manually impaired voters have been afforded an equal opportunity to participate in and enjoy the benefits of voting" thereby confirming the lack of an ADA violation. (R215 23).

In summary, this case was not about physical facilities and entry barriers. It was about the *method of communicating* one's vote once within voting facilities. Given the federal and state voting laws (including HAVA) that occupy this area of the law, it was error for the trial court to apply the ADA and to find a regulatory violation as it did.

IV. 28 C.F.R. § 35.151(b) Was Inapplicable and Was Not Violated

A. Plaintiffs Were Not Excluded from or Denied the Benefit of Voting

The decision in AAPD v. Shelley, 324 F.Supp 2d 1120 (C.D. Cal. 2004) is instructive because it rejected a 28 C.F.R. § 35.151(b) claim by Plaintiff AAPD. At issue was a state directive decertifying touchscreens that had been certified and used in prior elections in a number of California counties. Plaintiff AAPD contended that "decertification of touch-screen voting machines will alter the voting system and make the right to vote less accessible to disabled persons, citing 28 C.F.R. § 35.151(b)." 324 F.Supp. 2d at 1125. It also asserted that the elimination of touchscreens with audio ballots "discriminate by reason of disability, amounting to state action that disproportionately burdens the disabled because of their unique needs." Id.

The trial court rejected AAPD's argument and ruled consistent with the Supervisor's position, as follows:

> ***The evidence does not support the conclusion that the elimination of the DREs would have a discriminatory effect on the visually or manually impaired.*** Although it is not disputed that some disabled persons will be unable to vote independently and in private without the use of DREs, it is clear that they will not be deprived of their fundamental right to vote. ... ***The evidence establishes that long before the conditional certification of DREs,***

> ***counties utilized a number of programs to provide handicapped persons with ready access to voting equipment.***

Id. at 1125-26 (emphasis added). Specifically, the court found that a *return* to using voting systems with third party assistance, such as optical scan, did not violate the ADA.

By analogy, the failure to provide a secret, independent voting experience does not violate the ADA where each Plaintiff is afforded an equal opportunity to participate in and enjoy the benefits of voting. (R216 23).

B. Voting Systems Are Not "Facilities" Under 28 C.F.R. § 35.151(b), Which is Limited to Architectural and Physical Barriers

Plaintiffs in discussing the Supreme Court in Tennessee v. Lane, overlooked the fact that the Court made clear that "***architectural***" barriers which limit "physical accessibility" are the focus of 28 C.F.R. § 35.151. The Court stated that "[i]n the case of facilities built or ***altered*** after 1992, the regulations require compliance with specific ***architectural*** accessibility standards. 28 C.F.R. § 35.151 (2003)." 124 S.Ct. at 1993 (emphasis added).

Despite this pronouncement from the Supreme Court and the rejection of the 28 C.F.R. § 35.151(b) claim in Shelley, the Plaintiffs ignore the difference between the concept of "Program Accessibility" set forth in Subpart D of the regulations and

the concept of "Communications" set forth in Subpart E" of the regulations. The former, which includes 28 C.F.R. § 35.151(b), applies to *architectural* and other barriers that impede physical accessibility. The latter applies to *communications* barriers and *auxiliary aids* as described in 28 C.F.R. § 35.160. This dichotomy is consistent with the ADA itself, which provides for the "removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services" which enable the participation in government programs and services. 42 U.S.C.A. § 12131. Despite Plaintiffs' claim to the contrary (Appellee's Brief, pp 40-43), this common sense dichotomy is reflected in the caselaw, which establishes that 28 C.F.R. § 35.151(b) involves a physical alteration to a permanent structure, thereby undermining the concept that a portable piece of voting equipment is a "facility" subject to "architectural" alterations. See Initial Brief, p. 40, footnotes 30, 31, 32.

Finally, the Supervisor clearly did not misconstrue the word "equipment" in 28 C.F.R. § 35.104. As the caselaw applying 28 C.F.R. § 35.151(b) reflects, the meaning of "equipment" in this context must be understood in conjunction with other terms used in the regulations. Thus, the meaning of "equipment" within the definition of a "facility" is best understood as applying to elevators, escalators and other types of "equipment" that are architectural components which become physical modifications to a permanent structure or site. Voting equipment does not meet this definition.

V. Plaintiffs Misrepresented the Availability of Audio Touchscreens

Plaintiffs inaccurately state that a wide array of certified touchscreen/audio ballot "systems" were available in late 2001/early 2002. See Appellee's Brief, pp 18-20. As the district court found, however, only *one vendor's* touchscreen/audio ballot was certified at that time, that of ESS, which had the first and only certified audio ballot in Florida (R215 at ¶ 24), but which also experienced the massive problems discussed in the Miami-Dade Inspector General reports and the Governor's Task Force Reports. See Ps' Ex. 1 at 65; Stafford Ex. 12 at 65. No touchscreen system or audio ballot was used in Florida *until* the Fall 2002 election cycle, which was long *after* the Supervisor had made his procurement decision and after the Diebold system had been delivered and prepared for use in that same election cycle.[3]

In this regard, the Plaintiffs' statements that "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 the Supervisor decided to purchase the optical scan system, are categorically incorrect.

[3] The Supervisor decided on the Diebold System in January 2002, it was procured that same month, and thereafter delivered beginning in April 2002. (Initial Brief, pp. 18, 19 and record citations therein). It was used in the September primary and November general election in 2002.

CONCLUSION

In a case that becomes moot while on appeal, the order or judgment being appealed, or both, as in this case, must be vacated, or the right to appeal is effectively denied. When this occurs there is no prevailing party as to the issues that were on appeal. That is so whether the issue being reversed is a denial of a preliminary injunction sought by the Plaintiff in the case, as in BankWest, Inc. v. Baker, 446 F.3d 1358, 1368 (11th Cir. 2006), or whether the issue being reviewed is the claimed unjust granting of a preliminary injunction, as in this case. This Court should not now change this long-established law and procedure when no legal predicate for so doing has been laid because of perceived or likely collateral effects mandated by other laws.

The operative order and judgment in this case (Docs. 215, 216) were declared moot by the initial panel which heard the case in the interlocutory appeal. The district court should have vacated the order and judgment when requested to so by motion, but didn't, and erred in not so doing. The Court properly has jurisdiction over this appeal and now must do what the district court should have done before and vacate the order and judgment (Docs. 215, 216).

Respectfully submitted,

RICHARD A. MULLANEY
GENERAL COUNSEL

_____
ERNST D. MUELLER
Deputy General Counsel
Florida Bar No.: 164027
Office of General Counsel
117 West Duval Street, Suite 480
Jacksonville, FL 32202
(904) 630-1871 (Telephone)
(904) 630-1316 (Facsimile)
Attorneys for Appellant Holland

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.Civ.P. 32(a)(7) and Eleventh Circuit Rule 28-1, counsel for Appellant certifies that the Reply Brief of Appellant is prepared in 14 point Times New Roman type, and further certifies that the word count for the foregoing Brief, as counted by the word processing system used in preparing this brief, is 4,247.

_____
ATTORNEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply Brief of Appellant has been furnished to the following by Federal Express, this 28th day of April, 2008:

Sashe D. Dimitroff, Esquire
Heather M. Khassian, Esquire
Kevin A. Keeling, Esquire
HOWREY LLP
1111 Louisiana, 25th Floor
Houston, Texas 77002

Elizabeth Elaine Gardner
Robert Bruskins
Washington Lawyers' Committee for Civil Rights and Urban Affairs
11 Dupont Cr. N.W., Suite 400
Washington, DC 20036

George Lee Waas
Attorney General's Office
The Capitol, Suite PL-01
Tallahassee, FL 32399-1050

RICHARD A. MULLANEY
GENERAL COUNSEL

_____

ERNST D. MUELLER
Deputy General Counsel
Florida Bar No.: 164027
Office of General Counsel
117 West Duval Street, Suite 480
Jacksonville, FL 32202
(904) 630-1871 (Telephone)
(904) 630-1316 (Facsimile)
Attorneys for Appellant Holland