10-2320-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NEW YORK STATE BOARD OF ELECTIONS, TODD D. VALENTINE, CO-EXECUTIVE DIRECTOR OF THE NEW YORK STATE BOARD OF ELECTIONS, IN THEIR OFFICIAL CAPACITIES, STANLEY L. ZALEN, CO-EXECUTIVE DIRECTOR OF THE NEW YORK STATE BOARD OF ELECTIONS, IN THEIR OFFICIAL CAPACITIES, STATE OF NEW YORK,

Defendants-Cross-Defendants-Appellees,

(For continuation of caption see inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS APPELLEE

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(Continuation of caption)

THE CATSKILL CENTER FOR INDEPENDENCE,

Defendant,

NASSAU COUNTY BOARD OF ELECTIONS,

Intervenor Defendant-Cross Claimant-Respondent-Appellant,

NASSAU COUNTY LEGISLATURE,

Cross-Claimant-Respondent-Appellant,

LARRY ROCKEFELLER, STEPHEN DEWITT, HENRY J. NICOLS, LIONEL LOGAN, BO LIPARI, NEW YORKERS FOR VERIFIED VOTING, THE LEAGUE FOR WOMEN VOTERS OF NEW YORK STATE, COUNTY OF SUFFOLK,

Intervenors-Defendants.

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STATEMENT OF JURISDICTION

This is an appeal of the district court's injunction issued under the All Writs Act, 28 U.S.C. 1651, and its inherent equitable authority to enforce its remedial orders. The district court had jurisdiction pursuant to the All Writs Act. This Court has jurisdiction pursuant to 28 U.S.C. 1292(a)(1), which gives courts of appeals jurisdiction over the grant of an injunction.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in enjoining Appellants Nassau County, *et al*., from taking further action interfering with implementation of its previous remedial orders entered in this action to enforce provisions of the Help America Vote Act of 2002 (HAVA), 42 U.S.C. 15301 *et seq*.

STATEMENT OF THE CASE

In March 2006, the United States filed suit in the district court against the New York State Board of Elections (SBOE), the State of New York, and several individuals in their official capacities (collectively, the State), alleging violations of HAVA Sections 301 and 303(a), 42 U.S.C. 15481 and 15483(a).[1] The United States moved for a preliminary injunction, which the district court granted. Both the State and the United States filed proposed remedial plans. On June 2, 2006, the

[1] Section 301 pertains to voting systems standards and Section 303(a) pertains to computerized statewide voter registration lists.

district court entered a remedial order requiring compliance with HAVA. Due to compliance delays, the district court entered two subsequent remedial orders on January 16, 2008, and June 4, 2009.

In December 2006, Appellants Nassau County Board of Elections and the Nassau County Legislature (collectively, Nassau County or the County) moved to intervene in this action. The district court denied intervention, and this Court affirmed. In so ruling, the Court rejected the County's contention that the State was not adequately representing its interests because the State's repeated delays in implementing HAVA demonstrated that it was indifferent to the County's need for adequate time to replace its lever voting machines with new voting machines mandated by HAVA.

In April 2010, the United States requested the district court to hold the State in contempt for, among other things, Nassau County's failure to accept possession of HAVA-compliant voting machines for the 2010 federal elections. The State subsequently moved for an injunction under the All Writs Act against Nassau County, requiring it to accept HAVA compliant voting machines. The district court issued an injunction against the County under the All Writs Act on May 20, 2010, enjoining it from further interfering with implementation of its prior remedial orders to effectuate compliance with HAVA. The following day, the district court denied Nassau County's motion for a stay pending appeal. On July 2,

2010, this Court denied the County's motion for an interim stay, referred the motion for a stay to the merits panel, and expedited the appeal.

STATEMENT OF THE FACTS

1. Statutory Background

a. Federal Law

In response to shortcomings in the nation's electoral systems revealed by the 2000 presidential election, Congress enacted the Help America Vote Act of 2002 (HAVA), 42 U.S.C. 15301 *et seq.* Title I of HAVA, 42 U.S.C. 15301-15306, provides for, among other things, federal payments to states to replace punch card and lever voting machines. Section 102, 42 U.S.C. 15302, is entitled "Replacement of Punch Card or Lever Voting Machines." Specifically, it establishes a voluntary funding program and requires states that elect to receive funds to "use the funds provided * * * to replace punch card voting systems or lever voting systems (as the case may be) * * * with a voting system * * * that does not, [*inter alia*,] use punch cards or levers." 42 U.S.C. 15302(a)(2)(A). States that accept funds under Section 102 are required to replace their lever systems. 42 U.S.C. 15302(a)(3), as amended by Pub. L. No. 111-8, § 625(a), 123 Stat. 678.

Title II of HAVA, 42 U.S.C. 15321-15472, establishes, among other things, the United States Election Assistance Commission (EAC) to "serve as a national

clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections." 42 U.S.C. 15322. The EAC's rulemaking authority is limited. The EAC "shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under section 1973gg-7(a) of this title." 42 U.S.C. 15329.

Title III of HAVA establishes minimum requirements for voting in federal elections. 42 U.S.C. 15481-15512. In particular, Section 301 requires that a voting system be auditable:

> (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.

42 U.S.C. 15481(a)(2). HAVA's Section 301 also defines "voting system" to mean, among other things:

> (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.

42 U.S.C. 15481(b).

HAVA allows states leeway to meet Title III's requirements. "The specific choices on the methods of complying with the requirements of this subchapter shall be left to the discretion of the State." 42 U.S.C. 15485. Finally, Title IV of HAVA expressly gives the United States authority to seek equitable judicial relief to redress violations of HAVA. 42 U.S.C. 15511.

b. State Law

In addition to HAVA, the State of New York passed the Election Reform and Modernization Act of 2005 (ERMA). ERMA requires that "all lever machines in New York state * * * be replaced." N.Y. Elec. Law § 7-209(11) (McKinney 2005). The lever machines must be replaced by "voting machines or voting systems" that meet a series of requirements, including that the system retain "all paper ballots" or "produce and retain a voter verified permanent paper record" to "allow a manual audit." N.Y. Elec. Law § 7-202(j) (McKinney 2005).

2. Voting Machine Technologies

The case involves two types of voting machine technologies: optical scan technology and lever machine technology.

a. Optical Scan Voting Machine Technology

Optical scan voting technology works by tallying votes marked on paper ballots. JA 397.[2] A voter marks his or her vote on a ballot directly or with a ballot marking device. The ballot is then fed into a voting terminal. An advantage of such a system "is that the resulting paper trail is directly verified by voters and [the tallied paper ballot] can be used for various verification processes including * * * independent recounts." JA 397.

The optical scan voting terminals identify "marked portions of the ballot, insuring that the markings correspond to a legal vote" and adding votes to the counter associated with a particular candidate or position on a ballot initiative. JA 397.

By the 2008 presidential election, nationwide, "[n]early 60 percent of voters voted in polling places using paper-based optical-scan voting systems." The PEW Center on the States, "Election Preview 2008: What if We Had an Election and

[2] "JA __" refers to the specific page number in the Joint Appendix. "SA __" refers to documents in Appellants' Special Appendix. "Doc. __ at ___" refers to documents on the district court docket by their docket number and page number. "Br. __" indicates the page number of the Appellants' opening brief.

Everyone Came?" at 6 (Oct. 21, 2008), available at http://www.pewcenteronthestates.org/uploadedFiles/Election%20Preview%20FINAL.pdf (last visited Aug. 16, 2010).

b. Lever Voting Machine Technology

The first lever voting machine was introduced in 1892. Eric A. Fischer, "Voting Technologies in the United States: Overview and Issues for Congress," *Congressional Research Service* at 3 (March 21, 2001), available at http://digital.library.unt.edu/ark:/67531/metacrs1630/m1/1/high_res_d/ (last visited Aug. 16, 2010). With a lever voting machine "there is no document ballot." *Ibid*. Rather, a "voter enters the voting booth and chooses candidates listed on a posted ballot by pulling a lever for each candidate choice." *Ibid*. "The votes are recorded by advances in a counting mechanism that are made when the voter leaves the booth." *Ibid*. The lever machine eliminated "the need to count ballots manually." *Ibid*. Rather, "poll workers read the numbers recorded by the counters." *Ibid*. "Because there is no document ballot, recounts and audits are limited to review of totals recorded by each machine." *Ibid*. "[T]he machines are no longer manufactured, although parts are still available." *Ibid*.

"Lever machines reduce some kinds of human error, but problems with counts may occur as a result of malfunctioning machines or from errors made by the poll workers who read them." "Voting Technologies in the United States" at

10. With lever machines * * * recounts are limited to checking the vote totals recorded by each machine." *Id*. at 12. This means that lever machines do "not allow for a ballot-by-ballot paper audit trail." *Ibid*. Lever voting machine systems are often considered the most expensive of the available voting systems. *Id*. at 18.

3. Procedural History

a. Initial Proceedings

In March 2006, the United States filed suit in the United States District Court for the Northern District of New York against the State, alleging HAVA violations. The United States specifically alleged that the State's existing voting systems did not comply with Section 301, 42 U.S.C. 15481, because, among other things, they failed to "produce a permanent paper record with a manual audit capacity." JA 53. The United States moved for a preliminary injunction, arguing that "the voting system predominant throughout the State for use in elections for federal office – lever voting machines – does not comply with Section 301 in several respects, including * * * the requirement that voting systems produce a permanent paper record with a manual audit capacity." JA 69.

On March 23, 2006, the district court granted the United States' motion. The district court found that the SBOE was not in full compliance with several Sections of HAVA. It ordered the SBOE to "take all necessary actions to come into compliance with the requirements of Sections 301 and 303(a) of HAVA as

soon as practicable, in accordance with a remedial plan to be approved" by the district court. JA 146. Both the State and the United States submitted proposed remedial plans. On June 2, 2006, the district court entered a remedial order. JA 150-151. Among other things, the order required that no later than August 15, 2006, the State submit a detailed schedule for implementation of a long-term plan to replace "all lever voting systems in the State with all HAVA-compliant voting systems in every polling place by September 2007." JA 151.

Due to delays by the State, the district court entered two supplemental remedial orders, on January 16, 2008, and June 4, 2009. The first supplemental order required, *inter alia*, that the State fully implement its plan "for the deployment of fully HAVA-compliant voting systems throughout the State of New York, specifically including the replacement of all lever voting machines in the State, by the fall 2009 State primary and general elections." JA 159. The second supplemental remedial order required New York to have fully HAVA-compliant voting machines for the fall 2010 federal primary and general elections. JA 162-163.

b. Nassau County's Attempt To Intervene

On December 21, 2006, Nassau County moved to intervene in the action. Nassau County argued that it had "direct, substantial, and protectable interests in [the] matter, arising out of the SBOE's failure to certify non-lever, HAVA-

compliant voting systems within sufficient time to allow [Nassau County] to select, order and deploy such systems by September 2007." JA 597. Nassau County further argued that its interests were not protected or represented by the parties to the suit. JA 614-615. Nassau County affirmatively stated numerous times that HAVA required the replacement of lever machines. In an accompanying declaration, its election commissioners stated: "These federal voting machine requirements effectively require [Nassau County] to replace all of the lever voting machines utilized in Nassau County for the past century." JA 557. Similarly, in its memorandum of law in support of its motion to intervene, Nassau County described HAVA as requiring replacement of lever voting machines. JA 596, 602, 606.

On July 19, 2007, the district court denied Nassau County's motion to intervene. In denying the motion, the district court adopted the reasons set forth in the United States' opposition to the motion to intervene. Among these reasons was that Nassau County had "failed to establish" that its interests "would not be adequately protected by the existing parties given the current status of the remedial process." JA 629 at 5. While Nassau County subsequently appealed to this Court (Doc. 126), because of changed circumstances it also renewed its motion to intervene in the district court on December 13, 2007. JA 643-646. After a hearing on December 20, 2007, the district court again denied the County's motion to

intervene for the reasons articulated by the United States. JA 830; see also Doc. 167. The district court converted Nassau County's pleadings into an *amicus curiae* brief, and stated that it would "consider it together with the other counties' positions." JA 885.

Nassau County renewed its appeal to this Court. Doc. 177. The Court affirmed the district court's denial of intervention. *United States* v. *New York State Bd. of Elections*, 312 F. App'x 353 (2d Cir. 2008). In denying the County's motion to intervene as a matter of right under Federal Rule of Civil Procedure 24(a)(2), this Court rejected the County's contention that its interests were not adequately represented by the State Board of Elections "because the BOE's repeated delays have jeopardized HAVA funding and the BOE is at best indifferent to Nassau County's need for adequate time * * * to install and verify new voting systems." 312 F. App'x at 355. In so ruling, the Court noted that, "pursuant to the parties' most recent 'Time Line' for replacing New York's lever voting machines, the BOE will provide the counties with a list of certified machines by October 23, 2008, thereby affording Nassau County [adequate time] to install and verify the new [non-lever] voting equipment before the September 2009 primary elections." *Ibid.*

c. The All Writs Act Proceedings

On April 20, 2010, the United States requested the district court to hold the State in contempt because of, *inter alia*, Nassau County's failure to accept possession of HAVA-compliant voting machines needed for the 2010 federal elections. JA 269. Because of this, the United States argued, "HAVA compliance for the fall elections may be jeopardized." JA 270. The United States noted that the State could force Nassau County's compliance by moving for an injunction under the All Writs Act, 28 U.S.C. 1651. JA 272.

On April 26, 2010, the State moved for such an injunction, asking the district court to require Nassau County to take receipt of optical scan voting machines for implementation for the fall 2010 elections. JA 279. The United States filed a response in support of the State's motion. JA 328-333. Nassau County filed a response arguing that "the requested injunction" had "no foundation in HAVA." JA 336. Contrary to its previous position, Nassau County argued that "[n]ot only does HAVA *not preclude* the use of lever machines, it expressly *permits* their usage." JA 337.

On May 20, 2010, the district court issued an order enjoining Nassau County from taking further action interfering with implementation of the district court's remedial orders requiring the State to comply with HAVA. The district court made several findings. First, the "extensive record in this case * * * make[s] clear that

this Court has previously found that lever machines as utilized in the State of New York do not comply with the voting systems requirements of Section 301" of HAVA. SA 3. "[F]ull compliance with HAVA in New York will not be achieved until all lever voting machines in the State are replaced with fully-HAVA-compliant voting systems." SA 3. Second, the district court found that the State had "processed Nassau County's order for HAVA-compliant optical scan voting systems previously certified by the State," had spent "federal funds" for their purchase, and "conducted acceptance testing" of the machines. SA 3. The machines were ready for delivery beginning March 19, 2010. Third, the district found that Nassau County had "failed to take delivery of HAVA-compliant optical scan voting systems from the SBOE in a timely manner consistent" with the remedial order timetable. SA 3. Fourth, for a variety of reasons, the district court found that Nassau County was "interfering with implementation of this Court's lawful Remedial Orders designed to ensure compliance with HAVA." SA 4. Fifth, in addition to its authority under the All Writs Act to issue the injunction, the district court stated that the injunction was issued under its "inherent equitable authority to enforce its Remedial Orders." SA 4. Finally, the May 20, 2010, order also enumerated dates by which Nassau County needed to implement specific actions. SA 6-7.

On May 21, 2010, the district court denied Nassau County's motion to stay the injunction pending appeal. On June 18, 2010, Nassau County filed, in this Court, a motion to stay the injunction pending appeal and for expedited appeal. On June 21, 2010, the County moved for expedited consideration of its motion to stay. This Court denied an interim stay, but expedited the appeal. The Court also stated that the stay motion would be considered by the merits panel.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in entering an injunction against Nassau County pursuant to the All Writs Act requiring it to cease its interference with State efforts to provide all New York counties with HAVA-compliant optical scan voting machines. Nassau County is bound by the district court's previous holdings requiring the replacement of lever machines by optical scan machines. In any event, as a matter of law, the type of lever machines at issue in this case do not comply with HAVA's requirements. The United States Election Assistance Commission (EAC) guidance to this same effect is a persuasive interpretation of HAVA, and thus is entitled to deference. The district court's order should be affirmed accordingly.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENJOINING NASSAU COUNTY FROM FURTHER INTERFERING WITH IMPLEMENTATION OF ITS PRIOR REMEDIAL ORDERS ENTERED IN THIS ACTION TO ENFORCE PROVISIONS OF HAVA

The district court issued its order pursuant to the All Writs Act. That Act specifies: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a). As the Supreme Court has noted, the All Writs Act specifically authorizes a federal court "to issue such commands * * * as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States* v. *New York Tel. Co.*, 434 U.S. 159, 172 (1977).

Nassau County argues that the district court's injunctive order is based on the erroneous legal conclusion that HAVA precludes the use of its lever voting machines. This argument fails. First, because Nassau was adequately represented in the prior proceedings before the district court, it is bound by the district court's finding that HAVA precludes the State's lever voting machines. Second, even if this Court reaches the statutory question, an examination of HAVA's plain language demonstrates that it prohibits the lever machines at issue here. Finally,

the Election Assistance Commission's non-binding, but persuasive guidance confirms this reading of HAVA.

A. Standard Of Review

This Court reviews the "grant of an injunction under the All Writs Act for abuse of discretion." *United States* v. *International Bhd. of Teamsters*, 266 F.3d 45, 49 (2d Cir. 2001). Such an abuse of discretion "occurs when (1) [the district court's] decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision – though not necessarily the product of a legal error or a clearly erroneous factual finding – cannot be located within the range of permissible decisions." *Kickham Hanley P.C.* v. *Kodak Retirement Income Plan*, 558 F.3d 204, 209 (2d Cir. 2009) (internal quotations marks and citation omitted).[3] Here, the district court's injunction rests on solid legal and factual grounds, and thus did not constitute an abuse of discretion.

B. Nassau County's Interests Were Adequately Represented By The State In The Underlying Action, And Thus It Is Bound By The District Court's Holding That Its Lever Voting Machines Are Not HAVA-Compliant

As an initial matter, this Court need not even reach Nassau County's legal arguments. The County's arguments are barred by the doctrine of issue preclusion.

[3] Nassau County has argued only that the district court's injunction is based on an error of law; *i.e.*, its alleged misinterpretation of HAVA's requirements.

As the Supreme Court has recognized, "'in certain limited circumstances,' a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who [wa]s a party' to the suit." *Taylor* v. *Sturgell*, 128 S. Ct. 2161, 2172 (2008) (quoting *Richards* v. *Jefferson Cnty.*, 517 U.S. 793, 798 (1996)). "A party's representation of a nonparty is 'adequate' for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and her representative are aligned; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Id*. at 2176 (citations omitted). Here, both the district court and this Court previously found that Nassau County's interests aligned with those of the State.[4] The district court took care to protect Nassau County's interests by allowing it to explain its position at the December 20, 2007, hearing and, after denying its motion to intervene, converting its filings to an *amicus* brief and considering the County's position.

In short, Nassau County was adequately represented in the proceedings leading to the district court's remedial decrees to enforce the State to comply with HAVA. The County, therefore, is precluded from now raising the issue of whether

[4] Under the law of the case doctrine, this Court is bound by the previous panel's holding that Nassau County's interests were adequately represented by the State. *United States* v. *Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000) ("[A] court of appeals must usually adhere to its own decision at an earlier stage of the litigation.") (internal quotation marks and citation omitted).

HAVA permits the lever machines that it previously agreed HAVA prohibited. The question whether HAVA required the replacement of such lever voting machines was addressed by the United States in its preliminary injunction motion in March 2006, and the district court made clear in its remedial orders that their replacement was required. The district court understood itself to have so ruled on the issue. JA 470, 479. Nassau County could have argued in its efforts to intervene that its lever voting machines were HAVA-compliant, but chose not to do so. Thus, the County is bound by these remedial orders, because the interest it sought to advance at that time was adequately represented in the litigation by the State.

In addition, in its motions to intervene and its prior appeal to this Court, Nassau County argued that its intervention was necessary because HAVA required replacement of lever voting systems and the State had failed "to certify non-lever, HAVA-compliant voting systems within sufficient time to allow the [County] to select, order, and deploy such systems by September 2007." JA 597; see also Nassau County Supplemental Ltr. Br. 7, *United States* v. *New York State Bd. of Elections*, 312 F. App'x 353, 355 (2d Cir. 2008). Nassau County stated numerous times in its previous filings that HAVA required the replacement of lever voting machines. JA 557, 596, 602, 606. Now, without even acknowledging its changed position and without explanation, Nassau County has reversed course and makes

precisely the opposite contention, *i.e.*, that HAVA *permits* its lever voting machines.

While Nassau County was not a party to the litigation, its papers seeking intervention were converted into an *amicus* brief. This Court has declined to give weight to an *amicus curiae*'s changed policy position where that *amicus* changed its position with no explanation. *American Fed. of State, Cnty. & Mun. Emps*. v. *American Int'l Grp., Inc.*, 462 F.3d 121, 129-130 (2d Cir. 2006) ("The [Securities and Exchange Commission's] amicus brief is curiously silent on any Division action prior to 1990 and characterizes the intermittent post-1990 no-action letters which continued to apply the pre-1990 position as mere 'mistake[s].' * * * Although we are willing to afford the Commission considerable latitude in explaining departures from prior interpretations, its reasoned analysis must consist of something more than *mea culpas*."). To the extent that the district court relied on Nassau County's *amicus* filing, the County invited the alleged error about which it now complains.

In these circumstances, the County is estopped from arguing, in this proceeding under the All Writs Act, a position that is directly at odds with the position it advanced in seeking to intervene in the underlying action. Cf. *In re Westpoint Stevens, Inc.*, 600 F.3d 231, 256 (2d Cir. 2010) ("[E]stoppel applies to prevent a party from inequitably adopting a position directly contrary to or

inconsistent with an earlier assumed position in the same proceeding or a prior proceeding.") (internal quotation marks and citation omitted).[5]

C. In Any Event, HAVA's Plain Language Precludes The Use Of Nassau County's Lever Voting Machines

Nassau County contends that its lever machines are or can be made compliant with HAVA's requirements. Br. 33-35. It argues that HAVA expressly approves the use of lever voting machines. Br. 23 (quoting HAVA Section 301(a)(1)(A), 42 U.S.C. 15481(a)(1)(A)). Nassau County also argues that "[u]nder the plain language of HAVA, the returns of canvass and the police report constitute a 'permanent paper record' 'produced' by the lever machine 'voting system.'" Br. 32. Nassau County's argument misreads the plain language of the statute.

HAVA does explicitly name lever voting machines in its description of voting systems. 42 U.S.C. 15481(a)(1)(A). HAVA, however, does not simply endorse a voting system based on its label or name. Rather, HAVA establishes specific requirements that a voting system must include to be used in federal elections. The United States does not dispute that certain lever voting machines might be HAVA-compliant. What the United States does claim is that *Nassau*

[5] The district court's orders concerning lever voting machines are also the law of the case for this Court. *Johnson* v. *Holder*, 564 F.3d 95, 99 (2d Cir. 2009) ("The law of the case doctrine commands that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case, unless cogent and compelling reasons militate otherwise.") (internal quotation marks and citation omitted), cert. denied, 130 S. Ct. 3273 (2010).

County's lever machines do not comply with HAVA. Applying HAVA's plain language to the County's lever voting machines makes clear that they do not.

First, Nassau County's argument fails in light of Congress's clear preference for voting systems other than punch card and lever voting machines. Congress demonstrated this desire to eliminate lever voting machines in HAVA Section 102, 42 U.S.C. 15302, by which it authorized the payment of funds to states to replace lever and punch card voting systems. This evinces a Congressional preference for a different system. While this voluntary funding program is not an absolute bar to lever voting machines, it shows that Congress disfavored lever voting machines. The various components of the statute must be read in light of this overriding Congressional objective.

Second, the County's reading of HAVA is at odds with Section 301(b) of the Act, 42 U.S.C. 15481(b)(1). That Section defines a voting system as "the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment)" used, among other things, "to cast and count votes." Nassau County reads "documentation required to * * * support the equipment," as encompassing humanly produced paper tallies of lever machine counters. Br. 29-32. In other words, Nassau County considers the human volunteers who manually write down the lever machine tallies to be part of the voting system.

This reading violates the traditional statutory canon of *noscitur a sociis*, which "dictates that words grouped in a list should be giving related meaning." *Wojchowski* v. *Daines*, 498 F.3d 99, 108 n.8 (2d Cir. 2007); *Green* v. *City of New York*, 465 F.3d 65, 79 (2d Cir. 2006) ("[I]n searching for the meaning Congress intended, we consider the context in which a particular word occurs because a statutory term 'gathers meaning from the words around it.'") (quoting *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). Human beings are clearly not "mechanical, electromechanical, or electronic equipment." And a reading of the phrase, "documentation required to * * * support the equipment," given the words surrounding it, leads to the conclusion it is referring to such things as manuals, guides, and other forms of documents that aid the running, upkeep, and repair of a voting machine. In short, human beings cannot be part of the voting system, as defined by HAVA. Thus, Nassau County's lengthy discussion of how "returns of canvass" are created is beside the point. These returns of canvass are produced by human beings rather than a voting system as HAVA defines it.[6]

[6] Contrary to the County's claim (Br. 42-43), the United States is not relying on an "arcane" principle of statutory construction to avoid HAVA's plain meaning or its broader context. Rather, the United States' position is based upon a well-known and important principle of statutory interpretation to discern HAVA's meaning. See, *e.g.*, *United States* v. *Williams*, 553 U.S. 285, 294 (2008) (referring to this principle as a "commonsense canon, * * * which counsels that a word is given more precise content by the neighboring words with which it is associated").

The County's reliance (Br. 41-43) on *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 130 S. Ct. 1396 (2010), to argue against the use of *noscitur a sociis* is unpersuasive. There, the statute at issue included a "list of three items, each quite distinct from the other." *Id*. at 1403. Here, by contrast, the list of items is similar. Moreover, even assuming the use of this statutory canon is unwarranted, nothing in Section 301(b) or the larger context of HAVA suggests human beings are included in the definition of voting system.

Even assuming *arguendo* that human-produced tallies are produced by the "voting system," Nassau's argument still fails under the plain reading of 42 U.S.C. 15481(a)(2)(A), which requires the voting system to produce a "record with an audit capacity." The lever voting system does not produce such a record. To audit "is to examine and verify." *Webster's Third New International Dictionary, Unabridged* 143 (1993); see also *Black's Law Dictionary* 150 (9th ed. 2009). It is the "formal examination of an individual's * * * compliance with [a] set of standards." *Black's Law Dictionary* 150 (9th ed. 2009). It is the process by which voting officials can ensure that the voting systems are functioning properly. If a voting machine is erroneously counting or tallying votes, the audit capacity would allow election officials to catch and fix this error. The canvassing process the County employs does not allow this. Those persons taking the numbers off the back of the lever machine are simply recording these numbers whether they are

accurate or not. In contrast, the optical scan machines do allow for a true verification of votes. There is a permanent paper record – each individual ballot is scanned, processed by the machine and available for recount – against which the optical scan count can be checked if error is suspected. The lever voting machines do not have this capacity, and thus are not auditable. There is no "audit trail" back from the summary record to the individual vote. See 42 U.S.C. 15481(b)(1)(D).[7] Furthermore, New York State's own election law, ERMA requires such an audit trail. See N.Y. Elec. Law § 7-202(j) (McKinney 2005).

Nassau County's statutory argument fails on its own terms as well. HAVA mandates that the voting system must "produce a record with an audit capacity" and "produce a permanent paper record with a manual audit capacity for such system." 42 U.S.C. 15481(a)(2)(A) & (B)(i). Produce means to "[t]o bring into existence; to create." *Black's Law Dictionary* 1328 (9th ed. 2009). According to Nassau County, the documents created by poll workers are part of the voting system itself. If this Court accepts, for the sake of argument, that the vote totals are part of the voting system itself, then the lever machines are out of compliance with HAVA: they do not "produce" anything at all – the vote totals are part of, rather than produced by, the voting systems. If, alternately, the vote totals are the

[7] The term "audit trail" is defined as the "chain of evidence connecting account balances to original transactions and calculations." *Black's Law Dictionary* 151 (9th ed. 2009).

"permanent paper record" mandated by HAVA, Nassau County's argument fails because those records are created by poll workers, not the voting system. The vote totals cannot be both part of the voting systems *and* produced by the voting systems. Under either reading of the statute, Nassau County's argument fails.

Nassau County's argument further runs aground when one considers HAVA Sections 301(a)(2)(B)(ii) & (iii), 42 U.S.C. 15481(a)(2)(B)(ii) & (iii). The wording of 42 U.S.C. 15481(a)(2)(B)(ii) demonstrates that a paper record must be produced for each individual voter. 42 U.S.C. 15481(a)(2)(B)(ii) states that 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." If, as Nassau County argues, all HAVA requires is a paper record of the combined election tallies or results, this Section is rendered meaningless. There would be no need to include this provision, as a paper record would necessarily be produced at the end of a day's voting, rather than at the time of a particular person's vote. Nassau County's reading must be rejected, for it violates the statutory canon "against construing a statute as containing superfluous or meaningless words or giving it a construction that would render it ineffective." *Garcia-Villeda* v. *Mukasey*, 531 F.3d 141, 147 (2d Cir. 2008).

Additionally, the paper record that is produced must "be available as an official record for any recount conducted." 42 U.S.C. 15481(a)(2)(B)(iii). A

recount means counting each individual vote, not summaries of vote totals. ERMA comports with this. See N.Y. Elec. Law § 7-202(j) (McKinney 2005).

The retrofitting that Nassau County claims (Br. 33-35) it can obtain for its lever machines does not change this analysis. The printomatic device the County describes would not produce paper records tied to each individual voter. Rather, it would simply give a paper record of a particular machine's election day tally. This does not suffice under the plain meaning of HAVA. The other alternative suggested by Nassau County is a photographic record. Br. 34-35. Besides not being tied to individual voters, a photographic record is plainly not the "paper record" intended by Congress.

Thus, Nassau County's arguments (Br. 24-26) that HAVA's Section 301(a)(1)(A), 42 U.S.C. 15481(a)(1)(A), explicitly mentions lever machines; that Section 102, 42 U.S.C. 15302, is a funding program for voluntary replacement of lever and punch card voting machines; and that the Congressional record shows that Congress intended to allow localities to keep their voting systems, if possible, are beside the point. The question is not whether Congress allowed for the possibility that some lever machine systems might comply with HAVA. The United States agrees that Congress did allow for this possibility. The question is whether *Nassau County's lever machines* do or can be modified to comply with HAVA. They do not and cannot.

Nor does the United States' argument lead to a reading of HAVA that would prohibit optical scan machines. Br. 45-47. Nassau County fundamentally misunderstands the nature of the optical scan machines in making this argument. The County asserts that the optical scan ballots constitute both documentation under HAVA Section 301(b) and the auditable paper trail under HAVA Section 301(a)(2). The County also asserts that the permanent paper record is "produced" by the voters themselves. Br. 46. Not so. It is true that the voter marks his or her ballot. But this ballot is then fed into the optical scan machine, the vote is processed, if marked correctly, and then the machine produces the finished paper record. The voter's ballot, without more, is not the paper record. It is only after the optical scan machine reads the ballot that it becomes the paper record with manual audit capacity. Before the ballot has been read, it is just that – an unread ballot. Thus, the County is incorrect in claiming that the voter produces the permanent paper trail in the optical voting system.

Finally, Nassau County's assertion that a recount under an optical scan voting machine regime would be onerous and costly does not support its position. This is true with respect to any voting system, including its own lever system. Equally unavailing is its claim that optical scan machines are prone to problems with security, accuracy, and reliability. HAVA's whole intent is to ensure the integrity of elections. It does this by producing an auditable trail for each vote cast

in an election. If there are questions about the functionality of a voting machine, a manual audit can be done. The lever machines at issue in this case do not allow such a manual audit. They simply allow voting officials to recount summaries of vote totals without knowing whether those totals are accurate. Moreover, Nassau County's claim that the optical voting machines are vulnerable to error and unreliability is seriously undermined by the fact that nearly 60 % of voters in polling places around the country in the 2008 presidential election used them without reports of rampant errors and inaccuracies. See p. 7, *supra*.

D. Any Ambiguity In HAVA's Text Is Resolved By The EAC Guidance

Even assuming *arguendo* that HAVA's text harbors some ambiguity, the United States Election Assistance Commission's advice concerning the proper reading of the statute removes any ambiguity and is due deference. Nassau County argues that the EAC guidance effectively reads lever machines out of HAVA. Br. 36-37. The County also argues that the United States reads the EAC advisory paper as a binding rule. Br. 38. Further, the County argues that United States' position is based "entirely on" the EAC's advisory opinion. Br. 36. Nassau County is mistaken on all counts.

As an initial matter, the EAC advisory paper does not preclude the use of all lever machines and, in fact, acknowledges that HAVA does not "outlaw the use of lever machines, per se." JA 277. It points out that "lever voting systems have

significant barriers" that make compliance with HAVA "difficult and unlikely." JA 277. Nothing in this conclusion contradicts HAVA. Congress demonstrated a desire to eliminate lever voting machines in HAVA Section 102, 42 U.S.C. 15302, by which it authorized the payment of funds to states to replace lever and punch card voting systems. This evinces a Congressional preference for a different system. New York accepted federal funds under this HAVA provision for replacement of its lever machines, and by virtue of that acceptance, is likewise required by Section 102 to replace such systems (or return the funds). Further, Nassau County caused the State to expend funds for the purchase of optical scan machines. See SA 3.

Nor does the United States read the EAC advisory as a binding rule. As the United States' statutory argument makes clear, the government does not rely solely or even primarily upon the EAC to support its position. Clearly, while Congress established the EAC to "serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections," 42 U.S.C. 15322, it limited the EAC's rulemaking authority, 42 U.S.C. 15329. Thus, we do not take issue with Nassau County's assertion (Br. 39-40) that the EAC's guidance is not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

That is not the end of the story, however. As this Court has stated, "[i]nterpretive guidelines that lack the force of law, but nevertheless 'bring the benefit of [an agency's] specialized experience to bear' on the meaning of a statute, are still entitled to 'some deference.'" *Schneider* v. *Feinberg*, 345 F.3d 135, 143 (2d Cir. 2003) (brackets in original) (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 234-235 (2001)). "The extent of (so-called) *Skidmore* [v. *Swift & Co*., 323 U.S. 134 (1944),] deference is chiefly the 'power to persuade.'" *Schneider*, 345 F.3d at 143 (quoting *Mead*, 533 U.S. at 235). "Under *Skidmore*, the weight courts accord an agency interpretation depends on 'the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Natural Res. Def. Council, Inc.* v. *F.A.A.*, 564 F.3d 549, 564 (2d Cir. 2009) (quoting *Skidmore*, 323 U.S. at 140).

Consideration of these *Skidmore* factors leads to the conclusion that the EAC's advisory paper has a great deal of persuasive value. The EAC opinion demonstrates a careful reading of the statute and a thorough understanding of the term "audit capacity." As the opinion explains, a machine fails to have audit capacity if it simply summarizes the results of voting. Rather, to have audit capacity a summary must be able to be linked up with its "original transactions." JA 278 (quoting definition of "audit trail" in *Black's Law Dictionary* 131 (6th ed.

1990)). This interpretation has existed for nearly five years, and the United States is not aware of any other contrary guidance from the EAC or other electoral bodies. In these circumstances, the EAC's guidance has persuasive value and is entitled to *Skidmore* deference. Likewise, it has also been the view expressed by the Department of Justice, as the agency charged with enforcement of HAVA, in this and other cases, since Section 301 of HAVA went into effect. See, *e.g.*, *Taylor* v. *Onorato*, 428 F. Supp. 2d 384, 386 (W.D. Pa. 2006) ("There is no dispute that the lever style voting machines Allegheny County has used for the past several decades fail to comply with the mandates of section 301.")

* * * * *

In sum, Nassau County's position that its lever voting machines are HAVA-compliant is contrary to the district court's explicit finding (pp. 13-14, 18, *supra*); contrary to HAVA's plain language (pp. 20-28, *supra*); contrary to the EAC's guidance (pp. 28-31, *supra*); inconsistent with State law (pp. 6, 24, 26, *supra*); and inconsistent with the position it advocated to the district court in seeking to intervene in the underlying proceeding (pp. 10-12, 17-20, *supra*). In these circumstances, the district court's order under the All Writs Act enjoining Nassau County from further interfering with its prior remedial orders to ensure compliance with HAVA's requirements can hardly be deemed an abuse of discretion.

CONCLUSION

The Court should affirm the district court's issuance of an injunction under the All Writs Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains 7357 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Dated: August 25, 2010

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court using the CM/ECF system, this 25th day of August 2010. I also certify that I filed six (6) copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court via Federal Express overnight mail, this 25th day of August 2010.

The following will be served by the CM/ECF System: Peter James Clines, Dennis J. Saffran, Paul M. Collins, Andrew B. Ayers and Denise Ann Hartman.

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