IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 10-2320

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Defendants-Appellees

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

UNITED STATES' OPPOSITION TO MOTION OF RESPONDENTS-APPELLANTS, NASSAU COUNTY, *et al.*, FOR STAY PENDING APPEAL

For the reasons set forth below, the United States opposes the motion of Respondents-Appellants Nassau County, *et al*. (Nassau County), for a stay pending appeal.

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 specifically alleged that the State's existing voting systems did not comply with Section 301 because they failed to "produce a permanent paper record with a manual audit capacity." Compl., Doc. 1 at 7.[2] The United States also 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." Mem. in Supp. of Prelim. Inj. 7; Doc. 18-1 at 10.

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. Doc. 38 at 1. Both the State and the United States submitted proposed remedial plans. On June 2, 2006, the district court entered a remedial order. Doc. 77. Among other things, the order required that: (1) by the fall 2006

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

[2] Doc. __ at ___ refers to documents on the district court docket by their docket number and page number.

federal elections, the State deploy at each polling place one or more HAVA-compliant voting machines accessible to individuals with disabilities; and (2) 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." Doc. 77 at 2-3.[3]

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." Doc. 101 at 3. Nassau County further argued that its interests were not protected or represented by the parties to the suit. *Id*. at 20-21. Nassau County affirmatively stated numerous times that HAVA required the replacement of lever machines. In its accompanying declaration, its election commissioners stated: "These federal

[3] Due to ongoing delays by the State, the district court subsequently 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 systems in the State, by the fall 2009 State primary and general elections." Doc. 188 at 3. The second supplemental remedial order required New York to have fully HAVA-compliant voting machines for the fall 2010 federal primary and general elections. Doc. 299 at 1.

voting machine requirements effectively require [Nassau County] to replace all of the lever voting machines utilized in Nassau County for the past century." Doc. 100 at 5. Similarly, in its memorandum of law in support of its motion to intervene, Nassau County described HAVA as requiring replacement of lever voting machines. Doc. 101 at 2; *id*. at 8, 12.

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." Doc. 115 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. Doc. 144. After a lengthy hearing on December 20, 2007, in which Nassau County was given ample time to make its case, the district court again denied its motion for the reasons articulated by the United States. Dec. 20, 2007, Hearing Tr. 36, Doc. 176 at 36; 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." Dec. 20, 2007, Hearing Tr. 91, Doc. 176 at 91.

Nassau County renewed its appeal to this Court. Doc. 177. The County first asked for summary reversal of the district court's decision, which this Court denied on January 16, 2008. The United States argued that the facts demonstrated that the State's and County's interests were aligned. U.S. Br. 10. This Court agreed, holding that Nassau County had "failed to show that its interests in this litigation would be – or are being – inadequately represented by the [State]." *United States* v. *New York State Bd. of Elections*, 312 F. App'x 353, 355 (2d Cir. 2008).

On April 20, 2010, the United States requested the district court to hold the State in contempt because of, among other things, Nassau County's failure to accept possession of HAVA-compliant voting machines needed for the 2010 federal elections. Doc. 351 at 2. Because of this, the United States argued, "HAVA compliance for the fall elections may be jeopardized." *Ibid*. The United States noted that the State could force Nassau County's compliance by asking for an injunction under the All Writs Act, 28 U.S.C. 1651. Doc. 351 at 4.

On April 26, 2010, the State moved for an injunction under the All Writs Act requiring Nassau County to comply with the district court's remedial orders and take receipt of optical scan voting machines for implementation for the fall 2010 elections. Doc. 353. The United States filed a response in support of the State's motion. Doc. 363. Nassau County filed a response arguing that "the requested injunction" had "no foundation in HAVA." Doc. 364 at 3. 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." *Id*. at 4.

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 May 20, 2010, order also enumerated dates by which Nassau County needed to implement specific actions. 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. [4]

ARGUMENT

This Court considers four factors in determining whether to grant a stay of a district court's order pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interests lies." *In re World Trade Center Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007) (footnote and citation omitted). "[T]he degree to which a factor must be present varies with the strength of the other factors, meaning that more of

[4] Nassau County filed in this Court a Memorandum of Law in Support of Stay Pending Appeal (Mem. of Law) and a Declaration in Support of the Application for Stay (Decl. in Supp.).

one [factor] excuses less of the other." *Ibid*. (internal quotation marks omitted; brackets in original). In making the requisite showing, the moving party "bears a difficult burden." *United States* v. *Private Sanitation Indus. Ass'n*, 44 F.3d 1082, 1084 (2d Cir. 1995). Nassau County has failed to carry this difficult burden.

A. Nassau County Has Not Made A Strong Showing Of A Likelihood Of Prevailing On The Merits

Nassau argues that it has a likelihood of succeeding on the merits of its claim. This argument fails, for several reasons.

1. As an initial matter, despite how Nassau County has stylized its papers, this is not an appeal from a district court decision on what HAVA does or does not require. Rather, it is an interlocutory appeal of a grant of an injunction under the All Writs Act. 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 omitted). Nassau County has not even attempted to demonstrate how the district court's grant of the injunction was an abuse of discretion.

2. In addition, the Supreme Court has recognized that "'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 County*, 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." *Sturgell*, 128 S. Ct. at 2176. Here, both the district court and this Court have found that Nassau County's interests aligned with those of the State. The district court took care to protect Nassau County's interests by allowing it ample time 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 this action.[5] The County, therefore, is precluded from raising anew the issue of whether HAVA

[5] This decision is 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

permits the lever machines that it once 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 replacement was required. The district court understood itself to have so ruled on the issue. May 17, 2010, Hearing Tr. 8, 17. Thus, Nassau County is bound by these remedial orders, because it was adequately represented in the litigation by the State.

3. In its motions to intervene and its prior appeal to this Court, Nassau County argued that its intervention was necessary because 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." Doc. 101 at 3; see also Supplemental Ltr. Br. 7 (2d Cir., filed on Jan. 24, 2008). Now, without even acknowledging its changed position and without explanation, Nassau County has reversed course and contends that HAVA permits its lever 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

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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 omitted), cert. denied, 2010 WL 1946785, No. 09-7909 (May 17, 2010).

weight to an amicus curiae's changed position where the amicus changed its position with no explanation. *American Fed. of State, County & Mun. Empl.* v. *American Int'l Group, 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 also invited the alleged error about which it now complains. Nassau County cannot have it both ways.

4. Nassau County now contends that its lever machines are or can be made compliant with HAVA's requirements. Nassau County 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.'" Mem. of Law 8. Even if this Court were to treat this as an appeal from the merits of the district court's decision, Nassau County fails to meets its burden because it misreads the plain language of the statute.

HAVA 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 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).

Analysis of the statute's text demonstrates how flawed Nassau County's argument is. With regard to Section 301(b), 42 U.S.C. 15481(b)(1), Nassau's argument clearly runs aground. 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." Strangely, Nassau County reads "documentation required to * * * support the equipment," as encompassing humanly produced paper tallies of lever machine counters. 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)). A more accurate reading of the phrase, "documentation required to * * * support the equipment," given the words surrounding it, is that support documentation is akin to manuals, guides, and other forms of documents that aid the running, upkeep, and repair of a voting machine. Thus, Nassau County's lengthy discussion of how "returns of canvass" are created is beside the point. This sort of paper trail is clearly not the sort of documentation that Congress intended with its use of this phrase.

Nassau's statutory argument fails on its own terms. 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* (8th ed. 2004). According to Nassau, 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, Nassau argues that the vote totals are the "permanent paper record" mandated by HAVA, Nassau'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's argument fails.

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.

Also, the wording of Section 15481(a)(2)(B)(ii) demonstrates that the paper record is tied to each individual voter. In other words, a paper record must be produced for each individual voter. Section 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, Mem. of Law 9-10, 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).

Thus, the retrofitting, which Nassau County claims (Mem. of Law 9-10) it can obtain for its lever machines, is also irrelevant. 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 day's election tally. This does not suffice under the plain meaning of HAVA. The other alternative suggested by Nassau County is a photographic record. Mem. of Law 10. Besides not being tied to individual voters, a photographic record is not the paper record intended by Congress.

5. Even assuming *arguendo* that HAVA's text harbors some ambiguity, the United States Election Assistance Commission's (EAC) advice concerning the proper reading of the statute removes any ambiguity and is due appropriate deference. Nassau County argues that the EAC guidance effectively reads lever

machines out of HAVA. Mem. of Law 11-12. The County also argues that the United States reads the EAC advisory paper as a binding rule. *Id*. at 12.

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." EAC Advisory at 1, Doc. 351-1 at 2. It points out that "lever voting systems have significant barriers" that make compliance with HAVA "difficult and unlikely." *Ibid*. Nothing in this conclusion contradicts HAVA. Congress evinced a desire to eliminate lever voting machines in a separate Section of HAVA, Section 102, 42 U.S.C. 15302, in which it authorized the payment of funds to states to replace lever voting systems. New York accepted federal funds under this provision of HAVA for replacement of its lever machines.

Nor does the United States read the EAC advisory as a binding rule. 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 strictly limited the EAC's rulemaking authority, 42 U.S.C. 15329. Thus, Nassau County is correct to state 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).

The EAC, however, does not claim *Chevron* deference. But that is not the end of the story. 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." EAC Advisory at 2, Doc. 351-1 at 3 (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.

B. Nassau County Has Failed To Demonstrate Irreparable Harm Absent A Stay

Nassau County raises several arguments in asserting that it will be irreparably harmed absent a stay of the injunction. First, it argues that the new optical scan systems are especially susceptible to fraud. Decl. in Supp. 11-15. Second, it argues that a full manual recount of optical scan ballots would be particularly onerous. *Id*. at 15-16. Third, it argues that compliance with the district court's order is causing it and will continue to cause it to expend large sums of money. *Id*. at 17.

The first claim rings hollow, because Nassau County previously asserted that HAVA required replacement of its lever machines. The County can now hardly claim that replacing those lever machines will result in irreparable harm, when in 2006 and 2007 it sought intervention to replace the machines. Moreover, on December 15, 2009, the SBOE certified two different voting systems for use under the remedial orders. Doc. 353-2 at 2. Nassau County joined in this process selecting one of these two systems for its elections. *Ibid*. Nassau County itself was involved in the choice of the optical scan machines that it now claims will cause irreparable harm. Finally, as explained above, HAVA requires replacement

of the County's lever voting machines. It can hardly be the case that obeying a law causes irreparable harm.

No doubt a full manual recount would be onerous. But this is simply a speculative harm at worst, the likelihood of which Nassau County fails to demonstrate. At best, a manual recount is the potential price any jurisdiction desiring election integrity faces.

As for Nassau County's monetary harm contention, its asserted costs are mostly speculative and largely years in the future. The County's cost-based argument also suffers from the fact that it turns on its flawed interpretation of HAVA's requirements.

C. The Issuance Of The Stay Will Substantially Injure The State And Nassau County Residents

Nassau County asserts that a stay maintaining the status quo will injure no one. Decl. in Supp. 19. This argument is without merit.

First, the State of New York will suffer in that it will continue its non-compliance with HAVA more than four years after the United States commenced this action. It will continue to incur litigation costs in the suit.

Second, Nassau County citizens will suffer in that they will face yet another federal election in which federal law is thwarted and the requirements of HAVA disregarded by their County. These citizens will continue to vote using an

outdated system that Congress intended to do away with eight years ago through its enactment of HAVA. See, *e.g.*, HAVA, Title I, "Payments to States for Election Administration Improvements And Replacement of Punch Card And Lever Voting Machines"; HAVA, Title III, "Uniform and Nondiscriminatory Election Technology and Administration Requirements." Citizens in Nassau County will be placed in an unequal position in federal elections vis-à-vis all other New York and United States citizens whose voting districts are fully HAVA-compliant.

D. The Public Interest Lies With Enforcing HAVA

Nassau County did not address the question of the public interest as a separate issue. Rather, it conflated it with its discussion of whether it would be irreparably harmed. Decl. in Supp. 11-16. The public interest, however, is a separate question.

HAVA's provisions have been in effect since 2002. New York is the only state that has failed to comply fully with HAVA's requirements. See Dec. 20, 2007, Hearing Tr. 68, Doc. 176 at 68. Over four years after the United States filed its complaint in this case, the public is still waiting for New York to become HAVA-compliant. It is undeniable that enforcement of a duly enacted federal law – particularly one designed to assist Americans in exercising their right to vote – lies with the public interest. Moreover, Nassau County is unlikely to prevail on the

merits, making even more compelling the conclusion that the public interest lies with enforcement of HAVA and denial of a stay pending appeal.

CONCLUSION

The Court should deny Nassau County's motion for stay pending appeal.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/ Conor B. Dugan
DENNIS J. DIMSEY
CONOR B. DUGAN
Attorneys
United States Department of Justice
Civil Rights Division, Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
Telephone: (202) 616-7429

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the page limitation imposed by Fed. R. App. P. 27(d)(2). The brief was prepared using Microsoft Word 2007. The type face is Times New Roman, 14-point font.

s/ Conor B. Dugan
CONOR B. DUGAN
Attorney

Dated: July 1, 2010

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing UNITED STATES' OPPOSITION TO MOTION OF RESPONDENTS-APPELLANTS NASSAU COUNTY, *et al*., FOR STAY PENDING APPEAL with the Clerk of the Court using the CM/ECF system, this the 1st day of July 2010.

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

s/ Conor B. Dugan
CONOR B. DUGAN
Attorney