



# **Testimony of VoteEarlyNY**

at the

## **Public Hearing to Review Election Administration and Voting Rights in New York State**

Presented to the

**Senate Standing Committee on Elections**

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Good Afternoon Chairperson Myrie and Members of the Senate Committee on Elections.

My name is Jarret Berg, Co-Founder and Voting Rights Counsel of VoteEarlyNY (VENY), a nonpartisan education nonprofit dedicated to raising awareness among the public about access (and obstacles) to our voting rights and working with policymakers and the Boards of Elections to ensure pro-voter implementation of reforms to New York’s election law and regulations.

Since 2019, VoteEarlyNY has mapped and tracked early voting and mail ballot implementation developments and made them accessible for the public via the county-by-county pages of our [website](#), while pushing counties to adopt broadly accessible and inclusive new policies where our voting laws defer to local discretion and decision making. To date, more than half a million users have accessed our online resources. In addition, our team monitors Board meetings, websites, and policies, and participates in Election Protection and election monitoring.

Thank you for hosting the recent hearings around the state, as well as this *Hearing to Review Election Administration and Voting Rights in New York State* to identify what has worked well during recent elections and which existing policies need to be improved.

We should recognize that New York was home to the first largescale U.S. COVID-19 outbreak, placing enormous pressure on officials, but also that civil rights are jeopardized during States of Emergency around the globe (historically they are often trampled) due to the measures imposed, even where, as here, the emergency is genuine and the measures taken are responsive to it.

This is why your leadership and focus on voting reform was prescient in 2019, was critical in 2020, and remains an urgent priority today. As we’ve all seen, modern, flexible voting options provide resiliency and continuity of our democracy. As the health emergency slowly subsides, it is coinciding with increasingly disruptive weather incidents and potential political foul play.

Due to these reforms, for the past three elections New Yorkers have been able to access and have eagerly embraced the shift toward “Three ways to vote”. They aren’t alone: According to the Election Assistance Commission’s 2020 EAVS report, nationally 2020 “saw sweeping changes in how voters cast their ballots. In the 2016 EAVS, 54.5% of voters cast their ballots in person on Election Day, and in the 2018 EAVS, 58.2% of voters did so. In 2020, only 30.5% of voters cast their ballots in person on Election Day.”<sup>1</sup>

Although this has expanded voter access for New Yorkers’ significantly, there remains an ongoing need to build out due process, proliferate best practices, train staff and educate voters.

Our testimony focuses on: **A) Early Voting Implementation; B) Two Track Approach to Board Reform; C) Concerns about the New Ballot Request Deadline; D) Modern Voter Lookup and Tracking; E) User-Friendly Websites and a Chat Bot for FAQs; F) Impact of “Wrong Church” Suppression; and G) Legitimate “BOE Forwarded Ballots” Disqualified in *Tenney-Brindisi*.**

## **A) Progress on Early Voting Implementation**

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<sup>1</sup> ELECTION ASSISTANCE COMMISSION, ELECTION ADMINISTRATION AND VOTING SURVEY 2020 COMPREHENSIVE REPORT ii (2021), <https://bit.ly/3nPenlc>. “The percentage of the [U.S.] electorate that voted a mailed ballot increased to 43.1% of the electorate, nearly a 20-percentage point increase from 2016 levels.” *Id.*

Implementation of New York’s early voting program has been deployed successfully across the state, if somewhat unevenly, without significant disruption for four major election events and several specials. This is a transformative legislative accomplishment, with room to improve.

The initial program<sup>2</sup> created a nine-day period of at least 60 hours including two weekends preceding Election Day. Initially the minimum sites required were capped for the most populous counties, first at 7 sites, then at 10. This led to glaring access disparities between jurisdictions, and in some cases, disparities within localities. If the S4306B-2021 legislation that has passed both houses is signed, the arbitrary cap will be lifted for the most populous counties in 2022, creating greater access across the state and fairer resourcing ratios. Reliable funding is needed.

In 2019 and 2020 the early voting law required an aggregate of 145 locations statewide<sup>3</sup> but localities large and small leaned in, deploying a total of 281 sites in the 2020 General Election. 23 counties deployed more than the minimum sites required and 34 exceeded the minimum hours, including 11 Boards that expanded their hours during the election in response to unprecedented demand and sustained extremely long lines around the state.

In 2021, some of the counties with the most expansive plans include **Erie** with 38 countywide sites for 69 hours; **Nassau** with 17 sites for 82 hours; **Monroe** with 14 sites for 66 hours; **Westchester** with 23 sites; **Ulster** with six sites; **Cayuga** with 3 sites, **Chautauqua** with 4 sites.

However, counties like **Suffolk** and **Rensselaer** have persisted in under-resourcing their early voting programs from the start, despite public outcry for expanded access.<sup>4</sup> These episodes (and deadlocks elsewhere over fair resourcing) illustrate the need for an escalation mechanism, either to the State Board, the Attorney General, or another publicly accountable official. Local Commissioners may have primary authority to administer elections, but that discretion is not an absolute license to run roughshod over the voting rights of the citizens they purport to serve.

The 2021 NYC early voting plan has not been released yet. Although the **City Board** deployed 104 sites in Election 2020 that operated for 73 hours and public engagement has been robust, the City program still lacks a foundational access component because voters are limited to a single assigned site. When fully implemented, the Early Voting Law requires counties to permit “any voter” to cast a ballot “at any polling place for early voting” in their county.<sup>5</sup>

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<sup>2</sup> Ch. 6 of the Laws of 2019.

<sup>3</sup> NYS Election Law § 8-600(2); *NYS Voter Enrollment By County, Party Affiliation and Status*, NYS BOARD OF ELECTIONS, Feb. 1, 2019, <https://on.ny.gov/2JcH9iE>; *NYS Voter Enrollment By County, Party Affiliation and Status*, NYS BOARD OF ELECTIONS, Feb. 21, 2020, <https://on.ny.gov/33QSIY9>.

<sup>4</sup> Carl Campanile, *Entire NY State Elections Regime Needs Overhaul, Suffolk’s Bellone Says*, N.Y. POST, Nov. 8, 2020, <https://bit.ly/3krFTeJ> (Bellone: “We had people at Suffolk polling sites waiting in line for four hours during early voting. That’s unconscionable.”); NYS Attorney General, Press Release, *Court Affirms Attorney General James’ Successful Suit Against Rensselaer County, Orders County to Increase Access to Early Voting Sites in Communities of Color*, Aug. 26, 2021, <https://on.ny.gov/39AJUHZ>.

<sup>5</sup> NYS ELECTION LAW § 8-600(3) (“Any voter may vote at any polling place for early voting . . . in the county where such voter is registered to vote; provided, however, if it is impractical to [1] provide each polling place for early voting all of the election district ballots or [2] if early voting at any such polling place makes ensuring that no voter has not previously voted early during such election, the board of elections may assign election districts to a particular early voting poll site. . . . If the board of elections does not agree by majority vote to plan to assign

This general programmatic rule is subject only to two specific, temporary exceptions. The City Board essentially invoked both in early 2019 when it voted on a plan to assign voters to sites and delineated a few technical hurdles to deploying boroughwide access. However, that decision has not been publicly revisited in two years, despite the default presumption in the law of countywide access, absent the Commissioners agreeing “by majority vote” to restrict access. Meanwhile, VoteEarlyNY successfully worked with Westchester, Albany, and Orange to provide voters with countywide access in 2020, in compliance with the law.<sup>6</sup> *If the City Board is still unable to overcome the remaining technical challenges, State and local officials should commence a public process that brings together all relevant stakeholders to address it.*

## **B) Two Track Approach to Reforming New York’s State and Local Board of Elections**

The challenge of reforming New York’s Boards of Elections (and where to begin) is a daunting one. Policymakers and stakeholders must avoid getting bogged down by a false choice: This binary question of ‘should we or shouldn’t we’ reform the board of elections. In a healthy and functional democracy, all public institutions must be open to modernizing systems and processes and to adopting best practices, and they must be capable of being reformed, to meet the evolving needs and expectations of the public they serve. This is even more true when it comes to entities that deliver access to civil rights.

Instead, we need to focus on how best to reform our Boards and toward what ends. That requires a two-track approach. There are many proposals to improve *compliance*, *objectivity*, and *transparency* in election administration, and with it, the quality of the voting experience, without implicating the multiyear amendment process to overhaul the entire structure. But it is not at all certain they can be implemented as intended and fully realized under the present board structure.

New York’s 58 Local Boards have vastly different voting populations, geographies, staffing, and resourcing. While some boards have full time commissioners and a large bipartisan staff, less-populous county boards have been described as “bare-minimum” boards due to their lack of full-time staff and generally meager local funding. Meanwhile, the City Board has ample local funding and a very large but decentralized staffing footprint owing to the Five Boroughs structure, as well as an executive staff, all of whom operate under the diffuse lay leadership of 10 part-time commissioners. Some boards work collegially; others mired in zero-sum dysfunction.

With such wide variation in staffing, professionalism, and local funding levels operating under one election law, it is not surprising that there is such a significant lack of uniformity and range of quality administration and compliance in New York elections.

With respect to the **State Board**, under HAVA there are key duties that the State’s top elections officer must undertake. But according to NCSL, of 50 states, only New York has this role filled by “Co-Directors”, representing each party.<sup>7</sup> At times, it is unclear whether the State Board, as

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*election districts to early voting poll sites, all voters in the county must be able to vote at any poll site for early voting in the county.* (emphasis added)

<sup>6</sup> NYS Election Law § 8-600(3).

<sup>7</sup> NATIONAL CONFERENCE OF STATE LEGISLATURES, ELECTION ADMINISTRATION AT STATE AND LOCAL LEVELS, Feb. 3, 2020, <https://bit.ly/3zoUewv>. Half the states have an *elected* Secretary of State as the chief election official (includes AZ, CA, CO, MA, MI, OH, OR, WA); Two states elect a Lt. Governor in that role; Five states have a chief

currently conceived and structured, is capable of carrying out some of the leadership duties that the public expects would fall within the mandate of the “Chief Election Official”.

While there may not be a perfect election administration model that addresses all concerns of all stakeholders and is impervious to every form of abuse or meddling, it is reasonable to expect that such a state entity or official: 1) would be vested with the authority and mandate to provide oversight of the operations of Local Boards including enforcement and remediation when glaring compliance or civil rights issues arise; 2) would provide policy uniformity, guidance, and pro-civic interpretations when ambiguities arise; and 3) would provide quality control through staff trainings, reports and advice on new equipment and technology, basic civic education materials, and dissemination of best practices from around the state and other liberal democracies.

At its best, our State Board can provide consistent access to digital tools, smoothing out local disparities; can procure niche expertise on topics of shared concern to Local Boards; can eliminate redundancies and election integrity blind spots; can coordinate scaled procurement to reduce costs; and can set a minimum standard of access, staffing, and administration. It is submitted that the lack of sufficient and dedicated state funding, the structural partisan paralysis that sometimes occurs, and the lack of a single publicly accountable full-time appointed or elected official with whom the voting buck stops are all factors that undermine the ability of the State Board to meet these expectations.

Both the Brennan Center and Senator Kreuger have introduced proposals to professionalize and improve administration at the City Board that should be closely considered.<sup>8</sup> Senator Comrie and Elections Chair Walker’s statewide staff training bill addresses a major missing piece of the puzzle,<sup>9</sup> while Chair Comrie and Walker’s proposed NYS Voting Rights Act would, among other things, empower the Attorney General to preclear local policy changes and curb patterns of malresourcing that can jeopardize fair access.<sup>10</sup>

As these and other measures are optimized and adopted, the legislature should seriously study the track record and experience of other jurisdictions, including a hybrid approach that prevents one-party domination of local administration, while providing far more effective oversight.

### **C) New York’s New Absentee Ballot Request Deadline and Regressive Shift from a “Mail By” Safeguard to a “Received By” Policy Jeopardizes Rights**

New York lawmakers should be credited with moving swiftly in response to the pandemic to modernize and scale New York’s previously limited absentee voting option. The legislature has also recently added important due process mechanisms at each stage, like online ballot requests and tracking, an opportunity for voters to cure clerical defects on ballot envelopes, some

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election official appointed by the Governor (includes FL, NJ, PA, and TX); In three states the legislature selects this official (includes ME and NH); Nine states have a Board or Commission that oversee Elections (includes IL, VA, NC, WI, NY); Seven states use a combination of a Board or commission and a chief official (includes GA).

<sup>8</sup> JOANNA ZDANYS ET AL., BRENNAN CENTER FOR JUSTICE, HOW TO FIX THE NEW YORK CITY BOARD OF ELECTIONS (2021), <https://bit.ly/3tUVx5f>; Senate Bill S6226A (Krueger) / Assembly Bill A5691B (Rozić).

<sup>9</sup> Senate Bill S5800-2021 (Comrie) (approved 49-14) / Assembly Bill A4323-2021 (Walker).

<sup>10</sup> Senate Bill S1046A-2021 (Myrie) / Assembly Bill A6678A-2021 (Walker).

protection against technical disqualification caused by missing postmarks or partially-sealed ballots, and restrictions to prevent bad-faith attempts to challenge and void legitimate ballots.

Along with the 2021 ballot proposal to remove the constitutional restriction on who qualifies for a remote ballot, these legislative changes provide a welcome and long overdue alternative to voting in person that ushers New York elections into the modern era of choice and convenience.. Options protect rights, especially when unexpected events or obstacles arise. Remote voting ensures the resiliency of our democracy (from storms or election meddling), by spreading out the turnout pattern across space and time, making it less likely that an entire election gets disrupted.

*However, VoteEarlyNY continues to oppose the regressive policy included in new legislation signed over the summer,<sup>11</sup> and related (mirror image language in) legislation that has yet to be reviewed by the Governor. As a path forward, we recommend a fair compromise that still achieves the legitimate goals of feasibly scaling up absentee voting and ensuring orderly election administration, while ameliorating the two most anti-voter impacts of the new law.*

The new absentee ballot request deadline—which is already in effect for the 2021 General—restricts access to absentee ballots during the most active timeframe before an election, when voters are making and executing their plan to vote. The bill rolls back the deadline for all remote absentee ballot requests by more than a week, from the voter-centric rule allowing requests made online or by mail (*postmarked*) 7 days before an election, to a rule that disqualifies requests *received by* Boards less than FIFTEEN days before an election. For the reasons discussed in full elsewhere<sup>12</sup> and outlined below, we recommend a balanced policy compromise that would:

1. Retain the voter-friendly ‘mailbox rule’ for absentee ballot requests—a clear “mailed to or submitted and received by” deadline for mailed or electronically submitted requests, rather than shifting to an uncertain (and harder to comply with) “received by” deadline.
2. Permit these (remote) absentee ballot requests so long as they are mailed to or submitted and received by the board of elections not later than the ELEVENTH day prior to an election, i.e., the end of day on Friday prior to the start of the Early Voting period, instead of cutting off remote absentee access more than two weeks prior to an election.

The purpose of the new rule is: “to conform deadlines for mailing of absentee ballot applications to comply with United States Postal Service (USPS) guidelines in order to assure the timely delivery of election mail” However, as the USPS Postmaster General reported earlier this year:

“We delivered 99.89 percent of ballots within seven days, consistent with the guidance we provided voters throughout the election cycle and delivered 97.9 percent of ballots from voters to election officials within three days. Overall, on average, we delivered ballots to voters in 2.1 days. Most importantly, on average, we delivered ballots from voters to election officials in just 1.6 days.”<sup>13</sup>

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<sup>11</sup> Chapter 273 of the laws of 2021 (was Senate Bill S264-2021 (Myrie)).

<sup>12</sup> VOTEEARLYNY, MEMORANDUM OF OPPOSITION AND PROPOSAL FOR CHAPTER AMENDMENT -- FIFTEEN DAY ‘RECEIVED BY’ DEADLINE FOR ABSENTEE REQUESTS, VoteEarlyNY Reports, <https://bit.ly/3zyWGRr>.

<sup>13</sup> UNITED STATES POSTAL SERVICE, DELIVERING THE NATION’S ELECTION MAIL IN AN EXTRAORDINARY YEAR 2, 18 (2021), <https://bit.ly/3zsYr29>.

In 2020, USPS lawyers confirmed in Federal Court that the “two-day service standard” applied to New York election mail.<sup>14</sup> According to NCSL, enacting this law would make New York a national outlier, as only one state had a longer pre-election deadline in 2020 for absentee requests made by mail.<sup>15</sup> Among states that still require voters to request a ballot (a policy choice New York has not publicly evaluated), New York’s deadline of 7 days is fairly typical.

Perhaps even more concerning is the new policy that a mailed ballot request needs to be “received by” the Board no later than the 15th day before election day, instead of “mailed to” the Board by the 7th day prior, requiring action by the voter several days before even this much earlier deadline to ensure the request is *received* timely. This change moves New York away from the voter friendly mailbox rule, unfairly shifting the burden to voters for unreasonable (and unsubstantiated) Board of Elections or USPS logistical delays outside the voter’s control.

This novel burden-shifting departs from the election law’s safe-harbor policy of protecting civil rights by counting ballots mailed on Election Day, affording voters seven days for ballots to arrive, and thirteen days for military and special federal ballots.<sup>16</sup> Although the intent may not be malicious, considering the fundamental rights at stake, a new policy that attempts to rebalance administrative burdens by rolling back key deadlines must also safeguard the voter’s interests.

However, this law disregards those interests. From a civil-rights, civic-education, and a campaign’s field perspective, *nobody can actually inform voters when they must mail their ballot request by to comply with the new law, i.e., to ensure the request is timely.*

Moreover, no public funding has been allocated to educate voters about this new rule ahead of upcoming 2021 and 2022 elections, leaving election officials without uniform guidance or resources to mitigate the predictable impact this harsher cutoff will have. As a result of this vacuum, the information provided by Local Board websites varies widely. While Local Boards like **Columbia** have done their best to emphasize the significance of this change on its website,<sup>17</sup> counties like **Orange** have grossly incorrect information posted,<sup>18</sup> while counties like **Suffolk** still have the old, far more generous deadline posted.<sup>19</sup> As a result, much of the public and the press remain unaware of the stricter new policy. Initial data received from County Boards indicate tens of thousands of ballots were requested during this eight-day timeframe in 2020.

*Finally, rolling back the deadline for requesting a ballot will not impact all voters equally. Those on the permanent absentee voting list, persons who rarely move residences, and high-propensity voters attuned to the political calendar will be least likely to be tripped up by this surprisingly early deadline. Voters with more resources, more scheduling flexibility, and ready*

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<sup>14</sup> *Gallagher v. NYS Bd. of Elections*, 477 F. Supp. 3d 19 (S.D.N.Y. 2020), at \*30, <https://bit.ly/3tVfusU> (“Within the five boroughs of New York City the postal service promises a ‘two-day service standard,’ which means that over 98 percent of mail placed in a collection box or delivered to a post office will arrive within two days, excluding Sundays.”).

<sup>15</sup> NCSL, *VOPP: Table 5: Applying for an Absentee Ballot, Including Third-Party Registration Drives*, <https://bit.ly/2PpiaPj>.

<sup>16</sup> N.Y. ELEC. LAW §§ 8-412(1); 10-114(1); 11-212(1).

<sup>17</sup> Columbia Board, *Extremely Important Notice Regarding Absentee Voting*, July 22, 2021, <https://bit.ly/3kJTNC>.

<sup>18</sup> Orange Board, *Absentee Voting: When Is it Due?*, <https://bit.ly/3ICS8V8> (visited Sept. 19, 2021).

<sup>19</sup> Suffolk Board, *2021 Absentee Voting, What are the deadlines to apply to vote absentee?*, <https://bit.ly/3o1Y6ll>.

transportation options will be best positioned to pursue alternatives. But already-marginalized communities of voters and those who tune in closer to an election will fall prey to this roll back. The new absentee ballot option will cut off just as many voters try to avail themselves of it.

**D) A Modern Voter Lookup and Tracking System for Applications to Register or Request Ballots, Absentees and Provisional Ballots, and Ballot Disposition.**

The legislature recently created an online ballot tracking system for absentee ballots, effective 2022 if signed.<sup>20</sup> Tracking election paper provides a major due process benefit to voters, who can protect themselves and take timely follow-up action as needed. Ultimately, this system should provide the voter with a one-stop tool where they can also find the status of new registration, address updates, and affidavit ballots. This should be integrated with the new AVR and Online Registration systems now in development, and other election management tools in addition to including USPS status updates. Such system should also be designed to ensure that timely turnout and ballot tracking data can be aggregated and made available to stakeholders in a sharable electronic format, and on a fair and equal basis. *A data sharing regulation is needed.*

A robust tracking system advances the goals of voter convenience and due process (ie, recourse is possible), but it is also a hallmark expectation of sets of transactions where chain of custody or timely filing is important. Timestamps and a reference number should memorialize each stage of a voter’s transaction. The Board has an administrative interest in being able to closely track election records and paper apart from maintaining the public trust. Investing in a robust tracking system now will be foundational as election technology and laws are refined for the digital age.

**E) Board Websites Should Be User Friendly with Uniform Information About Voter Access; State Board Has Key Role to Play; Adding a Chat Bot for FAQs**

The language and messaging, layout, and content found on the 58 Local Board websites varies widely across the state.<sup>21</sup> As New York continues to modernize election administration, policymakers should take a comprehensive look at what is presently required to be posted on Local Board websites and direct the State Board—in consultation with civic design professionals and civil rights advocates—to propagate additional ‘model’ content and reusable graphics. This would provide New Yorkers living anywhere in the state with more uniformity and quality control around access to clear and timely voting rights information.

The measure should be whether a new voter in any locality would be able to easily navigate to their Local Board webpage, learn about the voting options, deadlines, and any key technicalities that could jeopardize their vote, and take action based on the information and functionality to successfully qualify and exercise their rights.

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<sup>20</sup> Senate Bill S6395A-2021 (Comrie) (approved 49-14).

<sup>21</sup> Compare Wayne Board Website, <https://web.co.wayne.ny.us/281/2021-Elections>, Niagara Board Website, <https://elections.niagara.ny.us>, and Sullivan Board Website, <https://sullivanny.us/Departments/Elections>, with Monroe Board Website, <https://www.monroecounty.gov/elections>, Erie Board Website, <https://www.elections.erie.gov/>, Suffolk Board Website, <https://www.suffolkcountyny.gov/Departments/BOE/InvitationtoBid>, and Nassau Board Website, <https://www.nassaucountyny.gov/agencies/BOE/index.html>

While the City Board website is very built out for voters and poll workers, includes a media kit with sharable graphics about voting, language access, easy functionality for ballot requests and tracking, and typically contains voter-friendly descriptions of the voting options and regulations, some county websites make it very difficult to find relevant voting information, or the language used to describe the voting options may be unclear, bare-bones or incomplete.

Some counties still frame voting during most of the year in terms of the single Election Day, omitting general details about the availability of the early voting program on their landing page. As of September 17, 2021, around a dozen counties including the City Board had not posted or publicized their General Election 2021 early voting plan (dates, hours, and locations), in contravention of the early voting regulations.<sup>22</sup>

The early (pre-primary) deadline for designations of the General Election early voting plan should probably be rolled forward to a more feasible date, but in any case, a requirement that boards publicize the voting options via their website (some formulation of ‘three ways to vote’) in a clear, timely, consistent and wholistic way, including via county and local social media channels, should be made more explicit in the relevant statute and regulations.<sup>23</sup>

Anecdotally, we have heard that several County Board officials are not directly in control of the content on their own website. If this is still accurate and prevalent, this poses a challenge to modern administration that is basically unsustainable in the medium and long term. This consideration implicates the need for a very well-designed State Board website as a backstop.

The State Board website should be overhauled with the public and voter-friendly functionality in mind, especially as it may increasingly become the online destination for core digital functions related to voting, like registration, ballot requests, tracking, and aggregated election data.

Finally, policymakers should consider funding and directing the State Board to develop a ‘chat bot’ that can answer the most common voter FAQs and direct voters to online tools, like registration, ballot requests, poll site look ups, and tracking, as California did in 2020.<sup>24</sup> While the City Board has explored this, such functionality should be deployed on a statewide basis.

#### **F) New York’s “Wrong Church” Suppression Policy Disproportionately Impacts Densely Populated Localities and Several Majority-Minority Assembly Districts**

As VoteEarlyNY reported earlier this year based on data collected from the State and Local Boards of Elections,<sup>25</sup> in the 2020 General Election, more than 13,800 New York voters walked

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<sup>22</sup> N.Y. ELEC. LAW § 8-600(4)(e) (“Early voting polling places and their hours of operation for early voting at a general election shall be designated by May first of each year . . . .”); see NYCRR Part 6211.1(a) (“Early voting sites for primaries and special elections shall be designated no later than forty-six days before such an election.”); NYCRR Part 6211.7(a)-(c) (“Early Voting Communications Plan” requires local publicity).

<sup>23</sup> See N.Y. ELEC. LAW § 8-600(4)(e); NYCRR Part 6211.7(a)-(c).

<sup>24</sup> CA Sec’y of State, Press Release, *Secretary of State Alex Padilla Launches New Elections Chatbot*, Sept. 25, 2020, <https://bit.ly/3AnPEjx>; *Meet Sam*, Sept. 25, 2020, <https://www.youtube.com/watch?v=O1LMCB36wpQ>.

<sup>25</sup> RACHEL LANDY AND JARRET BERG, IMPACT OF NEW YORK’S “WRONG CHURCH” BALLOT DISQUALIFICATION RULE IN THE 2020 GENERAL ELECTION, VoteEarlyNY, May 21, 2021, <https://bit.ly/2XmNSR3> (“WRONG CHURCH REPORT”).

into a local polling place and were ultimately directed to vote provisionally by affidavit ballot even though they were registered, and each did so. However, as officials determined days later, these voters had turned out to a poll site in their correct county that was different from the one assigned to them, a fatal technical pitfall under the law known as the ‘wrong church’ rule.<sup>26</sup>

Although state law requires poll workers to redirect lost voters to their assigned polling place before issuing them a ballot,<sup>27</sup> in practice, that doesn’t consistently occur, leading to the rejection of the voter’s *entire* ballot if it was cast at any poll site other than the one assigned, regardless of what the voter is told. This includes the votes for contests on the ballot that all New York voters may participate in like U.S. President, Senator, or Governor; as well as offices these voters are usually eligible to vote for, like their Member of Congress, county- or citywide officials, and state legislators. “In Election 2020, this restriction accounted for the largest source of disqualified affidavit ballots cast by duly registered voters (more than 50%), both statewide and in nearly every county.”<sup>28</sup> **The report’s key findings include:**

- “Wrong church” disproportionately disqualifies ballots in population dense counties. The 15 most population dense counties<sup>29</sup> accounted for 13,008 disqualifications, or over 94%.
- A large majority of the rejected ballots—nearly 69% or 9,481 lost votes—were cast by registered New York City voters, who make up less than 42% of all state voters.<sup>30</sup>
- Of the five boroughs, the Bronx saw a disproportionate number of “wrong church” disqualifications: Approximately one for every 187 voters in the borough.<sup>31</sup> Four of the top five impacted NYC Assembly Districts (and six of the top ten) are in the Bronx. In each of those six districts, the 18+ population is over 70% non-white.
- More voters had ballots disqualified for voting at an unassigned site in each of Assembly District 79 in the Bronx<sup>32</sup> and Assembly District 24 in Queens,<sup>33</sup> than in all of Staten Island.

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<sup>26</sup> *Id.* N.Y. ELEC. LAW § 9-209(2)(a)(iii); Chapters 248 and 489 of the laws of 2009.

<sup>27</sup> N.Y. ELEC. LAW § 8-302(3)(e).

<sup>28</sup> WRONG CHURCH REPORT, *supra* note 25 at 1-2; see Nick Reisman, *Lawmakers want to address ‘wrong church, wrong pew’ voting*, SPECTRUM NEWS 1, May 3, 2021, <https://bit.ly/3ITJOK3> (“This translates to a heavy percentage of affidavit ballots being rejected . . . .”)

<sup>29</sup> N.Y. DEP’T OF HEALTH, TABLE 2: POPULATION, LAND AREA, AND POPULATION DENSITY BY COUNTY (2018), [www.health.ny.gov/statistics/vital\\_statistics/2018/table02.htm](http://www.health.ny.gov/statistics/vital_statistics/2018/table02.htm). In order of population density, the counties are: New York (Manhattan), Kings (Brooklyn), Bronx, Queens, Richmond (Staten Island), Nassau, Westchester, Rockland, Suffolk, Monroe, Erie, Schenectady, Onondaga, Albany, and Orange.

<sup>30</sup> N.Y. BD. OF ELECTIONS, ENROLLMENT BY COUNTY - 11/01/2020, <https://on.ny.gov/33QSIY9>. WRONG CHURCH REPORT, *supra* note 25, at 5-8.

<sup>31</sup> This figure is an estimate determined by adding the number of disqualified affidavit ballots (for any reason) to the “Total Votes” counted for “President/Vice President”, as provided by the State Board of Elections’ Certified 2020 General Election Results (i.e., the number of disqualified “wrong church” ballots in the Bronx, divided by the “Total Votes” plus all disqualified affidavit ballots in the Bronx). Both disqualified absentee and affidavit ballots are not accounted for in the State’s certified results. N.Y. BD. OF ELECTIONS, 2020 ELECTION RESULTS, GEN. ELECTION RESULTS, PRESIDENT/VICE PRESIDENT, <https://on.ny.gov/3hp7V9I>. WRONG CHURCH REPORT, *supra* note 25, at 5-8.

<sup>32</sup> Representing Concourse Village, Morrisania, Melrose, Belmont, Claremont and East Tremont.

- Because all 57 counties outside NYC permit Early Voting at *any* county site, this means that on Election Day 2020 alone, over 4,000 registered voters outside NYC cast a wrong church ballot. Over 3,500 of these were cast in the ten most population-dense counties outside NYC. In Erie, 83% of rejected affidavits cast by registered voters (nearly 1000) were wrong church.
- At least 128 wrong church ballots from voters registered in New York’s 22<sup>nd</sup> Congressional District were disqualified, a contest certified with only 109 votes separating the candidates.<sup>34</sup>
- Voters in the top 20 impacted NYC Assembly Districts had nearly as many ballots disqualified for wrong church (4,278) as residents in all 57 counties outside NYC (4,348).<sup>35</sup>

As mentioned, one aggravating factor contributing to the disproportionate quantity of wrong church disqualifications in New York City which should also be remedied is an early voting restriction applicable only to City voters, who are limited to a single assigned early voting site. Voters outside the City completely avoid this suppression risk during nine days of early voting.<sup>36</sup>

Perhaps what is most unjust about this policy is that voters are not made aware the affidavit they are casting is entirely void under the law. This policy has failed New Yorkers for decades and it silences registered voters at dramatically disparate rates in our communities.<sup>37</sup> The rule is the compromise product of backwards looking litigation,<sup>38</sup> rather than the type of modern due process safeguard we should have—and so clearly need—to shore up our voting rights laws.

Lawmakers have options to address it. The NYS Senate has already passed Senator Myrie’s ballot-saving legislation,<sup>39</sup> but the issue has not been publicly considered by the Assembly. It is notable that the law in several states,<sup>40</sup> as well as the newly introduced Federal *Freedom to Vote Act*<sup>41</sup> requires election officials to count ballots cast in the correct county for all contests the

<sup>33</sup> Representing Briarwood, Bellerose, Bellerose Manor, Fresh Meadows, Glen Oaks, Hillcrest, Hollis Hills, Holliswood, Jamaica Estates, Jamaica Hills, Oakland Gardens, Queens Village, Richmond Hill, South Richmond Hill, and Utopia.

<sup>34</sup> *Tenney v. Oswego Cty. Bd. of Elections*, 2021 N.Y. Misc. LEXIS 386, [\*3] (N.Y. Sup. Ct. 2021).

<sup>35</sup> WRONG CHURCH REPORT, *supra* note 25, at 8, 12-13.

<sup>36</sup> See VoteEarlyNY, My Early Voting Rights, <https://www.voteearlyny.org/about-early-voting/>.

<sup>37</sup> Samantha Maldonado, *Will Your Primary Vote Count? Why Thousands of New York Ballots Got Tossed*, THE CITY, May 24, 2021, <https://bit.ly/2Xv4sid>. Reisman, *supra* note 25, <https://bit.ly/3ITJOk3>; Jarret Berg and Rachel Landy, *A small change to save thousands of votes*, N.Y. DAILY NEWS, May 25, 2021, <https://bit.ly/3pgKj8J>; WRONG CHURCH REPORT, *supra* note 25, at 7.

<sup>38</sup> “In 2005 the Court of Appeals held that an affidavit ballot cast by an individual who voted at the wrong polling site cannot be counted. This is often referred to as the ‘wrong-church, wrong-pew’ rule.” *Tenney v. Oswego Cty. Bd. of Elections*, 2021 N.Y. Misc. LEXIS 386, [\*3] (N.Y. Sup. Ct. 2021) (citing *Panio v. Sunderland*, 4 NY3d 123, 128 (2005)).

<sup>39</sup> Senate Bill S284A-2021 (Myrie) (approved 43-20), <https://bit.ly/3nN6zbB>.

<sup>40</sup> N.J. STAT. § 19:53C-17; CAL. ELEC. CODE § 14310 (c)(3)(A) and (B); MD. ELEC. LAW 11-303(e)(2); UTAH CODE § 20A-4-107(2)(a)(ii)(B) and -107(2)(c); N.M. STAT. ANN. § 1-12-25.4(F); Massachusetts protects ballots cast in the correct city or town, MASS. GEN. LAWS ch. 54, § 76C(d). Georgia recently severely limited its countywide ballot saving rule. Compare GA Code § 21-2-419(c)(2) (2020) with 2021 Ga. Laws Act 9 (enacting SB 202) §§ 34 and 35.

<sup>41</sup> S. 2747, 117th Cong. § 3911, <https://bit.ly/2VXONqU> (“[I]f a provisional ballot is cast within the same county in which the voter is registered or otherwise eligible to vote, then notwithstanding the precinct or polling place at which a provisional ballot is cast within the county, the appropriate election official of the jurisdiction in which the

registered voter would have been eligible for had they appeared at their assigned poll site, as the State Senate voted for in 2021. Other states avoid it by mailing every voter a ballot while some are moving to ballot-on-demand vote centers, but these options have far broader implications.

### **G) The *Tenney-Brindisi* Court Disqualified Legitimate “BOE Forwarded Ballots”**

In the post-Election 2020 *Tenney-Brindisi* litigation, one of the classes of disputed ballots categorically discounted by the Court were 51 “BOE Forwarded Ballots” from registered voters who had in fact timely requested, received, *and returned* their absentee ballots to a poll site or board of elections within the State of New York, but one which was outside their locality.<sup>42</sup> These ballots were then forwarded by various Boards of Elections in larger enclosure envelopes that were themselves postmarked after Election Day. This is part of an informal practice by Local Board officials (out of comity), of compiling and rerouting misdirected ballots and other election paper to their colleagues at sister Local Boards.

The Court acknowledged this was a “harsh result” for the impacted voters, and it is submitted that, regardless of whether the Court properly interpreted EL § 8-412, the statute (or regs) should be amended and clarified to avoid this unnecessary outcome in the future.

The Court examined the law and found that while absentee ballots must be mailed or personally delivered to a poll site or Board office within the voter’s county *by election day* to be valid, the law “does not direct who must place the absentee ballot in the mail, or otherwise deliver it, to the proper local Board.”<sup>43</sup> So the fact that voters had mailed or delivered their ballots to the wrong Local Board wasn’t fatal. The fatal defect the Court found was as follows: “In order to be timely, however, the envelope forwarding a ballot that a voter delivered to an improper polling site or Board of Elections *must still be postmarked no later than election day.*”<sup>44</sup>

So although these 51 ballots were timely relinquished by the voter and timely received by a New York election officials, the subsequent clerical act of the receiving Board in forwarding these ballots by mail or delivery to its sister Board was held to the same public-facing statutory deadline, and, based on the subsequent postmarks, disallowed by the Court and at the canvass.

It is submitted that the court applied this time restriction beyond it’s intended scope, ie, a clear cutoff for voters to relinquish control of their ballot, a sound policy that ensures fairness, integrity, and finality. Instead, the court extended this public deadline to what should be treated as (and explicitly regulated as) an ‘intra- or inter-agency transfer’ of sensitive documents from one set of government agency officials to another.

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individual is registered or otherwise eligible to vote shall count each vote on such ballot for each election in which the individual who cast such ballot is eligible to vote.”)

<sup>42</sup> *Tenney v. Oswego Cty. Bd. of Elections*, 2021 N.Y. Misc. LEXIS 386, [\*5] (N.Y. Sup. Ct. 2021), <https://bit.ly/2XEOJih>.

<sup>43</sup> *Id.* N.Y. ELEC. LAW §§ 8-410 and 8-412.

<sup>44</sup> *Id.* (emphasis added). The Court also recognized that in Election 2020, an ambiguity existed for voters because the instructions printed on the absentee ballots did not properly state the restriction on ballot return. *Id.* footnote 2.

In fact, this appears to be the expectation and intent undergirding the informal practice by Local Boards of sorting and then rerouting election paper intended for their colleagues without regard for the public-facing deadline. The timing of this shouldn't be counted against the voter. The delayed transfer makes sense in the field: Election officials are extremely busy at that point in the cycle administering the election. They may get around to administrative rerouting soon after the election as they sort and prepare for canvass. Moreover, support for this interpretation grows naturally out of the existing language of EL § 8-412, which now should be broadened and clarified to apply to sister Local Boards, the State Board, and local governments. The law reads:

“The board of elections shall cause all absentee ballots received by it before the close of the polls on election day and all ballots contained in envelopes showing a cancellation mark of the United States postal service or a foreign country's postal service, *or showing a dated endorsement of receipt by another agency of the United States government, with a date which is ascertained to be not later than the day of the election* and received by such board of elections not later than seven days following the day of election to be cast and counted.” (emphasis added).

While the Court did not extend this language to state and local government entities like sister Local Boards, the policy adopted by the Court is, respectfully, a suboptimal one. That's because, by the Court's own reasoning, these same 51 ballots could (and would) have counted if only the sending Local Board officials had taken the clerical step of delivering them to their colleagues sooner. This rises and falls on actions by staff outside a voter's control. The election integrity concerns that require voters to relinquish their ballots by election day simply are not present. The more predictable, administratively feasible, and consistent policy—and the one that protects the most legitimate votes—is to honor the actual postmarks and timestamps that appear on the ballot envelopes being transferred (in bulk) from election officials at one Local Board who are sworn to uphold the law to their colleagues at another. The policy should be official and the votes counted.

Thank you for your leadership improving voter access and modernizing our elections. VoteEarlyNY stands ready to assist in improving administration and safeguarding civil rights.