



MEMORANDUM OF SUPPORT

Count Votes Cast by Registered Voters in the Correct County: A642B / S284B (2022)

The League of Women Voters of New York State supports the enactment of **A642B / S284B**, a proposal to remedy an overbroad civil rights injustice that disqualified more than 13,800 New York ballots in the 2020 General Election.

This bill amends the Election Law to avoid disqualifying a registered voter's *entire* ballot solely because it was cast at a poll site in their county that is different from the voter's assigned polling place.¹ If enacted, voters who are directed to cast an affidavit ballot instead of being redirected to their assigned site (as EL § 8-302(3)(e) requires), will still have their ballots counted for the races they are entitled to vote in. This will improve due process and ensure more accurate results.

Many states count the eligible votes on ballots cast at unassigned poll sites and the federal *Freedom to Vote Act* would require all states to do so.² But in New York, these ballots are fully disqualified, even for the statewide contests that all 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 was the largest source of disqualified affidavit ballots cast by duly registered voters. 9,481 (~69%) were cast in New York City. Several denser residential communities and majority-minority NYC districts were disproportionately impacted—the top 20 NYC Assembly Districts had nearly as many disqualifications as all 57 counties outside NYC** (see full [VoteEarlyNY Report](#)).

The NY-22 *Tenney-Brindisi* close contest litigation recently highlighted this voting pitfall too.³ The *Tenney* court, consistent with current law, disqualified 128 wrong church ballots, suppressing a greater swath of registered voters on this basis than the certified 109 vote margin. Notably, the court invited lawmakers to act: “no Court has subsequently rejected the rule set forth by the Court of Appeals in *Panio*. In addition, the Legislature, despite recent sweeping reforms to the Election Law, continues to codify the ‘wrong-church, wrong-pew’ rule in Election Law § 9-209[.]”

¹ N.Y. Elect. Law § 9-209(7)(d) (2022) (“If the central board of canvassers determines that a person was entitled to vote at such election, the board shall cast and canvass such affidavit ballot *if such board finds that the voter appeared at the correct polling place*, regardless of the fact that the voter may have appeared in the incorrect election district and regardless of whether the voter's name was in the registration poll record.”); Chs. 248 and 489 of 2009. “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)).

² Statewide ballot saving laws: CAL. ELEC. CODE § 14310 (c)(3)(A) and (B); N.J. STAT. § 19:53C-17; MD. CODE ANN., ELEC. LAW § 11-303(e)(2). Correct county ballot saving laws: UTAH CODE § 20A-4-107(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 (but did not eliminate) its countywide ballot saving rule. 2021 Ga. Laws Act 9 (enacting SB 202) §§ 34 and 35. Freedom to Vote Act, S. 2747, 117th Cong. § 3911 (2021) (counting provisional ballots).

³ *Tenney v Oswego Cty. Bd. of Elections*, *supra* note 1.



In 2013, the Governor endorsed this proposal to count eligible votes. Responding to *Tenney-Brindisi*, several local election officials and a NYSECA leader have announced support as well.⁴

Apart from the total suppression this harsh rule imposes on thousands of voters, the full disqualification policy causes surprise and is unjust: voters cast these ballots under the mistaken belief their votes will count. The lost voters and poll workers assisting them with affidavits are generally unaware they are assigned elsewhere, which staff can determine far more easily today using e-poll books, smart phones, or the streetfinder. But instead of being redirected as the law now requires, voters are, in many situations, offered the opportunity to cast an affidavit ballot, and not told that the ballot may not count.

The U.S. Supreme Court recently reversed a sustained Voting Rights Act challenge to Arizona law which, like New York law, entirely disqualifies ballots cast at unassigned poll sites. In 2020, the 9th Circuit found a discriminatory *impact* on Arizona's minority communities. Experts cited three factors making it more likely these voters turn out to vote at unassigned sites: 1) frequent site changes; 2) confusing poll site assignments; and 3) high rates of renters and resident mobility.⁵ Those factors may ring familiar to voters in several New York communities. The court found that difficulty locating the proper polling place after moving a short distance in an urban area leads to more "wrong church" ballots; that counterintuitive site assignments result in voters going to a nearby site where neighbors vote, not realizing they are assigned further away; and, that when they arrive at an unassigned site, these voters are not redirected nor informed their ballot will be void.

Moreover, during nine days of early voting, all 57 counties outside New York City permit residents to vote at any county location, i.e., there are no "wrong church" ballots to fully void in the counties during early voting. Meanwhile, City voters are still assigned to one site. Maintaining the old *Panio* rule with this new access disparity in place magnifies its suppression impact in the Five Boroughs, where one out of every 187 Bronx voters cast a void affidavit ballot in the "wrong church."

The complete disenfranchisement of thousands of registered voters compels lawmakers to fix this overbroad statute. Weighed against the avoidable impact, there is no State interest in maintaining the status quo, which punishes legitimate voters. There is no increased risk of foul play—affidavits are never scanned during voting hours and before being canvassed, officials cross-reference in-person voters, absentees and those who have moved to prevent duplicates.⁶ Nationally, other states have demonstrated that it is administratively feasible for county officials at a post-election canvass to count the votes for the eligible contests, rather than summarily disqualifying the entire ballot.

Because this small change improves due process, protects civil rights, and ensures more accurate election results, The League of Women Voters of New York State strongly supports the enactment of **A642B / S284B**.

⁴ Press Release, *Gov. Cuomo* (2013), <https://on.ny.gov/2PjPtDL>; Patrick Lohmann, *Brindisi, Tenney Argue, Vote By Vote, in Epic Nail-Biter. How Perfect Does a Voter Have to Be?*, Syracuse.com, Jan 3, 2021, <https://bit.ly/3rz7A5r>.

⁵ *DNC v. Hobbs*, 948 F.3d 989, 1001-1005 and 1045 (9th Cir. 2020) (en banc), cert. granted sub nom. *Brnovich v. Democratic National Committee*, No. 19-1257, 2020 WL 5847130 (U.S. 2020). In 2018, renters made up nearly two thirds of New York City's population and 58.5 percent of Buffalo residents. Noah Manskar, *Fewer New Yorkers Own Homes As Number Renting Grows, Figures Show*, Patch, Jan. 25, 2018, <https://bit.ly/3uVXAFu>.

⁶ Election Law § 9-209(7)).