



NEW YORK
CITY BAR

**REPORT ON LEGISLATION BY THE
ELECTION LAW COMMITTEE**

**A.642-C
S.284-C**

**M. of A. Carroll
Sen. Myrie**

AN ACT to amend the election law, in relation to counting of affidavit ballots

THIS LEGISLATION IS APPROVED

I. BACKGROUND

In the 2020 November general election, over 9,400 registered voters walked into poll sites in their densely populated, New York City neighborhoods, and presented themselves to poll workers to cast their ballots in the pivotal election. Poll workers, however, were unable to locate these voters in their poll books and, as is likely the case, simply provided them with affidavit ballots. Several days later, when election officials undertook their customary post-election canvass of affidavit ballots, it was determined that these voters had all cast a ballot at a poll site different from the one to which they were assigned, a fatal flaw under New York election law. Officials were required to disqualify their ballots in full – including for contests in which all voters in the state may participate, such as U.S. President, Senator or Governor, as well as other offices for which these voters are eligible to vote, such as their Member of Congress, county- or citywide officials and state legislators. Such disqualified ballots are commonly referred to as “wrong church” ballots.

The above is not a hypothetical. In Election 2020, wrong church ballots were the largest source of disqualified affidavit ballots cast by duly registered voters across New York State. Approximately 69% - 9,481 - were cast in New York City. Notably, several denser residential communities and majority-minority New York City districts were disproportionately impacted—the top 20 New York City Assembly Districts had nearly as many disqualifications as all 57 counties outside New York City.¹

Legislation to remedy this lurking administrative technicality that results in the disenfranchisement of thousands of unknowing voters has been introduced in both houses, and

¹ VoteEarlyNY, *Impact of New York's 'Wrong Church' Ballot Disqualification Rule in the 2020 General Election*, May 20, 2021 (“VENY Report”), <https://bit.ly/3urJ5Zq>; see Exhibit 1. (All websites last visited Feb. 3, 2022.)

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has approximately 24,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

passed (three times) in the state Senate. This bill (A.624-C/S.284-C) would require Boards of Elections to canvass and count affidavit ballots for any race the voter would have been eligible to vote in at their assigned polling place, so long as they are voting in their correct county at a polling site that serves their assembly district.

II. REASONS FOR SUPPORT

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.² 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 in which they are entitled to vote, so long as the voter is in a polling site that serves their assembly district. This will improve due process and ensure more accurate results.

The Congressional District 22 *Tenney-Brindisi* litigation recently highlighted this voting pitfall.³ The *Tenney* court, consistent with current law, disqualified 128 wrong church ballots, suppressing a greater number of registered voters on this basis than the certified 109 vote margin of victory. Notably, the court invited lawmakers to act: “no Court has subsequently rejected the rule set forth by the Court of Appeals in [the 2005 case that first codified the rule, *Panio v. Sunderland*]. 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[(7).]”

Federal lawmakers have endorsed this proposal and included a fix in the *Freedom to Vote Act* (which faces an uphill battle in the Senate), and in response to *Tenney-Brindisi*, several election officials 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. It is likely that the voters who show up at the unassigned poll site, and the poll workers assisting them with affidavits, are unaware that the voters are assigned elsewhere. Although staff can determine this information far more easily today using e-poll books, smart phones, or the streetfinder, instead of being redirected as the law requires,⁵ and based on the fact that over 9,400 votes were disqualified in New York City in Election 2020, there is little doubt

² 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)).

³ *Tenney v Oswego Cty. Bd. of Elections*, *supra* note 2.

⁴ 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://www.syracuse.com/politics/cny/2021/01/brindisi-tenney-argue-vote-by-vote-in-epic-nail-biter-how-perfect-does-a-voter-have-to-be.html>.

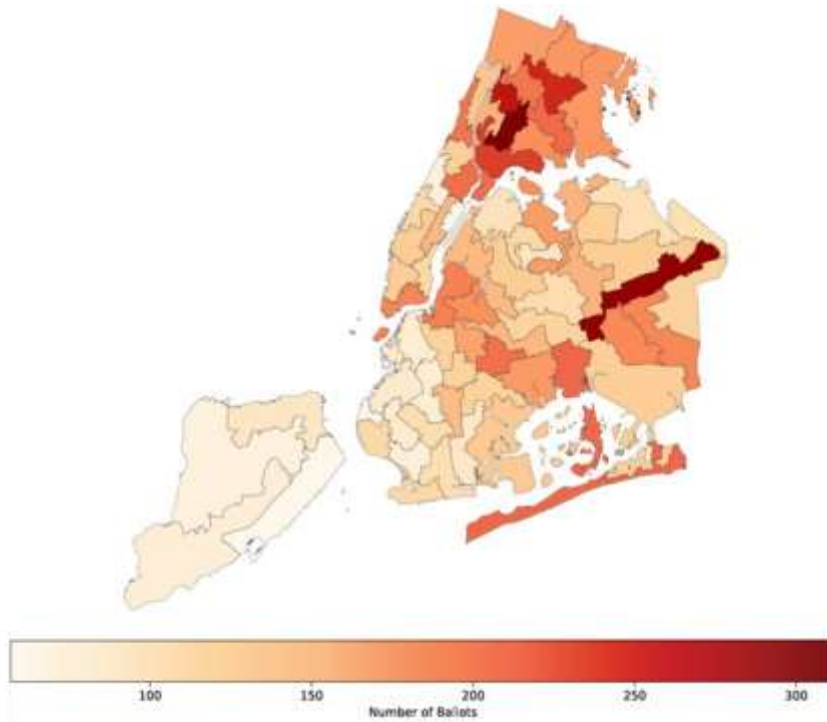
⁵ N.Y. Elect. Law § 8-302(3)(e).

that voters are instructed to vote by affidavit without being told the full ballot will be void. The current system leaves far too much room for total disenfranchisement and must be remedied.

The U.S. Supreme Court recently reversed a successful Voting Rights Act challenge to an Arizona law which, like New York law, entirely disqualifies ballots cast at unassigned poll sites. In 2020, the 9th Circuit had found this practice had a discriminatory impact on Arizona’s minority voters. In the case, experts cited three factors making it more likely that such voters turn out to vote at a poll site other than the one assigned: 1) frequent site changes; 2) confusing poll site assignments; and 3) high rates of renters and resident mobility.⁶ Those factors – which similarly affect voters in denser New York communities – disproportionately affect minority voters. The 9th Circuit had reasoned that difficulty locating the proper polling place after moving even 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.

New York City voters face additional challenges during early voting. During the nine days of early voting, all 57 counties outside New York City permit residents to vote at any county location rather than requiring them to vote at one particular site, *i.e.*, there are no “wrong church” ballots to fully void in these counties during early voting. By contrast, New York City voters are still assigned to one site. Maintaining the old *Panio* rule, requiring disqualification of votes cast in unassigned polling places (even when in the correct county), with this upstate/downstate disparity in early voting access magnifies its suppressive impact in the state’s largest urban area, where one out of every 187 Bronx voters cast a void affidavit ballot in the “wrong church.” The below “heat map” demonstrates the relative distribution of “wrong church” ballots in the 2020 General Election across the five boroughs.

⁶ *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, whose poll sites change as they move, 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>. See also *Hypothetical Demonstrating Factors that May Give Rise to Wrong Church Ballots*, Exhibit 2.



Map courtesy of Daniel Grenell.

The complete disenfranchisement of thousands of registered voters compels lawmakers to fix this overbroad statute. Weighed against the avoidable detrimental and disproportionate impact on voters living in high-density NYC areas, one struggles to find any State interest in maintaining the status quo, which only serves to punish legitimate voters. There is no increased risk of foul play—affidavit ballots are never scanned during voting hours, and before being canvassed, officials cross-reference in-person voters, absentees and those who have moved in order to prevent duplicates.⁷ 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.

Accordingly, the Committee believes that it is critical for the Legislature to pass A.642-C (AM Carroll) and S.284-C (Sen. Myrie), an important fix to re-enfranchise thousands of voters. We urge that this legislation be enacted into law without delay.

Election Law Committee*
Katharine Loving, Chair

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⁷ Election Law § 9-209(7).

* Abstentions: John Wm. Zaccone

EXHIBIT 1

Assembly District	Borough	Wrong Church Disqualifications	Black and Hispanic Population (18+, based on 2010 apportionment)
79	Bronx	312	96.73%
24	Queens	299	32.11%
86	Bronx	266	94.8%
80	Bronx	254	63.84%
84	Bronx	239	95.72%
23	Queens	215	35.33%
87	Bronx	212	85.12%
68	Manhattan	209	72.24%
55	Brooklyn	207	95.18%
78	Bronx	203	82.68%
71	Manhattan	203	76.73%
50	Brooklyn	195	22.57%
65	Manhattan	190	19.84%
29	Queens	189	79.75%
32	Queens	187	83.99%
85	Bronx	184	97.91%
53	Brooklyn	182	65.03%
82	Bronx	178	54.31%
83	Bronx	178	92.75%
60	Brooklyn	176	91.51%
TOTAL (top 20 Ads):		4,278	

EXHIBIT 2

Hypothetical Demonstrating Factors that May Give Rise to Wrong Church Ballots

Voter is a General Election 2020 voter, registered Democrat, who lives on the west side of Marmion Avenue, in Election District 005 (Assembly District 79), between Crotona Park and the Bronx Zoo, in the Bronx.



Voter's 2020 Election Day polling site was PS 57 Crescent, 2111 Crotona Avenue, Bronx, NY 10457. In January 2021, Voter – a renter – moved across the street to the east side of Marmion Avenue in the Bronx. As a result of the move, Voter's poll site was changed to PS 44 David C. Farragut 1825 Prospect Avenue, Bronx, NY 10457.

Both PS 57 and PS 44 are a five- to ten-minute walk from Voter's home. On Election Day, Voter mistakenly goes to a nearby voting site, which is different from Voter's previous and new voting sites, but is even closer to where Voter lives, *i.e.*, P.S. 67 Mohegan School, 2024 Mohegan Ave, Bronx, NY 10460. Not appearing on the list, Voter is given an affidavit ballot, which under current law is entirely void.

Voter's ballot is discarded. If this bill becomes law, then Voter's votes for all city-, county-, and state-wide races would still count, *as well as* any races that *also* would have been on Voter's ballot in the newly assigned polling place, including for assemblymember since the voter cast the affidavit ballot in a poll site that serves that voter's assembly district. Given the proximity

of the 3rd poll site to the newly assigned site, this could easily also include city councilmember and state senator.