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The New York Democratic Lawyers Council

Bringing Early Vote to the State of New York:

Recommendations for Amendment of Early Vote Bills A689A (Silver) / S1461A (Stewart-Cousins)

A report of the Legislative Affairs Committee of the New York Democratic Lawyers Council

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Recommendations for Amendment of Early Vote Bills A689A (Silver) / S1461A (Stewart-Cousins)

Introduction

For several legislative sessions, New York Democratic Lawyers Council (NYDLC) has supported the passage in New York of in-person early vote legislation, including bills A689 (Silver) / S1461 (Stewart-Cousins), which passed the State Assembly in April 2013, before stalling in the State Senate. Thereafter, the Assembly bill was amended in several minor respects and passed the State Assembly in February 2014. The Senate version was amended to reflect these revisions in March 2014.[1]

Thirty-four U.S. jurisdictions, including the District of Columbia, currently facilitate some method of early voting,[2] and it has become increasingly popular. In 2012, nearly a third of all voters cast their ballot "early," before Election Day: 29 million voted by mail and 18.5 million voted in-person.[3] Early vote periods are 19 days on average. Vote-by-mail and no-excuse absentee options are common in the West, while in-person early voting is popular in the South.[4]

There are many rationales for enacting early vote reform in New York. Early voting opportunities could help blunt the disruptive impact of weather emergencies on Election Day, like the 2012 Presidential election in the wake of Superstorm Sandy. Early voting periods comport with basic notions of convenience and procedural due process, and make it easier for busy citizens to exercise their right to vote within a reasonable timeframe. Moreover, there are the many logistical benefits—The *Brennan Center for Justice* reports that an extended voting period permits the discovery and possible correction of "the small glitches that can lead to more major errors during the increased pressure of Election Day."[5] Furthermore, the bipartisan *Presidential Commission on Election Administration* recently found that:

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[1] Assem. B. 689A, 200th Leg., 2d Sess. (N.Y. 2014), *available at* http://open.nysenate.gov/legislation/bill/A689A-2013; Press Release, Office of Assembly Speaker Sheldon Silver, Speaker Silver Announces Passage of Early Voting Legislation (Feb. 11, 2014), *available at* assembly.state.ny.us/Press/20140211/. S.B. 1461A, 200th Leg., 2d Sess. (N.Y. 2014), *available at* http://open.nysenate.gov/legislation/bill/S1461A-2013.

[2] *Absentee and Early Voting*, Nat'l Conf. of State Leg., http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx (last visited Mar. 17, 2014). Hereinafter, "early vote" will refer only to in-person early voting. Other forms of voting prior to Election Day are beyond the scope of this memorandum.

[3] ROBERT F. BAUER, BENJAMIN L. GINSBERG ET AL., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION, PRESIDENTIAL COMM. ON ELECTION ADMIN. 54 (2014) [hereinafter PCEA RECOMMENDATIONS], *available at*: http://electionlawblog.org/wp-content/uploads/pcea-final-report.pdf.

[4] PCEA RECOMMENDATIONS, *supra* note 3, at 55-56.

[5] DIANA KASDAN, EARLY VOTING: WHAT WORKS, BRENNAN CENTER FOR JUSTICE 6 (2013) [hereinafter BRENNAN CENTER EARLY VOTING REPORT], *available at* http://www.brennancenter.org/sites/default/files/publications/VotingReport_Web.pdf.

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> "[E]arly voting offers Americans opportunities to participate in the electoral process that simply cannot be afforded by the contained twelve-hour period of the traditional Election Day. Election officials from both parties testified to the importance of early voting in alleviating the congestion and other potential problems of a single Election Day."[6]

This is not a hypothetical benefit. During the "off year" 2013 general election in New York City, multiple ballot-scanners malfunctioned and overwhelmed the Board of Elections' real-time capacity to respond to problems for much of the morning.[7] If this systemic stress had been spread over a multi-day period, the Board of Elections would have had greater opportunities and capacity to resolve the problems that did arise, and remaining election administration problems would have been less disruptive to voters.

Early voting has drawn prominent endorsement and enjoys widespread public support. Governor Andrew Cuomo backed early voting as a reform priority in his 2013 State of the State address[8] and the New York State Bar Association's Special Committee on Voter Participation recommends its adoption.[9] Robert Brehm, the Co-Executive Director of the New York State Board of Elections, supports an early vote alternative to voting on Election Day,[10] as does

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[6] PCEA RECOMMENDATIONS, *supra* note 3, at 54-55.

[7] *See Hearing to Examine Solutions to Make Voting, in Person and Absentee, More Accessible for All Voters, and Examine Moving the State Primary to June, Beginning in 2014 Before the Assembly Standing Comm. on Election Law and the Assem. Subcomm. on Election Day Operations and Voter Disenfranchisement*, 2013 Leg., 200th Sess. 318-19 (N.Y. 2013) (testimony of Jarret Berg, Esq., New York City Voter Protection Director 2013, New York Democratic Lawyers Council), *available at* http://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_ab758b6e2bdbd561fb5f704d57490051.pdf&view=1 (discussing "systemic scanner malfunction" during the 2013 election). In Brooklyn's 52nd Assembly District, "70 machines at 21 poll sites were out of commission all morning." Greg B. Smith, *NYC Elections 2013: Broken Voting Machines, Mistranslated Ballot Measures Plague Low-Turnout Election*, N.Y. DAILY NEWS, Nov. 5, 2013, www.nydailynews.com/news/election/broken-machines-mistranslated-ballots-plague-voters-article-1.1508003. Additionally, "[m]any of the city's 'optical-scan' voting machines were reported broken—or simply would not boot up—on [Election Day], forcing voters to toss paper ballots into overflowing baskets." Natalie O'Neill, *Voting Machine Glitches Plague Mayoral Election*, N.Y. POST, Nov. 5, 2013, nypost.com/2013/11/05/voting-machine-glitches-plague-mayoral-election/.

[8] Press Release, Governor's Press Office. *Governor Cuomo Outlines Bold Agenda for 2013* (Jan. 9, 2013), *available at* http://www.governor.ny.gov/press/01092013-cuomo-agenda-2013 ("The Governor proposed that New York create an early voting system that is at least one week long, and includes the weekend before a scheduled Election Day.").

[9] *See* N.Y. STATE BAR ASSOC., SPECIAL COMMITTEE ON VOTER PARTICIPATION FINAL REPORT 28 (Jan. 25, 2013) *available at* http://old.nysba.org/Content/NavigationMenu94/SpecialCommitteeonVoterParticipationHome/FinalReportoftheSpecialCommitteeonVoterParticipation.pdf.

[10] *Hearing to Examine Solutions to Make Voting, in Person and Absentee, More Accessible for All Voters, and Examine Moving the State Primary to June, Beginning in 2014 Before the Assem. Standing Comm. on Election Law and the Assem. Subcomm. on Election Day Operations and Voter Disenfranchisement*, 2013 Leg., 200th Sess. 22-

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Common Cause New York.[11] Moreover, more than two-thirds of New Yorkers surveyed by Siena Research in 2013 favored enacting early vote.[12]

Despite widespread public support for early voting, opponents have lined up as well.[13] Early vote critics chiefly oppose the increased costs to counties.[14] Other critiques include: (i) the potential for fraud absent a networked early voter accounting system to prevent multiple voting; (ii) logistical issues of ballot security over the early-vote period; and (iii) the differing needs of rural, suburban, and urban counties. Many election officials in counties that oppose early vote contend that the potential benefits of A689A are outweighed by its anticipated costs. For example, one Livingston County Administrator indicated that his colleagues support early voting

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23, 36-39 (N.Y. 2013) (testimony of Robert Brehm, Co-Executive Director, N.Y. Bd. of Elections), *available at* http://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_ab758b6e2bdbd561fb5f704d57490051.pdf&view=1.

[11] SUSAN LERNER, ET AL., COMMON CAUSE/NY & COMMON CAUSE ELECTION PROT. PROJECT, PEOPLE LOVE IT: EXPERIENCE WITH EARLY VOTING IN SELECTED U.S. COUNTIES 3 (2013) (hereinafter COMMON CAUSE EARLY VOTING REPORT), *available at* www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/The%20People%20Like%20It%20FINAL.pdf.

[12] Siena College, *Siena College Poll: Cuomo Enters 3rd Year Still Riding High with Voters*, Press Release, Jan. 17, 2013, http://www.siena.edu/uploadedfiles/home/sri/SNY%20January%202013%20Poll%20Release%20--%20FINAL.pdf.

[13] In January 2014, the New York State Election Commissioners Association (NYSECA) specifically opposed including the present early voting bill in its 2014 Legislative Program. Press Release, Republican Party of New York State, NYGOP Applauds Election Commissioners Association, (Jan. 17, 2014), www.nygop.org/page/nygop-applauds-election-commissioners-association. In 2013, the New York State Association of Counties (NYSAC) also passed a resolution opposing the present legislation. STANDING COMM. ON INTERGOVERNMENTAL AFFAIRS, NEW YORK STATE ASS'N OF COUNTIES, RESOLUTION OPPOSING THE PASSAGE OF LEGISLATION TO ALLOW EARLY VOTING, OR TO ALLOW COUNTIES TO OPT-IN TO EARLY VOTING OPPORTUNITIES, AND FOR THE STATE TO FULLY FUND ANY INCREASED COSTS ASSOCIATED WITH EARLY VOTING (2013), *available at* http://www.nysac.org/legislative-action/NYSAC-IntergovAffairs-Res3-Feb2013.php. Counties like Ulster, Allegany, Onondaga, Lewis, Genesee, Otsego, Fulton, Cayuga, and Livingston have also passed resolutions opposing early voting, often on party lines. *See* Michael Anich, *Supervisors Oppose Bills for Early Voting*, LEADER-HERALD, May 16, 2013, www.leaderherald.com/page/content.detail/id/556129/Supervisors-oppose-bills-for-early-voting.html?nav=5011; Ben Beagle, *County Opposes Early Voting Plan*, LIVINGSTON COUNTY NEWS, May 31, 2013, http://www.thelcn.com/news/county-opposes-early-voting-plan/article_f81dd0bc-add8-11e3-ba15-001a4bcf887a.html; Glenn Coin, *Onondaga County Legislature Opposes Early Voting, I-81 Dismantling*, THE POST-STANDARD, May. 7, 2013, www.syracuse.com/news/index.ssf/2013/05/onondaga_county_legislature_op.html; Patricia Doxsey, *Ulster County Legislature Opposes Proposal to Allow Early Voting in NY State*, DAILY FREEMAN, May 15, 2013, www.dailyfreeman.com/general-news/20130515/ulster-county-legislature-opposes-proposal-to-allow-early-voting-in-ny-state-with-audio-video; Daniel Flatley, *Jefferson Election Commissioners Criticize Cost of Early Voting Plan*, WATERTOWN DAILY TIMES, Mar. 16, 2013, www.watertowndailytimes.com/article/20130316/NEWS03/703169884; Joe Mahoney, *Most County Reps Oppose Early Voting*, DAILY STAR, Apr. 5, 2013, www.thedailystar.com/localnews/x1916524918/Most-county-reps-oppose-early-voting/print; Brian Quinn, *County Legislators Oppose State Proposal for Early Voting*, WELLSVILLE DAILY REPORTER, Jan. 18, 2013, www.wellsvilledaily.com/x1503802628/County-legislators-oppose-state-proposal-for-early-voting.

[14] Opponents have provided unsupported estimates that the cost of early vote may fall between $50,000 and $150,000, depending on the county and election. *See* articles cited *supra* note 13.

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in theory, but are opposed to the bills' placement of additional costs on the counties.[15] In sum, the current one-size-fits-all model lacks support in less densely populated localities; places which rarely experience the volume of Election Day disorder that makes an early vote option a necessity in New York's urban areas.

This memorandum examines New York's primary proposed early vote legislation, A689A / S1461A and addresses common concerns. Drawing from model early voting systems nationwide, NYDLC recommends several bill amendments that will make early voting viable in New York. Alternatively, a new early vote bill could include the following provisions.

Summary of NYDLC's Early Vote Recommendations[16]

- **Implement a population-based, graduated minimum amount of early vote sites required per county, instead of the proposed requirement of five sites for all counties.**

- **Implement a flexible early vote period in the form of a range, mandating the minimum and maximum amount of early vote days, based on the type of election being held.**

- **Implement a minimum "hours of operation" provision that preserves county discretion to adjust for local turnout trends during the week and on weekends or holidays.**

- **Implement a localized early voter accounting safeguard to prevent potential misconduct by requiring daily reconciliation of voters who have already voted early within the county. In the longer-term, consider launching a pilot program in select counties to explore the utility of electronic poll book technology.**

- **Implement a collaborative "extreme hardship" opt-out process, allowing good-faith waivers of certain requirements where the minimum standards are unfeasible.**

[15] Beagle, *supra* note 13.

[16] The full NYDLC recommendations and draft text provisions are set out in detail below. *See infra* Part III.

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I. Summary of Present Early Vote Bills A689A (Silver) / S1461A (Stewart-Cousins):[17]

For ease of reference, asterisks denote provisions recommended herein for amendment.

Section 1) Amends Election Law § 3-400 (9) to provide that election inspectors and poll clerks at early voting locations shall be local board of elections employees as chosen by the board commissioners on an equal and bipartisan basis.

Section 2) Amends Election Law § 4-117 to ensure that early voting days, hours, and locations are mailed to registered voters as part of the "mail check" process.

Section 3) Amends Election Law § 8-102 (1) to add a new paragraph (k), which provides that voting at all early voting sites will be conducted in the same manner as on Election Day, with exception of the tabulation and proclamation of results.

Section 4) Amends Election Law § 8-104 by adding a new subdivision 7 to require that the same polling place protocols that are observed on Election Day be extended to all early voting days.

Section 5) Amends Election Law 8-508 (2) (b) to provide that a space for challenged early voters be included on the "challenge report."

Section 6) Adds to the Election Law a new title VI (§ 8-600 and 8-602) entitled "Early Voting" and sets forth the parameters of early voting:

§ 8-600 to provide as follows:

(1) **Early voting shall run from the third Thursday before a general election and from the second Thursday before a primary or special election, until the Thursday before Election Day (15 and 8 days total, respectively).**

(2) **Each county Board of Elections shall designate at least five early voting sites in each county (in NYC, each borough) including one site at the Board of Elections itself. Such polling places shall be geographically located, insofar as is practicable, to provide all county voters an equal opportunity to cast a ballot.**

(3) Any eligible early voter may vote at any early vote site in their county. However, if it is impractical for a county to provide each site with all ballots for each election, or if the county is unable to ensure that such voter has not previously voted early during that election, that Board of Elections shall provide ballots only for voters registered to vote in the area served by a given early vote site.

(4) **Early voting hours shall be from 8:00 AM until 8:00 PM each weekday, and from 9:00 AM until 5:00 PM on Saturday and Sunday. Hours can be extended.**

(5) The Board of Elections shall create a communications plan, including social and other media, to provide the location, ADA status, dates and hours of operation of all

[17] Assem. B. 689A, 200th Leg., 2d Sess. (N.Y. 2014), *available at* http://open.nysenate.gov/legislation/bill/A689A-2013; S.B. 1461A, 200th Leg., 2d Sess. (N.Y. 2014), *available at* http://open.nysenate.gov/legislation/bill/S1461A-2013.

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early vote sites. If early vote sites are regionalized as per (3) above, the location of the early vote sites that will serve particular regions must be provided.

(6) The paper ballots used during early voting shall be the same as those used on Election Day and they shall be cast in the same manner as on Election Day. However, ballots cast during the early voting period shall not be canvassed until 9:00 PM on Election Day.

(7) Voters casting ballots early shall be subject to challenge in the same manner as those voters casting ballots on Election Day.

(8) At 9:00 PM on Election Day, bipartisan teams of Board of Elections employees or inspectors shall process the removable memory devices used in the ballot scanners during early vote. Results tapes and a canvass sheet shall be produced.

(9) At the end of each day of early voting, a bipartisan team of inspectors shall scan any ballots not already scanned. Any ballots that are unable to be scanned shall be returned to the Board of Elections uncounted. Bipartisan teams will canvass these ballots at 9:00 PM on Election Day.

(10) Upon completion of the canvass, the removable memory devices for all voting scanners shall be used to produce the unofficial tally of results.

§ 8-602 to state as follows:

(1) The State Board of Elections is empowered to create any rule or regulation necessary to ensure an efficient and fair early voting process that respects voter privacy. Such regulations shall require that the voting history for each voter be continually updated to reflect each instance of early voting.

Section 7) Sets an effective date of January 1, immediately succeeding the date on which the early voting bill becomes law.

Additionally, prior to their amendment, both the original Assembly and Senate early vote bills contained an important accounting provision omitted from their present counterparts that may need to be addressed by state or local Boards of Election in subsequent regulations, or included in the early vote bills by future amendment. Proposed § 8-600, *no longer includes* the following provision:[18]

(8) **At the close of each day of early voting, the names of those voters casting ballots early shall be recorded by the local Board of Elections to ensure that those early voters do not appear in election day poll books, thus preventing them from voting a second time on election day.**

[18] *Compare* N.Y. S.B. 1461, 200th Leg., 1st Sess. (N.Y. 2013), *available at* http://open.nysenate.gov/legislation/bill/S1461-2013, *and* Assem. B. 689, 200th Leg., 1st Sess. (N.Y. 2013), *available at* http://open.nysenate.gov/legislation/bill/A689-2013, *with* N.Y. S.B. 1461A, 200th Leg., 2nd Sess. (N.Y. 2014) *available at* http://open.nysenate.gov/legislation/bill/S1461A-2013, *and* Assem. B. 689A, 200th Leg., 2d Sess. (N.Y. 2014), *available at* http://open.nysenate.gov/legislation/bill/A689A-2013.

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II. Perceived Shortcomings of A689A / S1461A and Discussion of Potential Solutions from Model Legislation Nationwide:

Opposition to the pending early vote bills most frequently focus on four main concerns: 1) the increased costs to counties; 2) the potential for voter misconduct or fraud during the early vote period; 3) the logistical issues involved in securing uncanvassed ballots over several days; and 4) the hardship created by the rigid "one-size-fits-all-counties" approach, in light of disparities in population size, density, county size, transportation, and Election Day congestion. We address these objections in turn.

Objection 1 The Increased Costs to Counties:

Several counties in New York State have raised concerns about the costs imposed by early voting. The *Brennan Center for Justice* found that election officials across the country were split about whether early voting increased or decreased net costs.[19] Unfortunately, few counties in early vote jurisdictions isolate and report the costs of early voting in an itemized election administration budget. In New York, over half of counties pass along some or all of the election costs to their municipal counterparts within the county. Perhaps this explains the dearth of comprehensive data regarding county-by-county cost estimates of early voting.[20]

Due to a number of unknowns, including the ultimate structure of New York State's early vote regime, it is difficult to predict what the added cost of early vote will be at the state or county level with a reliable degree of accuracy.[21] Moreover, variations in site-by-site or county-by-county hours of operation in model early vote jurisdictions, and the fact that budgeting for early vote occurs at the county level in most early vote jurisdictions make concrete cost determinations a daunting exercise.[22]

Early voting will not establish significant new burdens on counties and municipalities if the framework is designed in an efficient, cost-effective manner. To that end, it is useful to examine the likely drivers of additional costs, the potential for cost savings from early vote, and possible variations to the scope of early vote legislation that will reduce additional costs.

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[19] BRENNAN CENTER EARLY VOTING REPORT, *supra* note 5, at 8.

[20] In 2013, the New York State Association of Counties reported that the costs associated with early voting legislation was unknown, but would add to the local cost of running elections. NEW YORK STATE ASS'N OF COUNTIES, A PRIMER ON EARLY VOTING PROPOSAL IN NEW YORK STATE 6 (2013), *available at* www.nysac.org/policy-research/documents/NYSACEarlyVotingPaper.pdf.

[21] For example, because far fewer polling locations per county will be open during early voting as oppose to on Election Day, determining the cost per county is not as simple as multiplying the cost of administering Election Day, per county, by the length of the early vote period.

[22] BRENNAN CENTER EARLY VOTING REPORT, *supra* note 5, at 8. See references to early vote "budgeting", which occurs on the county level in the model early vote jurisdictions of Florida, Illinois, Maryland, New Mexico, North Carolina, and Ohio. COMMON CAUSE EARLY VOTING REPORT, *supra* note 11, at 15–32.

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The additional expenses imposed by implementing early vote legislation in New York State will be driven by several variables, which include the need to staff and monitor sites in each county[23] during the early vote period and to have technicians on call for troubleshooting, the need to print multiple sets of ballots for each countywide site,[24] the need for added security measures to protect election materials, the cost of leasing traditional and non-traditional locations during the early vote period,[25] and the infrastructure costs of database management related to networked early voter recordkeeping. However, many of the costs already associated with administering elections, such as poll worker training, purchasing hardware, and paying senior staff will not be significantly affected by early voting.

On the other hand, there are compelling opportunities for cost savings associated with early voting. For example, early voting in Orange County, Florida, which encompasses the city of Orlando (2012 population: 1,202,234) was "budget neutral over time," because of the reduced cost of polling places and staff on Election Day.[26]

Notably, Orange County, Florida utilizes the statewide Ballot-on-demand early vote system. Ballot-on-demand systems can reduce the costs associated with early voting and Election Day by printing ballots for individual voters only after they arrive at an early vote site. *Common Cause New York*, which examined a number of counties in Florida, Ohio, and New Mexico that had incorporated Ballot-on-demand, found that "Ballot-On-Demand drastically reduces printing costs and reduces the amount of prep work for in-person absentee or Early Voting staff."[27] For example, Bernalillo County, New Mexico is cited as having offset approximately $1 million in printing costs.[28] Under the presently proposed New York early vote bills, each county Board of Elections that does not invoke the "unfeasibility" opt-out will be required to print and stock each county early vote location with all local ballots within the county.

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[23] In recent cycles, poll workers in New York State have been paid between $150 and $200 per day, depending on the county. For example, poll workers are paid $200 per day in New York City, $175 per day in Rockland County, and $150 per day in Clinton County. Board of Elections in the City of New York, Poll Worker Application, Important Information, www.vote.nyc.ny.us/downloads/pdf/forms/boe/pollworkers/PollworkerApplication.pdf; Rockland County Board of Elections, 2011 Annual Statistical Information Report, Inspector Information Summary 2 (Jan. 25, 2012) (unpublished budget document, on file with author); Clinton County Board of Elections, Budget A1450013 - Detailed Backup 1 (2012) (unpublished budget document, on file with author).

[24] However, the present bill includes an "unfeasibility" opt-out, to reduce this burden. Unfortunately, widespread use of this opt-out may substantially limit early vote convenience. *See* Assem. B. A689A, 200th Leg., 2d Sess. § 6 (3) (N.Y. 2014).

[25] This factor may cut either way. Counties can continue to use publicly owned buildings as early voting locations, thereby avoiding additional costs over the extended voting period. On the other hand, certain public facilities that accommodate Election Day voting may prove unsuitable as a protracted voting site, or the day-to-day operations of the facility may be extremely burdened.

[26] COMMON CAUSE EARLY VOTING REPORT, *supra* note 11, at 16; U.S. Census Bureau, State & County QuickFacts: Orange County, Florida, quickfacts.census.gov/qfd/states/12/12095.html.

[27] COMMON CAUSE EARLY VOTING REPORT, *supra* note 11, at 16.

[28] *Id.* at 26.

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Scope-reduction alternatives are possible as well, insofar as early voting need not be rolled out in full all at once.[29] Best practices, turnout trends, and accurate cost estimates will develop over time, making early vote easier to tailor and implement. However, any system of limited applicability could increase confusion, since different types of elections (and perhaps localities) would be subject to different rules.

Objection 2 The Potential for Voter Misconduct during Early Vote:

Prior to their amendment, both the original Assembly and Senate early vote bills contained an important accounting provision that is omitted from their present counterparts which may need to be addressed by state or local Boards of Election in subsequent regulations, or included in the early vote bills by future amendment. Proposed § 8-600 *no longer includes* the following provision:

> "At the close of each day of early voting, the names of those voters who voted early shall be recorded by the county Board of Elections or by the Board of Elections of the City of New York to ensure that those voters do not vote a second time on election day."

Because early vote results will not be canvassed until poll closing on Election Day under the proposed early vote bills, multiple early voting attempts can presumably be detected once the final Election Day poll book is reconciled to eliminate early voters ahead of Election Day. At this point, multiple records of the same individual early voting could be identified, remedied, and any criminal conduct prosecuted. While this provision may not prevent other potential multiple voting *attempts*, it should serve as an effective backstop provision against potential voter fraud.[30]

Nonetheless, the bipartisan PCEA found that "[f]raud is rare, but when it does occur, absentee ballots are often the method of choice[,]" and not (in-person) early vote, which requires physical presence.[31] It is therefore important to keep the risk of fraud in a proper perspective;

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[29] New Jersey's Governor Chris Christie cited the purported expense when he vetoed 2013 early vote legislation providing for a fifteen-day early-vote period for both primaries and general elections. In response, in 2014 New Jersey lawmakers proposed new legislation to limit early vote to *general* elections, thereby reducing, perhaps by half, any additional costs. Michael Linhorst & Michael Phillis*, N.J. Lawmakers Reconsidering Vetoed Bills on Early Voting, Tuition, Pig Crates*, NORTHJERSEY.COM, Jan. 30, 2014, www.northjersey.com/news/politics/NJ_lawmakers_reconsidering_vetoed_bills_on_early_voting_tuition.html. As an alternative in New York, early vote could initially be limited to: all general and primary elections, but excluding special elections; all general elections only; all even-year (Federal) elections; or, as more of a pilot program, to select counties or localities where the need is greatest, such that any additional costs are more palatable.

[30] For example, without daily reconciliation at the county level, an attempt could theoretically be made to vote in multiple early vote locations within a county on the same or different early voting days. Daily reconciliation processes within each early vote location would likely prevent a perpetrator from returning to the *same* early vote site repeatedly on subsequent days. However, different county locations may not be able to update their voter rolls instantaneously or account for early voting activity in other early voting sites within a county. This conduct, would however, be discovered by the current "back stop" provision on the eve of Election Day.

[31] PCEA RECOMMENDATIONS, *supra* note 3, at 56.

evidence of widespread voter fraud is scant across the country,[32] and the potential for early vote to significantly increase fraud is unlikely. Each act of voter fraud during a federal election is punishable by five years imprisonment and a $10,000 fine, plus state penalties. "In return, it yields at most one incremental vote. That single extra vote is simply not worth the price."[33]

To reduce the theoretical possibility of voter fraud during early vote, the revised New York early vote approach could mandate a localized instantaneous or daily accounting safeguard, wherein each site transmits the identity information of that day's early voters to a central county-run database at the Board of Elections. The aggregated early voter list could be updated daily and transmitted back or made available electronically to each early vote site. On Election Day, each polling place could be provided with a list of the relevant registered voters who cast an early ballot, organized by election district, or poll books could be reconciled. In the longer-term, New York should consider a pilot program to explore the utility of electronic poll book technology.

A. Potential Solution: Electronic (and Networked) Poll Books

Although a full discussion of this innovation is beyond the scope of this memo, its potential importance and obvious relevance warrants passing consideration. Electronic poll books can be programmed to update countywide or statewide in real time or periodically. The software can be loaded onto a laptop or tablet. Currently, Maryland, Georgia, Colorado, and counties in at least twenty-seven states and the District of Columbia use some type of electronic poll books to process voters.[34]

Electronic poll books are not without their cost. The New Jersey Division of Elections estimated that electronic poll books could cost between $1,000 and $3,000 per device depending on the technology.[35] Officials and poll workers require training and technicians would be required for troubleshooting. Over time, it is likely that any tablet with Wi-Fi connectivity will be able to access an inexpensive "app" or website to update an early voting database in real time.

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[32] The practice of individuals impersonating other voters at the polls is "an occurrence more rare than getting struck by lightning." Voter fraud is extraordinarily rare, in part "because fraud by individual voters is a singularly foolish and ineffective way to attempt to win an election." JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD, Brennan Center for Justice 3, 6-7 (2007), *available at* brennan.3cdn.net/c176576c0065a7eb84_gxm6ib0hl.pdf; Kira Zalan, *The 'Myth' of Voter Fraud*, U.S. News & World Report, Apr. 24, 2012, www.usnews.com/opinion/articles/2012/04/24/the-myth-of-voter-fraud.

[33] LEVITT, *supra* note 32, at 7; *see* Nick McClellan, *How Much Voter Fraud is There?*, SLATE, Sept. 18, 2012, www.slate.com/articles/news_and_politics/map_of_the_week/2012/09/voter_id_laws_a_state_by_state_map_reveals_how_much_voter_fraud_there_is_in_the_united_states_almost_none_.html.

[34] Brennan Center for Justice, *VRM in the States: Electronic Poll-Books*, BRENNAN CENTER (May 18, 2012), www.brennancenter.org/analysis/vrm-states-electronic-poll-books. Each early vote site may require broadband connectivity for this process to be fully effective. BRENNAN CENTER FOR JUSTICE, TESTIMONY OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW BEFORE THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 14 (Sept. 4, 2013), *available at* https://www.supportthevoter.gov/files/2013/11/Testimony-of-the-Brennan-Center-for-Justice-before-the-PCEA.pdf; Md. Code Regs. 33.17.04.02 and 33.17.04.03 (b).

[35] STATE OF NEW JERSEY, 215TH LEGISLATURE, FISCAL NOTE (SECOND REPRINT), No. 2364, at 3 (Mar. 25, 2013), http://www.njleg.state.nj.us/2012/Bills/S2500/2364_F1.PDF.

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In other ways, adopting this technology may result in savings if it is combined with useful innovations. For example, compatible ballot-on-demand technology permits an early voter to sign in via the electronic poll book and have their customized ballot instantly printed. This ensures that the voter receives the correct ballot; that his or her ballot is available regardless of which early vote site the voter attends; and that excess ballots are not unaccounted for. This, in turn, reduces the potential for fraud and reduces costs associated with stocking, securing, and destroying unused ballots.[36] Electronic poll books with integrated ballot-on-demand printing could also enable the printing of ballots specifically tailored to a non-native English speaker's primary language.[37]

Election officials may be reluctant to embrace this today, due to procurement, training, and troubleshooting costs. But as more voters and poll workers become computer-savvy and the technology improves, these apprehensions will fade and the costs will be reduced. In New York, a pilot program in select counties may ease this transition, help officials gauge the actual costs and benefits, and discover unknown glitches.

B. Potential Solution: Alternative Early Voter Recordkeeping Approaches

To help reduce the risk of undiscovered multiple voting attempts, some states mandate that specific procedures and databases be used to update poll books during the early vote period.[38] The revised New York approach could include daily reconciliations into a state-or-county-run database, while permitting counties the flexibility to decide the best method for achieving this. Approaches in other jurisdictions include:

- **Florida**. In Florida, each county must maintain an electronic data record of the total number of early voters casting a ballot at each early voting location during the previous day. This data file lists all individuals who voted early and must be updated no later than noon each day and contemporaneously shared with state election officials.[39]

- **Texas**. Texas requires election officials to maintain a roster, updated daily to include each early voter. The roster must include each voter's name, address, registration number, county precinct of registration, and the date that person voted early. Information must be made available for public inspection at the beginning of regular business hours the following day.[40]

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[36] *See* Wendy Underhill, *Elections in the Digital World: February 2012*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Feb. 2012), http://www.ncsl.org/research/elections-and-campaigns/elections-in-the-digital-world.aspx. ("Wendy Noren, the county clerk in Boone County, Mo., expects to hire 25 percent fewer poll workers now that she's made the transition to e-poll books.").

[37] BRENNAN CENTER FOR JUSTICE TESTIMONY (Sept. 4, 2013), *supra* note 34, at 29.

[38] *See* BRENNAN CENTER EARLY VOTING REPORT, *supra* note 5, at 11.

[39] FLA. STAT. § 101.657(2) (2013).

[40] TEX. ELEC. CODE ANN. § 87.121 (2013).

- **Illinois**. In Illinois, within one day after an early voter casts a ballot, the election authority must transmit the voter's name, address, precinct, and district numbers to the State Board of Elections, which maintains that information in an electronic format on its website, arranged by county and accessible to state and local political committees.[41] Additionally, each election authority must maintain a list of voters who were issued early ballots, organized by precinct. Before Election Day, the authority provides each precinct with that precinct's registered voters who have voted by early ballot.[42]

- **Tennessee**. In Tennessee, election officials make a notation on the early voter's "duplicate permanent registration record." Where computerized registration records are used, the voter history is updated. In all cases, the voter's name is recorded in the early voting poll book.[43]

C. Potential Solution: Education or Law Enforcement Alternatives

A fraud education and enforcement approach may be useful as a deterrent. Warnings clarifying that early voters cannot subsequently vote on Election Day are included in the amended early vote bills within the informational mailers already required by the "mail check" system. The stiff penalties for misconduct discussed above could be advertised as well.[44]

Objection 3 Logistical Issues Related to Securing Ballots during Early Vote:

Security of ballots during the early voting period will present new challenges for the State and County Boards of Election. Unlike single-day voting, the extended early vote period requires that voting locations remain active for days or weeks at a time. Beyond Election Day security protocols, which in the present bills already apply to the early vote period, added safeguards may be needed because scanner recording devices will not be canvassed prior to Election Day. The amended bills improve ballot security by scanning early vote ballots immediately.

Although the security and chain-of-custody issues may primarily be resolved in the regulations to be drafted by the State Board of Elections pursuant to the new enabling provision § 8-602 summarized above, Robert Brehm, Co-Executive Director of the State Board of Elections has explained that one unresolved matter touching upon ballot security is whether to locate early vote sites in traditional government buildings or whether to locate them in high-traffic public places or thoroughfares frequented by voters during the workweek.[45]

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[41] 10 ILL. COMP. STAT. ANN. 5/19A-35 (b-10) (West 2010).

[42] 10 ILL. COMP. STAT. ANN. 5/19A-5 (c) (West 2010).

[43] TENN. CODE ANN. § 2-6-109 (c) (2) and (3) (2013).

[44] Assem. B. 689A, 200th Leg., 2d Sess. §§ 2 and 6 (5) (N.Y. 2014). Robert Brehm, Executive Director of the State Board of Elections, suggested that New York could pursue an enforcement-only approach, or limit voters to specific early vote sites based on geography. Testimony of Robert Brehm, Co-Executive Director, N.Y. Bd. of Elections, *supra* note 10, at 72-73. *See supra* text accompanying note 33.

[45] Testimony of Robert Brehm, Co-Executive Director, N.Y. Bd. of Elections, *supra* note 10, at 38.

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Because early voting locations in other states "typically operate as 'vote centers'—serving all registered voters in a county—and must remain open several days, election officials need the flexibility to choose facilities that can meet unique logistical, security, and capacity needs."[46] While a handful of states limit early voting to the county clerk's office, most states with early voting (including those with the highest early voting turnout rates) permit election officials to use a range of voting locations, both public and private.[47]

Even where state laws express a preference for government buildings, officials often supplement them with private locations to allow for voter convenience. For example, in Utah, state law directs that early voting locations must be government facilities "unless the election officer determines that . . . there is no government building or office available" that meets certain criteria. In Utah this exception is invoked frequently.[48]

A preference could be legislatively expressed for high-security government buildings like courthouses. However, there is often too much security in these facilities due to their daily operations. Also, most members of the public do not regularly visit courthouses, so these locations may be inconvenient and difficult to access.[49] On the other end of the spectrum, early vote sites could be placed in shopping malls, food courts, stadiums, or other high-traffic locations near workplaces and public spaces where the public naturally congregates. However, in those cases, there is often minimal security or privacy, increasing the need for safeguards, and perhaps increasing costs.[50] Temporary or mobile early vote sites can supplement more secure permanent sites, and may be placed in high-traffic areas like shopping centers, university campuses, parking lots, or stadiums.

The state Board of Election is empowered to delineate location preferences or baseline requirements for election security, privacy, and chain of custody under (the forthcoming) § 8-602 regulations. Given the varying needs of each county, the regulations could outline a baseline of security "best practices" while permitting flexibility to local boards of election to select the locations that provide the best combination of convenience and security in light of the cost to taxpayers. These could include requirements that each county provide location-specific security plans or chain-of-custody assurances to the state Board of Elections ahead of each election.

For example, Nevada law requires that "[a] plan for the security of ballots for early voting must be submitted to the Secretary of State for approval no later than 90 days before the

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[46] BRENNAN CENTER EARLY VOTING REPORT, *supra* note 5, at 14.

[47] *Id.*

[48] *Id.*, citing UTAH CODE ANN. § 20A-3-603(1)(d) (West 2013) (criteria include availability during early voting hours, "physical facilities necessary to accommodate early voting requirements," "adequate space for voting equipment, poll workers, and voters," and "adequate security, public accessibility, and parking").

[49] Testimony of Robert Brehm, Co-Executive Director, N.Y.S. Board of Elections, *supra* note 10, at 38.

[50] *Id.*

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election at which early voting is to be conducted."[51] A similar collaborative approach in New York may best provide flexibility while maintaining election-security safeguards.

Objection 4 One Size *Does Not* Fit All: Different Counties, Different Needs

The "one-size-does-not-fit-all" critique is common among election officials. Central to this critique is the notion that different counties across New York have sharply divergent election administration needs. In light of the fact that geography, density, public transportation, and voting culture varies widely across New York's 62 counties, opponents of early voting take issue with the mandated "five sites per county" provision and statewide day and hour requirements. Nonetheless, "most jurisdictions that administer elections confront a similar set of challenges" and jurisdictions with similar attributes share similar problems.[52] It is axiomatic that similarly situated localities should be treated similarly, while differently situated localities should be treated differently.

Permitting counties to exercise significant flexibility in administering early voting procedures, while still maintaining minimum standards for access to early voting sites, may mollify critics who are fearful that rural or suburban communities with smaller populations will be held to the same standard under the law, and bear similar costs, as urban communities. In fact, *Common Cause NY* recommends preserving local flexibility by setting a minimum schedule that can be promoted statewide, with counties determining whether and where to increase early voting above this minimum floor, based on their respective demographics and turnout trends.[53]

A. The "Five Polling Places Per County" Provision

In the proposed New York early vote bills, § 8-600 (2) provides:

> "The Board of Elections of each county shall designate at least five polling sites, including the Board of Elections itself, in each county or borough in the City of New York, for persons to vote early pursuant to this section."[54]

Opponents of the mandated "Five Polling Places Per County" provision argue that New York's counties should retain discretion over how many sites to provide given the vast disparities in geography, population, turnout trends, and transportation needs across the state. In response to this precise argument, many early vote jurisdictions around the country employ a statutory

[51] NEV. STAT. REV. § 293.3594 (2013).

[52] PCEA RECOMMENDATIONS, *supra* note 3, at 2, 55-56.

[53] COMMON CAUSE EARLY VOTING REPORT, *supra* note 11, at 37.

[54] The Amended Assembly bill's proposed § 8-600 (2) permits local Boards of Election to establish additional early vote sites, upon adequate notice, if the number of locations is insufficient due to the number of voters who are voting early. Assem. B. 689A, 200th Leg., 2d Sess. (N.Y. 2014), *available at*: http://assembly.state.ny.us/leg/?default_fld=&bn=A00689&term=2013&Memo=Y&Text=Y. An equal access safeguard is provided as well. *See id.*; *infra* p. 17.

population-based approach, which provides a graduated minimum floor for the amount of early vote sites within each county, authorizing local discretion to increase early vote opportunities.

An early vote bill with statewide applicability should be responsive to the fact that New York State encompasses several counties with (small) populations in the thousands or tens-of-thousands, as well as several counties with populations in the millions, with wide variations in size and geography.[55]

Potential Solution: Population-Based Polling Place Requirements

Below is an illustrative four-tiered breakdown of New York State counties by population.[56]

- *Tier 1: Counties with population less than 100,000 (34 total):*
    - Allegany; Cattaraugus; Cayuga; Chemung; Chenango; Clinton; Columbia; Cortland; Delaware; Essex; Franklin; Fulton; Genesee; Greene; Hamilton; Herkimer; Lewis; Livingston; Madison; Montgomery; Orleans; Otsego; Putnam; Schoharie; Schuyler; Seneca; Steuben; Sullivan; Tioga; Warren; Washington; Wayne; Wyoming; Yates.
- *Tier 2: Counties with population between 100,000 and 499,999 (19 total):*
    - Albany, Broome, Chautauqua, Dutchess, Jefferson, Niagara, Oneida, Onondaga, Ontario, Orange, Oswego, Rensselaer, Richmond, Rockland, St. Lawrence, Saratoga, Schenectady, Tompkins, Ulster.
- *Tier 3: Counties with population between 500,000 and 999,999 (three total):*
    - Erie, Monroe, Westchester.
- *Tier 4: Counties with population greater than 1 Million (six total):*
    - Bronx, Kings, New York, Queens, Nassau, Suffolk.

An effective, well-tailored early vote regime may establish different requirements for each tier.[57] Alternatively, an "extreme hardship opt-out" provision could be incorporated, which can provide that counties in certain tiers may request a waiver of some or all requirements ahead

[55] The smallest New York State counties include Hamilton County (4,836), Schuyler County (18,343), and Yates County (25,348). The largest New York State counties include Kings County (2,504,700), Queens County (2,230,722), and New York County (1,585,873). *Population by County in New York State: 2010 Census*, longisland.newsday.com/templates/simpleDB/?pid=197.

[56] *Id.*

[57] For example, "Tier 3" and "Tier 4" counties could be combined into a single tier, though this depends on how closely Westchester, Monroe, and Erie counties' Election Day experience resembles that of the largest counties.

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of each election. This approach would maintain early voting while simultaneously preserving flexibility for specific waivers in localities that can demonstrate that the practice would cause extreme hardship, or be unnecessary. As early vote is introduced elsewhere in the state, presumably those counties that continue to opt out will truly be those where early vote provides little benefit, as the public elsewhere would increasingly demand parity from local officials.

Listed below are sample variations of this population-based approach from model early vote jurisdictions in which populations reside in both rural and heavily concentrated urban centers. Notably, some early vote jurisdictions do not use county population, but instead, registered voter population. The most sophisticated formula may be one that models for new registrants in addition to currently registered voters countywide.

- **Maryland**. Maryland requires counties to create Early Vote Centers (EVC) in proportion to registered voters:[58]
    - Counties with under 125,000 registered voters must maintain at least one EVC;
    - Counties with between 125,000 and 300,000 registrants must maintain three EVCs;
    - Counties with 300,000 to 450,000 registrants must maintain five EVCs; and
    - Counties with still greater registered voter populations must maintain eight EVCs.
    - In Maryland, with the consent of state and local officials, it is possible to open an additional EVC, an ostensibly restrictive ceiling.

- **New Mexico**. In New Mexico, early voting is conducted in each office of the county clerk and additionally, at alternate voting locations as follows:[59]
    - In counties with more than 10,000 voters, not fewer than one alternate voting location;
    - In counties with more than 50,000 voters, not fewer than four alternate voting locations; and
    - In counties with more than 250,000 voters, not fewer than fifteen alternate voting locations.

- **Texas**. In Texas, which has had early voting since the late 1980s, the population formula makes use of the various-sized political districts, depending on the county population.[60]
    - A county with a population of 400,000 or greater must establish one or more branch early vote locations in addition to a "main" early vote site in each state representative's district covered by the election.
    - A county with a population between 120,000 and 400,000, must open one or more early voting sites other than the "main site" in each "commissioner's precinct" covered by the election.
    - Counties with even smaller populations are required to comply with this same requirement if at least 15 registered voters within that precinct make a timely request to the commissioner.

[58] MD. CODE ANN., ELEC. LAW § 10-301.1 (West 2013).

[59] N.M. STAT. ANN. § 1-6-5.7 (West 2013).

[60] TEX. ELEC. CODE ANN. § 85.062 (d)-(e) (West 2013).

- The county clerk may also permit mobile early vote sites. Where these are created upon the request of a political party, all other parties whose most recent gubernatorial nominee received 10% of the vote are entitled to their own mobile early vote site.

- **Illinois**. In Illinois, during each primary and general election, each county with a population over 250,000 must establish at least one early voting site within each of the three largest municipalities within its jurisdiction. If any of those three largest municipalities has a population of over 80,000, the authority must establish at least two polling places within the municipality. Also, any city, village, or incorporated town board of elections with a population over 100,000 must establish at least two in-person early vote sites.[61]

According to the *Brennan Center for Justice*, those states with the highest rates of early voting tend to set guidelines regarding the number of sites per county, or how they are to be distributed therein, or both. For example, New Mexico requires equitable distribution of voting sites, with population density and travel time as factors to be considered. Florida, North Carolina, and Utah have similar equal access safeguards.[62]

B. The Types of Early Vote Locations Permitted

In the proposed New York early vote bills, § 8-600 (2) also provides:

> "Such polling sites shall be geographically located so as to provide all voters in the county an equal opportunity to cast a ballot, insofar as is practicable. . . . The provisions of section 4-104 of this chapter shall apply to the designation of polling places for early voting except where such provisions are inconsistent . . . ."

New York State Election Law § 4–104, incorporated by reference in the proposed bills, regulates what types of locations may be designated for voter registration and polling sites across the state, a process that requires consultation by each county board of elections with their local municipalities. As currently drafted, § 4-104 may also define the limits of early-vote location flexibility.[63]

The provision does not include an exhaustive list of potential sites. Rather, § 4-104 contains a number of relevant regulatory prohibitions and preferences.[64] These include:

- Allowing polling places in houses of worship, but prohibitions on requiring it to be used on a Saturday if this is contrary to the organization's religion;

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[61] 10 ILL. COMP. STAT. 5/19A-10 (c) (2007).

[62] BRENNAN CENTER EARLY VOTING REPORT, *supra* note 5, at 15.

[63] N.Y. ELEC. LAW § 4-104 (McKinney 2014).

[64] *See id.* §§ 4-104 (1), (1-a), (3), (6-a), and (9).

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- Prohibiting any place in which a business licensed to sell alcoholic beverages for on premises consumption is conducted on any day of registration or voting;[65]

- Requiring accessibility for voters with disabilities and ADA guideline compliance.

- Requiring the use of facilities exempt from taxation "whenever possible", and delineating "public schools, fire houses, municipal buildings or other [tax exempt] buildings"

- Requiring placement of polls directly on public transportation routes, when practicable;

Potential Solution: Permit Early Voting in Public and Privately Owned Locations

States that have adopted early voting have experimented with different methods of delineating or prohibiting where early vote sites may be located. Below is a sample of how several model jurisdictions determine the locus of early voting sites:

- **Maryland**. In Maryland, privately owned spaces may be used if a suitable public space is unavailable, so long as the fee to be paid by the local board is reasonable. There is language similar to New York's Election Law § 4-104 (1) restricting the use of private spaces that serve alcohol, but this can be overcome if the seller suspends liquor sales.[66]

- **New Mexico**. In New Mexico, voter access is prioritized by statutory language requiring consideration of population density and travel time. In rural areas, mobile locations may be used for temporary sites.[67] Also, each early vote site need not be in a public facility, but absent a waiver from the secretary of state, sites must include: ballots for every county precinct; at least one optical scanner programmed to read every ballot in the county; at least one ballot marking device (BMD); broadband connectivity; sufficient space for at least five voters to simultaneously and privately mark their ballots; a secure area for storage of pre-printed ballots or a ballot-on-demand system; and, ADA compliance.[68] Notably, New Mexico includes a "hardship waiver" where stocking all county ballots is unfeasible.

- **North Carolina**. North Carolina requires at least one in-person site to be located at the county Board of Elections, or an alternative site nearby if not feasible. Any additional sites should be in facilities paid for in part by public funds. However, Mecklenburg County has leased large private locations like Masonic temples and vacant office

[65] This regulation could be interpreted to prohibit early voting at shopping malls, food courts, stadiums, parks, or other "places" where a tenant is a bar or restaurant in possession of a liquor license. However, supermarkets or shopping centers containing liquor stores would not be so prohibited, since their products are not for "on premises consumption." Malls could also be exempted.

[66] MD. CODE ANN., ELEC. LAW § 10-101 (West 2013).

[67] N.M. STAT. ANN.§§ 1-6-5.6 (A) and (D) (West 2013).

[68] *Id.* § 1-6-5.7 (D).

buildings to supplement public facilities.[69] As a regulatory check, if a county proposes a private facility, state officials must first find that "other equally suitable sites were not available and that the use of the sites chosen will not unfairly advantage or disadvantage geographic, demographic, or partisan interests."[70]

- **Illinois**. In Illinois, there is a preference that permanent early voting sites be placed in municipal or public agency offices.[71] All local public facilities must make themselves available free of charge for use as temporary or permanent sites. However, the rights of private property owners who host temporary sites are explicitly protected.[72] Temporary sites are thus encouraged to be located where most effective (considering cost to the authority and convenience to voters). Notably, a 2013 law that began as a pilot program requires each election authority to also conduct early voting in a "high traffic" location on the campus of a public university within its jurisdiction. The legislation lists specific universities and requires cooperation in identifying a "high traffic" area for early vote.[73]

- **Florida**. In Florida, early voting sites are located by default in the election supervisor's main or branch offices. In addition, officials may designate any city hall, permanent public library, fairground, civic center, courthouse, county commission building, stadium, convention center, government-owned senior center, or government-owned community center as early voting sites. Each county may further designate one early voting site per election in an area that does not have any of these eligible locations. These sites must provide all voters an equal opportunity, insofar as is practicable.[74]

Although Election Law § 4-104 may be sufficient to encompass early voting site designation, NYDLC recommends that the state legislature and Boards of Election take a permissive, creative approach to selecting sites, in order to optimize their convenience for voters.

C. The "Amount of Early Vote Days" and "Minimum Daily Hours" Provisions

With regard to the length of the early vote period, the proposed New York early vote bills provide in § 8-600 (1) that early voting shall run from "the third Thursday prior to any general election" and from "the second Thursday before a primary or special election[,]" until "the Thursday immediately preceding" Election Day (providing for 15 and 8 days of early voting, respectively).

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[69] *See* BRENNAN CENTER EARLY VOTING REPORT, *supra* note 5, at 14.

[70] N.C. GEN. STAT. ANN. § 163-227.2 (g1) (West 2013).

[71] *See* 10 ILL. COMP. STAT. 5/19A-10 (a) (2013).

[72] 10 Ill. Comp. Stat. 5/19A-20 (d) (2005); 10 Ill. Comp. Stat. 5/19A-21 (2006).

[73] 10 Ill. Comp. Stat. 5/1-12 (2013).

[74] Fla. Stat. § 101.657 (1) (a) (2013).

With regard to the hours of operation of the early vote period, the proposed New York early vote bills provide in § 8-600 (4) that early vote sites must operate from 8:00 AM until 8:00 PM each weekday, and from 9:00 AM until 5:00 PM on Saturday and Sunday. These hours may be extended by local Boards of Election.

In certain counties or during certain low-turnout elections, the fifteen and eight day early vote mandates may prove too costly and onerous. So long as safeguards ensure equal geographical access to early voting sites and defend against politically motivated conduct, such as curtailing the early vote period to hinder voter turnout drives,[75] local discretion to set the length of the early vote period and the daily hours of operation should be preserved.

i. Potential Solution: Minimum Requirements that Preserve County Flexibility

County election officials should be empowered with the discretion to determine when limited early voting resources would be most impactful. For example, in some communities, Sunday voting is popular, while in others it may be rare. With respect to hours of operation, lunch-hour voting may be more prevalent in industrial or corporate locations than in locations where early morning or after-work voting is preferred. Local county election officials are therefore best positioned to determine when and on which days resources should be expended.[76]

To preserve flexibility, New York could establish parameters for a minimum number of early voting workweek and weekend days, and minimum hours of operation during those days.[77] Counties could then choose to extend early voting opportunities above the minimum. Listed below are several state initiatives that have embraced locally driven practices for early voting site operation.

- **Nevada**. Nevada's counties have a significant county population disparity not unlike New York.[78] In Nevada, statewide day and hour requirements apply for weekdays, but the state mandates only a minimum hours requirement on weekends. On any Saturday within the early vote period, voting must be permitted for at least four hours between 10 a.m. and 6 p.m., or

[75] Legislation having the effect of blunting early voting practices like "Souls to the Polls" has passed in Florida, Ohio, and Georgia. *See* Michael C. Herron & Daniel A. Smith, *Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355*, 11 ELECTION L. J. 331, 331-32, 336-38 (2012), www.supportthevoter.gov/files/2013/07/Election-Law-Journal-Souls-to-the-Polls-Early-Voting-in-Florida-in-Shadow-of-House-Bill-1355.pdf.

[76] "According to Bill Cowles, [the Supervisor of Elections in Orange County, Florida,] the most important thing for an Early Voting system is that it be flexible. 'Not every county is the same,' he says, "The elections office [of a county] knows their community better and would know how to pick good locations and times.'" COMMON CAUSE EARLY VOTING REPORT, *supra* note 11, at 16.

[77] *Id.* at 37.

[78] Nevada's least populated county, Esmerelda, has 775 residents while the largest populated county, Clarke, has 2,000,759 residents. *State & County QuickFacts: Esmeralda County, Nevada*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/32/32009.html (last visited Jan.12, 2014); State & County QuickFacts: Clark County, Nevada, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/32/32003.html (last visited Jan.12, 2014).

until 8 p.m. if required by the county. A county may add Sunday voting and "temporary branch" poll sites can be added at its discretion.[79]

- **Texas**. In Texas, during a primary or general election a county with a population of 100,000 or more must provide weekend early voting at its "main" early voting site for at least 12 hours on the last Saturday and for at least five hours on the last Sunday of the early voting period. In counties with populations below 100,000, the county must allow early voting at those times upon receiving a timely request by at least 15 registered voters of the county.[80]

- **North Carolina**. In North Carolina, where county flexibility is preserved, Charlotte-Mecklenburg County officials found that early voters turn out most during lunch hours and after work before 7:00 pm. Local officials therefore set the county voting hours from 11:00 am to 7:00 pm. This flexibility permits counties to expand early voting for bigger elections and decrease it for smaller elections, which allows each county to carefully allocate its resources.[81]

- **Illinois**. In Illinois, early voting spans from the fifteenth day to the third day preceding a primary or general election. Permanent early vote sites must remain open between 8:30 a.m. to 4:30 p.m. or 9 a.m. to 5 p.m., on weekdays, 9 a.m. to 12 p.m. on Saturdays and holidays, and 12 p.m. to 3 p.m. on Sundays. In addition, a permanent early voting site is required to remain open for at least 8 hours on any holiday during the early voting period, and for a total of at least 14 hours on the final weekend of early voting.[82] Further, Illinois counties may establish temporary branch sites that need not adhere to the day or hour requirements. In such counties, early voting may be offered on any one or more days and during any hours within the early vote period. Uniformity is not required and local officials have complete discretion over operating days and hours.[83] Notably, a severe weather contingency is built into the statute should inclement weather cause an early voting facility to close. In such a case, the county must conduct early voting on the second day before Election Day from 8:30 a.m. to 4:00 p.m. or 9:00 a.m. to 5:00 p.m., and must make efforts to notify the public.[84]

- **New Mexico**. In New Mexico, early voting begins on the third Saturday before Election Day and ends the Saturday before the election (a fifteen-day early vote period), but early voting locations may be closed Sundays and Mondays. Early voting sites must be open each day for

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[79] NEV. REV. STAT. § 293.3568 and NEV. REV. STAT. § 293.3572. For example, during the 2012 general election, only the counties of Clark, Nye, and Washoe counties held Sunday early voting. During the 2012 Primary early vote period, only Clark and Washoe counties opted to open on Sunday, May 27 and Monday, May 28, Memorial Day. *2012 Primary Election - Week 1 Early Voting Turnout Totals*, NEV. SEC'Y OF STATE, http://nvsos.gov/index.aspx?page=1197 (last visited Feb. 4, 2014).

[80] TEX. ELEC. CODE ANN. § 85.006.

[81] COMMON CAUSE EARLY VOTING REPORT, *supra* note 11, at 29; *see* N.C. GEN. STAT. § 163-227.2(f)-(g).

[82] 10 ILL. COMP. STAT. 5/19A-15(a)-(b) (2005).

[83] 10 ILL. COMP. STAT. 5/19A-20 (a)-(c) (2005).

[84] 10 ILL. COMP. STAT. 5/19A-15 (c) (2005).

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at least eight consecutive hours, but must not open earlier than 7 a.m. nor close later than 9 p.m. It appears that each county has discretion within these parameters, though each authority must set publicly its operating hours 90 days before Election Day.[85]

- **Florida**. In Florida, early voting is required only for elections containing state or federal races. Early voting must begin on the tenth day before an election and end on the third day before an election, with no less than 8 hours and no more than 12 hours per day at each site. At the county supervisor's discretion, early voting may be extended up to the fifteenth day before an election, or to the second day before an election, with the same required hours. For other elections, early voting days and hours are at the complete discretion of the county.[86]

ii. Potential Solution: "Deep County Deference"—Minimum Total Hours Only

It is also possible to provide counties with an even greater degree of discretion over early voting sites, days, and hours. A revised early vote approach could simply authorize each county to determine an appropriate amount of early vote sites, operating days, and hours-of-operation within those days. The state would mandate safeguards for equal access and fairness and would set only a "no earlier than" and "no later than" timeframe demarcating the early vote period, as well as a *minimum number of aggregate early vote operating hours*, perhaps graduated by population.[87]

This approach would defer the setting of hours per day, sites per county, and days per election to the full discretion of the county, subject to certain restrictions to safeguard equal access, fairness, and good-faith conduct by election officials.

Perhaps the closest example to this "deep county deference" approach exists in North Carolina, which recently reduced its early voting period by a week and adopted a new "hours-based" formula. Counties in North Carolina must now calculate the cumulative total number of scheduled early voting hours offered at all early voting sites during the 2010 and 2012 primary and general elections, respectively. Going forward, when a Presidential candidate is on the ballot, the county must provide at least the same number of hours offered in 2012, and for other elections, the same number of hours offered in 2010. This must be done "through a combination of hours and numbers of one-stop sites during the primary or general election,

[85] N.M. STAT. ANN. § 1-6-5.7 (A), (C).

[86] FLA. STAT. § 101.657 (1)(d) (2013).

[87] Such a provision could, for example, mandate that early voting begin no earlier than the fifteenth day prior to an election, end no later than the second day before an election, and for a county of medium-sized population, require 200 total hours of early vote, including 50 weekend hours. Given these parameters, such a county could choose to operate 5 sites for 40 hours each over the course of the early voting period, with 10 hours of early voting at each site over the weekend before Election Day. The remaining 150 hours could be allocated by providing 6 hours of early voting at each of the 5 sites, during the Monday through Friday of the week preceding the election. Another county with a similar population (but perhaps a denser, smaller geographic area), may find it more useful to have two "mega" early vote sites open for 100 hours each over the course of the early vote period, with 12.5 hours total each weekend, during the two weekends prior to an election. Over ten weekdays, each of the two sites could stay open for 7.5 hours per day, or this could vary as needed, so long as the county met its 200-hour requirement.

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correspondingly."[88] Notably, an escape clause permits the counties to request a reduction of early vote hours, which the State may grant.[89]

Such a system could prove useful in New York, insofar as it preserves the most discretion to county boards to craft the hours, days, and amount of locations required. Each county can decide whether to use fewer locations that are open for longer hours, perhaps over several days, or many locations sprinkled around the county that are open for a few hours on a few days. There may be potential pitfalls or abuses to this approach, but if statutory safeguards for oversight are included and enforced, it is likely the most flexible.

Conclusion

For the foregoing reasons, NYDLC proposes several amendments to the current early vote framework prescribed by bills A689A (Silver) / S1461A (Stewart-Cousins). Alternatively, a new early vote bill could incorporate these recommendations, which are provided below.

[88] N.C. GEN. STAT. § 163-227.2 (g2)(1)-(2).

[89] *Id.* § 163-227.2 (g3). Although the hours are set by past practice, this approach places great discretion with county election officials to allocate effectively the dates, times, and locations of early voting, subject to state oversight for fairness and security.

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III. Recommendations for Amendment of Early Vote Bills A689A / S1461A:

Based on the foregoing analysis of early voting legislation in place across the country, NYDLC recommends the following amendments to the proposed early vote bills. Alternatively, a new early vote bill could incorporate the framework below. NYDLC believes that these provisions would optimize the implementation of early voting in New York by providing citizens with sufficient access to early voting, closely tailoring the framework to help avoid excess administration costs, and allowing counties the flexibility to implement a system according to local needs.

Minimum Amount of Sites Required per County:

NYDLC recommends that proposed § 8-600 (2) in each bill be amended to provide:

Each local Board of Elections shall, in collaboration with the State Board of Elections, designate and establish early voting centers geographically located with regard to population density and travel time, insofar as is practicable, so as to provide all voters in each county, and in New York City, in each borough, an equal opportunity to cast a ballot, as prescribed by this subsection:

- *(1) A county with fewer than 100,000 residents shall have at least one early voting center established in the county;*
- *(2) A county with 100,000 or more residents, but fewer than 500,000 residents shall have at least three early voting centers established in the county.*
- *(3) A county with 500,000 or more residents, but fewer than 1,000,000 residents shall have at least five early voting centers established in the county.*
- *(4) A county with 1,000,000 or more residents shall have at least seven early voting centers established in the county.*
- *(5) "Undue Hardship" exception: At least 120 days prior to each election, the Board of Elections of any county may submit to the State Board of Elections a request for partial waiver of this requirement, based on specified undue hardship. The state Board of Elections shall promptly review such a request, and if warranted, issue such a waiver.*
- *(6) The provisions of section 4-104 of this chapter shall apply to the designation of polling places for early voting except where inconsistent.*

Minimum Days of Operation Required:

NYDLC recommends that proposed § 8-600 (1) in each bill be amended to provide:

- *(a) In each county, early voting shall commence no later than the fourteenth day before any general Election Day and the tenth day before any primary or special Election Day, and shall conclude on the third day before any Election Day.*

- *(b) At the discretion of each County Board of Elections, early voting may commence no earlier than the seventeenth day before any general election and the fifteenth day before*

any primary or special election, and may conclude no later than the second day before any election.

- *(c) Notwithstanding subsections (a) and (b), a county may close an early voting center if the building in which the polling place is located has been closed in response to a severe weather emergency. In the event of a closure, the county shall conduct early voting on the second day before Election Day, shall notify the State Board of Elections of any closure, and shall make reasonable efforts to provide notice to the public of the extended early voting period.*

Minimum Hours of Operation Required:

NYDLC recommends that proposed § 8-600 (4) in each bill be amended to provide:

- *During each weekday of the early voting period, early voting centers shall operate for no less than eight hours per day, commencing no earlier than 7:00 a.m. and concluding no later than 9:00 p.m. During a Saturday, Sunday or Holiday within the early vote period, early voting centers shall operate for no less than five hours per day within that timeframe. Notwithstanding this provision, any eligible voter who is in line to vote at the conclusion of an early voting day shall be permitted to vote that day.*

- *Each local board of elections, having regard to local voting patterns and maximization of voter convenience, shall set the hours of operation for each early vote center within its jurisdiction, in collaboration with the state Board of Elections.*

Enhanced Accounting Safeguards to Prevent Potential Misconduct:

NYDLC recommends that proposed § 8-602 in each bill be amended to provide:

- *(a) (1) At the conclusion of each day of early voting, the names, street addresses, and ED/AD numbers of all voters casting ballots at each early vote center that day shall be electronically transmitted to and recorded by the local Board of Elections which shall maintain a County Early Voter Record of those names and that information in an electronic format.*

- *(a) (2) Each day of early voting before 10 a.m., the local board of elections shall transmit or make available electronically, a reconciled County Early Voter Record to each early vote center within its jurisdiction, to prevent early voters from casting a second ballot during the early vote period, in the same election.*

- *(b) At the end of the early voting period, each ED/AD poll book shall be reconciled with the County Early Voter Record, or the local board of elections shall deliver to each ED/AD poll site a list of voters registered in that specific ED/AD, who have voted by early ballot, thus preventing them from casting a second ballot on Election Day.*

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Appendix: Selected Provisions from Model Early Vote Legislation

Included below are model provisions from enacted legislation in other early vote jurisdictions from which NYDLC has drawn its recommendations.

Florida

FLA. STAT. § 101.657:

- (1) (d) Early voting shall begin on the 10th day before an election that contains state or federal races and end on the 3rd day before the election, and shall be provided for no less than 8 hours and no more than 12 hours per day at each site during the applicable period. In addition, early voting may be offered at the discretion of the supervisor of elections on the 15th, 14th, 13th, 12th, 11th, or 2nd day before an election that contains state or federal races for at least 8 hours per day, but not more than 12 hours per day. The supervisor of elections may provide early voting for elections that are not held in conjunction with a state or federal election. However, the supervisor has the discretion to determine the hours of operation of early voting sites in those elections. […]

  (2) During any early voting period, each supervisor of elections shall make available the total number of voters casting a ballot at each early voting location during the previous day. Each supervisor shall prepare an electronic data file listing the individual voters who cast a ballot during the early voting period. This information shall be provided in electronic format as provided by rule adopted by the division. The information shall be updated and made available no later than noon of each day and shall be contemporaneously provided to the division.

Illinois:

10 ILL. COMP. STAT. § 5/1-12:

- Public university voting. Each appropriate election authority shall, in addition to the early voting conducted at locations otherwise required by law, conduct early voting in a high traffic location on the campus of a public university within the election authority's jurisdiction.

10 ILL. COMP. STAT. § 5/19A-15 (c):

- An election authority may close an early voting polling place if the building in which the polling place is located has been closed by the State or unit of local government in response to a severe weather emergency. In the event of a closure, the election authority shall conduct early voting on the 2nd day before election day[,] . . . shall notify the State Board of Elections of any closure and shall make reasonable efforts to provide notice to the public of the extended early voting period.

10 ILL. COMP. STAT. § 5/19A-5 (c):

- The election authority must maintain a list for each election of the voters to whom it has issued early ballots. The list must be maintained for each precinct within the election authority's jurisdiction. Before the opening of the polls on Election Day, the election

authority shall deliver to the judges of election in each precinct the list of registered voters who have voted by early ballot.

10 ILL. COMP. STAT. § 5/19A-35 (b-10):

- Within one day after a voter casts an early voting ballot, the election authority shall transmit the voter's name, street address, and precinct, ward, township, and district numbers, as the case may be, to the State Board of Elections, which shall maintain those names and that information in an electronic format on its website, arranged by county and accessible to State and local political committees.

Maryland

MD. CODE ANN., ELEC. LAW § 10-301.1.

Early voting and early voting centers.

- (a) In general. — Except as provided under Title 9, Subtitle 3 of this article, during any regularly scheduled primary or general election a voter may vote:
  (1) in the voter's assigned precinct on election day; or
  (2) at an early voting center in the voter's county of residence on any early voting day in accordance with this section.
  (b) Establishment.
  (1) Each county shall have at least one early voting center established in the county as prescribed in this subsection.
  (2) A county with fewer than 150,000 registered voters shall have one early voting center established in the county.
  (3) A county with more than 150,000 but fewer than 300,000 registered voters shall have three early voting centers established in the county.
  (4) A county with more than 300,000 registered voters shall have five early voting centers established in the county.

New Mexico

N.M. STAT. ANN. § 1-6-5.7:

- (A) Commencing on the third Saturday prior to an election and ending on the Saturday immediately preceding the election, an early voter may vote in person on a voting system at an alternate voting location established by the county clerk; […]
  (C) Not later than ninety days before each primary and general election, the county clerk shall publicly fix the hours of operation for alternate voting locations in the county, which shall open no earlier than 7:00 a.m. and shall close no later than 9:00 p.m. Within ninety days of a primary or general election, a county clerk may modify the hours of operation of alternate voting locations with the written approval of the secretary of state. Alternate voting locations shall be open each day of early voting for at least eight consecutive hours. Alternate voting locations may be closed Sundays and Mondays during the early voting period.

North Carolina:

N.C. GEN STAT. § 163-227.2 (g2)(1)-(2).

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- (g2) […] [F]or any county board of elections that provided for one or more sites as provided in subsection (g) of this section during the 2010 or 2012 general election, that county shall provide, at a minimum, the following:

  (1) The county board of elections shall calculate the cumulative total number of scheduled voting hours at all sites during the 2012 primary and general elections, respectively, that the county provided for absentee ballots to be applied for and voted under this section. For elections which include a presidential candidate on the ballot, the county shall ensure that at least the same number of hours offered in 2012 is offered for absentee ballots to be applied for and voted under this section through a combination of hours and numbers of one-stop sites during the primary or general election, correspondingly.

  (2) The county board of elections shall calculate the cumulative total number of scheduled voting hours at all sites during the 2010 primary and general elections, respectively, that the county provided for absentee ballots to be applied for and voted under this section. For elections which do not include a presidential candidate on the ballot, the county shall ensure that at least the same number of hours offered in 2010 is offered for absentee ballots to be applied for and voted under this section through a combination of hours and numbers of one-stop sites during the primary or general election, correspondingly.