



Testimony of VoteEarlyNY

at the

Oversight Hearing on New York City's Early Voting Rollout

Presented to the

New York City Council Committee on Governmental Operations

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Good Afternoon Chairperson Cabrera and esteemed Members of the New York City Council Committee on Government Operations. Thank you for hosting this important hearing to assess the implementation and rollout of early voting in New York City.

My name is Jarret Berg, Co-Founder of VoteEarlyNY (VENY), a non-partisan education non-profit dedicated to raising awareness among the public about New York's new early voting access and working with boards of elections (BOEs) statewide to ensure proper pro-voter implementation of Chapter 6 of the laws of 2019 and related election reforms.

It has become a ritual for the Council to conduct an on-the-record post-election review of election administration in NYC with an eye toward reform and modernization, and I want to recognize your leadership in that regard. The application of our election law and voting rights safeguards in the field across the state is, as a general matter, traditionally subject to an undesirable level of real-time poll worker discretion when it comes to troubleshooting election administration anomalies by persons who work for local BOEs only a few days a year. Also, the siting, policy, and resourcing decisions that impact our fundamental civil rights are too often shrouded in too much secrecy and generally lack accountability.

Early Voting better protects and advances civil rights for voters in many ways by providing more time—literally more due process—for busy New Yorkers to exercise their rights. But the administration benefits are equally as significant, as they spread out the systemic pressure placed on staff and technicians over a far more reasonable election period that better allows for the detection, reporting, and resolution of many typical voting incidents. In many cases, the additional time voters now have to cast a ballot means both that voters are less at risk of having their rights infringed *during the duration* of a given incident-discovery and incident-resolution timeframe. The additional days and hours also reduce the systemic impact of foreseeable turnout distortions caused by: 1) naturally-occurring variables like inclement weather or transportation delays, and 2) reduces the temptation for, and impact of, bad-faith conduct and intentional election manipulation.

With my testimony today I hope to provide a topline of initial progress on implementation as well as to express several observations and a few voter access concerns. At the outset I want to commend the NYC Board of Elections executive staff, training team, and personnel for their diligent efforts this year under tight time constraints in standing up a successful 2019 early voting program. **The law, technology and NYC program successfully and directly improved: 1) access and due process; 2) the balloting process itself; and, 3) the voting experience.**

VENY is grateful to our LetNYvote coalition partners for their impressive work this year. The coalition's early voting evaluation group is ready to conduct further analysis of early voting turnout and demographic data if and when that is made available.

VENY is excited about the statewide rollout of the first-ever NYS early voting program, which dramatically expands the timeframe voters have to cast a ballot through the creation of a nine-day early voting period including two weekends preceding Election Day.¹ In 2019, VoteEarlyNY.org mapped and tracked early voting implementation developments statewide

¹ Ch. 6 of the Laws of 2019.

while pushing counties to adopt the highest standard of pro-voter policies in the many areas where the law defers to local discretion and decision-making. By the end of Early Voting over 54,000 users had visited our website, thanks to our amazing coalition partners who spread the word about early voting and made available a robust library of multilingual public education materials that anyone—including community leaders, elected officials and localities—may use to help raise awareness among residents about this historic expansion of our access to the ballot. **We invite more City officials and stakeholders to embrace these resources in 2020.**²

Despite the provision of 2019-20 state funding for operations and capital upgrades, there were actually no funds allocated by the State specifically for public education or publicity, which must primarily be viewed as a BOE responsibility. This would be especially impactful during the first few cycles of the program, to help raise awareness among voters about their new access.

Exciting and Notable 2019 Early Voting Implementation Developments

In 2019, the NYS early voting law required an aggregate minimum of 145 early voting locations statewide.³ However, localities reportedly deployed a total of 249 early voting sites with 18 BOEs including NYC exceeding the minimum required sites. While each locality must now provide voters with at least 60 additional hours of voting during the nine-day early voting period, 19 BOEs including NYC exceeded the minimum hours. Also, when fully implemented, the NYS early voting law intends and requires local BOEs to offer “countywide votecenters” that any resident voter may access. In 2019, voters in **54 of 62 counties had countywide votecenter access** (all localities except NYC, Westchester, Albany, and Orange). **NYC BOE—required by law to provide 34 early voting sites Citywide—deployed 61 assigned sites (for 74 hours).**

In total, over 256,000 New Yorkers voted early in 2019, including more than 60,000 NYC voters. According to initial turnout data, “[t]he six counties with the highest early voting turnout percentages differ in size, but they had one thing in common: They opted to have more early voting centers than the law requires.”⁴

NYC BOE led several noteworthy Early Voting innovations worth briefly mentioning. **1)** NYC BOE directed all early voting personnel working four or more days of early voting to attend a mandatory “Friday meeting” at their respective early voting sites to prepare the site and go over the plan, so folks were warmed up ahead of the first day of early voting. This is a great practice that can only improve administration and performance and reduce or remediate staff “no-show” rates. **2)** NYC BOE created a “red affidavit table” to serve as a help desk in each early voting site. This creates better capacity to keep the lines moving while having staff dedicated to troubleshooting, much like the system one encounters when attending a well-run conference. **3)** NYC BOE embraced the phrase “Any Line Any Time” to describe the early

² NYS 2019 Early Voting Implementation Map, www.VoteEarlyNY.org; VENY-LNYV 2019 Early Voting Resources, <https://www.VoteEarlyNY.org/Resources/>.

³ NYS Election Law § 8-600(2); *NYS Voter Enrollment By County, Party Affiliation and Status*, NYS BOARD OF ELECTIONS, Feb. 1, 2019, <https://on.ny.gov/2JcH9iE>. Statewide Registered Voter data was updated in November, 2019.

⁴ Robert Harding, *Five Takeaways from New York's First Early Voting Period*, AUBURN PUB, Nov. 13, 2019, <https://bit.ly/2D3dDIS>.

voting e-poll book check in process. This improves election administration, as voters are not limited to checking in at a single Election District table; 4) NYC BOE ratios were 1:1 for e-poll books to ballot printers. This can reduce confusion and increase capacity. 5) NYC BOE designed hardened cradlepoint cases, ensuring connectivity and ease of setup at each early voting site.

Statewide, several counties large and small, blue, red, and purple successfully stood up an early voting program that exceeded the minimum requirements in the law. Although access is merely a prerequisite to turnout and does not guarantee increased participation, which is driven far more directly by competitive contests, New York's initial early voting experience suggests what one may expect—that counties with more convenient programs (less barriers to access) actually performed better than similarly situated peers. That said, there is no perfect apples-to-apples comparison cycle-to-cycle or county-to-county, given how much has changed since 2015.

Public Engagement and Publicity

With respect to public engagement, NYC, through independent efforts by NYC BOE, DemocracyNYC, and NYC Votes put forth what was by far the most impressive and comprehensive early voting publicity campaign in the state. These entities each took noteworthy measures to help inform voters about their new early voting rights.

For example, the BOE launched a new website, developed a short video and made available a digital media kit, graphics, and undertook a public awareness campaign.⁵ This included ads in public places and local media and a digital ad campaign, and a few low-profile public demonstrations. NYC BOE also utilized sandwich board signage and branded floor-stickers outside and in proximity to early voting sites and provided early voters with stickers and durable wristbands, which are tools that organically harness the energy of the voting public to spread the word about early voting access among family, friends, and colleagues.

DemocracyNYC advertised the program in public spaces like subways and ferries, electronic kiosks, online via email, through City government communications, etc. NYC Votes continues to be a key partner for voting reform and raised awareness about the new program in its voting guide and through its ongoing civic engagement work with community stakeholders, including Charter question awareness efforts. **We hope citywide publicity can continue in a more coordinated manner in 2020**, since accurate and clear messaging and the need to raise public awareness about civil rights access is an area of completely aligned and overlapping interest across these entities, and others like partners engaged around the Complete Census Count issue.

In terms of budgeting, it is notable that the Charter Commission reportedly spent between \$1 million and 1.4 million in 2019 on advertising to publicize the Charter questions. While it is unknown how much the three aforementioned entities spent to publicize early voting separately or combined, it is submitted that a robust overall publicity budget is indispensable to helping the non-partisan coalition, community leaders, and 2020 candidates reach the voting public.⁶

⁵ NYC Early Voting Video and Digital Media Kit, <https://early-voting-community-outreach.webflow.io/>.

⁶ Rebecca Lewis, *Who Knows About the Charter Revision Proposals?*, CITY & STATE, Oct. 6, 2019, <https://bit.ly/2DhvxYd>.

Toward this end, despite the provision of 2019-20 state funding for early voting, there were actually no state funds allocated specifically for public education or publicity, which is especially needed during the first few cycles to help raise awareness about the new access rights and voting options. **These three entities and other interested stakeholders should have a forum for working together on publicity to ensure a generally consistent message, adequate saturation across NYC communities, languages, and media, and to avoid duplication.**

One opportunity for better coordination between NYC BOE, the LNYV coalition, and other public and private stakeholders is in the area of public demonstrations, tabling, meetings and briefings to bring information about the new technology and access options to the public.

New Technology Provides Objective Election Oversight Capability and Rich Analytics

The authorization for localities to adopt electronic poll books ⁷ provides potentially transformative opportunities for objective oversight of New York elections. The new capabilities have not been explored in detail during implementation. The new e-poll book law merely authorized their use as an alternative to paper check-in books to reconcile voter check-ins in real time. KnowInk (e-poll book vendor) mostly engages directly with NYC BOE (rather than SBOE) for contracting, staff training, configuration, optimization, servicing, and troubleshooting.

Aside from the fact that a person has voted early, the recent voting reforms are silent on what data must be collected by the e-poll books during voting, how and when such data must be organized, stored, and shared, and with whom. For example, the law and the regulations don't set a uniform statewide standard for ensuring that the affidavit ballot process, the challenge oath process, the assistance oaths and language access happen as part of the e-poll book check-in process or that they are compliant with New York law. Instead, vendors are working directly with counties on local configuration preference, with no known state oversight post-certification.

That administrative patchwork raises civil rights concerns. While the residual election law applies, it bears recalling that each of the vendors' software has its own front-end workflow for use by poll workers to check in voters and a back-end "dashboard", presumably for use by county or state officials to gain a birds-eye view of administration. These tools have massive potential to advance or infringe rights.

In sum, this new data-rich environment can help gauge performance of election equipment, adequacy of early voting access and siting, election law compliance, and the ability to conduct more dynamic resource allocation and oversight by identifying trends or anomalies in real time.

However, there is also the potential for whitewashing, withholding, or deleting this data, so it is actually critical that some uniform rules be laid down to ensure that as much of the voting process as possible is captured by e-poll book records and that transparency and accountability prevail. It is submitted that absent a compelling reason for specific redaction, policymakers, voting rights advocates, campaigns, and the public all have a legitimate interest in this data.

⁷ Ch. 55 of the Laws of 2019, Part XX; Robert Harding, *NY Elections Board OKs Three E-Poll Book Vendors to Help Counties With Early Voting*, AUBURN PUB, Jun. 7, 2019, <https://bit.ly/2MQRou1>.

Troubling Implementation Issues: State Board of Elections Lacks Meaningful Oversight Power

The new early voting law and regulations place various reporting requirements and deadlines on local BOEs to provide greater transparency and so the State BOE may satisfy its “responsibility for administration and enforcement of all laws relating to elections in New York State.”⁸ This includes deadlines for: designating early voting locations and hours, and indicating whether site access is countywide or assigned; submitting state funding reimbursement requests; producing a modern communications plan; developing a security plan when a new early voting plan is announced; complying with a cyber-security checklist for counties adopting new technologies, and an ongoing implicit requirement that local BOEs keep SBOE aware of subsequent adjustments to these plans.

It is believed that two-thirds of counties missed the 2019 deadline for site designation; that several missed the communications plan deadline; that NYC still has not complied with the requirement that they publicize which election districts have been assigned to which early voting sites⁹ and that nearly all CBOEs failed to comply with the actual deadline for submitting security plans for approval, which makes oversight and accountability more difficult.

A cruel irony that those who prioritize voting rights will immediately recognize is that when a voter or candidate misses a procedural election-related deadline, that defect is fatal even as it undermines the fundamental right at stake, whereas it appears that New York’s local BOEs are too often permitted to run roughshod over election law deadlines, with complete impunity.

NYC Implementation Concerns and Ongoing Challenges

The quality of 2019 implementation of the NYS early voting law statewide spans a wide spectrum. Locality variation has primarily manifested within the discretionary aspects of the law, which were necessary because in a large, diverse, and populous state like New York, one principle pro-voter advocates noted as early as 2013 was “one size does not fit all counties.”¹⁰

As such, the new early voting law sets minimum standards of siting access (by providing due process floors for the quantity of locations and hours) and safeguards the discretionary elements of the law through an “adequate and equitable access” provision with objective, good-faith siting factors that must collectively be taken into account when developing an early voting plan.¹¹

⁸ *About the New York State Board of Elections*, <https://www.elections.ny.gov/AboutSBOE.html>.

⁹ 9 CRR-NY 6211.7(a)(4) and 6211.7(c) (requiring local BOEs to provide assignment information to State BOE and local media: “If early voting sites are specific to particular cities, towns or other political subdivisions, a statement describing the area served by each early voting site.”).

¹⁰ NYDLC, *Bringing Early Vote to the State of New York: Recommendations for Amendment of Early Vote Bills* (Apr. 2014), <https://bit.ly/2jtqdqW>; Common Cause/NY, *PEOPLE LOVE IT: Experience with Early Voting in Selected U.S. Counties 37-38* (2013), <https://bit.ly/33bXxHN>; see generally Sean Young, ACLU, *For Early Voting, One Size Doesn't Fit All*, May 2, 2014, <https://bit.ly/2Owe8Sp>.

¹¹ NYS Election Law § 8-600(2)(d) (“Polling places for early voting shall be located so that voters in the county have adequate and equitable access, taking into consideration population density, travel time to the polling place, proximity to other early voting poll sites, public transportation routes, commuter traffic patterns and such other factors the board of elections deems appropriate.”); 9 CRR-NY 6211.1(c)(1) (requiring early voting “accessibility

NYC BOE—required by law to provide 34 early voting sites Citywide—deployed 61 assigned sites (for 74 hours). Voters were assigned to one of the 61 sites for the full early voting period.

Lack of Countywide Votecenters. NYC BOE declined to provide countywide votecenter access for the five boroughs for 2019, apparently invoking the temporary “ballot style impracticality exception” in the law.¹² This represents the most significant and material programmatic restriction and runs counter the law’s intended early voting access, because it eliminates the ability to vote at multiple locations (perhaps dozens of additional locations!) that may be more convenient for the voter than the one site assigned.

For more-populous localities, achieving countywide votecenters are a more complicated undertaking due to the far greater volume of voters, far more ballot styles and language access needs. However, in light NYC BOE’s successful adoption and use of electronic poll books and ballot-on-demand printers during early voting in 2019, and the countywide votecenter access successfully demonstrated by 54 of their peer BOEs, it is submitted that localities like NYC that restricted access in 2019 are required to provide countywide votecenter access by April 2020 to comply with the early voting law, or they must at least revisit the prior decision restricting voters to assigned early voting sites, identify which exception they are invoking, and why.¹³

Although it may require a legislative change, city residents routinely travel inter-Borough to commute to and from work, and for family or social obligations, such that even when fully implemented, the existing law will not meet the access expectations and convenience needs of City residents. **As such, it is submitted that the top early voting reform priority left outstanding for NYC is countywide (and ultimately Citywide) votecenter access.**

Quantity of Early Voting Locations. The early voting law includes an arbitrary cap of seven required sites for populous counties with registered voters in excess of 350,000. This cap places NYC residents at risk of being underserved. Statewide, this applies to the nine most-populous counties which includes four of the five Boroughs. Even though NYC BOE went above the statutory siting minimums, the ratios of voters-per-site are disproportionate across the five Boroughs, and compared to the statutory framework utilized by most of the state, insofar as the law prescribes a graduated formula of one early voting site per full increment of 50,000 registered voters.

for voters with physical disabilities.”); 9 CRR-NY 6210.19(c)(3) and (d)(1) (“County boards shall deploy sufficient voting equipment, election workers and other resources so that voter waiting time at a poll site does not exceed 30 minutes. . . . If the voter waiting time at an early voting site exceeds thirty minutes the Board of Elections shall deploy such additional voting equipment, election workers and other resources necessary to reduce the wait time to less than 30 minutes as soon as possible but no later than the beginning of the next day of early voting.”).

¹² NYS Election Law § 8-600(3) (“Any voter may vote at any polling place for early voting . . . in the county where such voter is registered to vote; provided, however, *if it is impractical to provide each polling place for early voting all of the election district ballots* or if early voting at any such polling place makes ensuring that no voter has not previously voted early during such election, the board of elections may assign election districts to a particular early voting poll site.”) (emphasis added).

¹³ NYS Election Law § 8-600(3).

In Brooklyn, the BOE designated 18 early voting sites for its 1,607,640 registered voters (average of 1 per 89,314 voters); In Queens the BOE designated 14 early voting sites for its 1,258,019 Registered Voters (average of 1 per 89,859 voters); in Manhattan, the BOE designated nine early voting sites for its 1,181,425 registered voters (average of 1 per 131,270 voters); in the Bronx the BOE designated 11 early voting sites for its 819,141 registered Voters (average of 1 site per 74,468 voters). By contrast, in Staten Island the BOE designated 9 early voting sites for its 313,930 registered Voters (average of 1 site per 34,882 voters). However, because the NYC BOE has not made public the overall assigned early voting siting plan as it was required to do, these are estimates. It is unknown what the actual ratios per site were.¹⁴

The equity provision requires equitable siting for voters “in the county”,¹⁵ though it is submitted that in the case of the multi-county NYC BOE, that this provision must be read to mean “City” or “jurisdiction”. If for no other reason, it is submitted that the presence of Citywide races on the ballot in 2019 and future years support such a reading for equal protection purposes. In any case, the City may push Albany to have the law amended for citywide applicability, to ensure fairness.

In light of the foregoing, the current siting plan (with its disproportionate site-per-voter ratios in four of five boroughs) when coupled with the single-assigned-site restriction, significantly underserves City residents.

To safeguard meaningful and equitable **student access to early voting**, the City could prioritize a legislative change that requires early voting siting on campus or within easy reach of public transportation. Alternatively, the City or BOE NYC could attempt to place greater emphasis on prioritizing student voter access in its discretionary siting decisions.

The early voting equity provision and regs also requires dynamic resource re-allocation to ensure wait times and travel times are kept reasonable and do not deprive voters of meaningful access to early voting. There is actually an ongoing statutory obligation that administrators continue to optimize and tailor these programs over time, including during an early voting period.¹⁶

Transparency of BOE Decisions. There is also a risk, perhaps less likely in NYC but no less existent, that the politics of siting cycle-to-cycle will override the legislative intent of providing and maintaining fair and equitable access. For that reason, BOEs should be required to open up the siting process to include local stakeholders before major decisions or revisions are taken.

As we continue to push NYC BOE to open up the siting process to include stakeholders in government, potential site hosts, and the public, we want to recognize the unique challenge inherent in implementing this law in the densely populated urban setting. Aligning ideal siting factors like ADA accessibility, 24/7 secure facilities, cost-conscious spacious real estate located near public transportation, and doing this equitably as the law requires across NYC’s very diverse communities, transit system, and geography is an extremely difficult needle to thread.

¹⁴ 9 CRR-NY 6211.7(a)(4) and 6211.7(c) (requiring local BOEs to provide assignment information to State BOE and local media: “If early voting sites are specific to particular cities, towns or other political subdivisions, a statement describing the area served by each early voting site.”).

¹⁵ NYS Election Law § 8-600(2)(d), quoted in full, *supra* note 11.

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A better siting process may be one that includes submissions of ADA compliant public or private sites from Borough Presidents and Councilmembers, in addition to other stakeholders like Community Boards, NYCHA and City entities that serve large swaths of the public. In short, all of us have a stake in equitable and adequate early voting siting.

To the NYC BOE's credit, the bulk of feedback from voters and poll workers regarding NYC's initial early voting rollout presented an overwhelmingly positive civic engagement experience. Moreover, NYC BOE leadership has publicly committed to revisiting the countywide votecenters decision and expanding the siting plan ahead of the upcoming election events. However, the pushback from schools, PTAs, and other traditional poll site hosts is a new challenge that must be navigated for future early voting events, in light of the more permanent footprint created by the nine-day early voting period.

To balance these factors in a way that best meets the needs of the City's diverse landscape, BOE should consider a mix of sites in public and private locations, and of varying sizes. For example, Erie and Nassau sites had much smaller footprints (less check in tables at each site). This may permit more sites in more locations, albeit with less capacity per site.

Funding. Across the state, localities are reliant on state funding to administer early voting operations. With respect to future funding levels for operations beyond the minimum required by law, the state funding formula should be designed in a way that incentivizes innovation and quality siting. Given the large proportion of NYS voters who are NYC residents, NYC should continue to make adequate state funding of elections a priority.

Staff Training and Voter Challenges. One place where clearer guidance is desirable regards the capability of e-poll books to scan the bar codes on BOE-issued voter cards or documents like DMV-issued drivers licenses. This feature has the potential to speed up election administration, but may also jeopardize voting rights, depending on how the capability is applied in the field. This raises staff training and public messaging questions, but as noted above regarding the local configuration of e-poll books, localities are pursuing very different policies here. **NYC used this feature to scan the voter cards it mailed to voters.** That capability in and of itself is potentially very useful. However, there is a larger (national voting wars) context at play, and according to the League of Women Voters' survey results, in localities including NYC, some voters reported being asked to present an ID at the sign in table, which raises civil rights concerns in NYC.

The adoption of e-poll books, where signature check-ins occur using a stylus instead of a pen may give rise to a new wave of "signature challenges". However, challenging a voter's signature is actually a challenge to that voter's identity. Poll worker training should emphasize that voters be told to sign legibly as they would a document, and if anything, signature scrutiny should be *more* lenient, given that all voters are adapting to signing in on a new medium.

Thank you for the opportunity to testify today. We appreciate the City Council's continued leadership and interest in improving New York's voting experience in 2020 and beyond.