ECLEG DEC18'12 AM10:29

A RESOLUTION TO BE SUBMITTED
BY LEGISLATOR GRANT

RE: Need for Election Law Reform in New York State to Ensure that Every Vote is Counted

WHEREAS, the Erie County Legislature strongly supports needed reforms to New York State Election Law that will ensure that the vote of every legally registered voter be counted; and

WHEREAS, this Honorable Body has sought and received an explanation from the Erie County Board of Elections, to wit, Democratic Commissioner Dennis Ward and Republican Commissioner Ralph Mohr, regarding the impediments to having every vote counted, notably certain "write-in" votes and certain affidavit ballot votes cast by persons who do not vote at their designated polling place; and

WHEREAS, as a consequence of this briefing, the Erie County Legislature is seeking changes to the New York State Election Law, specifically Section 9-112(3) and the corresponding Election Law Section 104(20) dealing with the definition of a write-in vote, as well as the administrative rule on the same matter found in Section 6210.15(a)(5) of the New York State Board of Elections Rules and Regulations; and

WHEREAS, this Honorable Body has concluded that the changes it seeks would end the wrongful disenfranchisement of voters who write-in the name of their candidate when that name is already printed on the ballot; and

WHEREAS, the current law (Election Law Section 9-112(3)) is obsolete, as it hearkens back to the time of mechanical machine voting employing levers, when it was theoretically possible to pull a lever for a candidate and also to write that same candidate's name again as a write-in, resulting in two votes cast by one voter; and

WHEREAS, this "double" vote is no longer possible with the new electronic scanning machines utilizing pre-printed paper ballots, yet existing statutory language results in a voter's ballot being ruled "void" if the voter fills in the bubble next to a candidate's name and again writes that same candidate's name, apparently in error yet with the intention to reinforce the voter's preference; and

WHEREAS, voters do not realize that this practice, under current law, nullifies their vote for a single candidate of their choice; and

WHEREAS, another current law nullifies the affidavit ballot of a voter if the voter did not cast his or her ballot in their correct polling place; and

WHEREAS, the consolidation of election districts and polling places has led to voter confusion, and if the elections inspectors make an error and do not direct the voter to the correct polling place, that voter's right to be heard in the "ballot box" is taken away by the

automatic nullification of his or her vote as the result of a ruling by the local board of elections that is now supported by current state law; and

WHEREAS, the Erie County Legislature has reviewed the state statute in this circumstance as well, and proposes changes to Election Law Section 9-209(a)(iii) and its effect in overturning the Court of Appeals decision in *Panio v. Sunderland,* 4 N.Y.3d 123 (2005); and

WHEREAS, this Honorable Body believes that effectuating this needed change in state law would end the wrongful disenfranchisement of voters who vote by affidavit ballot at the incorrect polling place, often through no fault of their own; and

WHEREAS, the Erie County Legislature expresses bi-partisan support for the proposed New York State Election Law reforms advanced in this resolution.

NOW, THEREFORE, BE IT

RESOLVED, that the Erie County Legislature authorize and direct Chair Betty Jean Grant, Majority Leader Thomas Mazur, Minority Leader John Mills, Majority Counsel Jerome D. Schad, Esq. and Minority Counsel Ronald Bennett, Esq. to execute a letter and any other appropriate documents and to submit this package of reforms, to wit, the proposed changes to Election Law Section 9-112(3) and Election Law 104(20) to the Election Law Committees of both the New York State Senate and New York State Assembly; and be it further

RESOLVED, that these proposed reforms be conveyed to members of the Western New York Delegation to the New York State Legislature for sponsorship consideration and legislative advocacy so that, one day, every legally qualified voter will have his or her vote counted in the State of New York; and be it further

RESOLVED, that certified copies of this resolution be sent to the Governor of New York State, the Majority Leader of the State Senate, the Speaker of the Assembly, Erie County Democratic Elections Commissioner Dennis Ward, Republican Elections Commissioner Ralph Mohr and all others deemed necessary and proper.

FISCAL IMPACT: None for resolution.

Proposed Amendments to
Election Law
Section 9-112(3)
Section 1-104(20)
NYS BOE Regulation
6210.15(a)(5)

Purpose: To eliminate arcane language that currently disenfranchises many voters.

To give effect to voter intent whenever voters write in the name of a candidate whose name is printed on the ballot.

The Current Statute:

New York State Election Law Section 9-112 is entitled "Canvass ballots; validity of ballot." The purpose of Section 9-112 is to assure that the voting process is not corrupted and that a voter's intent to vote for a particular candidate is given effect. One subdivision of Section 9-112, however, has the opposite result.

Section 9-112(3) reads as follows:

> A vote shall be counted for a person whose name is written under the title of an office or party position **only** if such name is written by the voter upon the ballot in the proper space provided therefor and **only if such name is not printed under the title of such office or position.** A voting mark before or after such written in name shall not invalidate the vote. (Emphasis added)

Section 9-112, subdivision (3), was adopted at a time when mechanical voting machines created the possibility that a voter could both vote once for a given candidate on the machine but then vote a second time for the same candidate as a write-in vote. The Legislature's concern was that a given voter could vote twice for the same candidate if the local Board of Election was required or permitted to count the write-in votes for a candidate whose name actually appeared on the machine. The possibility that a voter could cast two votes for the same candidate was unique to the old voting machines.

Unfortunately, with paper ballots and scanning machines in today's world, the statutory language - that if a voter writes in name the name of the candidate of his or her choice, the vote is valid "only if such name is not printed under the title of such office or

position" - results in a voter's ballot for a single candidate of their choice being ruled "void" due to the arcane language of Section 9-112(3). The prohibition had a rationale when the old lever machines were used, but a change to paper ballots eliminated that justification.

Many voters, without recognizing that they are not required to write in the name of a candidate if his or her name is printed on the ballot, actually do write in the name of their candidate. Most often the write-in name is in an appropriate spot below the printed name on the ballot. Below is a sample primary ballot configuration illustrating this phenomenon.

SAMPLE BALLOT	New York State Assembly	
	1A 0 THOMAS SMITH	2A 0 ALTERNATIVE CANDIDATE
WRITE-IN	*Thomas Smith*	

The above example, under the current Election Law Section 9-112(3), would be, and is routinely determined to be, a "void" ballot, even though, any common sense understanding of what the voter intended is that he or she intended to vote for "THOMAS SMITH" when the voter wrote in the name "*Thomas Smith*" below the printed name of the candidate. Such disenfranchisement of voters should not be tolerated and Election Law Section 9-112(3) should be amended.

Proposed Election Law Statute Amendments:

Election Law Section 9-112(3) should be amended to delete the offending language to give effect to voter intent. The following proposed revision to Section 9-112(3) would, this writer suggests, correct the problem and validate voter intent to cast a ballot for a candidate.

> A vote shall be counted for a person whose name is written under the title of an office or party position ~~only~~ if such name is written by the voter upon the ballot in the [~~proper~~] space provided [~~therefor and only if such name is not printed under the title of such office or position~~]. A voting mark before or after such written in name shall not invalidate the vote.

Election Law Section 1-104, "Definitions," at subparagraph 20, the term "write-in ballot" should be re-defined to permit a write-in vote for a person whose name appears on the

ballot. The following proposed revision to Section 1-104(20) would correct the definitional problem.

> The term "write-in ballot" means a vote cast for a person [~~whose~~] *by the voter writing or printing the name of the person of their choice on the ballot and whether or not the* name [~~does not~~] appears on the ballot labels.

The above changes would result in giving effect to voter intent when voters write in the name of a candidate whose name is already printed on the ballot. Those ballots would be counted and voters will not be disenfranchised.

Proposed Election Law Regulation Amendment:

New York State Board of Elections Rules and Regulations at Section 6210.15(a)(5) should also be amended to carry out the amended legislation's intent. The following proposed change to Section 6210.15(a)(5) would address the issue:

> (5) voter writes in or stamps the name of a candidate in the designated write-in space for that race, even if the write-in square, oval or arrow is not marked, and regardless of whether the candidate, whose name is written in, is printed on the ballot;

The above regulatory change would conform the regulations to the proposed amendment to Election Law Section 9-112(3).

Proposed Amendment to
Election Law
Section 9-209(2)(a)(iii)

To give effect to ballots of properly registered and eligible voters who appear at a wrong polling place to cast their vote and who are given an affidavit ballot to do so.

The current voter disenfranchisement problem:

In each election, ballots of many voters are not counted for the simple reason that these voters appeared at the wrong polling place and, after poll inspectors do not find their names in the poll book, the voters were given an affidavit ballot and affidavit ballot envelope with which to cast their ballot.

If voters are lucky enough to present themselves at the correct polling place but the wrong election district table at that polling place and they are handed an affidavit ballot and ballot envelope, their votes are valid because Election Law Section 9-209(a) (iii) so provides and the Court of Appeals decision in *Panio v. Sunderland*, 4 N.Y.3d 123 (2005) so holds.

Unfortunately, if those voters appeared at the wrong polling place, not just at the wrong election district table in the correct polling place, the Court of Appeals decision in *Panio v. Sunderland* holds that their ballot shall not be counted. The Court held, among other things, that the 457 "affidavit ballots cast by voters who had gone to the wrong polling place and therefore voted in the wrong election district should not be counted." 4 N.Y.3d at 128.

Every year, local Boards of Election, being constrained to follow the Court of Appeals holding in *Panio v. Sunderland,* invalidate affidavit ballots on the sole ground that the voter cast his or her ballot at the wrong polling place. In a close election, those votes could be outcome-determinative.

Unfairness of the Court of Appeals' wrong-polling-place invalidity rule:

In a perfect world, when a voter presents himself or herself at the wrong polling place, the election inspector would, with one-hundred percent accuracy, implement Election Law Section 8-302(e) and direct that voter to their correct polling place to vote. In a perfect world, thus, a voter would never cast an affidavit ballot at the wrong polling place.

When a voter presents himself or herself at a polling site and the poll clerk or election inspector cannot find the person's name in the poll book, Election Law Section 8-302(e) provides, in part, that the poll clerk's or election inspector's duties, as follows:

> Whenever a voter presents himself or herself and offers to cast a ballot [and the voter's name does not appear in the poll book], a poll clerk or election inspector shall consult a map, street finder or other description of all of the polling places and election districts within the political subdivision in which said election district is located and if necessary, contact the board of elections to obtain the relevant information and advise the voter of the correct polling place and election district for the residence address provided by the voter to such poll clerk or election inspector.

In spite of the clear duty on poll clerks and election inspectors to cure the voter's wrong polling place appearance by determining and advising the voter of the correct polling place at which the voter should vote, the Court of Appeals, in the *Panio* decision, treats these errors solely as voter fault and no responsibility for such errors is laid at the feet of the poll clerks or election inspectors at polling sites on Election Day.

What is unfair is that an affidavit ballot should not even be offered to a prospective voter if the election inspector properly inquires as to the voter's residence and the election inspector competently checks the available street finders to be able to inform the voter of the correct polling location to which the voter should then proceed to vote.

The most unfair aspect of applying the *Panio* wrong-polling-place rule is that it can easily void a voter's ballot which, if he or she had voted at the correct polling place, would have been a ballot for the same candidates he or she would have had the opportunity to vote for if the voter had arrived at his or her correct polling place.

Additionally, application of the *Panio* wrong-polling-place rule is affected by the happenstance of whether a particular polling location is large – and thus can house 5, 6 or even 8 election districts under one roof – or whether it is small - with only 2 or 3 election districts under one roof. In the former situation, a voter's error in go to the wrong election district will not result in his or her vote being voided but in the latter situation if the wrong election district is also in the wrong location, the voters' ballot is voided because of the *Panio* rule.

It would be far fairer if the voter's affidavit ballot were counted as to those offices listed on the ballot cast in the wrong polling place that were common to the offices on the ballot in the voter's correct polling location. Where voters appear at the correct polling location, but cast their ballot in the wrong election district, the votes cast for the offices common to both are valid and only those offices not in the voter's correct election district are void or not counted. This common-sense process should be extended to the wrong-polling-place voters as well.

Avoidance of excessive ballot objections on procedural, non-substantive, grounds:

Objections to wrong-polling-place voters under the *Panio* decision are often coupled with objections to the completeness of the information supplied by the voters on the affidavit ballot

envelopes. A Board of Elections' assessment of whether an affidavit ballot should even be opened becomes, itself, the subject of many objections in the canvass process.

Because affidavit ballots are part of the Board of Election's manual canvass of the ballots cast in each election and that canvass is carried out at the county level, the Board of Elections has data with which to determine (a) if particular affidavit voters are who they say they are, (b) if their party affiliation is what they indicate, and (c) if their address is accurate such that the board is able to determine "where" the voter should have presented himself or herself to vote. A voter's ballot should not have its validity rise or fall solely on some minor irregularity in the information on the affidavit ballot envelope provided by the board.

Election Law Section 9-209(2)(a)(iii) should be amended to permit local Boards of Election to count ballots cast by voters whom the Board of Elections can verify as voters eligibility to vote - regardless of some minor irregularity in the information provided on an affidavit envelope or the voter's appearance at the wrong polling location.

The Proposed Amendment of Election Law Section 9-209(2)(a)(iii):

The following proposed revision to Section 9-209(a)(iii) would, this writer suggests, correct the wrong-polling-place invalidity rule and permit counting of ballots where a voter has made some minor irregularity in the form of his or her affidavit ballot envelope.

> (iii) If the board of elections determines that a person was entitled to vote at such election, the board shall cast and canvass such ballot if such board finds that (a) the voter appeared at the correct polling place, regardless of the fact that the voter may have appeared in the incorrect election district, (b) the voter appeared at the wrong polling place but is otherwise eligible to vote and, in that case, the board shall count only those votes cast for offices common to the wrong polling place location and the voter's correct polling place location, and (c) any irregularities or omissions on the affidavit envelope did not prevent the board from being able to verify the voter's eligibility to vote in the election.

The above change will give effect to voter intent when otherwise eligible voters appear at a polling place to cast their ballot and, for whatever reason, are not at the correct location and are offered an affidavit ballot with which to cast their vote.