

**INVESTIGATION OF THE VOTE MISCOUNT
IN THE MONMOUTH COUNTY
NOVEMBER 2022 ELECTION

POLICY RECOMMENDATIONS**

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I. EXECUTIVE SUMMARY

In January 2023, the Division on Civil Rights (“DCR”) in the Office of the Attorney General, New Jersey Department of Law and Public Safety, retained Peter Harvey, Esq., former New Jersey Attorney General, and his colleagues at Patterson Belknap Webb & Tyler LLP¹ for two purposes. First, DCR requested that Mr. Harvey and his colleagues conduct an investigation on behalf of DCR into the recording, tabulation, reporting, and certification of votes cast in the November 2022 General Election in Monmouth County, New Jersey. One objective of the investigation was to assist DCR in ascertaining whether any person or entity engaged in any practice declared to be unlawful under the New Jersey Civil Rights Act, *N.J.S.A. § 10:6-1 et seq.* Second, DCR requested that Mr. Harvey propose recommendations for potential election reforms in New Jersey based upon the findings and conclusions of the investigation.

This report addresses the second request. Specifically, we discuss two categories of election reforms with the goals of: (i) *preventing* vote miscount issues from arising in the future, and (ii) *correcting* vote miscount issues reasonably quickly should they arise in subsequent elections. We hope that these recommendations will be helpful to the Attorney General’s Office, election officials, legislators, voting equipment vendors, and advocacy organizations as they continue their efforts to protect New Jerseyans’ right to vote and ensure the accuracy of election results. An explanation supporting each recommendation is set forth *infra* in Sections III and IV.

Recommendation No. 1. Before every election, counties should conduct comprehensive pre-election logic and accuracy (“L&A”) testing on vote tabulation and reporting software, in addition to L&A testing on voting machines and tabulators. L&A testing on software should include (i) double insertion of flash drives containing recorded votes when transmitting results from regional locations into the software, (ii) double insertion of flash drives when ballot images are loaded into the software to tabulate write-in votes, and (iii) any other testing that might prevent potential double counting of votes. We propose that the certification process for voting equipment, to the extent it does not already do so, include consideration of the effectiveness, comprehensiveness, and accessibility of L&A testing plans proposed by voting equipment vendors.

¹ Mr. Harvey was assisted by Emma Ellman-Golan, Esq., and Basil Williams, Esq.

Recommendation No. 2. Counties should generate and review reports that describe voting system performance (i) after the tabulation of votes on Election Night; (ii) if applicable, after loading ballot images on the day after the election; and (iii) during pre-certification canvassing, the process of counting and verifying votes cast in an election. Additionally, voting equipment vendors should produce easy-to-read reports that summarize election results, actions taken in vote tabulation software, and the load status of flash drives.

Recommendation No. 3. Counties should ensure, either in their contract negotiations with voting equipment vendors or otherwise, that only vendor representatives who have technical expertise with respect to the counties' voting software and hardware can make changes to voting equipment. Also, counties should negotiate contract provisions that require specific training and access to certain vendor records regarding the software and equipment purchased by the county.

Recommendation No. 4. In addition to the efforts that counties are already making, counties should expand pollworker training, with a focus on adaptation protocols and instructions to follow if technological issues arise.

Recommendation No. 5. Counties should adopt communications plans both to address issues that may arise in the election process and to correct any misinformation about vote counts or certification. The plans should include protocols that guide information-sharing between:

- (i) pollworkers and "lead pollworkers";
- (ii) pollworkers and county election offices;
- (iii) Clerks' Offices, Boards of Elections, and Superintendents of Elections;
- (iv) counties and voting equipment vendors;
- (v) counties and the State Division of Elections; and
- (vi) counties and the public.

Recommendation No. 6. Currently, the Division of Law within the Office of the Attorney General, New Jersey Department of Law and Public Safety, represents county Boards of Elections and Superintendents of Elections in carrying out their election-related responsibilities. In our view, an alternative system of legal

representation of county Boards of Elections and Superintendents of Elections should be explored. Representation of these entities from outside the Attorney General’s Office would enable the Office to further focus its efforts on enforcing New Jersey’s civil rights laws. For example, a system in which county counsel represents those offices may be preferable to the current arrangement.

Elections in New Jersey are secure. In fact, the voting equipment used in Monmouth County is protected from outside intrusions, including by any vendor personnel. In our investigation, we discovered no evidence suggesting that the miscount was the result of any fraudulent or willfully wrongful conduct by any Monmouth County election official or personnel, ES&S employee, or any other person. We also did not discover evidence of double counting of ballots on ES&S’s elections system before or after the November 2022 Election in Monmouth County, or elsewhere. Nevertheless, we believe that the suggested reforms discussed below would help to preserve public trust in elections.

II. METHODOLOGY

For purposes of our recommendations of election reforms, interviews were conducted of State election officials, election experts, and leaders of advocacy organizations.² Personnel from Monmouth County and Election Systems & Software, LLC (“ES&S”) were separately interviewed to obtain the factual information included in this report. Those interviews, and documents reviewed in connection with those interviews, also informed our policy recommendations. All witnesses helpfully provided insights into current issues and potential policy reforms based on their experiences. The recommendations in this report do not necessarily reflect the views of any of the persons we interviewed.

² We were unable to speak with elections personnel in the Division of Law within the Attorney General’s Office. The Division of Law represents (i) State election officials, in addition to (ii) county Boards of Elections and (iii) Superintendents of Elections in carrying out their election-related responsibilities. The Division of Law did not represent any Monmouth County election officials in this investigation.

III. RECOMMENDATIONS FOR PREVENTING VOTE MISCOUNT ISSUES IN THE FUTURE

1. Pre-Election Logic and Accuracy Testing

Recommendation: Before every election, counties should conduct comprehensive pre-election logic and accuracy (“L&A”) testing on vote tabulation and reporting software, in addition to L&A testing on voting machines and tabulators. L&A testing on software should include (i) double insertion of flash drives containing recorded votes when transmitting results from regional locations into the software, (ii) double insertion of flash drives when ballot images are loaded into the software to tabulate write-in votes, and (iii) any other testing that might prevent potential double counting of votes. We propose that the certification process for voting equipment, to the extent it does not already do so, include consideration of the effectiveness, comprehensiveness, and accessibility of L&A testing plans proposed by voting equipment vendors.

Pre-election logic and accuracy (“L&A”) testing is a process used by counties to test their voting systems before elections. New Jersey law requires that each county have the “automatic tabulating equipment” tested to ensure that it will operate properly on Election Day—that is, that the equipment will count votes accurately. *N.J.S.A. § 19:53A-8(a)*. The statutory language does not exactly match today’s electronic voting technology, but the function of the testing remains the same. In Monmouth County, L&A testing includes both manual and automatic testing of voting machines.

A voting system’s software aggregates ballots from polling places and tabulates final results. It plays as critical a role as voting machines and paper-ballot tabulators in ensuring accurate vote counts because it collects and processes ballots from the voting machines and paper-ballot tabulators.

Because the purpose of L&A testing is to ensure that “automatic tabulating equipment” will “accurately count the votes cast,” *id.*, we recommend that counties’ L&A testing include testing of vote tabulation and reporting software. This testing should supplement any testing conducted on voting machines and tabulators of paper ballots.

In our view, at a minimum, testing of software should include: (i) double insertion of flash drives when transmitting results from regional locations

into the software, and (ii) double insertion of flash drives when ballot images are loaded into the software. Of course, voting systems will differ between counties. Accordingly, L&A testing of software also should include any other testing that might prevent double counting of votes.

To ensure that L&A testing of software can catch potential issues that may arise, we propose that the certification process for voting equipment—to the extent it does not already do so—include considerations of the effectiveness, comprehensiveness, and accessibility of L&A testing plans proposed by voting equipment vendors.

In New Jersey, the process for certifying voting systems includes three steps. *First*, the United States Election Assistance Commission (“EAC”) reviews a proposed voting system, including hardware and software. The EAC determines whether the voting system satisfies the Voluntary Voting System Guidelines (“VVSG”). If the voting system satisfies the VVSG, then the EAC certifies the voting system.

Second, New Jersey’s “Voting Machine Examination Committee” examines the voting system. The Committee is comprised of a registered patent attorney and two mechanical experts from the New Jersey Division of Gaming Enforcement in the Attorney General’s Office. The Committee inspects the voting system, in part, by analyzing whether the system satisfies certain statutory requirements. *See id.* §§ 19:48-1–2, 19:53A-3. One of these requirements is that the voting system “shall prevent the voter from voting for the same person more than once for the same office.” *Id.* § 19:48-1(e); *see also id.* § 19:53A-3(f).

Third, the New Jersey Secretary of State certifies the voting system for use in the State. *See id.* §§ 19:48-2, 19:53A-4.

Consideration of L&A testing plans proposed by voting equipment vendors fits naturally within the voting system certification process. Voting systems must be tested periodically to ensure that they *continuously* satisfy New Jersey’s statutory requirements, not just that they satisfy these requirements when they are initially certified. Thus, it makes practical sense for the voting system certification process to include an assessment of how voting systems can be tested before each election to ensure that they will always “prevent [a] voter from voting for the same person more than once.” *See id.* §§ 19:48-1(e), 19:53A-3(f).

2. Reporting

Recommendation: Counties should generate and review reports that describe voting system performance (i) after the tabulation of votes on Election Night; (ii) if applicable, after loading ballot images on the day after the election; and (iii) during pre-certification canvassing.

Additionally, voting equipment vendors should produce easy-to-read reports that summarize election results, actions taken in vote tabulation software, and the load status of flash drives.

After the polls close on Election Night, post-tabulation reports are necessary to confirm that votes have been tabulated accurately. The election software at issue in our investigation enables counties to run, among other reports, an *Election Audit Events Report* and a *Media Status Report*. Each of those reports can assist counties in verifying that votes were tabulated correctly. An *Election Audit Events Report* records all actions taken within the tabulation and reporting software. A *Media Status Report* indicates the load status of flash drives used in an election; it shows whether, when, and how many times a flash drive has been previously inserted. Counties should run these reports at all stages of tabulation, including (i) at the end of Election Night; (ii) if applicable, after loading ballot images to tabulate write-in votes; and (iii) during pre-certification canvassing.

Still, these reports must be easily readable and reviewable by county election officials. That task rests with the vendor of the voting equipment—in this case, ES&S.

The portion of the *Election Audit Events Report* that captures actions taken in the software on Election Day and on the day after an election can be nearly 1,000 pages. The *Media Status Report* can be nearly 300 pages. The length of those reports may make it difficult to identify miscounts in the high-pressure environment of an election. Vendors should assist counties in finding and correcting potential errors by producing reports that are easy to read. Vendors also should provide periodic in-person, and written, training for election officials regarding these valuable reports.

3. Vendor Personnel Requirements

Recommendation: Counties should ensure, either in their contract negotiations with voting equipment vendors or otherwise, that only vendor representatives who have technical expertise with respect to the counties' voting software and hardware can make changes to voting equipment.

Also, counties should negotiate contract provisions that require specific training and access to certain vendor records regarding the software and equipment purchased by the county.

Changes to voting systems or software, including uninstallations and reinstallations, may sometimes be necessary or helpful to troubleshoot issues that may arise. Our investigation revealed that these changes are not always made by vendor representatives who have the requisite experience or expertise to ensure that any pre-election adjustments to voting systems or software do not alter the functions or effectiveness of those systems. To avoid problems with any changes to voting equipment, counties should ensure that only vendor representatives having technical expertise with the software and hardware can make such changes. Technicians also should be required to make any adjustments or corrections in person at the site of the voting equipment.

The simplest way to impose this requirement is through the contracts between counties and their vendors. The State, counties, and vendors also might consider other potential solutions, including certification requirements for personnel to operate voting equipment.

Additionally, training of county elections personnel is vital to the smooth operation of voting equipment. Training on the software and hardware when both are initially installed is helpful, but one training is not enough. Periodic training from the voting equipment vendors helps ensure that county officials become and stay knowledgeable about their voting equipment, and also helps these officials train new personnel. Counties should consider including in their contracts a requirement that vendors periodically train key elections personnel, whether in person, virtually, or through written instructions.

Counties also should consider adding an "access to records" provision to their contracts, requiring the county's voting equipment vendor to maintain records and information about elections and the county's voting system and software

for at least two years following each election. The provision also should require the vendor to produce the information upon request from the county.

It should be noted that the ES&S voting machines and tabulation equipment used by Monmouth County are *not* connected to the Internet at any time. Moreover, neither ES&S nor anyone else can access Monmouth County's voting equipment remotely. In fact, no one can access Monmouth County's voting equipment without Monmouth County personnel being physically present. Thus, the only information about an election received by the vendor, ES&S, is that which has been shared by the county. Vendors may have other information about counties' voting systems and software, however, that the counties cannot access. An "access to records" provision would enable counties to access this information when it is necessary to do so.

4. Pollworker Training

Recommendation: In addition to the efforts that counties are already making, counties should expand pollworker training, with a focus on adaptation protocols and instructions to follow if technological issues arise.

Another method for verifying election results is to compare the *total* number of ballots cast on Election Day to the *total* number of voter check-ins in pollbooks. The accuracy of pollbook data depends, in part, on pollworker training. If any issues arise with the operation of electronic pollbooks or the syncing of pollbook data with pollbook applications, pollworkers should be equipped to continue processing and recording voter check-ins to ensure that check-in data can be compared to the total number of ballots cast.

IV. RECOMMENDATIONS FOR ADDRESSING VOTE MISCOUNT ISSUES IF THEY ARISE IN THE FUTURE

1. Communications Plans

Recommendation: Counties should adopt communications plans both to address issues that may arise in the election process and to correct any misinformation about vote counts or certification. The plans should include protocols that guide information-sharing between:

- (i) pollworkers and “lead pollworkers”;
- (ii) pollworkers and county election offices;
- (iii) Clerks’ Offices, Boards of Elections, and Superintendents of Elections;
- (iv) counties and voting equipment vendors;
- (v) counties and the State Division of Elections; and
- (vi) counties and the public.

Communications plans are critical to addressing issues that may arise before, during, and after elections. Communications plans also may assist in ensuring that county election offices and State election officials are informed of, and have accurate information about, any issues regarding vote tabulation before county and State certification of results, respectively.

Communications plans should require that accurate information be communicated and give instructions regarding (i) how, (ii) when, and (iii) with whom information should be shared concerning election-related incidents. They should be written to provide information to and among pollworkers, county election officials, voting equipment vendors, the State Division of Elections, and the public. Training on communications plans is necessary to make them effective.

As part of this recommendation, we also suggest that counties, to the extent they do not do so already, establish “lead pollworker” positions for each polling location to liaise between pollworkers—who may be the first persons to learn about election-related incidents—and county election officials. Counties should

clearly describe and communicate lead pollworkers’ responsibilities and provide them with specialized training. Currently, counties employ what have been called “master pollworkers,” but, according to a 2022 survey conducted by the League of Women Voters of New Jersey, those pollworkers do *not* appear to receive additional training.

Several of the persons we interviewed highlighted helpful resources that counties might consider using when adopting communications plans for various scenarios, including cyber incidents and misinformation campaigns. We have noted those resources and others below:

- The Election Group’s “Crisis Communications Planning Guide” (Mar. 2020), available at: <https://www.electionsgroup.com/communications-resource-desk/crisis-communications-plan>
- The Belfer Center at Harvard Kennedy School’s “Election Cyber Incident Communications Coordination Guide” (Feb. 2018): <https://www.belfercenter.org/sites/default/files/files/publication/CommunicationsGuide.pdf>
- The Brennan Center for Justice’s explainer on “7 Facts About Voting—and Myths Being Spread About Them”: <https://www.brennancenter.org/our-work/research-reports/7-facts-about-voting-and-myths-being-spread-about-them>
- The Cybersecurity & Infrastructure Security Agency’s “Rumor Control Start-Up Guide”: https://www.cisa.gov/sites/default/files/2023-01/rumor-control-startup-guide_508.pdf
- The Belfer Center at Harvard Kennedy School’s “Election Influence Operations Playbook” for state and local election officials:
 - “Part 1: Understanding Election Mis and Disinformation” (Sept. 2020): <https://www.belfercenter.org/sites/default/files/2020-09/IO%20Playbook%202%20Part%201.pdf>
 - “Part 2: Mis/Disinformation Response Plan” (Sept. 2020): <https://www.belfercenter.org/sites/default/files/2020-09/IO%20Playbook%202%20Part%202.pdf>

2. Division of Law’s Representation of County Election Offices

Recommendation: Currently, the Division of Law within the Office of the Attorney General, New Jersey Department of Law and Public Safety, represents both county Boards of Elections and Superintendents of Elections in carrying out their election-related responsibilities. In our view, an alternative system of legal representation of county Boards of Elections and Superintendents of Elections should be explored. Representation of these entities from outside the Attorney General’s Office would enable the Office to further focus its efforts on enforcing New Jersey’s civil rights laws. For example, a system in which county counsel represents those offices may be preferable to the current arrangement.

The Attorney General’s Office (“NJ OAG”) simultaneously plays several different roles in elections, including the roles of:

- (1) Representing the New Jersey Secretary of State;
- (2) Defending State election statutes when they are challenged;
- (3) Enforcing criminal laws;
- (4) Enforcing the New Jersey Civil Rights Act, *N.J.S.A. § 10:6-1 et seq.*, and the New Jersey Law Against Discrimination, *N.J.S.A. § 10:5-1 et seq.*; and
- (5) Representing county Boards of Elections and Superintendents of Elections—but not county Clerks’ Offices—in carrying out their responsibilities under New Jersey election law.

Several of the Attorney General’s roles listed above do not conflict with each other. For example, the Attorney General’s role as an enforcer of civil rights statutes, through DCR, is consistent with its role as the defender of those statutes. Other dual roles—for example, NJ OAG’s civil enforcement role and criminal enforcement role—can be easily separated by ethical walls within NJ OAG, such that certain personnel only work on civil enforcement matters and other personnel only work on criminal enforcement matters. NJ OAG’s responsibility to represent the Secretary of State does not pose any conflicts with its responsibility to represent other cabinet officials. And NJ OAG can work alongside agencies to resolve any inter-agency conflicts that may arise.

The Attorney General’s role in representing county Boards of Elections and Superintendents of Elections, however, presents a tension and a challenge. As noted above, the Attorney General has the responsibility to enforce New Jersey’s civil rights laws. Voting rights enforcement requires consideration and, sometimes, evaluation of the actions of county election offices that have significant responsibilities in administering elections in New Jersey. But, currently, NJ OAG’s representation of county election offices, through the Division of Law, poses a structural challenge to the Attorney General’s and DCR’s voting rights enforcement responsibilities.

For example, NJ OAG may be unable to enforce voting rights laws in a county in which the Division of Law represents county election officials. A contemporary example is instructive. Earlier this year, the United States Department of Justice filed a consent order against Union County, New Jersey, directing the county to expand bilingual access for voters. Instead of joining the United States in its enforcement efforts, NJ OAG—through the Division of Law—represented Union County’s Board of Elections. *See* Notice of Appearance, *United States v. Union County*, No. 2:23-cv-02531-TLA-SDW-BRM (D.N.J. May 24, 2023), ECF No. 9. If Union County election officials were violating rights or laws that guaranteed equal access to the ballot, then NJ OAG should be among the agencies conducting the inquiry and enforcing those rights and laws.

A recent case in New York State offers a contrast. In 2021, the New York Attorney General’s Office sued the Rensselaer County Board of Elections for failing to provide voters in communities of color with adequate access to Early Voting polling sites. *See* Verified Pet., *People v. Schofield*, No. EF2021-268959 (N.Y. Sup. Ct. May 27, 2021), NYSCEF Doc. No. 1. County counsel represented the Board of Elections. *See* Notice of Appearance, *People v. Schofield*, No. EF2021-268959 (N.Y. Sup. Ct. May 28, 2021), NYSCEF Doc. No. 13.

The structural challenge posed by the Division of Law’s representation of county election offices is not easily remedied by constructing ethical walls between enforcement attorneys and attorneys representing county election offices. To establish those walls, the Attorney General’s Office must assign one Assistant or Deputy Attorney General to the matter for enforcement purposes, and one Assistant or Deputy Attorney General to represent the county election offices. This interoffice divide presents potential conflicts regarding how attorneys with election law expertise are staffed within the Attorney General’s Office. When disputes have

resulted in litigation, which is rare, one side or the other has hired outside counsel to avoid representation by NJ OAG of both plaintiffs and defendants in court.

The Attorney General's Office's dual roles of enforcing civil rights laws and representing county election offices also affects how the Attorney General and the Director of DCR are able to communicate with the public about potential civil rights violations in elections. If members of the public know that the Division of Law represents a county Board of Elections, they may be less likely to request that the Attorney General's Office bring an enforcement action against the Board. For the same reason, the Attorney General's Office cannot easily solicit information from the public regarding potential civil rights violations where the public knows that the Attorney General's client is the agency that may be the subject of a complaint.

We observed this structural challenge in our investigation. Because of the Division of Law's representation of county Boards of Elections and Superintendents of Elections, we were unable to interview the Division of Law's elections personnel about the facts known to them, their experiences in elections, or their perspectives regarding election policies.

One potential response to this structural challenge could be for county counsel, which represents counties for other purposes, also to represent the county Boards of Elections and Superintendents of Elections with respect to their election-related responsibilities.

We note that one potential drawback of this change could be the temporary loss of the Division of Law's expertise in New Jersey election law based on its longstanding representation of county Boards of Elections and Superintendents of Elections. The Division of Law is familiar with, among other things, issues that may arise in elections and courts' interpretations of New Jersey's election laws. NJ OAG might consider a reasonable transition period so that county election offices can continue to benefit from the Division of Law's guidance as they transition to representation by county counsel.

If NJ OAG is inclined to make a change to the present arrangement, then it might consider permitting the Division of Law to continue to provide its election education services statewide to all county Boards of Elections and Superintendents of Elections. That role need not change because it is not an adversarial or investigative function. The tension arises when the Attorney

General's Office provides advice and direction to these agencies as problems arise in counties before elections, on Election Day, or in the days after an election.

How this potential reform could be implemented is an open question. Regarding Superintendents of Elections, New Jersey courts have concluded that, because the Superintendents are considered "State officers," the Division of Law is sometimes responsible for representing them under *N.J.S.A. § 52:17A-4*, which enumerates non-exhaustive powers and duties of the Division of Law. *See Keenan v. Bd. of Cnty. Freeholders of Essex Cnty.*, 244 A.2d 705, 710 (N.J. Super. Ct. Law Div. 1968), *aff'd*, 255 A.2d 786, 789 (N.J. Super. Ct. App. Div. 1969); *see also County of Mercer v. Mercer Cnty. Superintendent of Elections*, 412 A.2d 461, 462 (N.J. Super. Ct. App. Div. 1980) (explaining that "[t]he office of County Superintendent of Elections has repeatedly been held to be a state rather than a county office" (collecting cases)).

Title 52 sets forth the Attorney General's powers, authority, and responsibilities. It provides that these powers and duties include, among other things, to:

[a]ct as the sole legal adviser, attorney or counsel, notwithstanding the provisions of any other law, for *all officers, departments, boards, bodies, commissions and instrumentalities of the State Government in all matters other than those requiring the performance of administrative functions entailing the enforcement, prosecution and hearing of issues as imposed by law upon them*; and represent them in all proceedings or actions of any kind which may be brought for or against them in any court of this State; and [to] interpret all statutes and legal documents, inspect and approve contracts and titles and otherwise control their legal activities.

N.J.S.A. § 52:17A-4(e) (emphasis added). We note that, in an unpublished opinion, the New Jersey Appellate Division explained that the Division of Law's representation of Superintendents does *not* extend to personnel matters. *Malave v. Freytes*, No. A-5807-12T2, 2017 WL 712782, at *9 (N.J. Super. Ct. App. Div. Feb. 23, 2017). But the court noted the Attorney General's concession that "county election officials are, in some respects, considered state officers" and that "the State would be authorized to provide legal representation to the . . . Superintendent . . . to assure the proper enforcement of election laws." *Id.* (citation and internal quotation marks omitted).

In contrast, regarding county Boards of Elections, the New Jersey Appellate Division has concluded that Boards of Elections’ “role in overseeing the election process in each respective county is not a traditionally recognized State function.” *In re Denial of Def. & Indemnification to Cape May Cnty. Bd. of Elections by the Att’y Gen. of the State of N.J.*, No. A-4254-12T4, 2014 WL 3407272, at *2 (N.J. Super. Ct. App. Div. July 15, 2004) (per curiam) (unpublished). In *In re Denial of Defense*, the Appellate Division affirmed the Attorney General’s decision *declining* to represent a county Board of Elections in a voter-initiated action alleging malicious prosecution for voter fraud. *Id.* at *1. The court, distinguishing the role of the Board of Elections from the role of the County Prosecutor, reasoned that “[t]he electoral structure set forth in Title 19 restricts the [Board of Elections] handling of election matters to those in its own county,” and that “[t]he Secretary of State . . . has statutorily defined supervisory duties that are largely ministerial and limited.” *Id.* at *2–3 (citations omitted). The court noted that “[e]ven if [it] were to conclude that the State’s role in county elections is more than minimal,” the Attorney General need not represent Boards of Elections “in all instances.” *Id.* at *3. The court added that “[t]he State would certainly not be required to intervene in a situation where . . . the Board was acting within it[s] local election duties at the time of the events alleged in the complaint.” *Id.*

It is unclear how the Appellate Division’s reasoning in *In re Denial of Defense* would apply in counties without a Superintendent of Elections, where the Board of Elections assumes the responsibilities of the Superintendent. *See N.J.S.A.* §§ 19:31-2, 19:32-54, 19:48-4.

In presenting the above considerations, we offer no opinion about NJ OAG’s current voting rights enforcement capacity or strategy. Nor are we commenting upon the quality of the Division of Law’s representation of county election offices, which, by all accounts, is professional, ethical, and excellent. We simply note this structural challenge for the Attorney General’s consideration, and suggest one way in which that challenge might be overcome.

To the extent that the Division of Law’s representation of county election offices is statutorily mandated, then legislative action may be necessary to implement the reform described above.

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Respectfully submitted,

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