

Current Conditions of Voting Rights Discrimination

Virginia

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Voting Rights in Virginia: 2006-2021

A Report of Campaign Legal Center



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The nonpartisan Campaign Legal Center (CLC) advances democracy through the law at the federal, state, and local levels, fighting for every American's rights to responsive government and a fair opportunity to participate in and affect the democratic process. Since the organization's founding in 2002, CLC has participated in major redistricting, voting rights, and campaign finance cases before the U.S. Supreme Court as well as numerous other federal and state court cases. CLC's work promotes every citizen's right to participate in the democratic process.

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Introduction

When Congress reauthorized the Voting Rights Act (“VRA”) in 2006, it included in its record a report enumerating voting issues in and detailing the VRA’s impact on racial discrimination in election laws, administration, and practices in the Commonwealth of Virginia.¹ Since then, there have been numerous instances of racial discrimination in the enactment and administration of voting laws and election practices across the state of Virginia, demonstrating the need for further federal action.

The increase in racial discrimination in voting that has occurred over the last fifteen years is tied in large part to the absence of federal preclearance measures, after the United States Supreme Court struck down the coverage formula governing such measures in 2013 in *Shelby County v. Holder*.² Without preclearance, voter suppression and other forms of racial discrimination in voting have flourished across Virginia. Unsurprisingly, most instances of discrimination in voting have surfaced after *Shelby County*, which significantly weakened protections for racial and language minorities. The persistence of racial discrimination in Virginia’s electoral process underscores the importance of reinstating preclearance—to ensure that historically disenfranchised communities will have their voices heard and reflected in the electoral process and all changes to it.

This report details racial discrimination in voting in Virginia since the state’s last congressional review in 2006. This update addresses ongoing discrimination exposed through litigation, as well as anti-voter laws, voter intimidation and disinformation campaigns, and other tactics that disproportionately burden and disenfranchise voters of color. The report is organized in four parts. First, it reviews statistical inequities in Virginia’s electoral processes since 2006. Second, the report examines the broader landscape of racial discrimination in Virginia elections, detailing its insidious effects on state election laws, in-person voting, redistricting, and felony disenfranchisement, as well as the ways in which COVID-19 further exacerbated racial inequalities in democratic participation during the 2020 election. Third, the report details how minority voters in Virginia have been intimidated and targeted—by nongovernmental actors, local governments, and political campaigns—with disinformation campaigns designed to confuse and threaten voters, and thereby disenfranchise them. Lastly,

¹ See Anita S. Earls, Kara Millonzi, Oni Seliski & Torrey Dixon, RenewtheVRA.org, *Voting Rights in Virginia 1982-2006*, CTR. FOR CIV. RTS., UNIV. OF N.C. SCH. OF LAW (2006), <http://www.protectcivil-rights.org/pdf/voting/VirginiaVRA.pdf> (last visited Aug. 11, 2021).

² 570 U.S. 529 (2013).

the report highlights the pervasiveness of racial discrimination in voting in Virginia through a case study of Campaign Legal Center's ongoing litigation in *Holloway, et al. v. City of Virginia Beach*.

This report's conclusion is clear: when politicians erect deliberate barriers to silence voters based on what they look like or where they live, Congress must act to ensure that all Americans, regardless of race, have an equal opportunity to vote and participate in our nation's democracy. Passing the John Lewis Voting Rights Advancement Act is vital to achieving that goal.

Impact of *Shelby County v. Holder* on Virginia

In 2013, in *Shelby County v. Holder*, the U.S. Supreme Court gutted a key provision of the Voting Rights Act.³ This provision, called preclearance, required states and localities with histories of racial discrimination in voting to have the federal government approve any changes in their voting rules before they went into effect.⁴ The Court, in a 5–4 decision, ruled as a matter of law that “[o]ur country has changed” because the discriminatory “conditions that originally justified [the VRA’s preclearance measures] no longer characterize voting in the covered jurisdictions.”⁵ Sadly, the years since *Shelby County* have disproven the Court’s hypothesis about voting in previously-covered jurisdictions, especially in Virginia.

The Supreme Court’s decision in *Shelby County* has impacted Virginians’ freedom to vote in two significant ways. **First**, before *Shelby County*, preclearance ensured that minority communities were kept informed of potential changes to voting laws in their city or county, and had the ability to express their views on the effects of the proposed law to the Department of Justice (“DOJ”) before the law was cleared to go into effect.⁶ *Shelby County* wiped out these protections for public input and transparency around voting laws, placing the onus on minority communities and advocacy organizations to expend resources and time to track and advocate for communities impacted by proposed and newly enacted voting restrictions.⁷ **Second**, before *Shelby County*, the state of Virginia was required to submit all proposed changes to polling places, absentee ballot processes, special election procedures, referendums, voter registration procedures, voting procedures, and redistricting procedures to the federal government for preclearance. This compelled the state to consider the racial impact of all proposed changes in state voting laws, barring the enactment of discriminatory provisions and acting

³ See *id.*

⁴ The Supreme Court invalidated the coverage formula for determining which jurisdictions were subject to preclearance. Thus, although the Court, in theory, allowed preclearance to exist, see *id.* at 557 (“We issue no holding on [preclearance] itself, only on the coverage formula.”), by invalidating the formula used to identify which jurisdictions were covered, in practice, the Court ended preclearance.

⁵ *Id.* at 535, 557. *But see id.* at 590 (Ginsburg, J., dissenting) (“Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”).

⁶ *Archive of Notices of Section 5 Activity Under the Voting Rights Act of 1965, as Amended*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/archive-notices-section-5-activity-under-voting-rights-act-1965-amended> (last visited Aug. 9, 2021).

⁷ *Advocating for Polling Place Access in the Deep South*, CAMPAIGN LEGAL CTR., <https://campaign-legal.org/cases-actions/advocating-polling-place-access-deep-south> (last visited Aug. 10, 2021).

as a deterrent to voter suppressive measures.⁸ By declaring unconstitutional the formula underlying preclearance, the Supreme Court in *Shelby County* guaranteed that none of this is now required, allowing the state to act to restrict the right of Virginians, particularly Black, Asian, and Latino Virginians, to participate fully in American democracy. And, in the absence of preclearance, this is exactly what has happened.

Post-*Shelby County*, no federal agency or entity is required to track changes in state voting laws, let alone approve them before going into effect. The result—including in Virginia—has been significant rollbacks of protections for the right to vote. For example, in the last eight years, the state of Virginia has closed hundreds of polling places that would have required federal approval before *Shelby County*.⁹ Since *Shelby County*, the state has also purged tens of thousands of voters from the state voter rolls.¹⁰ These electoral changes have been subject to no oversight or critical analysis of their discriminatory impact on voters, as preclearance would have previously required.

Recently, however, the tide has begun to turn in Virginia: in 2020, it became the fourth state in the country to adopt a state Voting Rights Act, including a provision mandating public notice and comment or statewide preclearance for changes to certain electoral practices.¹¹ The goal of Virginia's Voting Rights Act is to restore some of the protections for racial and language minority voters previously guaranteed by federal preclearance. But the state law does not go as far as the John Lewis Voting Rights Advancement Act; thus, the latter is needed to provide robust protections for minority voters and ensure that all Americans, regardless of race, have an equal freedom to vote.

⁸ See e.g., *Section 5 Notices of Submission: Notice of Preclearance Activity the Voting Rights Act of 1965, as Amended*, U.S. DEP'T OF JUST. (Jan. 24, 2011), <https://www.justice.gov/crt/section-5-notices-submissions-116>; *Section 5 Notices of Submission: Notice of Preclearance Activity the Voting Rights Act of 1965, as Amended*, U.S. DEP'T OF JUST. (Feb. 28, 2011), <https://www.justice.gov/crt/notice-date-022811>.

⁹ See, e.g., Rob Arthur & Allison McCann, *How the Gutting of the Voting Rights Act Led to Hundreds of Closed Polls*, VICE NEWS (Oct. 16, 2018), https://news.vice.com/en_us/article/kz58qx/how-the-gutting-of-the-voting-rights-act-led-to-closed-polls.

¹⁰ See, e.g., Michael Pope, *Virginia Voter Roll Purges Attract Scrutiny*, WVTF (July 24, 2018), <https://www.wvtf.org/post/virginia-voter-roll-purges-attract-scrutiny#stream/0>; Tomas Lopez, *'Shelby County': One Year Later*, BRENNAN CTR. FOR JUST. (June 24, 2014), <https://www.brennan-center.org/our-work/research-reports/shelby-county-one-year-later>.

¹¹ See Voting Rights Act of Virginia, HB 1890, § 24.2-129, 2021 Special Sess. (Va. April 7, 2021).

Voting Rights in Virginia Since 2006¹²

Summary Statistics

This section provides a basic overview of the statistics around Virginia elections, which alone reveal significant racial disparities in access to voting and ease of electoral participation in the state.

State Demographics

Virginia is home to 8,454,463 people.¹³ The state is 67.6 percent white, 19.2 percent Black, 9.4 percent Latino, and 6.5 percent Asian and Pacific Islander (“AAPI”).¹⁴ Since 2013, Virginia’s population has grown by 4.37 percent,¹⁵ including a 1.3 percent growth in the state’s Latino population and a 0.7 percent growth in the state’s AAPI population.¹⁶ Virginia’s citizen voting age population today is 6,140,257, an increase of 5.68 percent since 2013.¹⁷

Voter Participation: Registration and Turnout

In November 2020, there were 5,975,696 registered voters in Virginia,¹⁸ an increase of almost 700,000 registered voters since November 2014, the first national election after *Shelby County*.¹⁹ In November 2020, Virginia had the most registered voters since at least 1976 and saw historic voter turnout, with 81.48 percent of registered voters casting their ballots,²⁰ compared to 59.5 percent of voters in 2018, 72.05 percent in 2016, and 71.06 percent in 2012.²¹

¹² Voting rights in Virginia prior to 2006 are detailed in submissions to the record from the 2006 reauthorization of the Voting Rights Act of 1965. See, e.g., Earls, Millonzi, Seliski & Dixon, *supra* note 1.

¹³ U.S. CENSUS BUREAU, American Community Survey, 2019 American Community Survey 5-Year Estimates, Table DP05, <https://data.census.gov/cedsci/table?d=ACS%205-Year%20Estimates%20Data%20Profiles&tid=ACSDP5Y2019.DP05> (last accessed Aug. 9, 2021).

¹⁴ *Id.*

¹⁵ *Id.*; U.S. CENSUS BUREAU, American Community Survey, 2013 American Community Survey 5-Year Estimates, Table DP05, <https://data.census.gov/cedsci/table?d=ACS%205-Year%20Estimates%20Data%20Profiles&tid=ACSDP5Y2013.DP05> (last accessed Aug. 9, 2021).

¹⁶ U.S. CENSUS BUREAU, 2019 American Community Survey 5-Year Estimates, *supra* note 13; U.S. CENSUS BUREAU, 2013 American Community Survey 5-Year Estimates, *supra* note 15.

¹⁷ U.S. CENSUS BUREAU, 2019 American Community Survey 5-Year Estimates, *supra* note 13; U.S. CENSUS BUREAU, 2013 American Community Survey 5-Year Estimates, *supra* note 15.

¹⁸ VA. DEP’T OF ELECTIONS, Registration/Turnout Reports, <https://www.elections.virginia.gov/resultsreports/registrationturnout-statistics/> (last accessed Aug. 9, 2021).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

But voter registration and turnout are marked by racial disparities. While Virginia does not track voter registration or turnout by race and ethnicity, census estimates show that, during the November 2020 election, eligible voters of color were registered to vote at a lower rate than were white eligible voters.²² Turnout was also lower for voters of color compared to white voters.²³ The following table shows disparities in registration and turnout during the November 2020 election, disaggregated by race and ethnicity:

	<i>Percent regis- tered (Total)</i>	<i>Percent voted (Total)</i>
<i>White alone</i>	75.0	70.8
<i>White non-Hispanic alone</i>	79.4	75.9
<i>Black alone</i>	61.8	58.3
<i>Asian alone</i>	52.9	49.4
<i>Hispanic (of any race)</i>	39.9	32.1

Section 203 Language Access Coverage

Section 203 of the Voting Rights Act requires certain states and localities to provide language assistance during elections for certain language minority groups, to ensure that those groups can participate fully in the electoral process.²⁴ Section 203 coverage was most recently reauthorized by the Census Bureau in 2016.²⁵

Fairfax County, near Washington D.C., is the only jurisdiction in Virginia that is covered by

²² U.S. CENSUS BUREAU, Voting and Registration in the Election of November 2020, P20 Table 4b (April 2021), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html>.

²³ *Id.*

²⁴ See Voting Rights Act, Section 203, 52 U.S.C. § 10503(c) (“Whenever any State or political subdivision [covered by the section] provides registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language.”).

²⁵ Voting Rights Act Amendments of 2006, Determinations Under Section 203, 81 Fed. Reg. 87532, 87538 (Dec. 5, 2016).

Section 203.²⁶ Because of its sizeable Latino and Vietnamese populations,²⁷ Fairfax County is required to provide all electoral materials in Spanish and Vietnamese, as well as in English.²⁸ The county was first covered by Section 203 for Spanish in 2011, and for Vietnamese in 2016.²⁹ When Spanish became covered in 2011, the Latino citizen voting age population in Fairfax County was 52,797.³⁰ During the 2016 reauthorization, the Latino citizen voting age population was 61,332.³¹ The Vietnamese citizen voting age population was 114,360 when the language became covered by Section 203 in 2016, during the statute's reauthorization.³²

Minority Representation Among Elected Officeholders

There has been a historic—and ongoing—lack of representation in Virginia of racial minorities in elected office. Indeed, Reconstruction was the height of Black representation in Virginia's General Assembly: the state has never had as many Black legislators as it did in 1869.³³ In 2020, only 21 percent of the Virginia House of Delegates identified as minorities,³⁴ despite more than 33 percent of the state's population identifying as nonwhite.³⁵ Thus, the pattern of insufficient representation for Virginia's minority communities continues.

Shockingly, a woman of color has never once held statewide office in Virginia.³⁶ And the state's

²⁶ See *id.*

²⁷ In Fairfax County, 9.9 percent of the citizen voting age population identifies as Latino, and 16.6 percent identify as Asian. U.S. CENSUS BUREAU, 2019 American Community Survey 5-Year Estimates, *supra* note 13.

²⁸ See Voting Rights Act, § 203, 52 U.S.C. § 10503; see also Voting Rights Act Amendments of 2006, Determinations Under Section 203, *supra* note 25.

²⁹ See Voting Rights Act Amendments of 2006, Determinations Under Section 203, *supra* note 25; Voting Rights Act Amendments of 2006, Determinations Under Section 203, 76 Fed. Reg. 63602, 63607 (Oct. 13, 2011).

³⁰ U.S. CENSUS BUREAU, Section 203 Determinations Table (Dec. 5, 2016), <https://www.census.gov/data/tables/2016/dec/rdo/section-203-determinations.html>.

³¹ *Id.*

³² *Id.*

³³ See Mallory Noe-Payne, *The Powerful Heritage and Growing Clout of Virginia's Legislative Black Caucus*, RADIO WVTM (Jan. 16, 2020), <https://www.wvtf.org/post/powerful-heritage-and-growing-clout-virginias-legislative-black-caucus#stream/0>; VA. GEN. ASSEMBLY, African American Legislators in Virginia, http://mlkcommission.dls.virginia.gov/lincoln/african_americans.html (last accessed Aug. 9, 2021).

³⁴ NAT'L CONF. OF STATE LEGIS., *State Legislator Demographics* (Dec. 1, 2020), <https://www.ncsl.org/research/about-state-legislatures/state-legislator-demographics.aspx>.

³⁵ See U.S. CENSUS BUREAU, 2019 American Community Survey 5-Year Estimates, *supra* note 13.

³⁶ See Antonio Olivio, *Regardless of Outcome, Virginia Lieutenant Governor's Race Will Make History*, WASH. POST (June 9, 2021), <https://www.washingtonpost.com/local/virginia-politics/virginia-lieutenant-governor-woman/2021/06/09/573eba66-c947-11eb-afd0->

only Black governor, L. Douglas Wilder, was not elected until 1990 and served just one term in office.³⁷ Likewise, today, only two of Virginia's eleven U.S. congressional members are Black, while nine members are white. Virginia has never had a Black U.S. Senator.³⁸

Representation of racial minorities in elected office is no better at the local level. For example, in Virginia Beach—the most populous city in the state, where 19 percent of the population is Black, 8.2 percent Latino, and 6.8 percent AAPI³⁹—only six people of color have ever been elected to the City Council, and, barring special circumstances, no Black official in city government has ever been reelected.⁴⁰

These statistics highlight starkly the historical and persistent problem of underrepresentation of Virginia's minority communities, both in voting and in office. But this is not just a story of statistics; the racial discrimination that these numbers reveal reflects the experience of real Virginians stymied in their effort to vote and participate equally in American democracy.

The Broad Scope of Racial Discrimination in Virginia Elections

Racial discrimination in voting in Virginia takes several forms and is a current and ongoing problem in the state, not merely a condition of the past. Indeed, since the Supreme Court's decision in *Shelby County*, cities and counties across Virginia, and the state itself, have engaged in voter suppression, intimidation, and dilution with impunity, undermining the representative nature of democratic processes in the Commonwealth.

Without federal oversight, Virginia has eroded minority voters' electoral participation and influence through repressive state election laws, restrictions on in-person voting, discrimination in redistricting, and felony disenfranchisement. The COVID-19 pandemic has further exacerbated existing racial disparities in the right to vote in Virginia.

[9726f7ec0ba6_story.html](#). L. Douglas Wilder also holds the distinction of being Virginia's only Black Lieutenant Governor, having served in that office from 1986 to 1990. See VA. MUSEUM OF HIST. & CULTURE, *L. Douglas Wilder*, <https://virginiahistory.org/learn/l-douglas-wilder> (last accessed Aug. 9, 2021).

³⁷ See Va. Museum of Hist. & Culture, *supra* note 36.

³⁸ See U.S. SENATE, *African American Senators*, https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/Photo_Exhibit_African_American_Senators.htm (last accessed Aug. 10, 2021).

³⁹ U.S. CENSUS BUREAU, 2019 American Community Survey 5-Year Estimates, *supra* note 13.

⁴⁰ See *infra*, "Racial Discrimination in Voting Through the Lens of Ongoing Litigation: *Holloway, et. al. v. City of Virginia Beach*," at 46.

Racial Discrimination in State Election Laws

In the absence of preclearance, the state of Virginia has enacted numerous state election laws that disproportionately—and too often intentionally—prevent voters of color from exercising their right to vote.

The past 15 years have seen two distinct, and inconsistent, approaches to voting rights by the state. In 2021, Virginia has been one of 25 states to enact laws with provisions *expanding* voting access.⁴¹ For example, the state has recently taken an expansive approach to vote by mail.⁴² It now allows all eligible voters to vote by mail; maintains a permanent mail voting list; operates a uniform mail ballot notice and cure process; allows online ballot tracking and ballot drop boxes; and does not have voter ID, notary, or enhanced witness signature requirements for vote by mail.⁴³ In 2021, Governor Ralph Northam has also taken significant steps to restore voting rights to formerly incarcerated Virginians.⁴⁴ Finally, this year, the state became only the fourth in the country to adopt its own state Voting Rights Act, which requires state-level notice or preclearance for certain changes to election laws.⁴⁵

Virginia's recent expansion of voting rights is indeed laudable. But it is an historical aberration: just a few years ago, Virginia's state voting laws were decidedly anti-voter. Indeed, you can count on one hand the number of years in which Virginia officials have expanded, rather than limited, voting rights. The state has not demonstrated sufficient advancements to render federal preclearance obsolete, and recent reforms must not obscure the ongoing problems in the state that preclearance under the Voting Rights Advancement Act would prevent.

A 2018 study from Northern Illinois University illustrates this point; the study's authors ranked Virginia as the second-most-difficult state in which to vote, second only to Mississippi.⁴⁶ The study indexed state voting laws—looking at whether states allow Election Day, online, and

⁴¹ *Voting Laws Roundup: July 2021*, BRENNAN CTR. FOR JUST. (July 22, 2021), <https://www.brennan-center.org/our-work/research-reports/voting-laws-roundup-july-2021>.

⁴² See generally Caleb Jackson & Valencia Richardson, *State Scorecard: 2021 Grades for Vote by Mail and Early Voting Opportunities*, CAMPAIGN LEGAL CTR., at 28 (July 2021), <https://campaignlegal.org/document/state-scorecard-2021-grades-vote-mail-and-early-voting-opportunities>.

⁴³ See *id.*

⁴⁴ See *Voting Rights Restoration Efforts in Virginia*, BRENNAN CTR. FOR JUST. (last updated Mar. 16, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-virginia>.

⁴⁵ See Voting Rights Act of Virginia, *supra* note 11.

⁴⁶ Quan Li, Michael J. Pomantell & Scot Schraufnagel, *Cost of Voting in the American States*, 17.3 ELECTION LAW J. 234, 240 (2018).

automatic registration; voting rights for people convicted of felonies; the availability of early and mail voting; and whether a state has passed voter ID laws—in order to compare the relative ease of voting across states.⁴⁷ As one author of the study noted, states with larger Black population tend to score higher on this “cost of voting” index.⁴⁸

Such has been the case in Virginia.

Virginia—where nearly 20 percent of residents identify as Black,⁴⁹ over 60 percent higher than the national average⁵⁰—has been home to many laws since 2006 which increased the cost of voting for Black voters and other voters of color. For example, until 2020,⁵¹ mail-in and in-person absentee voting were allowed, but only if voters had one of a limited number of approved reasons to vote absentee.⁵² And, from 2013 until 2020, Virginia required all voters to present photo identification to vote.⁵³ As explained below, laws like these erect deliberate barriers to voting and even if they are facially race-neutral, have a disproportionate impact on voters of color. Further, given the current national trend towards laws that restrict the freedom to vote,⁵⁴ Virginia’s past voter suppression tactics could again become its future without the preclearance safeguards of the John Lewis Voting Rights Advancement Act.

Since *Shelby County*, the Virginia legislature has employed numerous and diverse strategies to make voting harder, especially for voters of color, including voter ID laws, voter registration database cross-checking, off-year state elections, and restrictions on early and absentee voting.⁵⁵ These are exactly the type of anti-voter tactics that a preclearance system could prevent.

⁴⁷ Mechelle Hankerson, *Study finds there’s only one state in the U.S. where it’s harder to vote than in Virginia*, VA. MERCURY (Oct. 22, 2018), <https://www.virginiamercury.com/blog-va/study-finds-theres-only-one-state-in-the-u-s-where-its-harder-to-vote-than-in-virginia/>.

⁴⁸ *Id.*

⁴⁹ U.S. CENSUS BUREAU, *QuickFacts: Virginia* (2019), <https://www.census.gov/quickfacts/VA>.

⁵⁰ Karen R. Humes, Nicholas A. Jones & Roberto R. Ramirez, *Race and Hispanic Origin and the 2010 Census*, U.S. CENSUS BUREAU (Mar. 24, 2011), <https://www.census.gov/newsroom/blogs/random-samplings/2011/03/race-and-hispanic-origin-and-the-2010-census.html>.

⁵¹ Va. Code Ann. § 24.2-700.

⁵² Hankerson, *supra* note 47.

⁵³ *Id.*

⁵⁴ *Voting Laws Roundup: July 2021*, BRENNAN CTR. FOR JUST., *supra* note 41 (finding that, “[e]ighteen states have already enacted 30 laws this year that will make it harder for Americans to vote.”)

⁵⁵ *Voter Suppression in Virginia*, LOC. MAJORITY 1 (2017), https://localmajority.org/wp-content/uploads/2017/08/VA.votingrights.kp_6.11.17-1.pdf.

Voter ID Laws

In 2013, the Virginia General Assembly passed SB 1256, which required all voters to present photo identification when voting in person.⁵⁶ This law targeted, and consequently disproportionately impacted, low-income voters and voters of color. First, low-income voters and voters of color are less likely to have the types of identification needed to vote—a driver’s license, U.S. passport, college ID, or employee ID—meaning that these voters were disproportionately required either to obtain a free voter ID, as provided by the law, or be barred from voting.⁵⁷ Second, low-income voters and voters of color are more likely to face inflexible work hours and limited transportation options, which hinder their ability to go in-person to obtain an ID to vote.⁵⁸ Third, among voters unable to obtain the required ID in time to vote, low-income voters and voters of color were more likely to be unduly burdened by provisional ballot requirements,⁵⁹ leading to their disenfranchisement at disproportionate rates.⁶⁰

Federal litigation around Virginia’s voter ID law demonstrated its discriminatory impact.⁶¹ In *Lee v. Virginia State Board of Elections*, three Black voters alleged that the state’s new voter

⁵⁶ *Id.*

⁵⁷ *Id.* at 2. Although the ID itself may be free, there are often associated costs with obtaining it—such as transportation to the elections office or postage to mail in paperwork. See *id.*

⁵⁸ See Hearing on “Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot” Before the Committee on H. Admin. Subcomm. on Elections, 117th Cong. 6 (June 11, 2021) (statement of Danielle Lang, Director of Voting Rights, Campaign Legal Center), <https://docs.house.gov/meetings/HA/HA08/20210611/112747/HHRG-117-HA08-Wstate-LangD-20210611.pdf>.

⁵⁹ Provisional ballots are used to ensure that a voter’s ballot is not excluded due to uncertainty about the voter’s eligibility to vote or a correctable, administrative error. “Also referred to as ‘challenge ballots’ or ‘affidavit ballots’ in some states, they are required by the federal Help America Vote Act of 2002 (HAVA). When there is uncertainty about a voter’s eligibility—the potential voter’s name is not on the voter rolls, a required identification document isn’t available or other issues—the election official is required to offer the voter a provisional ballot instead of a regular ballot. In nearly all of the states, after being cast, the provisional ballot is kept separate from other ballots until after the election. A determination is then made as to whether the voter was eligible to vote, and therefore whether the ballot is to be counted.” *Provisional Ballots*, NAT’L CONF. OF STATE LEGIS. (Jul. 22, 2021), <https://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx>.

⁶⁰ See, e.g., Joshua Field, Charles Posner & Anna Chu, CTR. FOR AM. PROGRESS, *Uncounted Votes: The Racially Discriminatory Effects of Provisional Ballots* 1-2 (Oct. 2014), [https://cdn.american-progress.org/wp-content/uploads/2014/10/ProvisionalBallots-report.pdf\[...\]=2.243008386.1469165157.1628084333-1475051755.1628084333](https://cdn.american-progress.org/wp-content/uploads/2014/10/ProvisionalBallots-report.pdf[...]=2.243008386.1469165157.1628084333-1475051755.1628084333) (demonstrating how provisional ballot rejection rates can disproportionately disenfranchise voters of color).

⁶¹ See *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577 (E.D. Va. 2016).

ID law was enacted with discriminatory intent and caused a disparate impact on Black and Latino voters, as well as on young voters, in violation of the VRA.⁶² Plaintiffs argued that the voter ID law was discriminatory because low income voters, voters of color, and young voters were more likely to lack the time, financial resources, and transportation necessary to obtain a valid photo ID,⁶³ and because the law was “consistent with the long line of actions taken over Virginia’s history to suppress minority vote.”⁶⁴

Despite ample evidence of the disparate impact the new photo ID requirement had on communities of color,⁶⁵ the district court in *Lee* rejected the plaintiffs’ arguments, in large part because the state offered free IDs to voters without one, and because another state Board of Elections rule permitted otherwise valid IDs that had expired within a year to be used for voting.⁶⁶ The court also accepted the state’s argument that requiring voters to show identification in order to vote strengthens the integrity of the electoral system and voters’ confidence in that system.⁶⁷ Even still, the court acknowledged that hundreds of voters without an ID who tried to vote in prior elections became so angry or “disgruntled” with the need to use a provisional ballot that they gave up and never cured their ballots or got a valid form of ID, and thus were disenfranchised.⁶⁸

Plaintiffs also presented evidence that the new requirements imposed a burden on college students, on the elderly and disabled, and, particularly, on low-income voters of color. The plaintiffs showed how, for many voters, transportation limitations, inflexible work schedules, and other costs created significant barriers to accessing the registrar’s office.⁶⁹ Other voters were physically unable to leave their homes to obtain an ID.⁷⁰ Despite this ample evidence, the court refused to accept that this was a widespread problem or one caused with the purpose or effect of preventing Black, Latino, or young voters from being able to vote.⁷¹ Ultimately, the district court found the voter ID law did not impose a genuine impediment to accessing the right to vote.⁷² The Fourth Circuit affirmed the district court’s ruling, thereby

⁶² *Id.* at 581-82.

⁶³ *Id.* at 594.

⁶⁴ *Id.* at 592.

⁶⁵ *Id.*

⁶⁶ *Id.* at 588.

⁶⁷ *Id.*

⁶⁸ *Id.* at 593.

⁶⁹ *See id.* at 589-90.

⁷⁰ *Id.*

⁷¹ *Id.* at 593, 609-10.

⁷² *Id.* at 610.

allowing the state's discriminatory law to remain in effect.⁷³

Luckily in this case, Virginia's voter ID law was repealed in 2020 – after it was in effect for eight years and multiple election cycles.⁷⁴ Without the Voting Rights Advancement Act's preclearance requirement, discriminatory voter suppression tactics like this could be revived, if political power in the future changes hands. Virginians deserve a federal guarantee that their freedom to vote will not be restricted in the years to come.

Database Cross-Checking

Another means of voter suppression the state of Virginia has employed is an erroneous database cross-checking system—i.e., a process in which voter registration records shared between states or between different state agencies are cross-checked to identify and purge voters seemingly registered in more than one place.⁷⁵ While voter list maintenance can seem unobjectionable, the process is prone to matching errors if not performed properly.⁷⁶ In cases of false positives leading to removal from the rolls, database cross-checking can disenfranchise significant numbers of eligible voters.

In Virginia, database cross-checking identified 342,556 voters in 2014 who were allegedly registered to vote in Virginia and another state.⁷⁷ Thirteen percent of those voters—more than 41,000 individuals—were purged from the voter rolls, most of them “just before Election Day.”⁷⁸ Preclearance would prevent methodologically dubious purges such as these—which don't give voters enough time to correct potential errors—and make list maintenance more transparent.⁷⁹

Some database cross-checking programs may also disproportionately affect racial minorities.⁸⁰ For example, experts argue that some database cross-checking programs

⁷³ *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 608 (4th Cir. 2016).

⁷⁴ S.B. 65, 2020 Session (Va. April 10, 2020).

⁷⁵ LOC. MAJORITY, *supra* note 55, at 3.

⁷⁶ *Id.*; Kim Zetter, *Voter Database Glitches Could Disenfranchise Thousands*, WIRED (Sept. 16, 2008), <https://www.wired.com/2008/09/voter-database-glitches-could-disenfranchise-thousands/?currentPage=all>.

⁷⁷ Greg Palast, *The GOP's Stealth War Against Voters*, ROLLING STONE (Aug. 24, 2016), <https://www.rollingstone.com/politics/politics-features/the-gops-stealth-war-against-voters-247905/>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

disproportionately flag Black, Latino, and Asian voters as being registered in more than one state, because they are more likely to have common last names and, thus, seemingly duplicative registrations (i.e., more than one “Joe Smith”):⁸¹

“U.S. Census data shows that minorities are overrepresented in 85 of 100 of the most common last names. If your name is Washington, there’s an 89 percent chance you’re African-American. If your last name is Hernandez, there’s a 94 percent chance you’re Hispanic. If your name is Kim, there’s a 95 percent chance you’re Asian.”⁸²

Despite claiming to use middle names, birthdates, and Social Security numbers as verification to avoid erroneous voter purges, there is little evidence that state officials regularly and systematically take these precautions.

In 2017, the Virginia legislature passed HB 2343, which required the state Department of Elections to provide county registrars with a list of all voters in their locality who were flagged through interstate database cross-checking—a common and effective voter purge tactic.⁸³ The governor vetoed the bill,⁸⁴ but database cross-checking remains alive and well elsewhere, and may yet become a tool of voter suppression in the state of Virginia. Virginians—and all Americans—deserve federal standards that require states and localities to consider the racial impact of election measures, like database cross-checking, before they can be implemented.

Off-Year Elections and Restrictions on Early and Absentee Voting

The state of Virginia has employed a myriad of other vote suppression tactics. For example, Virginia’s state-level elections are held in odd numbered years—off-years relative to federal elections. This scheme dates to Virginia’s antebellum 1851 Constitution,⁸⁵ and has been shown to suppress voter turnout.⁸⁶ A 2015 bill that would have moved Virginia state elections to even years didn’t even make it out of subcommittee.⁸⁷ Further, Virginia did not adopt no-excuse

⁸¹ *Id.*

⁸² LOC. MAJORITY, *supra* note 55, at 4.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Ben Paviour, *A Brief History of Virginia’s Off-Year Elections*, VPM (Oct. 25, 2019), <https://vpm.org/news/articles/7927/a-brief-history-of-virginias-off-year-elections>.

⁸⁶ LOC. MAJORITY, *supra* note 55, at 5.

⁸⁷ See HJ 547, 2015 Sess. (Va.), <https://lis.virginia.gov/cgi-bin/legp604.exe?151+sum+HJ547&151+sum+HJ547>.

absentee voting until 2020.⁸⁸

Aside from Virginia's past structural restrictions on the right to vote, the state has also struggled with implementation of its election laws. In 2020, for example, a federal judge ordered that Virginia's voter registration deadline be extended by two days after the state's online voter registration system malfunctioned on the last day of registration.⁸⁹ The disruption prevented thousands of individuals from registering to vote. Racial and ethnic minorities were particularly affected by this delay, as minorities tend to register to vote at disproportionately higher rates during the final days of the registration period.⁹⁰

Recent efforts by the state of Virginia to restrict the right of its people to vote and participate in American democracy illustrate the need for preclearance, to ensure that this freedom does not depend solely on the political will of state politicians.

Racial Discrimination in In-Person Voting

In addition to discriminatory laws at the state level, localities across Virginia have, since *Shelby County*, imposed an unprecedented number of restrictions on in-person voting locations, i.e., polling places.⁹¹ Decisions regarding Virginia's polling places are made by local elected officials, without any requirement of public notice or input.⁹² Congressional legislation like the John Lewis Voting Rights Advancement Act would change this, requiring states and localities to provide public notice and receive public input about all proposed polling place changes and prohibiting any that would negatively impact voters of color.

⁸⁸ LOC. MAJORITY, *supra* note 55, at 5.

⁸⁹ Order on Pls.' Mot. for Temporary Restraining Order and Emergency Injunctive Relief, *New Va. Majority Educ. Fund v. Va. Dep't of Elections*, No. 3:20-cv-801, 2020 WL 6051855, at *2 (E.D. Va. Oct. 14, 2020); see also Antonio Olivo, *Federal judge extends Virginia voter registration through Thursday*, WASH. POST (Oct. 14, 2020), https://www.washingtonpost.com/local/va-politics/virginia-voter-registration-extended/2020/10/14/837e6ed6-0db9-11eb-b1e8-16b59b92b36d_story.html.

⁹⁰ Br. in Support of Mot. For Temporary Restraining Order and Emergency Injunctive Relief at 8-9, *New Va. Majority Educ. Fund v. Va. Dep't of Elections*, No. 3:20-cv-801 (Oct. 13, 2020), ECF No. 4.

⁹¹ See, e.g., LEADERSHIP CONF. EDUC. FUND, *Democracy Diverted: Polling Place Closures and the Right to Vote* 10 (Sept. 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf> (documenting 1,688 polling place closures nationwide between 2012 and 2018).

⁹² While Virginia law requires counties to notify voters of newly *adopted* changes to polling locations within fifteen days of an election, it does not require notification of *proposed* changes. See Va. Code Ann. § 24.2-306(B).

This is critical because polling places—where many voters register to vote, update their registrations, and cast their ballots (either early or on Election Day)—are a bedrock of our electoral system.⁹³ The quality of polling places—their number, location, accessibility, and resources—affects voter participation and confidence, thereby affecting the health and representative nature of American democracy.⁹⁴

But free from the guardrails of preclearance, many jurisdictions have undermined in-person voting, by closing, consolidating, and relocating polling places, often without proper notice to impacted voters.

In Virginia, cities and counties across the state have closed and relocated numerous polling locations, disproportionately threatening voter turnout in minority communities. Under state law, localities may act without public notice about proposed changes or justification for their ultimate decisions, thereby denying vulnerable communities a chance to advocate for in-person voting locations that best serve the needs of voters in those communities. The closure, consolidation, and relocation of polling places, in turn, prolongs wait times to vote and exacerbates voter confusion, problems which depress turnout and risk disenfranchisement.⁹⁵ All of these harms disproportionately burden voters of color and other historically marginalized groups,⁹⁶ frustrating the purpose of the Voting Rights Act and demonstrating

⁹³ See *Election Administration and Voting Survey: 2018 Comprehensive Report*, U.S. ELECTION ASSISTANCE COMM'N 7, 12 (June 2019), https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf (documenting more than 230,000 polling places used by almost 88 million Americans voting in-person, either early or on Election Day, during the 2018 elections).

⁹⁴ See, e.g., VOTING RIGHTS LAB, *Polling Place Consolidation: Negative Impacts on Turnout and Equity* 7 (July 2020), <https://votingrightslab.org/wp-content/uploads/2021/01/Polling-Place-Consolidation-Negative-Impacts-on-Turnout-and-Equity.pdf> (“Longer distances to polling places ha[ve] been shown to reduce turnout in both large and small elections.”); Matt A. Barreto, Mara Cohen-Marks & Nathan D. Woods, *Are All Precincts Created Equal? The Prevalence of Low-Quality Precincts in Low-Income and Minority Communities*, 62 POL. RSCH. Q. 445, 454 (Sep. 22, 2008) (“[I]f a voter becomes familiar with his or her precinct location because it has been used year after year, this alone may have a significant impact on turnout”); Daniel Garisto, *Smartphone Data Show Voters in Black Neighborhoods Wait Longer*, SCI. AM. (Oct. 1, 2019), <https://www.scientificamerican.com/article/smartphone-data-show-voters-in-black-neighborhoods-wait-longer1> (finding that, in 2012, long lines at the polls were estimated to have deterred between 500,000 and 700,000 voters from casting their ballot).

⁹⁵ See, e.g., VOTING RIGHTS LAB, *supra* note 94; Barreto, Cohen-Marks & Woods, *supra* note 94; Garisto, *supra* note 94.

⁹⁶ See, e.g., Stephen Fowler, *Why Do Nonwhite Georgia Voters Have to Wait In Line For Hours? Too Few Polling Places*, NPR (Oct. 17, 2020), <https://www.npr.org/2020/10/17/924527679/why-do-nonwhite-georgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl>; Mark Nichols,

the need for federal legislative action to protect voters' ability to meaningfully access polling places.

Despite growing voter turnout across the country,⁹⁷ states have closed and moved polling places at an unprecedented rate since *Shelby County*. Between 2012 and 2018, at least 1,688 polling locations closed in states previously subject to preclearance.⁹⁸ Although some states offered non-race-related rationales—such as budgetary restrictions and the need to comply with the Americans with Disabilities Act (“ADA”)—to justify reductions in polling locations, without preclearance there is no process to ensure that such changes to polling places do not discriminate, intentionally or not, against voters of color.⁹⁹ Moreover, many jurisdictions offer no explanation at all for changes in polling place locations.¹⁰⁰

Because states are no longer compelled to track or publicize poll closures or changes, as preclearance required, it is extremely difficult to know what has happened to access to in-person voting across the country. Virginia, for example, does not even have reliable enough data to

Closed voting sites hit minority counties harder for busy midterm elections, USA TODAY (Oct. 30, 2018), <https://www.usatoday.com/story/news/2018/10/30/midterm-elections-closed-voting-sites-impact-minority-voter-turnout/1774221002/>; Alexa Ura, Chris Essig & Madison Dong, *Polling places for urban voters of color would be cut under Texas Senate's version of voting bill being negotiated with House*, TEX. TRIB. (May 23, 2021), <https://www.texastribune.org/2021/05/23/texas-voting-polling-restrictions/>.

⁹⁷ For example, from 2014 to 2018: Alabama's voter turnout increased from 42.5 percent to 50.7 percent; Alaska's increased from 50.7 percent to 52.8 percent; Arizona's increased from 40.6 percent to 58.9 percent; Georgia's increased from 43.2 percent to 55.9 percent; Louisiana's increased from 50.2 percent to 54.2 percent; Mississippi's increased from 42.3 percent to 54.2 percent; South Carolina's increased from 42.4 percent to 48.7 percent; Texas's increased from 34.6 percent to 48.4 percent; and voter turnout in Virginia increased from 41.7 percent to 57.5 percent. See U.S. CENSUS BUREAU, Reported Voting and Registration for States: November 2014, Table 4a (Jul. 2015), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-577.html>; U.S. CENSUS BUREAU, Reported Voting and Registration for States: November 2018, Table 4a (Apr. 2019), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html>. Between 2016 and 2020, voter turnout continued to increase in all these states, including increasing from 68.2 percent to 71.5 percent in Virginia. See U.S. CENSUS BUREAU, Reported Voting and Registration for States: November 2020, Table 4a (Apr. 2021), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html>; U.S. CENSUS BUREAU, Reported Voting and Registration for States: November 2016, Table 4a (May 2017), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html>.

⁹⁸ LEADERSHIP CONF. EDUC. FUND, *Democracy Diverted*, *supra* note 91, at 10, 12.

⁹⁹ LEADERSHIP CONF. EDUC. FUND, *The Great Poll Closure* 5 (Nov. 2016), <http://civil-rightsdocs.info/pdf/reports/2016/poll-closure-report-web.pdf>.

¹⁰⁰ *Id.* at 19.

be able to analyze the extent of polling place closures and relocations across the state: in a national study conducted by the Leadership Conference Education Fund, the research arm of a coalition of over 200 civil rights groups, Virginia was the only state in the country for which polling place data was not available.¹⁰¹ Because polling place changes in Virginia are left up to localities, voters have more difficulties tracking polling place closures and changes absent a notice requirement.¹⁰²

Nationally, evidence shows that polling place closures and relocations disproportionately impact minority communities. Between 2012 and 2016, voters in majority-minority urban counties lost an average of seven polling locations and more than 200 poll workers.¹⁰³ Majority-white counties, on the other hand, lost an average of only two polling places and two poll workers.¹⁰⁴ A 2020 survey similarly found that only five percent of white respondents reported having trouble finding their polling location, compared to 15 percent of Black respondents and 14 percent of Latino respondents.¹⁰⁵

In Virginia too, polling place changes disproportionately threaten minority communities. Virginia law caps the number of registered voters each precinct can serve at 5,000.¹⁰⁶ Because of this, localities in Virginia have had to create new precincts to accommodate the increasing number of registered voters in the state; since 2016, Virginia cities and counties have added 72 new voting precincts.¹⁰⁷ But more precincts do not necessarily mean more polling locations in minority communities. Indeed, some Virginia localities have opted for one polling location to serve multiple precincts,¹⁰⁸ increasing the number of voters assigned to vote at a single polling place. This ultimately increases poll wait times and the burdens of transportation to and from the polls for voters—especially for voters of color who already wait longer at the polls on average than white voters.¹⁰⁹

¹⁰¹ *Id.* at 11.

¹⁰² See Va. Code Ann. § 24.2-307.

¹⁰³ Nichols, *supra* note 96.

¹⁰⁴ *Id.*

¹⁰⁵ Sarina Vij, *Why Minority Voters Have a Lower Voter Turnout: An Analysis of Current Restrictions*, AM. BAR ASS'N (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/why-minority-voters-have-a-lower-voter-turnout/.

¹⁰⁶ Va. Code Ann. § 24.2-307.

¹⁰⁷ Ben Paviour, *Virginia Adds Voting Precincts, Bucking Trends in South*, VPM (Oct. 30, 2020), <https://vpm.org/news/articles/17688/virginia-adds-voting-precincts-bucking-trends-in-south>.

¹⁰⁸ *Id.*

¹⁰⁹ Nick Iannelli, *How long does the average Va. Voter have to wait in line?*, WTOP NEWS (Apr. 27, 2018), <https://wtop.com/virginia/2018/04/long-average-va-voter-wait-line/>.

For example, during the November 2020 election, Henrico County, surrounding Richmond—30.9 percent of which is Black¹¹⁰—consolidated four polling places into existing sites.¹¹¹ Because state law allows multiple precincts to be assigned to the same polling place¹¹², the county maintained separate precincts *in the same building*: each had their own poll workers and entrances, heightening voter confusion.¹¹³

Chesterfield County, which is 24.5 percent Black and 9.5 percent Latino,¹¹⁴ actually added five new polling locations in 2020—but only after a shortage of polling locations in 2018 caused significant wait times at the polls for voters.¹¹⁵

Research shows that lengthy wait times at the polls depress voter turnout during the election at issue.¹¹⁶ Research also suggests that wait times at polling places depress *future* voter turnout.¹¹⁷ And these effects are not felt equally: voters of color are three times more likely than white voters to wait more than 30 minutes to vote and *six times* more likely to wait more than an hour.¹¹⁸ These stark racial disparities in polling place wait times are easily explained: polling

¹¹⁰ U.S. CENSUS BUREAU, *QuickFacts: Henrico County, Virginia* (2019), <https://www.census.gov/quickfacts/fact/table/henicocountyvirginia/PST045219>.

¹¹¹ Paviour, *Virginia Adds Voting Precincts*, *supra* note 107; see also *COVID-19 Pandemic Temp Polling Locations Change*, HENRICO CNTY., VA., <https://henrico.us/registrar/politicaldist-maps/polling-locations/covid19-temp-polling-locaitons-change/> (last visited Aug. 9, 2021).

¹¹² Va. Code Ann. § 24.2-307.

¹¹³ Paviour, *Virginia Adds Voting Precincts*, *supra* note 107.

¹¹⁴ U.S. CENSUS BUREAU, *QuickFacts: Chesterfield County, Virginia* (2019), <https://www.census.gov/quickfacts/fact/table/chesterfieldcountyvirginia/PST045219>.

¹¹⁵ Ian M. Stewart, *Following Long Lines and Ballot Issues in 2018, Chesterfield Says It's Ready For 2020 Primary*, VPM (Feb. 25, 2020), <https://vpm.org/news/articles/10921/following-long-lines-and-ballot-issues-in-2018-chesterfield-says-its-ready-for>.

¹¹⁶ See, e.g., Robert M. Stein et al., *Waiting to Vote in the 2016 Presidential Election: Evidence from a Multi-county Study*, 73 POL. RSCH. Q. 439 (Mar. 28, 2019) (finding higher rates of people leaving the check-in line at polling places with longer lines and waiting times to check-in and vote); Garisto, *supra* note 94 (finding that, in 2012, long lines were estimated to have deterred between 500,000 and 700,000 voters from casting their ballot); Barreto, Cohen-Marks & Woods, *supra* note 94 (reporting that voter turnout is significantly lower in Los Angeles polling places with longer lines and check-in times).

¹¹⁷ See Stephen Pettigrew, *The Downstream Consequences of Long Waits: How Lines at the Precinct Depress Future Turnout*, 71 ELECTORAL STUD. 102188 (June 2021) (finding that, for every additional hour a voter waits in line to vote, their probability of voting in the subsequent election drops by 1 percent).

¹¹⁸ Stephen Pettigrew, *The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials*, 132 POL. SCI. Q. 527, 527 (Sept. 20, 2017); see also Matt Vasilogambros, *Voting Lines Are Shorter – But Mostly for Whites*, STATELINE, PEW CHARITABLE TRUSTS (Feb. 15,

places in minority communities often have fewer resources, including fewer poll workers and voting machines per capita, to serve larger numbers of voters.¹¹⁹ Such was the case in Chesterfield County where, of the roughly 500 complaints made to the Virginia Department of Elections in 2018, 165 were about incidents in Chesterfield County, and nearly half of those 165 complaints were about long lines.¹²⁰ In fact, the lines at the polls in Chesterfield County were so long that a federal judge ordered two precincts in the county to extend their hours of operation on Election Day, which only exacerbated confusion for poll workers and voters about when they needed to cast their ballot.¹²¹

Long lines at the polls are a persistent and widespread problem in Virginia. In 2012, for example, individuals in Prince William County had to wait up to four hours to cast their ballot on Election Day.¹²² Voters in other Virginia localities faced similarly long lines: voters in Pentagon City waited outside in the cold for hours to vote, and Woodbridge polling locations had roughly two-hour wait times all day, starting when the polls opened at 7 a.m.¹²³ In Stafford County, one polling location—a small country church—had almost 1,000 voters before noon

2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/02/15/voting-lines-are-shorter-but-mostly-for-whites>. On average, Latino voters wait in lines 46 percent longer than white voters, and Black voters wait in line 45 percent longer than white voters. Hannah Klain, Kevin Morris, Max Feldman & Rebecca Ayala, *Waiting to Vote: Racial Disparities in Election Day Experiences*, BRENNAN CTR. FOR JUST. 4 (June 3, 2020), https://www.brennan-center.org/sites/default/files/2020-06/6_02_WaitingtoVote_FINAL.pdf.

¹¹⁹ See, e.g., Pettigrew, *The Racial Gap in Wait Times*, *supra* note 118, at 537-38 (“Perhaps the most important factor in determining how long a line to expect on Election Day is the number of resources—particularly voting machines and poll workers—that are provided to a precinct. . . . [P]recincts that have higher concentrations of white voters tend to receive larger numbers of poll workers and voting machines than precincts with more minority voters.”); Christopher Famighetti, Amanda Melillo & Myrna Pérez, *Election Day Long Lines: Resource Allocation*, BRENNAN CTR. FOR JUST. 1-2 (Sept. 15, 2014), <https://www.brennancenter.org/sites/default/files/publications/ElectionDayLongLines-ResourceAllocation.pdf> (finding that, in 2012, voters in precincts with more minorities had fewer voting machines and poll workers and experienced longer wait times; “the resources distributed to polling places are a key contributor to long lines”); Adam Rogers, *Why Are Lines at Polling Places So Long? Math*, WIRED (Oct. 30, 2020), <https://www.wired.com/story/why-are-lines-at-polling-places-so-long-math/> (“Fundamentally, the movement of the line is limited by how many resources are available to process the elements in the queue.”)

¹²⁰ Stewart, *supra* note 115.

¹²¹ *Id.*

¹²² Carol Morello & Jeremy Borden, *In battleground Virginia, long waits at the polls*, WASH. POST (Nov. 6, 2012), https://www.washingtonpost.com/local/virginia-politics/in-battleground-virginia-all-eyes-will-be-on-races-for-president-senate/2012/11/05/69eb061a-2770-11e2-b2a0-ae18d6159439_story.html.

¹²³ *Id.*

waiting in a line to vote.¹²⁴ Voters in Fairfax County were even seen forgoing voting on Election Day because of long wait times at the polls.¹²⁵

Virginia's wait times were the third worst in the country in 2012, behind only Florida and Maryland,¹²⁶ with roughly 12 percent of voters in the state forced to wait more than an hour to vote.¹²⁷ Delays were, in part, caused by breakdowns in voting equipment at polling locations, which prolonged wait times.¹²⁸ Since 2012, problems of long lines at the polls in Virginia have not improved. In 2016, the Bipartisan Policy Center reported that voters at 10 percent of polling places in the state, spread across 17 jurisdictions, had to wait more than 30 minutes to vote.¹²⁹

Long lines at polling places are especially likely in larger precincts in dense urban areas with high minority populations.¹³⁰ Such was the case in Prince William County, near Washington D.C., where a county task force found that minority voters were disproportionately affected by long lines at the polls.¹³¹

In addition to underserving minority communities by limiting and changing polling locations, counties and localities in Virginia have provided insufficient resources to serve polling places in minority communities, including too few voting machines and too few poll workers. In some places, the length of lines is clearly tied to inadequate resources: in 2012, the River Oaks precinct in Dumfries, Virginia—a community of interest for redistricting purposes due to its 77 percent minority population¹³²—was supplied just six voting machines to serve 5,100 voters, which predictably increased the wait time for voters. Voters were forced to wait four hours or longer to vote, with the last voters not able to cast their ballots until 10:46 p.m. on Election

¹²⁴ *Election Day 2012: Voters Contend with Long Lines*, POTOMAC LOC. NEWS (Nov. 6, 2012), <https://potomaclocal.com/2012/11/06/election-day-2012-voters-line-up-early/>.

¹²⁵ Morello & Borden, *supra* note 122.

¹²⁶ U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-850, *Elections: Observations on Wait Times for Voters on Election Day 2012*, at 88 (Sept. 2014), <https://www.gao.gov/assets/gao-14-850.pdf>.

¹²⁷ *Id.* at 24.

¹²⁸ Morello & Borden, *supra* note 122.

¹²⁹ Iannelli, *supra* note 109.

¹³⁰ *Id.*

¹³¹ See Jeremy Borden, *Report: High turnout, large precincts drove long lines in 2012 in Pr. William*, WASH. POST (June 13, 2013), https://www.washingtonpost.com/local/virginia-politics/report-high-turnout-large-precincts-drove-long-lines-in-2012-in-pr-william/2013/06/13/85f0aa6e-d449-11e2-a73e-826d299ff459_story.html.

¹³² *River Oaks Split Unpopular in Redistricting Process*, POTOMAC LOC. NEWS (Apr. 18, 2011), <https://potomaclocal.com/2011/04/18/river-oaks-split-unpopular-in-redistricting-process/>.

Day.¹³³ Although a county task force stated that there was no concerted effort to intentionally suppress minority votes, task force members acknowledged that the perception of voter suppression existed, because of the voting machine shortages and long wait times at the polls.¹³⁴ The task force did not and could not deny the fact that minority voters were disproportionately adversely affected by these problems.

Before *Shelby County*, the state of Virginia and localities within it would have been required to submit all plans for polling place changes to the DOJ for approval prior to enactment. But without preclearance, jurisdictions are no longer compelled to consider and explain to federal authorities the racial impact of their polling place and precinct changes. The result has been racial discrimination and disparities in access to in-person voting across the state.

Virginia Beach exemplifies this trend perfectly. Two months before the November 2019 state elections, the city attempted, without explanation, to move its elections office and central absentee ballot drop-off site to a location roughly one mile away from the closest bus stop, when the existing office was located immediately across from a bus stop.¹³⁵ The proposed move raised serious accessibility concerns given that, in 2018, nearly 15,000 voters cast absentee ballots at the local elections office, in addition to thousands more voters who cast their ballots there on Election Day.¹³⁶ The proposed move also would have disproportionately impacted Virginia Beach's low-income minority communities. Most of the city's bus lines serve low-income communities, where minorities make up between 47 to 61 percent of the population.¹³⁷ Thus, by moving the elections office farther away from the nearest bus stop, the city would have made its main office and absentee ballot location less accessible to voters dependent on public transportation.

¹³³ Borden, *supra* note 131.

¹³⁴ *Id.*

¹³⁵ Peter Coutu & Marie Albiges, *Virginia Beach leased building from state senator, hoping to make it new elections office*, VIRGINIA-PILOT (Sept. 4, 2019), <https://www.pilotonline.com/government/local/vp-nw-desteph-building-precinct-change-20190904-avzfm57cjaebiczjof76orany-story.html>.

¹³⁶ *Id.*

¹³⁷ See Hampton Roads Transit, *Title VI Program 2020-2023: Title IV of the Civil Rights Act of 1964*, at 109 (2020), <https://gohrt.com/wp-content/uploads/2020/09/HRT-Title-VI-Program-Plan-2020-to-2023.pdf> (Hampton Roads Transit, the bus line that services Virginia Beach, shows minority and low-income serviced routes in Figure 1: Census Tracts—Minority & Low Income Populations); *Id.* at 101-02 (showing that Virginia Beach bus routes 12, 15, 20, 21, 22, 27, 966, 967, and 972 predominantly serve low-income minority communities, and bus routes 26 and 36 serve large minority communities.).

Andrew Jackson, a Black Virginia Beach resident and local activist, asked city councilmembers at a public hearing if they had considered how people would use public transportation to get to the new location to cast their absentee ballots, and if the relocation was a form of voter suppression.¹³⁸ The city council did not address these questions but, due to accessibility concerns and potential conflicts of interest raised at public hearings,¹³⁹ ultimately voted to delay moving the in-person absentee voting site.¹⁴⁰ Importantly, because Virginia law does not require notification of proposed changes to polling locations, only those that are actually adopted,¹⁴¹ the community's success in preventing Virginia Beach from moving its election office to a less accessible location depended on voters learning—independently—of the proposed change in time to advocate against it.

The onus should not be on affected communities to ferret out potential polling place changes; preclearance is needed to restore the balance of power between historically disenfranchised communities of color and jurisdictions with a history of voting rights violations.

Today, the reality for many minority communities in Virginia is that restrictions on in-person voting discriminate, intentionally or not, against them by creating undue burdens on the right to vote. Virginia has been quick to follow national trends of closing, limiting, and relocating polling locations—disproportionately those that serve minority communities. These restrictions have, in turn, increased wait times at the polls, a problem that again disproportionately affects people of color. Prior to *Shelby County*, localities would have to submit these changes to polling places for preclearance, as jurisdictions would have had to demonstrate that proposed changes were free of a discriminatory purpose and effect. Preclearance is needed again to preserve the right of all Virginians to vote in-person.

Racial Discrimination in Redistricting

Congress must also enact preclearance to combat racially discriminatory gerrymanders, which pack minority voters into limited districts or disperse them across multiple districts in order to diffuse their voting strength. For both the state and federal redistricting plans,

¹³⁸ Patrick Wilson, *Va. Beach Council is Taken Aback by Site for Registrar*, RICHMOND TIMES-DISPATCH (Sept. 1, 2019), <https://www.pressreader.com/usa/richmond-times-dispatch-week-end/20190901/283154315334850/textview>.

¹³⁹ See Coutu & Albiges, *supra* note 135.

¹⁴⁰ Keya Vakil, *Virginia Beach City Council delays moving voting location to building owned by state senator*, VIRGINIA DOGWOOD (Sept. 5, 2019), <https://vadogwood.com/2019/09/05/virginia-beach-city-council-delays-moving-voting-location-to-building-owned-by-state-senator/>.

¹⁴¹ See Va. Code Ann. § 24.2-306(B).

Virginia has engaged in such racial gerrymandering to maintain white political power in the state. Courts found both the congressional and state house maps enacted following the 2010 Census to impermissibly gerrymander Virginia voters by race, packing Black voters into a limited number of districts to dilute their voting strength.

For example, voters from Virginia's Third Congressional District successfully challenged the congressional redistricting plan adopted in 2012, asserting that the legislative redrawing of their district constituted an unconstitutional racial gerrymander.¹⁴² In the original district court case, *Page v. Virginia State Board of Elections*, the three-judge panel agreed, holding that Virginia's use of race in the creation of congressional districts did not meet constitutional requirements: race predominated in the modification of the district's boundaries, and its use was not narrowly tailored to serve a compelling governmental interest.¹⁴³ Finding an impermissible racial gerrymander, the district court ordered the Virginia legislature to adopt a new redistricting plan.¹⁴⁴

The three-judge panel in the second iteration of the case similarly found that the "legislative record [was] replete with statements indicating that race was the legislature's paramount concern."¹⁴⁵ The district was drawn in an "odd shape" that created "a disparate chain of communities, predominantly African-American, loosely connected by the James River"; but for the river, many parts of the district would not be considered legally contiguous.¹⁴⁶ This use of water contiguity was simply a "means to bypass white communities and connect predominantly African-American populations,"¹⁴⁷ packing them into a single district to limit their voting strength.

The panel rejected the state's "post-hoc" rationale that the plan advanced partisan political advantage, rather than racial advantage, finding that race predominated over other considerations.¹⁴⁸ The legislative record confirmed this, as state legislators admitted openly that they had not considered political advantage, but rather race, when redistricting.¹⁴⁹ Data

¹⁴² *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1735 (2016).

¹⁴³ *Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533, 550, 553 (E.D. Va. 2014), *vacated*, *Cantor v. Personhuballah*, 575 U.S. 931 (2015).

¹⁴⁴ *Id.* at 555.

¹⁴⁵ *Page v. Va. State Bd. of Elections*, 2015 WL 3604029, at *8 (E.D. Va. June 5, 2015).

¹⁴⁶ *Id.* at *11.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at *14.

¹⁴⁹ See *id.* at *15 (noting "Defendants' 'explicit and repeated admissions,' of the predominance of race . . . made in the course of hearings on the House of Delegates floor") (citation omitted).

further confirmed this, showing that the state moved the precincts with the highest Black voting age population, while excluding predominately white precincts with high Democratic performance.¹⁵⁰ Given this evidence, the court found that the legislature’s redrawing of Virginia’s Third Congressional District constituted an unconstitutional racial gerrymander designed to suppress the voting strength of minority communities.¹⁵¹

The state declined to appeal the ruling, but three congressmen representing other Virginia congressional districts intervened to appeal directly to the Supreme Court.¹⁵² The district court had imposed a remedial plan on January 7, 2016,¹⁵³ which the three congressmen appealed, but ultimately the Supreme Court held that the intervenors lacked standing and, thus, declined to determine if the remedial plan would cause them any actual injury.¹⁵⁴

In another lawsuit, twelve Virginia voters from twelve state house districts challenged the state legislative districting plans.¹⁵⁵ They alleged that the newly drawn districts were racially gerrymandered, relying on race to pack Black voters into twelve majority-Black districts, each with a minimum Black voting age population of 55 percent.¹⁵⁶ The plaintiffs alleged that this 55 percent threshold imposed by the state was arbitrary, diluted Black voting power, and was not required under the Voting Rights Act for Black voters to elect their preferred candidates.¹⁵⁷ At first, the district court panel disagreed, finding that race was not a predominant factor in redistricting of eleven of the twelve districts.¹⁵⁸ But that decision was appealed to the Supreme Court, which determined that the district court applied the wrong legal standard, and remanded the case for another trial.¹⁵⁹ After a second trial, the same three-judge panel found “overwhelming evidence” that race predominated in the redrawing of districts and held the redistricting plan unconstitutional.¹⁶⁰

The court accepted plaintiffs’ considerable evidence showing that there was no other plausible explanation for the formation of the eleven districts at issue than “the unavoidable

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at *19.

¹⁵² *Wittman*, 136 S. Ct. at 1735.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1737.

¹⁵⁵ *See Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128 (E.D. Va. 2018).

¹⁵⁶ *Id.* at 136-37.

¹⁵⁷ *Id.*

¹⁵⁸ *See Bethune-Hill v. Va. State Bd. of Elections*, 141 F.Supp.3d 505, 505, 510–11 (E.D. Va. 2015).

¹⁵⁹ *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 796 (2017).

¹⁶⁰ *Bethune-Hill*, 326 F. Supp. 3d at 180.

conclusion that the challenged districts were designed to capture [B]lack voters with precision.”¹⁶¹ The court was particularly troubled by the level of “remarkable precision” used to create these majority-Black districts, noting that districts were divided along racial lines following small residential streets, and that, as neighborhoods transitioned from mostly white to mostly Black, they would be assigned to different districts; even a military base was separated along racial lines.¹⁶² Because of the clear racial motivation behind the redistricting plan, the court enjoined the state from holding elections in those districts before a new plan was adopted, and ordered the Virginia General Assembly to develop a new plan.¹⁶³ The State Attorney General’s office declined to appeal the ruling, but the House of Delegates intervened to appeal. As in *Wittman v. Personhuballah*, the challenge to Virginia’s congressional map, the Supreme Court found that the House of Delegates lacked standing and dismissed the case.

Racial gerrymandering in Virginia is yet another mechanism of diluting the voting strength of the state’s communities of color. Federal action is needed to restore preclearance and ensure that redistricting plans do not dilute minority voting power.

Racial Discrimination Through Felony Disenfranchisement

While the Voting Rights Advancement Act would not expressly combat the racial discrimination motivating felony disenfranchisement laws, Virginia’s history with felony disenfranchisement is closely linked—and a major contributor—to the state’s ongoing history of racial discrimination in voting, and must be understood as such. Furthermore, trends in felony disenfranchisement track trends in other areas of voting which would be subject to preclearance, such that this history underscores the need for federal reform.

Historically, Virginia has had some of the most restrictive felony disenfranchisement laws in the country: in 2015, it ranked among the top twelve states with the most restrictive laws governing restoration of rights and had the fourth highest rate of felony disenfranchisement.¹⁶⁴

Virginia’s Constitution permanently prohibits individuals convicted of a felony from voting in the state, unless the Governor restores their individual right to vote.¹⁶⁵ Because the Fourteenth

¹⁶¹ *Id.*

¹⁶² *Id.* at 148.

¹⁶³ *Id.* at 227.

¹⁶⁴ Press Release, Governor McAuliffe Announces New Reforms to Restoration of Rights Process (June 23, 2015), <https://www.governor.virginia.gov/newsroom/all-releases/2017/mcauliffe-administration/headline-826609-en.html>.

¹⁶⁵ Va. Const. Art. 2, § 1 (“No person who has been convicted of a felony shall be qualified to vote

Amendment authorizes states to disenfranchise individuals convicted of felonies,¹⁶⁶ and the U.S. Supreme Court has upheld states' right to disenfranchise individuals even after they have completed their sentence,¹⁶⁷ there have been few legal challenges to Virginia's felony disenfranchisement laws—despite ample evidence that these laws disproportionately affect racial and ethnic minorities, and that the disparity is particularly acute in Virginia. For example, in 2010, 20.37 percent of Virginia's Black population could not vote because of a felony conviction, compared to a national average of only 7.7 percent of Black Americans who are disenfranchised for the same reason.¹⁶⁸ This means that one in five Black Virginians are *permanently* disenfranchised, more than twice the state average discounting race.¹⁶⁹

Changes to Virginia's felony disenfranchisement laws have been left largely to the prerogatives of state officials, and it is only in the last decade that Virginia has begun to address the damaging effects of felony disenfranchisement. Starting in 2013, successive governors have used executive orders to restore the right to vote to disenfranchised Virginians. Governor McDonnell began with an order restoring voter eligibility to all individuals who were convicted of nonviolent felonies.¹⁷⁰ Unfortunately, the state's records failed to comprehensively track eligible individuals, meaning that Virginia could not effectively inform

unless his civil rights have been restored by the Governor or other appropriate authority.”). “Other appropriate authority” includes the President of the United States, other governors, and pardoning boards that have the authority to restore rights. The General Assembly and courts are not appropriate authorities. See 1999 Va. Op. Att’y Gen. 48 (1999).

¹⁶⁶ U.S. Const. amend. XIV § 2 (“when the right to vote . . . is denied to any of the male inhabitants of such State . . . except for participation in rebellion, or other crime . . .”).

¹⁶⁷ See *Richardson v. Ramirez*, 418 U.S. 24, 54-55 (1974) (“We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment’s applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court. . . . [W]e may rest on the demonstrably sound proposition that § 1, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement.”)

¹⁶⁸ Christopher Uggen, Sarah Shannon & Jeff Manza, *State-Level Estimates of Felon Disenfranchisement in the United States, 2010*, SENTENCING PROJECT 17 (July 2012), <https://www.sentencingproject.org/publications/state-level-estimates-of-felon-disenfranchisement-in-the-united-states-2010/>.

¹⁶⁹ *Id.*

¹⁷⁰ Errin Whack, *Va. Ramps up restoration of voting rights for some ex-felons*, WASH. POST (July 15, 2013), https://www.washingtonpost.com/local/virginia-politics/restoring-voting-rights-of-some-va-ex-felons-ramping-up-at-end-of-mcdonnells-term/2013/07/15/62455f4a-ed69-11e2-a1f9-000119080000_story.html.

past offenders about the status of their right to vote.¹⁷¹ In April 2014, Governor McAuliffe reduced the waiting time for individuals convicted of violent felonies to be able to apply to have their rights restored from five years to three years.¹⁷² At the same time, drug offenses were removed from the list of violent felonies—a significant development in a state where Black individuals represented 20 percent of the state population at the time but 60 percent of Virginians in prison, including 72 percent of Virginians incarcerated for drug offenses.¹⁷³

In 2015, Governor McAuliffe abolished the requirement that citizens must pay their court costs and administrative fees in full before they could apply to have their right to vote restored.¹⁷⁴ Tying the right to vote to payment of criminal administrative fees disproportionately impacted the state's racial minorities, given the significant wealth gap between white Virginians and Virginians of color. Between 2008 and 2018, for example, the socioeconomic gap between Black Virginians and other Virginians actually grew; today, Black Virginians' median family income is only roughly 70 percent of Virginia's total median family income.¹⁷⁵

Virginia's racial disparities in wealth, in turn, lead to greater vulnerability of individuals of color to criminal involvement, more costly prosecutions, and harsher sentences. For example, Black Virginians disproportionately forego legal representation, resulting in more convictions and disadvantageous plea bargains.¹⁷⁶ Wealth disparities also lead to lengthier and more costly

¹⁷¹ Dawnthea Price, *Felons slow to seek restoration of rights*, FREE LANCE-STAR (Sept. 18, 2013), https://fredericksburg.com/news/felons-slow-to-seek-restoration-of-rights/article_a07c07d3-91f6-5a9b-a398-27bea6219f50.html.

¹⁷² *Gov. McAuliffe expands voting rights for ex-convicts*, WASH. POST (Apr. 19, 2014), https://www.washingtonpost.com/opinions/gov-mcauliffe-expands-voting-rights-for-ex-convicts/2014/04/19/9ccfe76c-c733-11e3-9f37-7ce307c56815_story.html.

¹⁷³ Helen A. Gibson, *Felons and the Right to Vote in Virginia: a Historical Overview*, 91 VIRGINIA NEWS LETTER, at 7 (2015), https://ceps.coopercenter.org/sites/ceps/files/Virginia_News_Letter_2015_Vol._91_No_1.pdf.

¹⁷⁴ Press Release, Governor McAuliffe Announces New Reforms to Restoration of Rights Process, *supra* note 164.

¹⁷⁵ Hamilton Lombard, *Inside the Income Gap for some Black Virginians*, UNIV. OF VIRGINIA WALDEN COOPER CTR. FOR PUB. SERV. (July 31, 2020), <https://statchatva.org/2020/07/31/inside-the-income-gap-for-some-black-virginians/>.

¹⁷⁶ See *Report of The Sentencing Project to the United National Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance*, SENTENCING PROJECT, at 1 (2018), <https://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf> ("African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted, and once convicted, and they are more likely to experience lengthy prison sentences. . . . The source of such disparities is deeper and more systemic than explicit racial discrimination. The United States in effect operates two distinct criminal justice system: one for wealthy people and another for poor

sentences for Black Virginians.¹⁷⁷ One study concluded that a Black man in Virginia must earn an additional \$90,000 a year to receive the same sentencing treatment in court as a white man.¹⁷⁸ Thus, historically disenfranchised communities of color were the biggest beneficiaries when Governor McAuliffe eliminated the requirement that citizens pay their court costs and fees in full to have their voting rights restored.¹⁷⁹

Starting in April 2016, Governor McAuliffe issued a series of executive orders restoring the voting rights of all individuals convicted of felonies who had completed their sentences, including any community supervision, parole, or probation requirement.¹⁸⁰ The governor acknowledged that permanently depriving individuals of the right to vote based on a felony conviction perpetuated a racial injustice.¹⁸¹ As over half the disenfranchised population in Virginia is Black, Governor McAuliffe's executive order would have represented great strides toward improving racial equality in voting in Virginia.¹⁸²

The story of just one man proves this point. David Green, a Black man and lifelong Virginian, was arrested at the age of eighteen for cocaine distribution.¹⁸³ Due to a lack of family and community support, Mr. Green cycled in and out of prison for drug-related offenses until his early thirties, when he was able to get his life on track. Only after seven years of gainful employment and productive contributions to his community did Mr. Green have his right to vote

people and people of color."); see also Dave Ress, *Blacks more likely to get prison time in plea deals, Hampton Roads court data shows*, DAILY PRESS (Mar. 17, 2016), <https://www.dailypress.com/news/dp-nws-sunshine-disparities-20160317-story.html> ("[W]hites are far more likely to strike a deal that keeps them out of jail than African-Americans are, a Daily Press review of nearly 474,000 Hampton Roads case records shows. . . . For grand larceny – stealing goods worth more than \$200, among the lowest threshold for felony theft in the nation – 55 percent of whites negotiating plea deals received no jail time compared to 48 percent of African-Americans.").

¹⁷⁷ Ress, *supra* note 176.

¹⁷⁸ David Colarusso, *Uncovering Big Bias with Big Data: An Introduction to Linear Regression*, DATA DRIVEN LAW: DATA ANALYTICS AND THE NEW LEGAL SERVICES 173, 187 (Ed Walters ed., 2019).

¹⁷⁹ Press Release, Governor McAuliffe Announces New Reforms to Restoration of Rights Process, *supra* note 164.

¹⁸⁰ Camila Domonoske, *Virginia Court Overturns Order That Restored Voting Rights To Felons*, NPR (July 22, 2016), <https://www.npr.org/sections/thetwo-way/2016/07/22/487107922/virginia-court-overturns-order-that-restored-voting-rights-to-felons>.

¹⁸¹ *Id.*

¹⁸² *State-by-State Data: United States and Virginia*, SENTENCING PROJECT, <https://www.sentencingproject.org/the-facts/#map> (last visited Aug. 10, 2021).

¹⁸³ Brief of *Amici Curiae* David Green and Bridging the Gap in Virginia, Inc. In Support of Respondents and In Opposition to Petition for Writs of Mandamus and Prohibition, at 21-22, *Howell v. McAuliffe*, 292 Va. 320 (2016).

restored—due to the governor’s executive orders.¹⁸⁴ Indeed, Governor McAuliffe’s executive orders would have restored the right to vote to 77.79 percent of disenfranchised Black Virginians.¹⁸⁵

Despite these successes, the Virginia Supreme Court recently stifled voting rights restoration efforts for more than 206,000 Virginians.¹⁸⁶ In *Howell v. McAuliffe*, the Court ruled that the governor did not have the power to make prospective, blanket restoration orders to unnamed individuals without regard to the nature of the convicted offense.¹⁸⁷ As a result, the court ordered the Virginia Department of Elections to cancel the voter registrations of all individuals who had registered to vote under the governor’s executive orders.¹⁸⁸ The court also instructed the Virginia Secretary of State to delete records of any individual whose right to vote was restored because of the governor’s executive orders.¹⁸⁹ The Virginia Supreme Court thus effectively blocked the governor’s ability to restore through a single action the voting rights of hundreds of thousands of Virginians. Instead, Governor McAuliffe was forced to resort to signing restoration rights orders for batches of individuals every month, a circumscribed and far less effective means of restoring Virginians’ right to participate in our democratic processes.¹⁹⁰

Still, despite the decision in *Howell*, Virginia has continued to push through voting rights restoration for individuals with felony convictions. Just this year, Governor Northam restored the voting rights of 69,000 Virginians and ordered that, moving forward, all Virginians released from incarceration will qualify to have their rights restored, even while on community supervision.¹⁹¹ Governor Northam credited the inherent racism in felony disenfranchisement as the basis for his order: “Too many of [Virginia’s] laws were written during a time of open racism and discrimination, and they still bear the traces of inequity.”¹⁹²

Even more recently, Governor Northam abolished the death penalty in Virginia, a decision

¹⁸⁴ *Id.*

¹⁸⁵ Uggan, Shannon & Manza, *supra* note 168.

¹⁸⁶ See *Howell v. McAuliffe*, 292 Va. 320, 343 (2016).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 352.

¹⁸⁹ *Id.* at 352-53.

¹⁹⁰ Domonoske, *supra* note 180.

¹⁹¹ Press Release, Governor Northam Restores Civil Rights to Over 69,000 Virginians, Reforms Restoration of Rights Process (Mar. 16, 2021), <https://www.governor.virginia.gov/newsroom/all-releases/2021/march/headline-893864-en.html>.

¹⁹² *Id.*

that disproportionately impacts individuals of color.¹⁹³ Of the 377 individuals executed in Virginia in the 1900s, 78 percent of them were Black.¹⁹⁴ And while 73 Black people were executed for rape, attempted rape, or armed robbery during the 1990s, not a single white person was executed for those crimes during the same period.¹⁹⁵

For all the recent, positive developments to help address racial inequities in Virginia's criminal justice system and restore the right to vote to individuals with felony convictions, much work remains to be done. Nearly 16 percent of Black Virginians—190,605 people—remain disenfranchised for life as of 2020, unless the governor personally restores their individual right to vote.¹⁹⁶ Further, those gains that have been made have come entirely as a result of gubernatorial executive orders and the work of massive organizing by criminal justice advocates.¹⁹⁷ Executive action is easily undone when political power changes hands; the next governor could easily reverse current efforts to enfranchise citizens with felony convictions. The freedom of hundreds of thousands of Virginians to vote must not depend on who is in the governor's office.

Racial Discrimination in Elections During the COVID-19 Pandemic

Finally, the John Lewis Voting Rights Advancement Act would better protect voters of color from abridgements of their freedom to vote during times of national emergencies and disasters, including pandemics. The Act reflects an awareness that electoral participation does not occur in a vacuum; it occurs within a vast network of social, economic, and environmental factors that impact voters, their civic engagement, and their ability to participate in elections. The ongoing COVID-19 pandemic is emblematic of how systemic barriers to access magnify racial disparities in electoral participation and voting power.

The COVID-19 pandemic has exacerbated existing racial inequalities, including but not limited to barriers to the polls that disproportionately affect voters of color. Indeed, the racially disparate impact of COVID-19 has been so acute in Virginia that, in July 2021, the Richmond City

¹⁹³ Dakin Andone, *Why Virginia's abolition of the death penalty is a big deal for the state and the US*, CNN (Mar. 29, 2021), <https://www.cnn.com/2021/03/29/us/virginia-death-penalty-abolition-significance/index.html>.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *State-by-State Data: United States and Virginia*, SENTENCING PROJECT, *supra* note 182.

¹⁹⁷ See, e.g., John Gramlich, *Groups Push to Expand Ex-Felon Voting*, PEW CHARITABLE TRUSTS (Sept. 23, 2008), <https://www.pewtrusts.org/en/research-and-analysis/blogs/state-line/2008/09/23/groups-push-to-expand-xfelon-voting>.

Council joined over 200 American localities in declaring that “racism is a public health crisis.”¹⁹⁸

There have been more than ten lawsuits alleging that, during the COVID-19 pandemic, in-person voting requirements forced voters to choose between their health and their freedom to vote.¹⁹⁹ Restrictions that were challenged included in-person candidate signature requirements and witness signature requirements for absentee voting. For example, in *League of Women Voters of Virginia v. Virginia State Board of Elections*, voters alleged that the impact of the state’s witness signature requirement for absentee ballots was not born equally by all Virginians.²⁰⁰ Rather, racial disparities in serious illness and death due to COVID-19 were “inextricably linked” to racial discrimination against Black voters.²⁰¹

“A history of systemic racism and inequity in access to health care and economic opportunity has made many African Americans far more vulnerable to the virus. Black adults suffer from higher rates of obesity, diabetes and asthma, which make them more susceptible, and also are more likely to be uninsured. They also often report that medical professionals take their ailments less seriously when they seek treatment.”²⁰²

Thus, the personal health risks posed by certain in-person voting requirements—including requiring a witness signature on an absentee ballot—are greater for Black voters than for

¹⁹⁸ Chris Suarez & Sabrina Moreno, *Racism is a public health crisis, Richmond City Council declares*, RICHMOND TIMES-DISPATCH (July 26, 2021), https://richmond.com/news/local/govt-and-politics/racism-is-a-public-health-crisis-richmond-city-council-declares/article_ff209b54-03c6-5b9b-8f55-4a2e321a7039.html#tracking-source=home-top-story.

¹⁹⁹ See e.g., *Faulkner for Va. v. Va. Dept of Elections*, No. CL20001456-00 (Va. Cir. Ct. 2020) (granting a preliminary injunction to reduce the number of signatures required for a candidate to enter a senate primary); Compl. for Injunctive & Declaratory Relief, *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-cv-00024 (W.D. Va. 2020) (settling a complaint regarding witness signature requirements for absentee ballots); *Lean on McLean v. Showalter*, No. CL20001959-00 (Va. Cir. Ct. 2020) (granting a preliminary injunction to reduce the number of signatures required for a candidate to enter a mayoral primary); *Alberto v. City of Roanoke*, No. CL 20000997-00 (Va. Cir. Ct. 2020) (granting a preliminary injunction to reduce the number of signatures required for a candidate to enter a city council primary); *Swecker v. Showalter*, No. CL20005368-00 (Va. Cir. Ct. 2020) (concerning a Virginia Freedom of Information Act request for data on absentee ballots rejected for a lack of witness signature).

²⁰⁰ Compl. for Injunctive & Declaratory Relief, *League of Women Voters of Va.*, No. 6:20-cv-00024, *supra* note 199, at 20.

²⁰¹ *Id.*

²⁰² *Id.* (citing Am. Standing Order No. 2020-5, In re: Court Operations Under the Exigent Circumstances Created by COVID-19 (W.D. Va. Mar. 24, 2020)).

white voters in Virginia. The case led to a consent decree abolishing the witness signature requirements for elections held in June 2020,²⁰³ and the parties came to a further agreement preventing enforcement of the witness requirement for the 2020 general election.²⁰⁴

But Virginia election officials have not always been so amenable to attempts to make elections safer and more accessible for at-risk communities during the COVID-19 pandemic. In *Swecker v. Showalter*,²⁰⁵ the Chairwoman of the Democratic Party of Virginia sued Richmond's General Registrar for failing to comply with the Virginia Freedom of Information Act.²⁰⁶ The chairwoman had requested access to absentee ballot curing data—which Virginia election boards are required by law to collect—to ensure that absentee ballots without witness signatures were not thrown out due to the burden on voters of obtaining a witness signature during the pandemic.²⁰⁷ The chairwoman and the Democratic Party of Virginia relied on this information to contact voters about problems with their absentee ballot and to help facilitate voters casting their ballots on time.²⁰⁸ Although the complaint did not allege that minority voters were particularly vulnerable to ballot rejections, evidence shows just that: nationwide, absentee ballots from minority voters are rejected at a significantly higher rate than absentee ballots from white voters.²⁰⁹ Since at least one in five Virginian voters cast a

²⁰³ *Case Profile: League of Women Voters of Virginia v. Virginia State Board of Elections*, CIVIL RIGHTS LITIGATION CLEARINGHOUSE, UNIV. OF MICH. LAW SCH., <https://clearinghouse.net/detail.php?id=17548> (last visited Aug. 10, 2021).

²⁰⁴ *Id.*

²⁰⁵ See Compl. for Injunctive Relief and Pet. for Writ of Mandamus at 1, *Swecker v. Showalter*, No. CL20005368-00 (Va. Cir. Ct. 2020).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See Steve Bousquet, *Study: Mail Ballots in Florida 10 Times More Likely to Be Rejected*, GOVERNING (Sept. 21, 2018), <https://www.governing.com/archive/tns-mail-ballots-florida-rejections-elections-voting.html> (explaining that a study in Florida's past two presidential elections saw that younger voters' and Black and Latino voters' ballots were more likely to be rejected and those voters were less likely to cure their ballots than older and white voters); Mario Ariza, Andrew Boryga & Brittany Wallman, *Black and Hispanic voters more likely to have ballots rejected*, SUN SENTINEL (Oct. 28, 2020), <https://www.sun-sentinel.com/news/politics/elections/fl-news-across-florida-black-brown-spoiled-ballots-high-rate-20201028-r4smpp3iljalfptxeer27l7kca-story.html> (identifying that in a handful of studied counties, black voters were twice as likely as white voters to have their mail-in ballots rejected, and that Hispanic voters were more than twice as likely as white voters to have their ballots rejected); see also R. Michael Alvarez, Andrew Boryga & Brittany Wallman, *Whose absentee votes are returned and counted: The variety and use of absentee ballots in California*, 27.4 ELECTORAL STUD. 673 (Dec. 2008) (concluding that non-English-language ballots had a lower likelihood of being counted compared to the general absentee voting population in the November 2002 general election in California).

mail-in absentee ballot,²¹⁰ efforts to help Virginians cure problems with their absentee ballots are crucial, particularly for voters of color and especially now, given the disproportionate health risks minorities have faced during the COVID-19 pandemic.

Unfortunately, Swecker was voluntarily dismissed after a settlement was reached.²¹¹ The Richmond General Registrar was ultimately fired amidst allegations of racism against employees:

“Richmond state Sen. Joseph D. Morrissey told the board he had sworn statements from two current and two former staff members asserting that Ms. Showalter [the Richmond General Registrar,] had treated Black staff members with less respect. Among other things, he said their statements alleged Ms. Showalter had called Black staff members ‘monkeys,’ ‘girls and boys’ and ‘chick-adees,’ while always addressing white staff members with an appropriate Mr. or Ms.”²¹²

The challenges faced by voters during the COVID-19 pandemic evince the multiplier effects of discrimination in public health and employment which exacerbate barriers to the ballot box for Virginia voters of color. Though strides have been taken to promote voter access in recent years, existing barriers continue to pose a threat to the right to vote in Virginia, a problem that can be addressed in large part through passage of the John Lewis Voting Rights Advancement Act.

²¹⁰ Over 956,000 absentee ballots were returned to the Department of Elections in the 2020 election. See Savannah Haugdahl, *Virginia Voting by the Numbers, Here’s some interesting figures about the 2020 election*, 13 NEWS NOW (Nov. 3, 2020), <https://www.13newsnow.com/article/news/politics/elections/virginia-dept-of-elections-46-of-registered-adults-voted-early-in-2020/291-08a710b7-5340-42cf-ba0f-eed4e8d9d781>.

²¹¹ See Alonzo Small, Ben Dennis & Dean Mirshahi, *Virginia Democrats Drop Lawsuit Challenging Richmond Registrar*, ABC8 NEWS (Oct. 29, 2020), <https://www.wric.com/news/politics/local-election-hq/virginia-democrats-drop-lawsuit-challenging-richmond-registrar/>.

²¹² Jeremy M. Lazarus, *Kirk Showalter, Richmond’s voter registrar, is dismissed by the Richmond Electoral Board after multiple complaints surrounding the Nov. 3 general election*, RICHMOND FREE PRESS (Feb. 4, 2021), <http://richmondfreepress.com/news/2021/feb/04/kirk-showalter-richmonds-voter-registrar-dismissed/>.

Other Instances of Discrimination in Voting in Virginia

Since voters of color first obtained the freedom to vote, they have been targeted with intimidation tactics designed to dissuade them from casting their ballots. Though the mechanisms of intimidation have evolved with technological advances, voters of color in Virginia today are still subjected to intimidation and disinformation campaigns intended—purposefully—to confuse and threaten voters. Passing the John Lewis Voting Rights Advancement Act would affirm the federal government’s commitment to ensuring that all voters are able to cast their ballots safely.

Voter Intimidation and Threats

Ever since the Fifteenth Amendment guaranteed the right of all Americans to vote regardless of “race, color, or previous condition of servitude,” voters of color in Virginia have been subjected to intimidation, harassment, and threats when attempting to exercise their right to vote. Sadly, this remains the case today.

Since 2006, voters of color in Virginia have faced a number of different threats and attempts at suppression. As discussed below, Latino voters have had their private information released to the public in an attempt to intimidate them and perpetuate the myth of Latino voters as noncitizens; Black voters have been targeted with robocalls threatening criminal prosecution if they vote and giving them incorrect polling place information; and in-person voter intimidation has occurred in numerous cities across the state. Further, voters of color who have spoken out about voting discrimination in their communities have faced harassment and threats online and from local law enforcement.

Historically, publication of Black voters’ personal information in newspapers, including their names and addresses, was an effective method of voter intimidation;²¹³ the Virginia state agencies and private organizations were recently involved in the modern version of such voter intimidation—internet doxing, i.e., the publication of personal information online for the purpose of harassment.²¹⁴ During the 2018 election, the League of United Latin American Citizens (“LULAC”) and the Latino community in Virginia faced voter intimidation at the hands

²¹³ Brief of *Amici Curiae* Campaign Legal Ctr. et al. in Opposition to Defendants’ Motion to Dismiss Plaintiffs’ Complaint at 22-23, *League of United Latin American Citizens- Richmond Region Council 4614 v. Pub. Int. Legal Found.*, No. 1:18-cv-00423, 2018 WL 10498655 (E.D. Va. Nov. 27, 2018), <https://campaignlegal.org/sites/default/files/2018-06/LULAC%20v.%20Public%20Inter-est%20Legal%20Foundation%20%E2%80%94%20CLC%20Amici%20Brief.PDF>.

²¹⁴ *LULAC v. Pub. Int. Legal Found.*, 2018 WL 10498655, at *1.

of the Public Interest Legal Foundation (“PILF”) after it published confidential voter information—including voters’ Social Security numbers—inappropriately released by the Virginia Department of Elections.²¹⁵ LULAC sued PILF, alleging that PILF conspired with the Virginia Department of Elections to knowingly defame eligible minority voters by posting their names and contact information online and claiming that these minority voters engaged in felony voter fraud because they were noncitizens.²¹⁶ The plaintiffs further alleged that this was done in order to intimidate Latino voters out of voting and registering to vote.²¹⁷ LULAC claimed that its members and the Latino community it represents were being threatened as a result of PILF’s publications, which asserted falsely that LULAC’s members who registered to vote were an unlawful invasion of noncitizens who should be criminally prosecuted.²¹⁸

Emails among the defendants from the Public Interest Legal Foundation revealed that PILF was not only encouraging the criminal prosecution of Latino voters based on inaccurate records, but explored further intimidation tactics to deploy against voters.²¹⁹ In email exchanges with PILF, Virginia Thomas, founder of the 501(c)(4) nonprofit Liberty Central,²²⁰ even asked if the organization could make signs “listing the laws people may break if they do voter fraud” and place them in front of polling locations in Virginia.²²¹ Printed and digital ads were also discussed.²²²

Even after the defendants were notified that the data they received from the Virginia Department of Elections was likely inaccurate and did not correctly reflect individuals’ citizenship status, PILF continued to publicly repeat its false narrative that noncitizens were voting. In another email exchange, Logan Churchwell, the Research and Original Content Director of PILF, stated that, despite knowing that the information received may be incorrect, the organization “still ha[d] the opportunity to convert pushback into official confusion to justify [their]

²¹⁵ *Id.*

²¹⁶ *Id.* at *15.

²¹⁷ See Brief of *Amici Curiae* Campaign Legal Ctr., *LULAC v. Pub. Int. Legal Found.*, 2018 WL 10498655, *supra* note 213.

²¹⁸ *LULAC v. Pub. Int. Legal Found.*, 2018 WL 10498655, at *1.

²¹⁹ Document 166-3, Exhibit Y, at 1, *LULAC v. Pub. Int. Legal Found.*, No. 1:18-cv-00423-LO-IDD (E.D. Va. May 23, 2019), <https://protectdemocracy.org/resource-library/document/lulac-v-public-interest-legal-foundation-exhibit-y/>.

²²⁰ Jessica Piper, *Virginia Thomas, wife of Justice Clarence Thomas, extends her conservative reach for 2020*, OPENSECRETS.ORG (June 5, 2019), <https://www.opensecrets.org/news/2019/06/virginia-thomas-extends-her-conservative-reach-for-2020/>.

²²¹ Document 166-3, Exhibit Y, *LULAC v. Pub. Int. Legal Found.*, *supra* note 219, at 1.

²²² See *id.*

call for top-down overhaul. The fog of war favor[ed] the aggressor.”²²³ Ultimately, the case settled out of court, with PILF apologizing publicly for its false statements and accusations about the citizenship status of eligible voters.²²⁴ Still, the damage was done, as many Latino voters endured harassment and intimidation because of PILF’s reports.

Voter intimidation in Virginia is widespread and enduring. In 2006, the FBI investigated reports from the Virginia State Board of Elections that callers were attempting to intimidate voters.²²⁵ Voters in cities with “considerable minority populations” across the state reported receiving phone calls intended to discourage them from voting or directing them to incorrect polling places.²²⁶ Some voters received calls falsely claiming that the voter was registered to vote in another state and would be criminally prosecuted if they attempted to vote in Virginia.²²⁷ Other voters received calls allegedly from the “Virginia Elections Commission” that incorrectly said their polling place location had changed,²²⁸ still more voters received calls allegedly from the Democratic gubernatorial candidate Jim Webb’s campaign, providing incorrect addresses for voters’ polling places.²²⁹

In 2008, registered voters in Virginia again faced intimidation and harassment designed, in particular, to confuse and prevent Democratic-leaning voters from participating in the presidential election.²³⁰ One voter explained that a caller who claimed to be from the Virginia Elections Commissions told him that he was registered in another state and would be criminally charged if he tried to vote in Virginia.²³¹ This voter, who had been an active voter in Virginia for two decades, is one of many Virginians who received these calls, as the state attorney’s office and the FBI were inundated with similar reports of voter intimidation and election

²²³ Document 188-3, Exhibit JJ, at 1, *LULAC v. Pub. Int. Legal Found.*, No. 1:18-cv-00423-LO-IDD (E.D. Va. June 14, 2019), <https://protectdemocracy.org/resource-library/document/lulac-v-public-interest-legal-foundation-exhibit-jj-2/>.

²²⁴ Sam Levine, *Voter Fraud Activist Will Apologize To Citizens He Accused Of Being Illegal Voters*, HUFFPOST (July 18, 2019), https://www.huffpost.com/entry/j-christian-adams-pilf-settlement_n_5d309002e4b0419fd3298ee6?02b.

²²⁵ *FBI looks into possible Va. voter intimidation*, NBC NEWS (Nov. 7, 2006), <https://www.nbcnews.com/id/wbna15603344>.

²²⁶ Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343, 348 (2010).

²²⁷ *Id.*

²²⁸ NBC NEWS, *supra* note 225.

²²⁹ *Id.*

²³⁰ Andrew Gumbel, *Another election is marred by dirty tricks*, INDEPENDENT (Nov. 8, 2006), <https://www.independent.co.uk/news/world/americas/another-election-is-marred-by-dirty-tricks-423410.html>.

²³¹ *Id.*

misinformation.²³²

Even today, Virginians face intimidation when trying to exercise their freedom to vote. During the 2020 presidential election, at least 768 Virginians called 1-886-OUR-VOTE, a national voter assistance hotline, seeking voting information, voter support, or to report a voting problem, including voter intimidation and electioneering.²³³ In total, over 80 reports of voter intimidation and electioneering were made between October 30, 2020 and November 3, 2020, with a large number of reports of voter intimidation coming from Fairfax, Chesterfield, Hopewell City, Arlington, and Stafford.²³⁴

In Fairfax County, for example, voter intimidation loomed large in 2020, especially at the Fairfax County Government Center, a polling place that serves a large minority population.²³⁵ In September 2020, groups of voters converged on the Fairfax County Government Center during in-person absentee voting, to demonstrate and pledge support for their candidate, Donald Trump, after Trump urged his supporters to congregate at polling places.²³⁶ Although no voters were hurt during the demonstrations, voters trying to cast their ballot reported feeling intimidated.²³⁷ Supporters stood about 100 feet from the polling location entrance, waving partisan flags and blaring horns. The group did not obstruct the polling place entrances, but

²³² *Id.*

²³³ 2020 866-OUR-VOTE Hotline Map, VOTEAMERICA, <https://866ourvote.voteamerica.com/#/?mapZoom=3.930810548450831&mapLat=40.598418393648814&mapLng=-102.90834753778654&timeRange=AllTime&categories=Board+of+Elections+%2F+SOS%2CGeneral+voter+concern%2CHealth+%26+Safety+at+Polling+Place%2CIntimidation+%26+Electioneering%2CMail-in+%2F+Absentee%2COther%2CPolling+Place+Access%2CPolling+Place+Ballots%2CPolling+Place+Technology%2CVoter+ID+%26+Registration%2CQuestion+%2F+Info+Requests> (last visited on Aug. 9, 2021).

²³⁴ *Id.*

²³⁵ According to Fairfax County's 2019 demographic data, the Fairfax County Government Center is located in an area that is roughly 32 percent Asian, 9.3 percent Latino, and 11.5 percent Black. See 2019 Asian Population Interactive Map, FAIRFAX CNTY., <https://fairfax-countygis.maps.arcgis.com/apps/webappviewer/index.html?id=f834312f67b8453994c12b9cfc91181e>; 2019 Hispanic Population Interactive Map, FAIRFAX CNTY., <https://fairfaxcountygis.maps.arcgis.com/apps/webappviewer/index.html?id=1905a13f79444e35ba8f0da3fe093a3e>; 2019 Black/African American Population, FAIRFAX CNTY., <https://fairfaxcountygis.maps.arcgis.com/apps/webappviewer/index.html?id=93516c6cc12543c796d9f4e398926361>.

²³⁶ Ike Ejiochi, *DMV voters concerned about potential for intimidation at polling places*, FOX 5 WASH. D.C. (Sept. 30, 2020), <https://www.fox5dc.com/news/dmv-voters-concerned-about-potential-for-intimidation-at-polling-places>.

²³⁷ *Id.*

election staff had to escort intimidated voters past the group.²³⁸ The county registrar even recounted one instance of attempted vote dissuasion, where a person was “working the line, saying you’d be better off leaving now and coming back election day and voting at your polling place.”²³⁹ County elections officials eventually were forced to open up a larger waiting area inside the Fairfax County Government Center so that voters could get away from the group outside.²⁴⁰

Another example of voter intimidation occurred recently in Virginia Beach. Ms. Latasha Holloway, one of the plaintiffs in *Holloway et al. v. City of Virginia Beach*,²⁴¹ a challenge to the at-large method of electing city council members in the City of Virginia Beach, discussed in detail *infra* at 46-53, received a number of intimidating and threatening messages online around the time that the trial concluded. On October 31, 2020, Ms. Holloway’s attorneys submitted a letter on her behalf to the FBI informing the agency of this harassment and requesting that the FBI investigate the matter as a hate crime.

One message posted to a local Facebook group showed a child dressed as a Ku Klux Klansman with the following message: “This Halloween I’m sending my kids to Latasha Holloway’s house. I hear she gives out good candy.” Ms. Holloway’s address was listed publicly on the court’s website from filings related to the Virginia Beach lawsuit. After this online message was discovered, Ms. Holloway’s attorneys requested that the court remove her address from all public documents.

Ms. Holloway also received direct messages from white community members stating that they “look[ed] forward to reading [her] obituary,” and that “the world would be a better place without [her] in it and I look forward to that day.” All these threats were reported to the FBI by Ms. Holloway’s attorneys.

The letter sent to the FBI explained that Ms. Holloway and her attorneys believe that these

²³⁸ Tom Porter, *Trump supporters staged a rally at a Virginia polling center during early voting, intimidating voters, election officials say*, BUS. INSIDER (Sept. 20, 2020), <https://www.businessinsider.com/virginia-trump-supporters-intimidated-voters-disrupt-early-voting-2020-9>.

²³⁹ Julie Carey, *Fairfax County Seeks to Get Ahead of Voter Intimidation Concerns*, NBC WASH. (Oct. 28, 2020), <https://www.nbcwashington.com/news/politics/decision-2020/fairfax-county-seeks-to-get-ahead-of-voter-intimidation-concerns/2456405/>.

²⁴⁰ Nick Corasaniti & Stephanie Saul, *Trump Supporters Disrupt Early Voting in Virginia*, N.Y. TIMES (Oct. 15, 2020), <https://www.nytimes.com/2020/09/19/us/politics/trump-supporters-early-voting-virginia.html>.

²⁴¹ *Holloway et al. V. City of Virginia Beach*, No. 2:18-cv-69 (E.D. Va. Mar. 31, 2021).

messages were sent and posted to intimidate Ms. Holloway and make her fear for her and her children's safety. Further, Ms. Holloway and her attorneys believe that this was done in retaliation for Ms. Holloway's activism on behalf of the minority community of Virginia Beach and her filing of a lawsuit against the city. Finally, Ms. Holloway's attorneys explained that these messages had clear racial motivation behind them. On June 15, 2021, Ms. Holloway's attorneys sent a second letter to the DOJ inquiring if there had been any action taken to open a hate crime investigation and to update the DOJ on new instances of harassment targeting Ms. Holloway.

Lastly, while racist remarks may not always rise to the level of voter intimidation, they do when they come from candidates for elected office. When candidates for office make clearly racist statements or jokes, such remarks may chill voter turnout and participation, especially by people and communities of color. Such has been the case in Virginia. In 2017, for example, a Democratic House of Delegates candidate running in District 21, which includes Virginia Beach and Chesapeake, was publicly criticized for racist jokes he exchanged with his son on Facebook six years prior, in 2011. The exchange included a "joke" about students preferring white teachers over Black teachers, because "it's easier to bring an apple than a watermelon" to school. A second quip in the exchange was about Stevie Wonder being unable to read because he is "BL . . . ACK!" The candidate later withdrew from the race because of the incident.²⁴²

In sum, Virginians of color have faced numerous threats and instances of intimidation over the last fifteen years designed to confuse and disenfranchise, thereby diminishing the voting strength and democratic representation of communities of color. The intimidation faced by Virginians of color further demonstrates the need for the John Lewis Voting Rights Advancement Act to protect against racial discrimination at the polls, as it provides additional protections against intimidation by expanding the situations in which federal observers may be assigned to monitor elections.

Disinformation Campaigns

In addition to outright threats and intimidation, disinformation has become an effective tool of voter suppression, used to confuse and dissuade voters—especially voters of color—from

²⁴² Patrick Wilson, *Va. House candidate accused of racist posts says there's more to the story*, RICHMOND TIMES-DISPATCH (May 22, 2017), https://richmond.com/news/local/government-politics/va-house-candidate-accused-of-racist-posts-says-theres-more-to-the-story/article_39dbbd36-97b4-52a0-96c8-cc52b51167cb.html.

casting a ballot and, thus, disenfranchise them.

In November 2008, for example, a fake Virginia State Board of Elections flyer was circulated in several Hampton Roads localities,²⁴³ advertising that Republicans should vote on November 4, but that Democrats should vote on November 5—the day *after* the election. The flyer featured the state board’s official logo and the state seal, and was designed to impersonate a real Board of Elections announcement.

The dissemination of fake official announcements like this is a common disinformation tactic known as “imposter content.”²⁴⁴ Such disinformation campaigns are an attempt at voter suppression—often targeted at voters of color. For example, although election officials did not specify in which Hampton Roads communities the 2008 fake flyer was disseminated, over 30 percent of Hampton Roads’ residents are Black, making it likely that they were disproportionately affected by propagation of false information about elections.²⁴⁵ And this flyer was only one of several disinformation incidents documented in Virginia in 2008.²⁴⁶

Disinformation campaigns targeting Virginia voters of color were also prevalent during the 2006 elections, with one heavily Black county being papered in fliers saying, in bolded letters, “Skip This Election.”²⁴⁷ Further, in November of that year, Black voters across the state complained that they received computer-generated “robo-calls” that told them—falsely—that the location of their voting precinct had changed or that they were ineligible to vote.²⁴⁸ News reports exposed the extent of the problem: “Voters complained not only that the messages were deceptive, but that they arrived with deadening regularity, sometimes very late at night, in what appeared to be a concerted effort by Republicans to anger their recipients and turn them off the idea of voting at all . . . such efforts are frequently directed at African

²⁴³ The Hampton Roads area includes the cities of Newport News, Virginia Beach, Hampton, Norfolk, and Williamsburg Virginia; the area is home to around 1.8 million people. See Hampton Roads, HAMPTON ROADS CHAMBER OF COMMERCE, <https://www.hrchamber.com/page/hampton-roads/> (last visited Aug. 10, 2021).

²⁴⁴ Claire Wardle, *Fake news. It’s complicated*, FIRST DRAFT NEWS (Feb. 16, 2017), <https://firstdraft-news.org/articles/fake-news-complicated/>.

²⁴⁵ U.S. CENSUS BUREAU, *ACS Demographic and Housing Estimates: 2013-2017 American Community Survey 5-Year Estimates*, <https://www.hrpdcva.gov/uploads/docs/HR%20Demographic%20Characteristics.pdf>.

²⁴⁶ See COMMON CAUSE AND LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, *Deceptive Election Practices and Voter Intimidation: The Need for Voter Protection* (2012), <https://lawyerscommittee.org/wp-content/uploads/2015/07/DeceptivePracticesReportJuly2012FINALpdf.pdf>.

²⁴⁷ *Id.*

²⁴⁸ Gumbel, *supra* note 230.

Americans[.]”²⁴⁹

In addition to imposter content like fake flyers and robo-calls designed to suppress the vote, disinformation campaigns are also deployed to intimidate voters. For example, one voter in 2006 received a voicemail threatening, “We’ve determined you are registered in New York to vote. Therefore, you will not be allowed to cast your vote [in Virginia] . . . If you do show up, you will be charged criminally.”²⁵⁰

Efforts at disinformation and voter intimidation are not relics of the past; similar incidents have been documented in Virginia elections as recently as 2018. In one incident, a Twitter account posted more than a dozen tweets on Election Day designed to mislead Virginia voters by telling them that they could cast their ballot for governor by text message.²⁵¹ The tweets featured images with the logos of the Democratic Party and its candidate, Ralph Northam.²⁵² While Twitter ultimately suspended the account, the disinformation it propagated was public for almost three hours out of the 13 hours that polls were open in Virginia.²⁵³ A similar disinformation campaign in 2016 targeted Hillary Clinton’s supporters, attempting to convince them that they could vote for her by text.²⁵⁴

Persistent, evolving attempts at voter intimidation and confusion demonstrate the insidiousness of discrimination in voting in Virginia and must be combatted as forcefully as overt forms of vote denial and dilution.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ Donnie O’Sullivan, *Virginia voter suppression tweets went undetected by Twitter for hours*, CNN MONEY (Nov. 8, 2017), <https://money.cnn.com/2017/11/07/media/twitter-virginia-voter-suppression/index.html>.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

Racial Discrimination in Voting Through the Lens of Ongoing Litigation: *Holloway, et al. v. City of Virginia Beach*

Ongoing litigation in Virginia Beach demonstrates the toll that discrimination in voting takes on communities of color in the state. The vast evidence of racial discrimination this case has uncovered alone demonstrates the need for preclearance and other means of federal oversight to protect the right of all Americans to vote.

On March 31, 2021, the U.S. District Court for the Eastern District of Virginia held that Virginia Beach's at-large election system for electing members of its city council violates Section 2 of the Voting Rights Act because it dilutes the voting strength of the city's Black, Latino, and Asian American voters. As a result, the federal court enjoined the city's use of its at-large system.²⁵⁵

Prior to this litigation, Virginia Beach, the state's largest city,²⁵⁶ had an 11-member city council, composed of the mayor and ten councilmembers, each elected by the city at-large for four-year staggered terms.²⁵⁷ The city began using an at-large voting system to elect its city council in 1966. But since then, the racial composition of Virginia Beach has changed dramatically: the percentage of the city's nonwhite population has more than doubled since 1970.²⁵⁸ According to the 2010 Census, minorities now constitute 31.6 percent of the city's population, including 19 percent of the population which is Black.²⁵⁹ According to the 2013-2017 American Community Survey, 65.37 percent of the citizen voting age population ("CVAP") was non-Hispanic white, while the combined Hispanic, Black, and Asian CVAP was around 32 percent.²⁶⁰ Still, despite sizeable minority communities, only six candidates of color have ever been elected to Virginia Beach's city council, and barring special circumstances triggered by the pendency of litigation under the VRA, no Black candidate has ever been re-elected to

²⁵⁵ See *Holloway, et al. v. City of Virginia Beach*, No. 2:18-CV-69, 2021 WL 1226554 (E.D. Va. Mar. 31, 2021).

²⁵⁶ *Id.* at *3.

²⁵⁷ *Id.* In 2021, Virginia passed HB 2198, which effectively abolished at-large voting systems in local elections in the state. See 2021 Va. Acts Ch. 225 §§ 15.2-1400, 22.1-29, 24.2-218, 24.2-222, and 24.2-223 (effective Jan. 2022). This reform made Virginia Beach's system of elections illegal, and the city will have to change its system in 2022, regardless of the ongoing litigation.

²⁵⁸ See *Holloway, et al. v. City of Virginia Beach*, CAMPAIGN LEGAL CTR., <https://campaignlegal.org/cases-actions/holloway-et-al-v-city-virginia-beach>.

²⁵⁹ *Holloway*, 2021 WL 1226554, at *28.

²⁶⁰ *Id.*

serve a second term.²⁶¹ Such anomalous situations have been explicitly exempted by the Supreme Court from the analysis required by the VRA.²⁶²

The scarcity of successful minority candidates elected to the Virginia Beach City Council is a direct result of the city's at-large method of election: the at-large system diluted the voting power of minority voters and prevents them from electing their candidates of choice.²⁶³ In fact, from 2008 to 2018, the minority communities of Virginia Beach were able to elect a candidate of choice only once in seven elections due to racially polarized and white bloc voting.²⁶⁴

Virginia Beach's at-large election system diluted minority voting strength because of the city's pattern of racially polarized voting: white voters and minority voters usually prefer different candidates, leading, under an at-large system with a white majority, to the election of the white-preferred candidate in most instances.²⁶⁵ If, however, Virginia Beach elected its city council using ten single-member districts and one citywide mayoral race rather than an at-large system, the consistent defeat of minority-preferred candidates would not occur.²⁶⁶ Instead, minority voters would be able to elect councilmembers who represent their interests.²⁶⁷ This is so because, although Virginia Beach's minority communities do not comprise a majority of the population, the city's Black, Latino, and Asian communities have shared common interests on local issues, including housing and transportation, and thus may vote together.²⁶⁸

²⁶¹ *Id.* at *6; Pls.' Br. in Opp. to Defs.' Motion for Summ. J., *Holloway, et al. v. City of Virginia Beach*, No. 2:18-CV-69, at 14 n.10 (E.D. Va. Mar. 31, 2021), <https://campaignlegal.org/sites/default/files/2020-10/118%20Pls%20Br%20in%20Opp%20to%20Defs%20MSJ%20.pdf>.

²⁶² Pls.' Br. in Opp. to Defs.' Motion for Summ. J., *Holloway, supra* note 261, at 27-29.

²⁶³ See *Holloway*, 2021 WL 1226554, at *28.

²⁶⁴ *Id.* at *35. Two black candidates were elected in 2018 under special circumstances, as their election came after the lawsuit challenging the at-large election system was filed, and both candidates received an unusually high level of white support, including public support from white incumbent officeholders and financial support from local white donors. *Id.* at *39; Pls.' Br. in Opp. to Defs.' Motion for Summ. J., *Holloway, supra* note 261, at 29.

²⁶⁵ *Holloway*, 2021 WL 1226554, at *59 (finding that "the at-large system of elections for the Virginia Beach City Council denies Hispanics, African Americans, and Asians equal access to the electoral and political process.").

²⁶⁶ *Id.* at *9 (finding that "[m]embers from the Minority Community have cooperated numerous times to change the City's method of elections and remedy the dilution of their votes under the at-large scheme. Specifically, in 2001, 'a coalition of African Americans, Hispanics, Asians, and [Native Americans] advocated for the City to adopt single-member districts.'").

²⁶⁷ See *id.*

²⁶⁸ *Id.* at *10-*11.

Virginia Beach’s at-large election system for city council created discriminatory barriers for minority candidates. In 2018, for example, two Black candidates, Aaron Rouse and Sabrina Wooten, were elected to the Virginia Beach City Council.²⁶⁹ Their success depended in large part on their unusually strong performance with white voters. Rouse won 15.4 percent of the white vote—179 percent higher than the average white support for other Black candidates who had run for at-large seats since 2008.²⁷⁰ And Wooten was the only Black candidate for city council since 2008 to win the majority of the white vote; in fact, she won the white vote in all precincts, a first in the city’s electoral history.²⁷¹ No Black candidates other than Rouse and Wooten have ever garnered substantial support from white voters.²⁷²

In striking down Virginia Beach’s at-large election system, the federal court recognized that its discriminatory effects reflect a broader culture of racial discrimination in the city and the state that continues to impact minority residents today: “[t]he Commonwealth of Virginia and the City have histories of voter discrimination as it pertains to registration, voter suppression, gerrymandering, and other forms of discrimination.”²⁷³ The most significant examples of racial discrimination detailed in *Holloway* are outlined below.

Racial Discrimination in Voter Registration and Turnout

Voter registration and turnout data reveal racial disparities and discrimination in voting in Virginia Beach. On average, from 2008 to 2018, the registration rate among white potential voters was 74 percent—nearly eight percentage points higher than the registration rate for Black potential voters (66 percent), ten percentage points higher than the rate for Asian potential voters (64 percent), and nearly twenty percentage points higher than the rate for Latino potential voters (55 percent).²⁷⁴

Likewise, from 2008 to 2018, turnout among white voters averaged 59.6 percent—over five percentage points higher than the turnout rate for Black voters (54.5 percent), more than ten percentage points higher than the rate for Asian voters (47.4 percent), and more than 15 percentage points higher than the turnout rate for Latino voters (44.4 percent).

²⁶⁹ *Id.* at *12.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at *8.

²⁷⁴ *Id.* at *9.

Racial Discriminating in Redistricting

Racial discrimination in Virginia Beach is also evident in the city's redistricting and the persistence of racial gerrymandering.

Statewide, in *Page v. Virginia State Board of Elections*, discussed *supra* at 27-28, a federal district court held Virginia's post-2010 congressional redistricting plan unconstitutional because it needlessly "packed" Black voters into a single district, diminishing their political influence.²⁷⁵ In 2018, the district court in *Bethune-Hill*, discussed *supra* at 28-29, similarly found "overwhelming evidence" that Virginia engaged in unlawful racial gerrymandering by sorting districts by race.²⁷⁶

In Virginia Beach, minority communities have worked together on numerous occasions to advocate for districting solutions that counter the vote dilution caused by at-large elections.²⁷⁷ In 2001, for example, "a coalition of African Americans, Latinos, Asians, and [Native Americans] advocated for the City to adopt single-member districts."²⁷⁸ To support these efforts, members of the city's minority communities formed the Virginia Beach Concerned Citizens Coalition.²⁷⁹ In 2011, the Chairman of the Virginia Beach African American Leadership forum repeatedly requested that the at-large system of electing city councilmembers be abolished because it "impede[d] equal representation."²⁸⁰ Most recently, a current city councilmember asked the city to support a district or ward system for local elections because "the at-large voting system dilutes the voting strength of voters."²⁸¹ The Virginia Beach City Council rejected all of these proposals.²⁸²

Virginia Beach demonstrates the extraordinary barriers that candidates of color face when seeking elected office, and that voters of color face in seeking to elect them. Virginia Beach's at-large system inextricably ties the success of minority candidates in the city to the preferences of white voters, often at the expense of the preferences of minority communities.

²⁷⁵ *Page*, 2015 WL 3604029, at *15.

²⁷⁶ *Bethune-Hill*, 326 F. Supp. 3d at 180.

²⁷⁷ *Holloway*, 2021 WL 1226554, at *9.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* at *10.

²⁸¹ *Id.*

²⁸² *Id.*

Racial Discrimination by Political Candidates and Campaigns

Voters of color in Virginia Beach have not only faced structural barriers to equal democratic participation but have also been subjected repeatedly to discrimination by political candidates and campaigns. In 2008, for example, two flyers were distributed anonymously in Black neighborhoods of the city without the legally required attribution (e.g., “paid for by . . .”).²⁸³ One flyer depicted the white Republican mayoral candidate, Will Sessoms, with a smiling Barack Obama.²⁸⁴ The other flyer purported to represent “African Americans for Change” and claimed that candidate Sessoms, if elected, would prioritize city contracts with Black businesses, playing on community outrage over discrimination in city contracting.²⁸⁵

In 2017, a political ad for Delegate Rocky Holcomb, a Republican representing Virginia Beach, claimed that his Democratic opponent wanted to reinstate parole in Virginia and “let rapists out of jail early.”²⁸⁶ The ad showed a Black hand over the mouth of a young, white girl, thereby pandering to racial stereotypes.²⁸⁷ The next year, in 2018, a political committee called “Friends of the Elephant” distributed sample ballots at a Virginia Beach polling place.²⁸⁸ The sample ballots were color coded—one color for Black voters, another color for white voters.²⁸⁹ Aaron Rouse, one of two Black candidates for city council that year, was only included on the sample ballots given to Black voters, not on the sample ballots provided to white voters, in an attempt to suppress support for him among white voters.²⁹⁰

Most recently, in 2019, Shannon Kane, a white Virginia Beach city councilmember challenged Delegate Kelly Fowler—who is of Mexican and Filipino descent—by distributing flyers with a photoshopped image of Fowler next to MS-13 gang members, stating “Kelly Fowler. Good for illegal immigrants. Bad for us.”²⁹¹ Kane never apologized for the racist flyer.

Racial Discrimination in Wealth

In addition to overt forms of racial discrimination in voting and elections, the federal district court in *Holloway* detailed other forms of discrimination in Virginia Beach that exacerbate

²⁸³ *Id.* at *11.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* at *12.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

inequalities in democratic participation. One particularly obvious form of racial inequality that the court identified is disparities in wealth by race. Black, Latino, and Asian communities in Virginia Beach have lower per capita income, higher poverty rates, higher rates of reliance on the Supplemental Nutrition Assistance Program, lower median home values, and a higher percentage of adults with no health insurance than do white residents of the city.²⁹²

Racial Discrimination in Education

The court likewise recognized racial discrimination in education in Virginia Beach. While 95 percent of white students in the city graduate from high school, only 91.8 percent of Asian students, 89.4 percent of Black students, and 88.7 percent of Latino students graduate.²⁹³ Further, the English writing proficiency rate for white students is 89 percent, but just 81 percent for Latino students and 68 percent for Black students.²⁹⁴ Similar trends exist in reading, math, and science proficiency rates, with students of color scoring lower across the board.²⁹⁵ This data makes clear the racially discriminatory education gap that exists in Virginia Beach.

This achievement gap is accompanied by a rise in school resegregation. Since 1990, racial segregation in the Virginia Beach Public School District has actually *increased*, after temporary progress towards integration following a 1969 court desegregation order.²⁹⁶ The city also lags in employing minority teachers relative to minority public school enrollment and to the state as a whole: “[i]n 2011, the City had one white teacher for every nine white students, but only one minority teacher for every 43 minority students. . . . In Virginia [as a whole], 43 percent of students and 17 percent of teachers were minorities; while in the City over 50 percent of students were minority and just 15 percent of teachers were minorities.”²⁹⁷

Racial Discrimination in Public Contracts

The district court also described ample evidence of racial discrimination in the awarding of public contracts in Virginia Beach. In 2008, for example, the city set and failed to meet a goal of 10 percent minority participation in city contracts.²⁹⁸ Subsequently, the minority community in Virginia Beach lobbied *for over nine years* just to secure a study of racial disparities in

²⁹² *Id.* at *8.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at *9.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at *13.

city contracts.²⁹⁹ Local communities were joined in their call for a disparity study by the Minority Business Council in 2011.³⁰⁰ In 2016, Bruce Smith, a Black former-NFL player and Virginia Beach resident, alleged that the city had rejected his bids on multiple contracts in part because of his race.³⁰¹ He too joined the public call for a disparity study, and offered to pay for half of its cost.³⁰² In 2017, leaders of Virginia Beach’s minority communities organized the “Faith, Freedom, and Justice March” to advocate for a disparity study.³⁰³ Only after all of this did the city finally acquiesce, authorizing a disparity study of city contracts—and accepting Smith’s offer to pay for half of its cost.³⁰⁴

The results of the study, released in 2019, showed “a substantial disparity in the participation of minority owned businesses in contracts that the City had awarded during the study period.”³⁰⁵ The report showed that the city underutilized minority owned businesses,³⁰⁶ the effect of which was most detrimental for Black business owners, who were largely shut out of city contracting opportunities.³⁰⁷ And although the report found that Asian American owned businesses were overutilized, more than 86 percent of the total dollars spent through city contracts with minority owned businesses went to a *single* Asian owned business, skewing the data.³⁰⁸

Racial Discrimination in Public Employment

Minorities in Virginia Beach have also faced discrimination in public employment. Such discrimination was so rampant that, in 2006, a consent decree between the U.S. Department of Justice and the city’s police force stated that, “the City has pursued policies and practices that discriminate against and deprive or tend to deprive African Americans and Latinos of employment opportunities because of their race and national origin.”³⁰⁹ Despite this consent decree, only 15.5 percent of the Virginia Beach police force were people of color by 2015, even though minorities constituted 30 percent of the city’s adult population.³¹⁰

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* at *13.

³⁰⁶ *Id.* at *14.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* (citation omitted).

³¹⁰ *Id.*

Racial Discrimination in Public Infrastructure Investment

Finally, the court in *Holloway* recognized that Black communities in Virginia Beach have faced enduring discrimination in public infrastructure investment. For example, the historically Black Burton Station community has—for decades—lacked basic sewer and water infrastructure, despite residents’ complaints and advocacy to the city.³¹¹ Virginia Beach has only begun to address these issues in the past five years.³¹² There are no white areas or neighborhoods in the city that lack adequate, basic city services.³¹³ This evidence shows how Virginia Beach has been able to ignore the needs of minority communities precisely because they lack effective representation in city government.

In sum, the *Holloway* litigation demonstrates the ways in which disparities in wealth, health, education, and public services are intertwined with and exacerbate barriers to voting faced by Virginians of color. Widespread and systemic racial discrimination in Virginia Beach—the state’s most populous city and one of its most diverse—proves that federal oversight is necessary to eradicate the vestiges of racism which continue to prevent voters of color from participating equally in public life.

³¹¹ *Id.* at *15.

³¹² *Id.*

³¹³ *Id.*

Conclusion

This report evinces a simple conclusion: racial discrimination in voting is not a matter of the past in Virginia, it is a current and ongoing problem. Black voters and other voters of color face voter suppression, intimidation, and more insidious threats to their right to vote, as well as vote dilution through racial gerrymandering.

Virginia's recent trend towards pro-voter reforms must not distract from the ongoing need for federal oversight in the state. Virginia's history of voter suppression is deep and entrenched. Although the exact form that voter suppression takes has changed over time—in part due to the successes of the VRA—new and recurrent forms of voting discrimination in the state indicate the need for action from the federal government.

Voters of color in Virginia still face the threat of racial gerrymanders and other forms of voter suppression not addressed by recent improvements in the state's election laws. Ongoing voter intimidation and disinformation campaigns often target voters of color. And the broader context of racial discrimination in Virginia, in areas such public services, education, wealth, and public health, create myriad, compounding barriers to the freedom to vote for Virginians of color.

Under the John Lewis Voting Rights Advancement Act, Virginia will eventually be relieved of preclearance if recent pro-voter trends in the state hold.³¹⁴ For now though, the freedom to vote is under threat for too many Virginians. It is therefore imperative that Congress pass the Voting Rights Advancement Act and reinstate preclearance for the Commonwealth of Virginia.

³¹⁴ See Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. § 3 (2019) (setting forth preclearance formula which automatically updates every ten years).