



# **Election Laws Position Update**

## **Part 2**

### **Revised**

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# Introduction

Although state League members are covered by national positions, the League of Women Voters of Virginia (LWV-VA) has chosen to articulate its own Election Laws positions with greater specificity to assure they fully cover advocacy on issues in Virginia. LWV-VA members voted at Convention 2019 to review and update the following items in the LWV-VA Election Laws position:

- A. Include election processes, laws, and regulations (e.g. post-election audits) that ensure free and fair election results, transparency, security, and accountability;
- B. Prepare amendment to State position to strengthen support for security, including physical security of voting equipment and ballots;
- C. Review the language supporting electronic voting;
- D. Add a statement opposing requirement for photo ID at polls;
- E. Consider and explore the effectiveness and impact of ranked choice voting;
- F. Address voter suppression.

In the urgency of education on election security concerns for the 2020 election, and due to the number of topics to be addressed, the report was broken into two parts. Part 1 (topics A-D) was published May 1, 2020. This report addresses the final two topics.

LWVUS publishes its position on elections in the Representative Government section of *Impact on Issues, 2020-2022*.<sup>1</sup> The League of Women Voters of Virginia (LWV-VA) publishes its position in the Election Laws section of *Positioned for Action 2019*.<sup>2</sup> In the discussion that follows, we have provided relevant excerpts from these positions.

## Part E. Ranked Choice Voting Effectiveness and Impact

### I. Background

#### Description of Ranked Choice Voting

Ranked choice voting (RCV) is a form of preferential voting that allows voters to rank candidates on their ballot in order of preference. When used in single winner elections, it is also referred to as Instant Runoff Voting (IRV). The process of determining the winner is described by FairVote as follows: “A candidate who receives over 50% of the first preference votes will be declared the winner; if this does not occur, the ballot count simulates a series of runoff elections. The candidate with the fewest first-place votes is eliminated, and ballots cast for that candidate are ‘transferred’ to second choices as indicated on voters’ ballots. This process of transferring votes continues until one of the candidates has a majority.”<sup>3</sup>

The process becomes more complex when used in multi-winner elections. Again, voters are invited to rank candidates on their ballot in order of preference. However, it is not mathematically possible for multiple candidates to receive 50% of the vote for multiple-winner elections, so it is necessary to determine an “election threshold”, defined by FairVote as “the number of votes that mathematically guarantees that the candidate cannot lose.” The election threshold is determined by

City Council						
Rank up to 6 candidates. Mark no more than 1 oval in each column.	First choice	Second choice	Third choice	Fourth choice	Fifth choice	Sixth choice
	1st	2nd	3rd	4th	5th	6th
Valarie Altman Orange Party	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
George Hovis Yellow Party	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Althea Sharp Purple Party	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Mary Tawa Lime Party	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Joe Li Tan Party	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Phil Wilkie	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

FIGURE 1 SAMPLE BALLOT

the number of seats to be filled. “For example, if three candidates will be elected, the threshold is 25% of votes. That's because if one candidate has more than 25% of the vote, it is impossible for three other candidates to get more votes than them (because that would add up to more than 100% of votes). If four candidates are to be elected, the threshold is 20% of votes. If five candidates are to be elected, it is about 17% of votes.”<sup>4</sup>

## **Other Voting Systems**

The Constitution of Virginia says that the candidates receiving “the highest number of votes” shall be declared elected for the offices of governor, lieutenant governor and attorney general.<sup>5</sup> This is the essence of *plurality voting*. In plurality systems, the candidate who wins the largest share of the vote wins the election. The candidate need not win an outright majority to be elected. These systems are sometimes referred to as “first-past-the-post” or “winner-take-all.” Plurality voting is simple to understand and to implement.

Plurality provides a majority vote count if there are only two candidates. However, when there are more than two candidates, plurality voting can result in a winner who is not supported by a majority of the voters. Plurality elections are also impacted by gerrymandered districts and prone to the spoiler effect<sup>6</sup>, which is “when a minor candidate takes enough votes from one of two major candidates to throw the election to the less-popular of the front runners.”<sup>7</sup> Princeton University’s *Voting Research - Voting Theory* explains the spoiler effect this way, “The problem is that each voter has to make a judgment call and pick only one candidate to support. Similar candidates can end up splitting votes and losing to a less popular alternative.”<sup>8</sup>

There are several other voting systems that attempt to correct the failings of plurality voting. However, the assigned objective for this study was to “consider and explore the effectiveness and impact of ranked choice voting.” Therefore, this report will only summarize other methods in use in the US for government-run elections and note that all have their strengths and weaknesses. To quote economist Kenneth J. Arrow, developer of Arrow's Impossibility Theorem, “Most systems are not going to work badly all the time. All I proved is all can work badly at times.”<sup>9</sup> This is also sometimes paraphrased as “the only voting method that isn't flawed is a dictatorship.”<sup>10</sup> A more detailed review of other systems could be done in a separate study.

**Majority voting:** Also known as “plurality with runoff” and “two-round runoff system” (TRS). Winners are required to have 50% plus one votes. If the election does not result in a candidate with over 50% of the votes cast, then a runoff election is held between the two top vote getters. This is a costly method since more elections are held. In the US, TRS is used in a number of jurisdictions, mostly on the local level and mostly in the South.<sup>11</sup> Georgia and Louisiana are the only two states that use TRS in general elections for state and federal level elections.<sup>12</sup>

**Score voting/range voting:** A voting method for single-winner districts in which voters award each candidate a “score.” Voters’ scores are then either summed or averaged together for each candidate. The candidate with the highest total score wins.<sup>13</sup> A variation called STAR (Score Then Automatic Runoff) has been promoted for use in Oregon and used in party-run primaries.<sup>14</sup>

**Cumulative voting:** Voters have a number of votes equal to the number of seats to be filled and may allocate their votes among the candidates in any way they see fit, including giving multiple votes to a single candidate or spreading their votes among multiple candidates. Cumulative voting is used in some US jurisdictions, imposed as the result of lawsuits under National Voting Rights Act of 1965. As of March 2012, more than 50 communities use cumulative voting.<sup>15</sup>

**Approval voting:** A single-winner voting method that allows voters to choose any number of candidates simply by approving them or not. The candidate chosen the most often wins. In 2018, Fargo, ND, became the first locality to adopt approval voting.<sup>16</sup>

## **Pros and Cons of Ranked Choice Voting**

RCV proponents, such as Elizabeth Melson, president of FairVote Virginia, commonly point to several ways in which RCV is thought to improve voter choices and lead to a more representative outcome, including 1) cleaner campaigns with higher voter satisfaction, 2) higher voter turnout, and 3) more diverse candidates. However, detractors as well as other LWV studies have raised concerns with RCV. The benefits and concerns are explored in more detail below:

### **Pros**

**1. *Cleaner campaigns with higher voter satisfaction:*** RCV is thought to encourage more civil discourse in campaigns as candidates are incentivized to appeal to the broadest range of voters, and risk alienating voters by using negative attacks. A 2016 study comparing cities with plurality systems and those that use preferential systems (which include RCV) found that citizens in the latter were significantly more satisfied with local campaigns and were twice as likely to report that campaigns were “a lot less negative.” FairVote has published a range of studies that similarly point to voters’ perceptions of less negativity in campaigns in RCV races as well as greater positivity in newspaper and social media posts covering campaigns.<sup>17</sup>

**2. *Higher voter turnout:*** RCV is thought to encourage voter turnout by reducing voter concerns about “wasted votes” when voting for weaker candidates.<sup>18</sup> In elections without RCV, voters may choose to not vote rather than vote for the “lesser of two evils,” because their favorite candidate is less likely to win.<sup>19</sup> In its examination of the six largest cities that utilize RCV, FairVote found an increase in voter turnout after the implementation of RCV. However, the study did not control for other factors that could have increased participation.<sup>20</sup> Other studies have found that RCV has a positive effect since contests do not experience the drop in voter turnout typically seen between first round and runoff elections in jurisdictions that use TRS voting. That study, however, found that in localities that do not use runoff elections, RCV had not been shown to have a strong impact on voter turnout.<sup>21</sup>

**3. *Promotes sincere rather than strategic voting:*** Strategic voting, sometimes called tactical voting, is defined by FairVote as occurring when a voter casts their vote for a candidate other than their preferred first choice in order to prevent an unwanted outcome based upon the voter’s expectations of how others will vote.<sup>22</sup> For example, in a single seat plurality election, a voter who actually supports a third-party candidate decides to vote instead for a major party candidate with a greater chance of winning, in order to stop a candidate the voter dislikes from winning. As noted by Jen McEwen, Minnesota state senator, “Strategic voting over time, at the expense of our ideals, is a race to the bottom. RCV allows the true will of voters to come through much more effectively than in a plurality system.”<sup>23</sup> This is because with RCV voters are incentivized to cast their vote for the candidate they believe to be the best candidate without consideration for how others will vote and without feeling pressure to vote for “the lesser of two evils” or simply not vote at all, as noted above. If there is not a winner after all first-choice votes are counted and the voter’s first choice candidate is eliminated, their vote will automatically count for their second-choice candidate. Voters who vote early or by mail also do not need to worry about whether their first choice may drop out of the race before the election date, since their vote will automatically count for their second-choice candidate if that happens.<sup>24</sup>

**4. *More diverse candidates:*** Proponents of RCV point to the ranked balloting process as an opportunity for women, minorities, and those from outside of the two major parties to win seats, even if they do not place highest on the first ballot. This enhanced opportunity encourages more diverse candidates to run for office, and therefore provides voters with a more representative choice of candidates.<sup>25</sup> A 2018 study of election outcomes in four California Bay Area cities found that alternative voting, which includes RCV, led to an increase in the number of candidates of color from 17.2% to 25.6%, controlling for other factors. The study also found that the probability of a female candidate winning increased from 40.2% to 44.6% in the same cities.<sup>26</sup> The study theorized that elimination of the

spoiler effect meant, “There are fewer incentives for gatekeepers and community groups to limit candidacy, and fewer reasons for would-be candidates to be discouraged from running because they feel their candidacy could harm their community’s interests (by splitting the vote).”<sup>27</sup> RCV is more effective in promoting greater diversity of winning candidates in multi-member districts than in single-winner districts. Some opponents of RCV argue that it has the potential to shut out minority representation in single-member districts, particularly where minority candidates have historically benefited from plurality voting.<sup>28</sup>

5. **Voter support:** The winner of an RCV election takes office with the support of the majority of voters even if that candidate would not have won under a plurality voting system.

6. **Cost of runoffs eliminated:** Proponents point out that RCV eliminates the cost of a runoff election in those jurisdictions which use the two-round runoff system (TRS). A runoff election is unusual in Virginia jurisdictions.

7. **Public health advantages:** Interestingly, RCV has provided added benefits in the COVID-19 context. Both the Democratic and Republican parties in Virginia utilized RCV during their 2020 delegate conventions to select candidates for some races. RCV allowed voters to cast one ballot, rather casting multiple ballots until one candidate reached a majority of votes. This shortened the process, and in some cases allowed delegates to cast their ballots by mail or from their cars, thus reducing the risk of COVID-19 exposure.<sup>29</sup>

## Cons

1. **Complicated and hard to explain to voters:** Implementation of RCV requires a significant training/educational effort for both voters and election officials. Training needs were broadly mentioned in LWV studies throughout the country. An investment in voter education must be budgeted for initial use of RCV so voters can complete ballots in a way that expresses their true candidate support.

2. **Difficult for election administration:** RCV is inherently more difficult to tally than plurality voting when there is no immediate first round winner. An analysis of Australia’s experience with using RCV for over 100 years shows there has been an immediate first round winner only about 25% of the time.<sup>30</sup>

3. **Largely untested in the US beyond local contests:** All eyes are on Maine, the only state that has approved RCV for broad use, having been approved by 52% of the vote in a 2016 citizen-initiated referendum.<sup>31</sup> However, RCV still cannot be used for state offices in general elections because the Maine Supreme Court has found it to conflict with the Maine Constitution. Similar challenges to RCV’s constitutionality under the US Constitution failed, and it was used in Maine’s US Senate election, its two congressional district elections in 2018, as well as in primaries for state and federal offices in both 2018 and 2020. It will be in effect for the US Senate race, the two congressional races, and the presidential race in Maine in 2020’s general election.<sup>32</sup> Nonetheless, there are a very small number of state and federal races where RCV has been used to date in the US.

4. **Requires a centralized tally for elections that cross locality borders:** Should RCV be utilized for an election that covers more than one locality (city, county), the vote count would have to be centralized either at the state Department of Elections or in a single selected locality in order to allocate votes. While some state legislative districts in more densely populated areas of Virginia could be drawn in a way to reduce the number of localities represented, US congressional districts necessarily involve many localities which would require determining how/where to conduct a centralized vote count.

5. **Ballot exhaustion:** RCV has been criticized as not truly majoritarian because the winner of the final tally round is only required to have a majority of votes counted in that round, not a majority of all votes cast. This happens because of what is called ballot exhaustion. The simplest example of ballot exhaustion is a voter who decides to only vote their first choice without ranking any other candidates. If



no candidate has a majority on the initial count and that voter's first choice is eliminated because it was the first choice of the least number of voters, that voter has no vote to count in subsequent rounds. Arguably, in this situation, there is little difference between that voter and someone who casts a vote in the initial round of a TRS election system but does not vote in the runoff election. The drop-off in voter participation in the runoff election of a TRS system is often quite significant. However, some jurisdictions that use RCV limit the number of candidates that voters can rank on the ballot, often allowing voters to rank only their top three choices. This may be because of complexities in tallying votes with more than three rankings. In a race with six or eight candidates where there are multiple rounds of counting to arrive at a majority, this can easily mean that all three of a voter's top three choices are eliminated before the final round. In this case, a voter's ballot is exhausted not through a choice of the voter, but because of the voting rules of the specific jurisdiction. FairVote looked at this issue in a 2016 article about elections in 4 jurisdictions around San Francisco. The article points out that, "While about half of exhausted votes were due to voters not using their full rankings, the other half were largely due to the limits of the voting systems used in the Bay Area, which can currently only accept three rankings."<sup>33</sup>

### **History of Ranked Choice Voting**

Ranked choice voting is one of a variety of methods of preferential voting, which has roots at least as far back as the French Revolution. It was first used in the 1850s in Denmark's proportional representation system (a multi-winner election system).<sup>34</sup> In the 1870s, William Ware, an MIT professor, proposed adapting RCV to a single-winner election for electing the head of MIT's alumni association.<sup>35</sup> The concept of single transferable vote was further developed by Thomas Hare and Andrew Inglis Clark in Tasmania, Australia in the 1890s and was first used in two parliamentary<sup>36</sup> districts in 1896. From that beginning, it was eventually adopted in Australia for almost all its elections.<sup>37</sup>

In the US, the American Proportional Representation League was formed in 1893 and actively advocated for preferential voting for 40 years.<sup>38</sup> Some variation of instant runoff voting was used for primaries in four states—Florida, Indiana, Maryland, and Minnesota—as early as 1912.<sup>39</sup> The 1912 presidential election, when Theodore Roosevelt ran under the Bull Moose Party splitting the Republican vote and resulting in the election of Woodrow Wilson, generated new interest in electoral reforms such as RCV. Between 1915 and the early 1940s, around two dozen cities across six states adopted RCV for multi-winner contests. In these early adoption cities, these reforms faced pushback centered around resentment of greater representation of various racial and ethnic groups, including Italians, Polish, Irish, and African-Americans.<sup>40</sup> Following repeal in Cleveland in 1931, Cleveland's city council had no elected women until 1949.<sup>41</sup> By 1962, all but Cambridge, MA had repealed its use.

More recently, Citizens for Proportional Representation was founded in 1992 to advocate for proportional representation nationally. The organization became the Center for Voting and Democracy in 1993, and in 2004 became FairVote.<sup>42</sup> According to data collected by FairVote, 19 city/county jurisdictions and the state of Maine are using RCV as of April 2020.<sup>43</sup> Three additional cities have approved RCV to be implemented in 2021, including New York City with 6.5 million voters.<sup>44</sup> RCV 2020 ballot initiatives succeeded in Alaska as well as the cities of Burlington, VT; Albany, CA; Eureka, CA; Bloomington, MN; and Boulder, CO,<sup>45</sup> but failed in Massachusetts.

As noted in the discussion of pros and cons, Maine voters approved the use of RCV in November of 2016, and approved it again in June of 2018. However, it has not been without controversy and it is currently barred by the Maine Constitution from use for state offices in general elections.

A recent study written for the California Law Review noted that almost 40 states, including Virginia, have plurality vote provisions in their state constitutions similar to Maine's, but concluded that, despite the ruling with respect to the Maine Constitution, such provisions "were not intended to bar RCV, and RCV is fully consistent with all the reasons behind the adoption of these provisions."<sup>46</sup> This is consistent with a 1923 Ohio Supreme Court case which ruled that the use of multi-member RCV, referred

to as the Hare system of proportional representation at the time, violated neither the Ohio Constitution nor the US Constitution.<sup>47</sup> In an interesting side note, the opinion was written by Florence Allen, the first woman to serve on a state supreme court.<sup>48</sup>

On a national level, Rep. Don Beyer (VA-8) introduced the Fair Representation Act in 2017. This proposal "would move US House elections into multi-member districts drawn by independent redistricting commissions and elected through ranked choice voting. The multi-member districts would be effective in states apportioned six or more seats in the House, and would elect three to five Representatives each, depending on the size of the state." The legislation was reintroduced in 2019.<sup>49</sup>

### **LWV Positions in Other States**

Over the last 25 years, sixteen state Leagues,<sup>50</sup> five local Leagues,<sup>51</sup> and the LWV of the District of Columbia have studied ranked choice voting, with some studies embracing additional alternative voting methods, and some focusing specifically on RCV. A common consensus among most of these studies is that plurality voting poses many problems—e.g., it allows a candidate to win with less than majority support, it creates the “spoiler effect”, and voters tend to vote tactically rather than voting their true preferences. The end result is often reduced voter turnout and voter dissatisfaction. A second common concern expressed in many of these studies is the sense that voters may not understand how RCV works.

Only one study—LWV of San Jose/Santa Clara—reached a consensus to not support any election method change locally.<sup>52</sup> This study was limited to local elections and the consensus was based on the fact that current equipment (in 2011) did not allow ranking of more than three candidates, and a desire that the winning candidate should receive a majority of all votes cast, not a majority of unexhausted ballots. One study—Utah<sup>53</sup>—did not result in any position being adopted. Four organizations—LWV California,<sup>54</sup> LWV Colorado,<sup>55</sup> LWV of Santa Monica (CA),<sup>56</sup> and LWV of Boulder County (CO)<sup>57</sup> —adopted broad general statements of support for alternative election systems to plurality voting that would encourage honest vs tactical voting without specifically supporting RCV.

The Florida LWV board initially adopted a position supporting RCV in March of 2007 based on a study by the LWV of St Petersburg.<sup>58</sup> This position lasted until a 2017 Open Primary Study.<sup>59</sup> The Florida LWV’s *Study and Action 2017-2019* has no position on the issue.<sup>60</sup> Concerns of Florida local leagues with Instant Runoff Voting (IRV) that surfaced during the 2017 Open Primary Study were “complexity, potential voter confusion and lack of state level election experience with Instant Runoff Voting.”<sup>61</sup> There was also a concern about the fiscal impact since few of Florida’s jurisdictions had equipment capable of accepting a ranked ballot.

The study by the South Carolina LWV led to a position encouraging local communities to move away from plurality voting to an alternative voting system, suggesting localities consider IRV, limited voting, cumulative voting, more use of at large seats.<sup>62</sup>

Fourteen studies—AZ, ME, MD, MA, MN, NC, OK, OR, PA, VT, WA, DC, Montgomery County (MD), and Larimer County (CO)—reached a consensus position supporting IRV for single seat elections. Of these fourteen, four—AZ, VT, DC, and Montgomery County—also support use of RCV for multi-winner elections.

### **Ranked Choice Voting in Virginia**

In April 2020, Governor Northam signed into law two pieces of legislation pertaining to ranked choice voting. House Bill 1103 provides localities with the option to use RCV in county board of supervisors and city council elections. The law requires that the use of RCV be approved by a majority vote of the board or council for which the election is held and that any additional cost incurred by using RCV is covered by the locality. The law goes into effect on July 1, 2021 and will remain effective for a period of 10 years. The second piece of legislation, House Bill 506, extends the use of RCV to the county



board of supervisors in Arlington County, however, with immediate effect. Arlington County required separate legislation as it is governed through a county manager plan. Thus, HB506 specifically amends the portion of the Code of Virginia pertaining to local elections under a county manager plan (§15.2-705).

In an interview, Delegate Sally Hudson, co-sponsor of HB1103, indicated that the sponsors chose to limit the bill to county boards of supervisors and city councils as those elected bodies have budgetary authority that would allow them to cover the additional costs of RCV elections. Other local elected bodies/officials, such as school boards, do not have the same budgetary authority.<sup>63</sup>

During the 2020 session, a third bill, House Bill 360, called for expanded use of RCV in state-wide contests including governor, lieutenant governor, and attorney general. Notably, the bill also calls for the use of a voter-nominated primary process where all candidates, regardless of party affiliation, appear on a single primary ballot. Voters then rank their choices, with the top four candidates advancing to the general election. The bill was continued into the 2021 General Assembly session for further consideration by the House Privileges and Elections Committee.

Sponsors of HB1103 and HB506, including Delegate Sally Hudson, who was interviewed for this study, see these new laws as opportunities to introduce RCV to Virginia voters. Starting at the local level has specific advantages, including working with individual registrars who are interested in implementing RCV, rather than trying to implement it state-wide. Elizabeth Melson, president of FairVote Virginia, noted that the successful implementation of RCV in a few localities could spur wider options in other localities in the state and demonstrate the value of RCV to Virginia voters.<sup>64</sup>

Statistics from an analysis of the 2018 and 2019 Virginia general elections for county boards of supervisors and city councils, which are specifically enabled to use RCV by the 2020 legislation, illustrate the potential impact in Virginia. For county boards of supervisors, winners exceeded 50% of the votes in ten of 101 races. In the city council races, winners gained a majority in only 2 of 16 races. At large races were not counted.<sup>65</sup>

Most town councils and approximately 60% of city councils hold multi-winner elections. Two-thirds of city school boards but only three county school boards have multi-winner elections. County boards of supervisors' elections are not multi-winner.<sup>66</sup>

The Virginia Department of Elections (ELECT) and others who voiced opposition to the bills pointed to the potentially high cost of updating VERIS (Virginia Election Registration and Information System) to support ranked choice voting. In its fiscal impact statement, ELECT estimated that upgrades would cost approximately \$1.3 million.<sup>67</sup> However, VERIS is expected to be replaced in 2022.

A 2018 cost assessment conducted by the Ranked Choice Voting Resource Center indicated that only 13 of the 133 Virginia localities had ballot scanning technology that was not compatible with conducting RCV elections.<sup>68</sup> The assessment also noted that much of the cost associated with implementing RCV (e.g., technology upgrades) would have wider benefits to the election process or are costs that the registrars would incur (e.g., voter education) in a non-ranked choice voting election.

Another area seen for expanded use of RCV by its proponents in Virginia is primary contests. In 2020, RCV was used in the Democratic Party primary for the Arlington County special election for school board<sup>69</sup> and by the Republican Party during its delegate conventions to select candidates for the 10<sup>th</sup> <sup>70</sup> and 11<sup>th</sup> congressional districts.<sup>71</sup> Notably, the adoption of RCV in these contests limited the need for in-person, multi-round balloting, particularly in light of the COVID-19 pandemic.

## II. Current LWVUS and LWV-VA Positions

**LWVUS:** *Impact on Issues 2020-2022, updated in December 2020, addresses electoral systems.*

LWVUS promotes an open governmental system that is representative, accountable, and responsive. We encourage electoral methods that provide the broadest voter representation possible and are expressive of voter choices.

Whether for single or multiple winner contests, the League supports electoral methods that:

- Encourage voter participation and voter engagement
- Encourage those with minority opinions to participate, including under-represented communities
- Are verifiable and auditable
- Promote access to voting
- Maximize effective votes/minimize wasted votes
- Promote sincere voting over strategic voting
- Implement alternatives to plurality voting
- Are compatible with acceptable ballot-casting methods, including vote-by-mail

**LWV-VA:** Positions do not address electoral systems.

## III. Study Committee Recommendations

The study committee recommends that the current LWV-VA Election Laws positions be modified to include:

- Supporting the option for localities to utilize Ranked Choice Voting for local elections, both single- and multi-winner. Localities opting to use RCV should consider the need for voter education in planning for these elections.
- Supporting the expanded use of Ranked Choice Voting in state-run primaries
- Supporting implementation of Ranked Choice Voting that allows for all candidates in a race to be ranked.
- Supporting the purchase and use of election infrastructure on a state-wide and local level that are able to accommodate alternative electoral systems including Ranked Choice Voting.
- Supporting use of Ranked Choice Voting beyond local elections after Ranked Choice Voting in local Virginia elections has been shown to meet the criteria listed in the LWVUS *Impact on Issues 2020-2022*.

# Part F. Voter Suppression

## I. Background

### Introduction

The Election Position Review and Update project was approved during the May 2019 League of Women Voters of Virginia (LWV-VA) Convention. The project was underway by August 2019 when the original scope for a study on voter suppression was set.<sup>72</sup> The original stated intent was:<sup>73</sup>

- a. Check and update current position
- b. Reinstatement of felons' right to vote after completion of the terms and conditions of their sentences
- c. Extended hours for polling places
- d. Add a statement opposing requirement for photo ID at polls

In the intervening time, the scope of Section F subject material was changed to correspond with evolving circumstances. For example, adding a statement opposing the requirement for photo ID at polls was reassigned to another team and the 2020 Virginia General Assembly addressed this issue through SB65 and HB19.<sup>74</sup> Extended hours for polling places was removed because a bill was pending in the 2020 Virginia General Assembly; furthermore, the League's position was subject to reconsideration.<sup>75</sup> Additionally, discussion arose among the study group and project oversight teams regarding other voter suppression-related issues originally omitted from the original scope of this study.

As a result, the study group team sought to reorient its work within the scope to address more specific voter suppression examples (i.e., not just reinstatement of felons' rights) and to limit the depth of each category to stay within the project's time constraint. The result is an overview of voter suppression activities that can achieve our goal of enhancing advocacy by providing position language around voter suppression. Voter suppression elements are mentioned throughout the LWVUS publication *Impact on Issues 2018-2020*<sup>76</sup> and the LWV-VA *Positioned for Action*,<sup>77</sup> however, they are interwoven throughout both documents and not located under a central heading. Our recommendations will provide suggested improvements for *Positioned for Action*.

Lastly, during our project, COVID-19 became a worldwide pandemic and was declared a public health emergency in the US in February 2020.<sup>78</sup> COVID-19 would have a dramatic effect on the 2020 elections including voter registration, methods of voting, and voter turnout. Voter suppression exists independent of COVID-19; however, we recognized that the pandemic could exacerbate voter suppression elements and create barriers to casting a ballot. As of this writing, we were unable to determine all of the effects of COVID-19 on voting, and it may be some time before they are fully known.

### Definition of Voter Suppression

The study group team reviewed a variety of definitions of voter suppression that were generally very similar. For example, "any behavior intended to deter an eligible voter from casting a ballot,"<sup>79</sup> or "any legal or extralegal measure or strategy whose purpose or practical effect is to reduce voting, or registering to vote, by members of a targeted racial group, political party, or religious community,"<sup>80</sup> or "efforts to discourage or prevent people from exercising their right to vote."<sup>81</sup> Perhaps the simplest definition was provided by Dr. Lindsay Nielsen, an election scholar based in Virginia, "Voter suppression is anything that discourages people from voting".<sup>82</sup> Regardless of how voter suppression is specifically defined, it remains a fundamental threat to democracy, as it undermines the core principle of the right to vote and equal protection under the law.<sup>83,84,85</sup>

Dr. Nielson explains that for the past half century or so, political science scholars have largely understood voter turnout within a framework known as “the calculus of voting,” which is predicated on a cost-benefit analysis, or, “a trade-off between the cost of voting and the benefit of the act of voting.”<sup>86</sup> If the perceived benefit of voting outweighs the cost, then people will be likely to vote. Costs include diverse elements such as the dollar cost of a voter ID, the amount of time it takes to vote, and the distance one has to travel to vote. Benefits include a sense of fulfillment experienced by exercising one’s civic duty and/or the act of aligning oneself with a political party or candidate. Raising or lowering the costs and benefits can cause voter turnout to adjust accordingly.<sup>87</sup> Thus, voter suppression is essentially putting a thumb on the scale by either increasing the cost for people to vote or diminishing the benefit.

In the past, discussions of voter suppression have focused on laws or policies that directly limit the ability of voters to register and cast ballots, such as Jim Crow-era laws like poll taxes or literacy tests, and, more recently, strict voter ID laws or rolling back early voting opportunities. However, as technology and politics evolve, so do voter suppression efforts. Increasingly, voter suppression strategies aim to deter participation by undermining confidence in the election process by simply creating an environment of doubt and uncertainty.<sup>88</sup> Complicating matters further is that measures restricting voting access are often presented as necessary for election security or to prevent voter fraud. Proponents of these efforts often downplay the burdens imposed on voters or ignore how they may particularly affect certain groups.<sup>89</sup>

Measuring voter suppression is challenging; it is difficult to *prove* why someone does not vote.<sup>90</sup> Researchers agree that establishing clearly defined data points for explicit non-voting is often, by necessity, derived or inferred evidence and not empirical.<sup>91</sup> For example, did a voter who was fully intending to vote *not* vote because of a recent law that was passed? Or, was there a death in the family that (understandably) directed the voter’s attention away from any imminent election? It is important to understand these details in order to develop strategies for countering barriers to voting.

There are other issues that impact voter access and also have the potential to disenfranchise voters while not falling directly under the general definition of voter suppression, such as the legitimate moving of polling places or bad weather events. These are significant issues; however, it is important to make a distinction between issues or challenges that unintentionally affect voters and acts of voter suppression, which are intentional, targeted, and systematic in nature.<sup>92</sup>

### **Historical Context of Voter Suppression in Virginia**

Although Virginia’s constitution, adopted in 1869, provided for universal male suffrage, and the 14<sup>th</sup> and 15<sup>th</sup> amendments of the U.S. Constitution guaranteed equal protection under the law and gave all men the right to vote, Virginia has a history of racially-based voter suppression. In 1902, a constitutional convention approved a new constitution that rolled back Reconstruction-era reforms and enacted laws that disenfranchised Black Americans from voting, including a poll tax and literacy tests. That constitution remained in place until 1971.<sup>93</sup> Additional laws increased restrictions on those with criminal records, purged voters from the rolls, and instituted further barriers to participation.<sup>94</sup> The passage of the federal Voting Rights Act in 1965 strengthened the enforcement of the 14<sup>th</sup> and 15<sup>th</sup> amendments and aimed at targeting blatant voter suppression laws such as literacy tests. Section 5 of the law added greater protections in states with a history of voter suppression, including Virginia. This measure required the US Attorney General or the District Court for the District of Columbia to review any changes that affected voting to ensure they were not discriminatory in intention or effect.<sup>95</sup> This provision came to be known as “preclearance.”

Despite legal challenges, the courts continued to uphold Section 5 until the Supreme Court’s 2013 ruling in *Shelby County v. Holder*. The Court ruled that the formula (Section 4) used to determine which states and local governments were subject to preclearance was outdated, making Section 5 inoperable.<sup>96</sup> The *Shelby County v. Holder* ruling paved the way for imposing voter photo ID requirements and allowed

the Virginia State Board of Elections to remove voters from the rolls using other states' voter rolls and an external database, which opponents challenged as an inaccurate source.<sup>97</sup> In 2020, Virginia passed new legislation repealing the photo ID requirement and expanding access to early and absentee voting. Members of Congress have introduced legislation, now called the John Lewis Voting Rights Advancement Act, that would restore Section 5 (by adjusting Section 4) and add protections against voter suppression tactics. However, without this law's passage, or equivalent measures at the state level, future legislation could roll back gains to voter access and institute new voter suppression measures.

## **F1. Restoring Felons' Right to Vote**

### **Current LWVUS and LWV-VA Positions**

The LWVUS positions do not specifically address felons' right to vote, although its general principles include that the League believes that "every citizen should be protected in the right to vote"<sup>98</sup> and "voting is a fundamental citizen right that must be guaranteed."<sup>99</sup> *Impact on Issues* also states that Leagues believe that "excessive disenfranchisement undermines voting rights as well as reintegration into the community."<sup>100</sup> The LWV-VA believes that "voting is a right and responsibility"<sup>101</sup> and also has a position in support of Civil Rights of Felons adopted in 2009, separate from the Election Laws positions.<sup>102</sup>

### **Background**

Felony disenfranchisement is commonly cited as an example of voter suppression, affecting as many as 5.2 million Americans in 2020.<sup>103</sup> The longer the waiting period following the completion of sentence before rights are restored, the larger the class of disenfranchised individuals.<sup>104</sup> The Virginia Constitution, Article II, Section 1 states, "No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority."<sup>105</sup> In addition to voting rights, civil rights include the right to hold public office, serve on a jury, serve as a notary, and own a firearm. The Governor is empowered to restore all civil rights except gun rights, which must be restored by the courts.<sup>106</sup>

The practice of revoking the civil rights of prisoners descends from English common law and dates to colonial times. After the Revolutionary War, states began making laws regarding disenfranchisement penalties and refined them after the Civil War. Many Southern states (including Virginia) targeted black male populations to ensure crimes disproportionately committed by them would cause their disenfranchisement. It is likely that poor whites were targeted as well. Disenfranchisement policies and laws continue to this day and, while advocates and critics can disagree about whether it is *intended* to suppress voting, the result is still disenfranchisement.<sup>107</sup>

Felons lose their right to vote while incarcerated in all but two states and the District of Columbia. Provisions for restoring voting rights vary widely from state to state. In Maine, Vermont and Washington, D.C. incarcerated persons never lose their voting rights. In 18 states, rights are restored when the person completes their prison sentence. Nineteen states restore rights at the completion of prison and parole or probation. Virginia and 10 other states are the most restrictive, where rights are lost during prison, parole, probation, and even post-sentence.<sup>108</sup>

Starting in 2000, the process of rights restoration was streamlined in Virginia—waiting periods were shortened and then eliminated, the requirement to pay all fees prior to rights restoration was eliminated, and governors began restoring voting rights in more cases each year. An estimated 188,000 persons had their voting rights restored, with Governor McAuliffe restoring rights to an estimated 173,000 people by executive order.<sup>109</sup> According to the Secretary of the Commonwealth, Governor



McAuliffe’s action cleared the backlog of those eligible to have their rights restored. As of August 10, 2020, Governor Northam had restored rights to 32,731 individuals, and was restoring rights to those who become eligible on a monthly basis.<sup>110</sup>

Despite this recent progress, rights restoration still depends on action by the governor in each individual case as required by the Virginia Constitution and a 2016 Virginia Supreme Court decision.<sup>111</sup> In recent years, resolutions for a Constitutional Amendment to eliminate or modify the rights restoration provision have been introduced in the Virginia General Assembly. In the 2020 session, these included SJ8 (Locke), SJ14 (Deeds), and SJ59 (Morrissey). All were carried forward to the 2021 session.<sup>112</sup>

## **F2. Barriers to Voter Registration**

### **Current LWVUS and LWV-VA Positions**

The LWVUS and LWV-VA positions on voter registration are not distinct from the larger message of voter accessibility and good election administration.<sup>113,114</sup>

### **Background**

Since the US was founded, there has been controversy over who gets to vote and how. Recent attempts to repress registration are more subtle than the old anti-Black “qualifying tests,”<sup>115</sup> but they are still with us. Examples of suppressive voter registration include excessively restrictive voter registration training (Texas),<sup>116</sup> targeting third-party registration groups with unreasonable pecuniary punishment (Tennessee),<sup>117</sup> and slow-rolling voter registration processing (Georgia).<sup>118</sup>

In Virginia, the 2020 legislative session produced a number of bills related to voter registration that coincide with the goals of the LWV and recommendations from the Brennan Center for Justice,<sup>119</sup> the Brookings Institution,<sup>120</sup> and the NAACP.<sup>121</sup>

The specific voter registration laws from the 2020 General Assembly session are:

- Automatic voter registration (opting out versus opting in)<sup>122</sup>
- High school voter registration (access to registration information and applications and the technology necessary to use them)<sup>123</sup>
- Same day voter registration (effective 1 July 2022)<sup>124</sup>
- Removal of archaic laws requiring registration records to be separated by race (invalidated by Virginia courts, but still on the books)<sup>125</sup>

Note that the ‘opting out/opting in’ change means that Department of Motor Vehicles (DMV) customers will *automatically* have their voter registration information updated rather than having to select the option to do so. In other words, the default position of that particular process function was changed from the previously existing ‘no’ to ‘yes’. This, along with those mentioned above show that the 2020 legislative session brought significant improvements to registration and voting.

Federal guidelines offer a template for how states and counties should approach voter registration, but documented abuses go back to just after the Civil War and continue to this day.<sup>126</sup> The National Voter Registration Act of 1993 (NVRA), also known as Motor Voter, became law in 1995. It requires state governments to offer voter registration opportunities to any eligible person who applies for or renews a driver’s license or applies for public assistance. NVRA prohibits states from removing registered voters from the rolls unless certain criteria are met and also requires the US Postal Service to mail election materials at the marketing non-profit rate.<sup>127</sup> In the first year after the passage of the NVRA, millions of voters registered under its provisions.<sup>128</sup>



Obstacles to the voter registration process vary depending on the method used. Online registration at the Department of Election's Citizen Portal is the easiest way to register,<sup>129</sup> although it is not as consumer-friendly as many commercial websites (for instance, no confirmation of a completed transaction, leaving many visitors uncertain of their success).<sup>130</sup> To register online, the applicant must have a current Virginia driver's license, or an ID card issued by the DMV. If the applicant prefers, paper registration application forms are available from local election offices, public libraries, and other government agencies, or by downloading and printing from the Department of Elections' website.<sup>131</sup> Unfortunately, the form is printed in a small font making it difficult for some to read and it is laid out in such a way that applicants often overlook required fields.<sup>132</sup>

A major drawback of the paper application form is that anyone who uses it must vote in person the first time voting in the locality, even if the voter has voted elsewhere in Virginia in past elections.<sup>133</sup> There are two exceptions that allow a first-time voter to vote by mail, however: if the voter has a state-permitted excuse; and, in a federal election, upon production of one of the several permitted types of identification.<sup>134</sup> These first-time voter rules are not only complicated but, in the case of voters who have previously voted within the Commonwealth, are neither necessary nor helpful: they are already present within the state's database. Noting that federal voting requirements are not within the purview of this study, the state law might be substantially rewritten to remove barriers that serve only to suppress voting.

### **F3. Aggressive Purges of Voter Rolls**

#### **Current LWVUS and LWV-VA Positions**

While *Impact on Issues* does not have an explicit position on illegal voter roll purging, it describes legal challenges to purging mounted by the League in various states<sup>135</sup> (likely undertaken because of lack of consistency with Section 8 of the NVRA<sup>136</sup>). LWV-VA's position can be inferred from the statement of support for well-administered elections in general.<sup>137</sup>

#### **Background**

Election officials and administrators regularly update voter rolls for accuracy, most often removing the names of people who have moved or are deceased.<sup>138</sup> A key component to fair and valid election administration is having up-to-date, accurate, and comprehensive voter registration lists. Done lawfully, and with good data, purging voter rolls is necessary. The problems come when laws are not followed, bad data are used, and outside agitators push for more aggressive purges, all of which can and have resulted in voter suppression by removing legitimate voters from voting rolls.

The Brennan Center for Justice has studied the issue of voter purges extensively. In a 2018 study, the Brennan Center reported that 16 million people were purged from voter rolls nationwide between 2014 and 2016, compared with 12 million between 2006 and 2008. This increase was disproportionate to the increase in the voter population. The report further documented that purge rates increased more in jurisdictions that had been subject to preclearance under Section 5 of Voting Rights Act before the *Shelby County v. Holder* decision of 2013. The Brennan Center estimated that 2 million more voters were purged than would have been if these jurisdictions had stayed with their pre-*Shelby* purge rate.<sup>139</sup>

In Virginia, counties removed 379,000 more voters between 2012 and 2016 than they had in the previous 4-year period. Virginia is among four states (the others being Florida, New York, and North Carolina) that have conducted illegal purges since 2013. In 2013, Virginia joined the Crosscheck program and used its information to remove about 40,000 voters from the voting rolls. Unfortunately, Crosscheck data (designed to detect "double-voters") was deficient in many respects. Error rates as high as 17% were not discovered before voters had been removed from the rolls right before the 2013 election.<sup>140</sup> A lawsuit

brought by the Democratic Party of Virginia to reinstate these individuals to the voting rolls was not successful.<sup>141</sup>

The Crosscheck program was suspended indefinitely in December 2019, as the result of a lawsuit filed by American Civil Liberties Union (ACLU) of Kansas that had challenged Kansas' management of the program. Prior to that ruling, a number of states had withdrawn from the program citing inaccurate data among other reasons. The program had also been accused of enabling unlawful voter purges.<sup>142</sup> Virginia had withdrawn from the Crosscheck program some months prior to the suspension.<sup>143</sup>

Virginia has been subject to the work of activist groups intent on implementing more aggressive purges, an activity that has become more common since 2008. Before the 2016 election, a self-styled “election integrity” group sued the city registrar of Alexandria in federal court, attempting to pressure her into an improper purge of the voter rolls. In order to protect eligible voters from unlawful disenfranchisement, LWV-VA joined the city’s legal efforts to have plaintiffs’ claims dismissed. The Public Interest Legal Foundation (PILF) and the Virginia Voters Alliance (VVA) published *Alien Invasion in Virginia* in 2016, which purported to document a “massive problem” with voting by noncitizens in the 2016 election. The report may have had a role in doubling the number of alleged noncitizens purged from the voter rolls in 2017. The resulting purges led to litigation, including one against PILF for defamation.<sup>144</sup> The latest information, posted on March 3, 2019, indicates that this case, filed in the Eastern District of Virginia by the League of United Latin American Citizens (LULAC) of Richmond, is still pending.<sup>145</sup> This kind of aggressive activity is a change from the decade prior to 2008 when it was private plaintiffs who were generally worried about improper purges.

Allegations of noncitizen voting, such as those made by PILF, have been proven baseless and the Presidential Advisory Commission on Election Integrity, set up after the 2016 election, was disbanded after finding no fraud and without even issuing a report.<sup>146</sup> In a study after the 2016 election, the Brennan Center noted that “The absence of fraud reinforces a wide consensus among scholars, journalists and election administrators: voter fraud of any kind, including noncitizen voting, is rare.”<sup>147,148</sup>

Many states have “challenger” laws that allow officials or private citizens to question the eligibility of a voter at the polls.<sup>149</sup> Virginia is among them and the statute states that “Any qualified voter may, and the officers of election shall, challenge the vote of any person who is listed on the pollbook but is known or suspected not to be a qualified voter.”<sup>150</sup>

Federal law does not allow states to conduct large-scale, systemic purges of the voter rolls within 90 days of a federal election, but challenger laws operate much closer to the elections without this safeguard. Virginia is among the states that also allows challenges to registration before an election. The Code of Virginia states that “In addition to challenging a voter’s registration before the general registrar, any three qualified voters may file with the circuit court of the county or city in which they are registered, a petition stating their objections to the registration of any person whose name is on the registration records for their county or city. However, no petition may be filed if the only objection raised is based on removal of residence from the precinct.”<sup>151</sup> Virginia statutes further state that the individual being challenged must be given 15 days’ notice by the petitioner<sup>152</sup> and that the petition must be filed within six months of the individual’s registration.<sup>153</sup> The Brennan Center notes that large scale challenges that could, in effect, become purges have been attempted in Colorado, Georgia, Iowa, and North Carolina, but these have been blocked with litigation.<sup>154</sup> Unlike Virginia, some states have repealed challenger laws.

The job of maintaining accurate voter rolls falls to the Virginia Department of Elections (ELECT) and local registrars play key roles. The ultimate authority to update, retain, or remove voters on the voter list lies with local election officials.<sup>155</sup> The components of list maintenance are spelled out in the Code of Virginia.<sup>156</sup> The 2019 ELECT *Annual List Maintenance Report* shows how, pursuant to state law and the National Voter Registration Act, ELECT conducted its annual match of Virginia’s voters addresses against records in the US Postal Service’s National Change of Address (NCOA) registry, which it is able to do as part of ELECT’s membership in the Electronic Registration Information Center (ERIC).

ERIC is a “non-profit organization with the sole mission of assisting states to improve the accuracy of America’s voter rolls and increase access to voter registration for all eligible citizens. ERIC is governed and managed by the states that choose to join (currently 30 plus DC) and was formed in 2012 with assistance from the Pew Charitable Trusts. The seven states that pioneered the formation of ERIC in 2012 are: Colorado, Delaware, Maryland, Nevada, Utah, Virginia, and Washington.”<sup>157</sup> Member states receive reports “that show voters who have moved within their state, voters who have moved out of state, voters who have died, duplicate registrations in the same state and individuals who are potentially eligible to vote but are not yet registered.”<sup>158</sup>

Procedures for removing a voter from the voter rolls are enumerated in Virginia Code in parts of §§24.2-427, 24.2-428, 24.2-428.1, and 24.2-428.2.<sup>159</sup> General registrars are required to cancel the registrations of persons who are known to be deceased, disqualified or ineligible to vote. Specific procedures are spelled out in ELECT’s ‘Annual List Maintenance Report, September 1, 2018 - August 31, 2019’ in the Executive Summary. Pursuant to state law (§24.2-428) and the National Voter Registration Act, ELECT conducts an annual address match of Virginia’s voters against records in the United States Postal Service’s (USPS) National Change of Address (NCOA) registry (this process is conducted as part of ELECT’s membership in ERIC). The NCOA database catalogs change of address requests submitted by individuals to the USPS when moving. ELECT relies on this database to identify voters registered in Virginia who may have moved and may need to update or cancel their voter registration. Voters registered in Virginia who are identified as having moved by the NCOA list are then sent a confirmation mailing by forwardable mail to their last known Virginia address asking the voter to either verify their residential address or request cancellation of their Virginia voter registration. These letters include a postage prepaid envelope and a confirmation form that voters can utilize to confirm that their address did or did not change, or to request that the general registrar cancel their registration, if appropriate. Voters who respond to the mailing within 30 days and confirm that their place of residence has not changed or that their new address is in Virginia, remain on the voter registration list as active, Virginia-registered voters. Voters who do not respond to the notice within 30 days or whose confirmation mailing is returned as undeliverable are then classified as ‘Inactive’ on the voter registration file. Voters identified as such will be removed from the voter registration list if the voter fails to either vote or update their voter registration over a period of two federal general elections (2 to 4 years). Voters who have been designated as ‘Inactive’ by the process outlined above may still cast a ballot on Election Day. The voter must have their eligible voting status verified by the general registrar, sign a statement declaring that they are a qualified and registered voter of the precinct at which they are present, and be added to the pollbook by officers of election.” After the 2018 General Election, ELECT canceled almost 189,000 inactive records.<sup>160</sup> The data resulting from Crosscheck was incomplete and unreliable, which was further exacerbated by multiple states pulling their membership and ceasing to share information through Crosscheck.”<sup>161</sup> ELECT also receives information from the Virginia State Police and the US Attorney’s Office concerning felons, from the DMV where the record states whether the individual is a citizen, and from clerks of the circuit courts concerning individuals judged mentally incapacitated.<sup>162</sup> Maintaining accurate voter rolls in Virginia depends on information from many state agencies beyond just ELECT. Every one of them must have the resources and staffing to keep accurate records and provide accurate information to ELECT and ultimately to local elections officials.

## **F4. Voting Inequities in Long Lines and Faulty Equipment**

### **Current LWVUS and LWV-VA Positions**

The LWVUS and LWV-VA positions on specific elements of voting activities are broadly inferred under the category of election administration.<sup>163,164</sup>

### **Background**

Waiting to vote is not merely annoying or inconvenient—if a voter cannot wait because, for example, she needs to get to work, that voter is effectively disenfranchised<sup>165</sup> and might have been subject to voter suppression. Moreover, problems on Election Day, such as malfunctioning scanners or electronic pollbooks, can be seen as a form of voter suppression or, at the very least, voter disenfranchisement.<sup>166</sup> Heavy turnout, problems with voting equipment, or decisions about polling place management can all be factors that result in long lines.

### **Lines and Wait Times**

The subject of lines and their disparate impacts on lower income and minority voters has been studied a great deal by the Brennan Center, the Bipartisan Policy Center, and others. In its study after the 2018 election, the Brennan Center found that areas that had become less white and poorer over the previous 10-year period had longer wait times compared with whiter, wealthier jurisdictions. This finding is in line with other social science research that finds that areas undergoing substantial demographic change can struggle to fund and provide the additional services that may be required.<sup>167</sup> The Brennan Center report also notes that simply ensuring resource parity does not necessarily ensure equal outcomes when it comes to wait times. For example, voting can be much harder and more time-consuming for voters for whom English is not their first language.<sup>168</sup> The Bipartisan Policy Center, using extensive data collected from 230 jurisdictions during the 2018 election—including 17 jurisdictions and 392 precincts in Virginia—found that wait times were longer in precincts with higher percentages of minorities, renters, and low income voters. Almost 5% of precincts in this study had average wait times of more than 30 minutes.<sup>169</sup>

What is a reasonable amount of time to wait? In its report presented in January 2014, *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration*, the Commission set 30 minutes as the maximum acceptable wait time to vote.<sup>170</sup> Yet in the 2016 election, the Bipartisan Policy Center estimated that more than half a million eligible voters did not vote because of polling place problems, including long lines.<sup>171</sup> In the 2016 election, stories about voting problems in states including Arizona, Florida, North Carolina, Ohio, Pennsylvania, and Virginia filled the press.<sup>172</sup>

For the 2018 midterm elections, the Brennan Center estimated that 3 million voters waited more than 30 minutes to vote as voter turnout surged compared with the previous nonpresidential cycle in 2014.<sup>173</sup> Long lines at the polling places can arise when local elections officials make resource decisions based on turnout in the previous comparable election. In Virginia, almost 55% of registered voters turned out to vote in 2018, compared with 37% in the 2014 election.<sup>174</sup> In 2018, there were also pollbook glitches and scanner issues.<sup>175-176</sup> In Prince George’s County, MD, in 2018, “Voters, who turned out in unusually large numbers for a midterm election, waited for more than two hours at some polling sites. Elections officials calculated the number of paper ballots sent to each of the county’s 274 precincts based on 2016 turnout, allotting enough ballots for 70 percent of the total turnout from the presidential election that year.” However, that formula did not work for a number of precincts, as turnout was 52% compared with 40% in the 2014 midterm elections. “Prince George’s election officials denied any effort to suppress voters, saying that Election Day was a success for most voters; but they blamed themselves for the

miscalculation.”<sup>177</sup> Virginia needs to follow best practices for quantifying the number of ballots to print in any election.

Voting problems in a number of states holding primary elections in 2020 during the COVID-19 pandemic foreshadow potential problems in November. Wisconsin; Georgia; Maryland; and Washington, DC, all experienced long lines for a variety of reasons.<sup>178</sup> Turnout is expected to be heavy again in November 2020.<sup>179</sup> The start of early voting in Virginia on September 18 is instructive. Lines of voters hundreds deep were reported in Northern Virginia as well as elsewhere in the Commonwealth. And the lines started early: in Arlington, 200 voters had voted by 9 a.m. and by the end of the day over 1,400 people had voted.<sup>180</sup>

## **Voting Equipment**

Federal laws, state laws and regulations, and decision-making by local officials all play a role in shaping the voting experience, including wait times. For voting equipment, Virginia localities are required by law to meet standards set forth by the State Board of Elections as well as the Code of Virginia.<sup>181</sup> State law requires at least one scanner per precinct and one voting booth with a marking device per 425 voters. The statute requires that each precinct with more than 4,000 registered voters provide not less than two scanners for a presidential election.<sup>182</sup> The statutes also make a general statement concerning resources, “The governing body of each county, city, and town shall provide funds to enable the general registrar to provide adequate facilities at each polling place for the conduct of elections.”<sup>183</sup>

While Election Day equipment issues can happen, Virginia has not demonstrated an overall pattern of machine problems, nor does it have a reputation for being nonresponsive in the event of problems. ELECT has created a *General Registrar and Electoral Board Handbook*<sup>184</sup> (*the Handbook*) that is amended annually to reflect any changes in Virginia election laws and includes, for example, the specifications for voting machines and other electronic equipment, such as pollbooks, and Election Day contingencies (e.g., machines breaking down).<sup>185</sup> Moreover, the Code of Virginia sets statewide standards that require localities to meet an acceptable standard of election equipment and administration, which, in turn, requires localities to budget for their needs in order to be compliant with the law.<sup>186</sup> However, it is not unreasonable to think that the resources of a district—there are 133 voting districts in Virginia with per capita incomes ranging from \$17,500 to almost \$70,000<sup>187</sup>—may dictate decisions such as how often machines are replaced, their maintenance, how many poll workers can be hired and adequately trained, all of which ultimately determine the extent to which all citizens have similar, and positive, voting experiences.

## **Polling Places**

Fewer polling places or changes in polling places are likely to lead to voter confusion and longer lines. For example, a Stateline post from Pew noted that “In the five years since the U.S. Supreme Court struck down key parts of the Voting Rights Act, nearly a thousand polling places have been shuttered across the country, many of them in southern black communities” and that in the first eight months of 2018, “10 counties with large black populations in Georgia closed polling spots after a white elections consultant recommended they do so to save money.”<sup>188</sup>

By law, in Virginia, at the time they are established, precincts in counties and cities can have no more than 5,000 registered voters.<sup>189</sup> The law further states that if more than 4,000 people vote in a presidential election, the general registrar is to notify the governing body, which in turn must revise boundaries such that new or revised precincts have not more than 5,000 voters. For towns, the general requirement is one precinct for each town.<sup>190</sup> Changes in polling places within a precinct can cause voter confusion and Virginia also has laws governing these changes. In general, changes to polling places cannot be made within 60 days of a general election, any changes must be advertised, and voters affected must be notified at least 15 days prior to the election.<sup>191</sup>



## **Absentee Voting**

Problems can also arise if elections officials overestimate the amount of early or absentee voting. A Policy Note in ELECT's *the Handbook* states "Due to the rise in absentee voting, and the projected continued expansion of absentee voting, ELECT Policy recommends that absentee voters be excluded when calculating the number of voters a precinct will serve. However, absentee voters may be included or excluded for the purpose of calculating the number of voters in each precinct and creating new precincts when necessary."<sup>192</sup>

And, as became painfully evident during the 2020 primaries in some states, projections for absentee voting break down if voters do not receive their absentee ballots in a timely manner.<sup>193</sup> Long lines in Maryland were subsequently described as voter suppression by Governor Hogan, prompting his call for all polling places to be open in November, despite challenges created by the COVID-19 pandemic.<sup>194</sup> Governor Hogan reversed his decision at the urging of the Maryland Electoral Board, which had urged the use of vote centers, instead of precincts. In issuing his proclamation, however, the governor "told elections officials he worried fewer polling locations could lead to long lines and potentially disenfranchise voters." Hogan went on to write in a brief letter, "I remain very concerned," about getting applications for mail-in ballots to every registered voter.<sup>195</sup>

By making this change, Maryland joins 16 states that allow vote centers, according to the National Conference of State Legislatures.<sup>196</sup> In a policy recommendation that states develop a vote center transition plan, the Brennan Center recommends that vote centers be piloted in lower turnout elections, allowing elections officials to gather information on how voters distribute themselves, among other factors.<sup>197</sup> Certainly the 2020 election cannot be considered a low turnout practice event. Virginia does not currently have vote centers, as defined by the National Conference of State Legislatures, as replacements for precinct polling places. Instead, Virginia has satellite voting locations or early voting locations, which expand the options for voters to vote early in-person, making voting more convenient and potentially reducing the time it takes to cast a ballot.

In the 2020 election, over a million Virginia voters cast their ballots by mail (including hand delivery).<sup>198</sup> As with the voter registration process, the voter can choose to apply online or on paper to receive a ballot in the mail. The online application requires a DMV driver's license or ID card and the voter's full Social Security number.<sup>199</sup> The paper application form is printed in a small font and contains numerous options and questions. It is more complicated than the voter registration form.<sup>200</sup> Voters, elderly and less educated voters in particular, find the paper form daunting and those voters are less likely to have access to online applications. Improved web design for the online application and improved design for the paper form would make mail voting more accessible for Virginians.<sup>201</sup>

## **F5. Purposeful Dissemination of False Information: Disinformation**

### **Current LWVUS and LWV-VA Positions**

Currently, there is no LWVUS or LWV-VA position on disinformation.

### **Background**

Disinformation in elections, the deliberate dissemination of false, misleading, or biased information, is not a new concept in the US. Note that *misinformation* is also misleading or incorrect, but it lacks the purposeful intent of disinformation.<sup>202</sup> Most commonly, in the past, disinformation took the form of phone calls or fliers that conveyed inaccurate information about the voting process with the aim of keeping certain voters away from the polls; these forms still exist today. Examples include mailers that list the wrong election date or robotic calls that claim that one party votes on Tuesday while another votes



on Wednesday. Disinformation also has the potential to undermine public confidence in the electoral process and outcomes.

Election disinformation in the digital age takes on new forms and offers tools that allow malign actors to spread disinformation more rapidly, widely, and in a more targeted manner. Social media provides a platform where actors can utilize user data to hyper-target individuals based on their demographic or likely political sentiments. Actors also use tools such as bots to automate fake accounts that share and repost these messages, further amplifying their reach. Moreover, deliberate disinformation can easily become misinformation as articles and posts are shared and re-shared through social media or picked up and published by traditional media outlets.

Disinformation as a tactic of voter suppression gained a foothold during the 2016 elections with the revelation that Russian-backed actors utilized social media to spread inaccurate information about the election process and stoke partisan sentiments with the intent of undermining confidence in the electoral process. While disinformation from foreign actors remains a threat, these tactics are increasingly being adopted by domestic actors, including political parties and candidates.<sup>203</sup>

In the 2018 midterm elections, the Brennan Center for Justice found that disinformation took on three forms that aimed at suppressing voter turnout:

1. **Deception** such as sharing of inaccurate information about how and when to vote in the elections
2. **Demobilization and calls to boycott** including messages expressing sentiments that voting is worthless or candidates do not care about certain groups. Notably, many of these messages were targeted at minority voters
3. **Intimidation** inducing threats of violence at polling stations<sup>204</sup>

In the 2020 election environment, an aggressive disinformation campaign against mail-in voting has been carried out.<sup>205</sup> This is a particularly insidious circumstance since mail-in voting and absentee voting have increased dramatically because of COVID-19. In fact, 35 states have changed their absentee/mail-in voting laws in some manner.<sup>206</sup> As of this writing, this attack on mail-in/absentee voting is an ongoing effort.

Actors share disinformation through different types of messages and posts including:

1. **Memes:** images with text that evoke human or other emotions
2. **Deepfakes:** videos created using artificial intelligence that misrepresent or manufacture events, including mimicking individuals' speaking patterns and mannerisms
3. **False news pages and articles** that convey inaccurate, misleading, sensational, or divisive information for financial or political gain<sup>207</sup>

Activist groups and election officials have tried a number of tactics to counter disinformation efforts or to mitigate their negative effects. Social media platforms have struggled with mitigating the spread of disinformation on their sites. Facebook, Twitter, and YouTube have banned the use of manipulated media, such as deepfakes. They have also banned content that includes deceptive information about voting procedures, while promoting authentic sources of voting information. However, they have struggled to keep up with the volume and evolving tactics of those pushing disinformation.<sup>208</sup> Social media platforms have been successful in identifying and removing networks of accounts belonging to foreign actors that push disinformation or divisive posts, but regulating disinformation of domestic actors is more difficult since statements and social media posts could be claimed as free speech. Political actors may also claim the platforms are taking a partisan stance.<sup>209</sup>

Other measures to counter disinformation include:

1. **Controlling the narrative through promoting accurate information from trusted sources:** Ensure that election stakeholders such as election administrators have adequate resources and the tools to provide voters with timely and accurate information to enhance confidence in the electoral process. These efforts should particularly target those most vulnerable to disinformation and voter suppression efforts.
2. **Understanding disinformation trends and sources:** Election stakeholders need to rapidly identify disinformation being circulated and quickly respond with mitigation measures. Tools such as the MITRE Corporation’s SQUINT can help to crowdsource information about potential election misinformation circulating on social media and share it with local election officials.<sup>210</sup> LWV-VA participated in a pilot of SQUINT for the 2020 elections.
3. **Fact checking:** Flag potentially deceptive or inaccurate information and provide access to more accurate information sources.

The 2016-2020 period shows that a more sophisticated and aggressive disinformation campaign is taking place. Moreover, tactics of creating doubt and confusion around routine elements of election administration have allowed actors to cast doubt on the normal election procedures themselves. Bluntly put, creating confusion itself is all that is required; the merits of the claim(s) are irrelevant.

## II. Study Committee Recommendations

### **Carefully consider the need for and the appropriate timing of future studies**

The COVID-19 pandemic has highlighted many of the strengths and weaknesses in overall voting administration. However, this is also an opportunity for the LWV (at state and national levels) to reflect deeply on voter access goals and develop new ways to increase voter participation and, more broadly, foster civic engagement. For example, many of the temporary laws passed because of COVID-19 should be considered for permanent legislation and could be considered as *de facto* “pilot programs.” Likewise, an analysis of the funding aspect of those temporary laws can help improve understanding of costs involved in combatting voter suppression. Additionally, as an examination of resources will inevitably arise from such a thoughtful undertaking, including a focus on the difference between equality and equity (i.e., where applicable, resources should be distributed – not equally – but according to need).

### **Add a paragraph/statement on voter suppression to *Positioned for Action***

LWV-VA positions regarding voter suppression are inferred and not articulated specifically. One way to bring greater focus to reducing voter suppression is to add this paragraph (or one similar) within the Election Laws sections:

#### ***Voter Suppression***

*LWV-VA supports the fundamental right to vote and supports measures that seek to enhance voter access and voter participation. Equally, LWV-VA opposes measures that seek to infringe on this fundamental right or create barriers to voters casting ballots. Voter suppression efforts can include but are not limited to: manipulation of the registration process; policies that make voting difficult, time consuming or dangerous; felon disenfranchisement; and disinformation that confuses voters or discourages them from casting their vote. These examples have changed over time and will continue to evolve. Thus, Leagues across the Commonwealth should monitor activities and adapt accordingly.*

### **Add language about voter suppression throughout *Positioned for Action***

This would allow for voter suppression language to be integrated throughout the existing document. Here are some examples of how existing text could be amended:

## **Rights of Felons in Virginia**

### Existing Position:

The League of Women Voters of Virginia believes that:

- The civil rights of felons in Virginia should be restored automatically either upon release from incarceration or upon completion of probation and parole.
- The procedure should be identical for all felons, regardless of the nature of their crime.
- The process should be easy to understand, accessible, transparent, and fair.
- Information about the process should be available to felons, the justice and corrections system and the general public. (2009)

### **Add**

- *Constitutional amendments and legislation should be considered to improve the rights restoration process.*

## **Election Laws**

### Existing position under Role of the Commonwealth:

Funding the cost of maintaining a statewide system of voter registration and providing equal and easy access for voting throughout Virginia, are responsibilities shared by the Commonwealth and local governments. The Commonwealth should provide additional funding where localities are financially unable to support an accessible and well-managed election system.

The Department of Elections (ELECT) and the State Board of Elections (SBE) must be given adequate authority and resources to: enforce election laws and mandatory standards for local election offices; encourage best practices in registration and elections management, especially in training election officers and officials; provide adequate oversight of registration and elections at locality and precinct levels; and oversee implementation of election laws, regulations and policies to ensure their consistent application across the Commonwealth. (2015)

### **Add**

*...and combat disinformation that can be used as a voter suppression tactic*

### Existing position under Registration:

Because the system of voter registration affects voter turnout, and because federal legislation has extended the availability and ease of voter registration in Virginia,

- Voter registration opportunities must be available, by mail and in person, consistently throughout the Commonwealth;
- A uniform system of voter registration is required to facilitate voting and prevent fraud; and
- Additional measures should be adopted to increase the availability of voter registration, especially those that utilize technological advances or provide cost savings, including:
  - Online voter registration,
  - Reducing the interval between the registration deadline and Election Day to the smallest number of days consistent with effective elections management, and
  - Same-day registration at county and city central election offices.

### **Add**

- *Care should be taken to ensure that the maintenance of voter rolls does not result in purges of eligible voters or other voter suppression.*

### Existing position under At the Polls:

The following should be required throughout Virginia to ensure an efficient voting process:

- Electronic poll books, with back-up paper copies for emergencies;
- Appropriate precinct sizes and numbers of voting machines to minimize *voting delays*;
- Well-trained officers of election; and
- Polling places selected to maximize voter participation and near public transportation, wherever possible.

***Replace “voting delays” with:***  
*wait times which can result in voter disenfranchisement*

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