



September 30, 2024

VIA EMAIL

Dear Virginia Election Officials:

Campaign Legal Center (CLC) writes to provide you with information regarding how Virginia county registrars and precinct election officers can properly adjudicate frivolous challenges to voter eligibility under Va. Code Ann. § 24.2-651 to minimize the burden on election administration and protect the rights of voters, including important guidance on limitations imposed by federal law.¹

CLC is a nonpartisan, nonprofit organization working to protect and strengthen the U.S. democratic process across all levels of government through litigation, policy analysis, and public education. CLC seeks a future in which the American political process is accessible to all citizens, resulting in representative, responsive, and accountable government. Consistent with that mission, we have worked with election officials across the nation to improve their administrative policies, protect the freedom to vote of citizens within their jurisdictions, and strengthen the democratic process.

To that end, CLC is concerned about the potential for frivolous mass eligibility challenges during the upcoming election, which have become increasingly common throughout the country.² In recent election cycles, partisan actors have relied on faulty databases to bring hundreds of thousands of challenges to voter eligibility across the nation.³ These databases attempt to match voter registration records with publicly

¹ This letter is not legal advice; it is intended to present a summary of relevant Virginia and federal law.

² See, e.g., Nick Corasaniti & Alexandra Berzon, *Trump's Allies Ramp Up Campaign Targeting Voter Rolls*, N.Y. Times (Mar. 3, 2024), <https://www.nytimes.com/2024/03/03/us/politics/trump-voter-rolls.html> (noting the recent wave of voter eligibility challenges in states such as Georgia, Michigan, and Nevada); David Gilbert, *Election Deniers are Ramping Up Efforts to Disenfranchise Voters*, Wired (Jul. 31, 2024), <https://www.wired.com/story/election-deniers-efforts-disenfranchise-voters>.

³ See Robyn Sanders & Alice Clapman, *Protections Against Mass Challenges*, Brennan Ctr. for Just. (July 17, 2024), <https://www.brennancenter.org/our-work/research-reports/protections-against-mass-challenges-voter-eligibility>. One common database is Eagle AI, which experts have criticized for its frequent identification of eligible voters as ineligible. See Alice Clapman

available information, but that information is almost always incomplete or out of date, making the database matches unreliable.⁴ They also often improperly flag registered voter with the same name as ineligible individuals, voters who are temporarily staying in another place but remain qualified at the address at which they are registered, and households where some but not all residents have moved.⁵ As a result, mass challenge lists almost always include significant numbers of eligible voters who should not be removed from the rolls.⁶

Mass eligibility challenges organized by partisan challengers and submitted with insufficient evidence risk disenfranchising eligible voters and causing unnecessary disruption to the orderly administration of the 2024 elections. We recognize that many election offices have lost their most experienced officials because of threats and volatility in the wake of the 2020 election and that this will be the first presidential election for new staff. We hope this letter will assist you as you provide guidance to your staff and volunteers regarding the rules for voter challenges and their responsibilities in dismissing challenges without cause, allowing your office to ensure a fair and orderly election, safeguard voters from intimidation, and minimize administrative disruption.

To mitigate the potential harms to both voters and election administrators caused by baseless mass challenges, CLC provides the election law summary below to support your development of uniform processes for adjudicating voter eligibility challenges, in compliance with the following requirements of Virginia and federal law.

I. Voter Challenges in Virginia

As you are aware, Virginia's Election Code allows registered voters and election officers to challenge a voter's eligibility. Challenges can be raised to a voter's eligibility prior to or on Election Day, though state law does not allow challenges to properly submitted absentee ballots.⁷

A. Challenges to Voter Registration

1. *Challenges Before the Registrar*

Although Virginia law provides a process for private parties to challenge a voter's registration prior to the in-person voting period, registrars may no longer consider this type of challenge for the purpose of cancellation prior to the 2024 General Election because the time period for valid challenges under law has already ended.⁸

& Andrew Garber, *A New Antidemocracy Tool*, Brennan Ctr. for Just. (Sept. 5, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/new-antidemocracy-tool>.

⁴ See Sanders & Clapman, *supra* note 3.

⁵ See *id.*

⁶ See *id.*

⁷ Va. Code Ann. § 24.2-651.

⁸ See *id.* § 24.2-429.

The Virginia Department of Elections (ELECT) maintains a voter list that is regularly and periodically reviewed to remove any voters whose addresses may have changed.⁹ Prior to the voting period, parties may make challenges to a registered voter's eligibility for any reason other than a change in residency outside of the precinct.¹⁰ Challenges based on change in residency are invalid on their face and must be summarily rejected.¹¹

Virginia law strictly regulates when pre-election challenges to voter registration are permitted and by whom they may be made. A valid challenge may only be made by three voters registered in the same county or city as the challenged voter or by the general registrar.¹² Registrars may not consider a challenge within 60 days of a general election—or after September 6, 2024, for the 2024 General Election—or within 30 days of any other election.¹³

When a valid challenge is filed, the registrar is required to post at the courthouse, or publish in a newspaper of general circulation in the same locality, the name of the challenged voter on a list of persons whose registrations will be cancelled.¹⁴ The list must be certified by the registrar and sent to the county or city chair of each political party.¹⁵ The general registrar must also send a notice by mail to the last known address of each challenged voter, stating the basis for the potential cancellation and informing the voter of the time and place of the hearing where the challenge will be decided.¹⁶ Within 10 days of mailing the notice to the challenged voter, the registrar must hold a hearing to determine whether the challenged voter's registration should be cancelled.¹⁷

No more than 10 days after the hearing, any voter whose registration is cancelled after a hearing by the registrar may appeal the registrar's decision to the circuit court of the city or county in which they were registered.¹⁸ The challenged voter further has the right to appeal the circuit court's decision in the state appellate court and the appeal must be heard on an expedited basis.¹⁹

At the hearing and any subsequent proceedings, it must be "conclusively presumed" that the challenged voter complied with all procedural requirements when applying to register to vote, unless their application was made within six months preceding the challenge.²⁰ If the sole reason for ineligibility is that the voter is registered in the

⁹ *Id.* §§ 24.2-414, -427.

¹⁰ *Id.* § 24.2-429.

¹¹ *Id.*

¹² *See id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* §§ 24.2-422, -430.

¹⁹ *Id.* § 24.2-433.

²⁰ *Id.* § 24.2-434.

incorrect jurisdiction and voter registration is open, the challenged voter must be permitted to change their registration to the proper jurisdiction.²¹

2. Challenges in the Circuit Court

Any three qualified voters may also challenge a new voter's registration by filing a petition stating their objections with the circuit court of their city or county.²² Petitioners cannot raise an objection under this provision if the sole basis for alleged ineligibility is the challenged voter's change of residence outside of the precinct.²³

This petition must be filed within six months of the challenged voter's registration date.²⁴ The petitioners must also give the challenged notice of the challenge at least 15 days prior to the challenge being decided.²⁵ A court will summarily proceed to determine the right of the challenged voter, without the need for formal pleadings, and will process this determination before all other matters on the docket.²⁶ Once the court has issued its judgment, it can be appealed by right to the Court of Appeals.²⁷ The appeal will be placed on the privileged docket and heard by the next available panel of the court.²⁸

B. Challenges to In-Person Ballots

Under Virginia law, any qualified voter may challenge the vote of any person who is listed on the pollbook but is known or suspected to not be a qualified voter.²⁹ This challenge process only applies to in-person ballots and cannot be invoked against any properly signed absentee ballot.³⁰

Challengers acting in bad faith or otherwise abusing the process may be subject to criminal penalties.³¹ To that end, the individual making the challenge must complete a signed statement affirming, subject to criminal penalties, that they are a "qualified voter of this Commonwealth or an officer of election" and that to the best of their "knowledge, information, and belief," the challenged voter is not a qualified voter of that precinct.³² The individual making the challenge must identify the specific reason for the challenge from a set of eight listed options, including that the registered voter is not a U.S. citizen, is not 18 years of age, is not a resident of the Commonwealth or of the locality or precinct where they are registered, is not the person they represented themselves to be, has previously been disqualified from voting and the disqualification

²¹ *Id.* § 24.2-429.

²² *Id.* § 24.2-431.

²³ *Id.*

²⁴ *Id.* § 24.2-434.

²⁵ *Id.* § 24.2-432.

²⁶ *Id.* § 24.2-432.

²⁷ *Id.* § 24.2-433.

²⁸ *Id.*

²⁹ *Id.* § 24.2-651.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

has not been removed, or has already voted in the same election.³³ **A challenge citing any basis other than one set out specifically in statute is invalid on its face and must be summarily rejected.**³⁴

An officer of election will then explain to the challenged voter the requirements to be a qualified voter and may examine the challenged voter's qualifications to confirm their eligibility.³⁵ If the challenged voter confirms that they are qualified, the voter will be asked to sign a statement that directly refutes the list of reasons for challenging a voter's qualifications.³⁶ A challenged voter who signs the statement affirming their eligibility must be permitted to vote a regular ballot, unless otherwise required to vote provisionally.³⁷

The election officer will also mark that person's name on the pollbook to indicate that they have signed the required statement in accordance with the instructions provided by the State Board.³⁸

³³ The eight valid options for challenging a voter under Va. Code Ann. § 24.2-651 are:

1. The named person is not a citizen of the United States;
2. The named person is not now 18 years of age or, in the case of a primary election or a special election held on a date other than a general election date, will not reach the age of 18 before the next general election;
3. The named person is not a resident of the Commonwealth (or, if he has not been a resident of the Commonwealth within the preceding 30 days, he is attempting to vote for an office or issue other than electors of President and Vice President of the United States);
4. The named person is not a resident of this precinct (or he has not been a resident of this precinct since the second preceding general federal election and has not continued to be a resident of this county or city and this congressional district);
5. The named person is not a resident of the town in the case of a town election;
6. The named person has been disqualified from voting by the Constitution and laws of the Commonwealth and this disqualification has not been removed by proper authority;
7. The named person is not the identical person he represents himself to be; or
8. The named person has voted in this election at this or another voting place (state when and where the named person previously voted in this election: _____).

Id.

³⁴ *See id.*

³⁵ *Id.* § 24.2-651.

³⁶ *Id.*

³⁷ *Id.* An otherwise eligible voter can only be required to vote provisionally under this section if the electronic pollbook indicates that the voter has already voted in person in the election in which their right to vote is challenged. *See id.* § 24.2-651.1.

³⁸ *Id.* § 24.2-651.

II. Other Legal Requirements

As you know, both federal and Virginia law provide robust protection against voter intimidation and other forms of infringement on the fundamental right to vote. The process for responding to voter challenges—especially those conducted in bulk—must therefore comply with all federal and state laws, as well as the U.S. Constitution. As such, all Virginia election officials have the responsibility to protect Virginia voters from baseless and discriminatory challenges and ensure that the adjudication of all voter challenges complies with both state and federal law.

A. Racially Discriminatory Challenges

Organized challengers frequently target voters from historically disenfranchised communities in an attempt to intimidate or deter members of those communities from voting.³⁹ Sustaining such discriminatory challenges could violate the U.S. Constitution and federal law. Taken together, the Equal Protection Clause of the Fourteenth Amendment⁴⁰ and Section 2 of the Voting Rights Act⁴¹ prohibit the use of voting practices that result in citizens being denied equal access to the democratic process on account of “race, color, or membership in a language minority group.”⁴² Virginia law similarly protects against voting practices that have the effect of denying the right to vote on the same bases.⁴³ Because voters of color, voters who speak English as a second language or who have limited English proficiency, and voters who are naturalized U.S. citizens are often the exact groups targeted by mass challenges, local elections officials should consider carefully whether granting mass challenges brought before them would have the effect of unlawfully disadvantaging voters because of their race, in violation of both federal and Virginia law.

B. Voter Intimidation

Baseless mass challenges to voter eligibility could constitute voter intimidation, because such challenges are often made in bad faith to deter eligible citizens—including members of historically disenfranchised groups—from voting. Such voter intimidation is illegal under both federal and Virginia law.

Federal law provides that anyone who “intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with

³⁹ See, e.g., Nicolas Riley, *Voter Challenges*, Brennan Ctr. for Just. at 11-12 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf.

⁴⁰ U.S. Const. amend XIV, § 1.

⁴¹ 52 U.S.C. § 10301.

⁴² See *Guidance Under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, for Redistricting and Methods of Electing Government Bodies*, U.S. Dept. of Justice (Sept. 1, 2021), <https://www.justice.gov/opa/press-release/file/1429486/download>.

⁴³ See Va. Code Ann. § 24.2-126. Specifically, the Voting Rights Act of Virginia prohibits any state or local official from enacting or enforcing any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . in a manner that results in a denial or abridgement of the right of any citizen of the United States to vote based on race or color or membership in a language minority group.” Va. Code Ann. § 24.2-126.

the right of such other person to vote” in a federal election has committed a federal crime.⁴⁴ Additionally, several federal statutes impose civil liability for voter intimidation. Section 11(b) of the Voting Rights Act makes it unlawful to “intimidate, threaten, or coerce” another person, or attempt to do so, “for voting or attempting to vote” or “for urging or aiding any person to vote or attempt to vote.”⁴⁵ In 2016, a federal court determined that voter challenges that intentionally target geographic areas with a large percentage of racial or ethnic minorities and that had the purpose or effect of deterring qualified members of those minority groups from voting violated a court order in a case involving claims under Section 11(b).⁴⁶ Further, the U.S. Department of Justice has cautioned that challenges made with the intention of or that have the effect of intimidating a reasonable voter can violate Section 11(b).⁴⁷ And the Ku Klux Klan Act of 1871 makes it unlawful for “two or more persons to conspire to prevent by force, intimidation, or threat,” any voter from casting a ballot for the candidate of their choice.⁴⁸

Similarly, Virginia law makes it a Class 1 misdemeanor to “hinder, intimidate, or interfere with any qualified voter” to prevent them from voting.⁴⁹ The aggressive use or threat of a challenge to a voter’s eligibility when there is no cause to would fall under this provision. Election officials can also have arrested or committed to a county or city jail for no more than 24 hours any individual who disturbs the election or abuses an election officer.⁵⁰

To that end, each election official, their staffs, and volunteers should review their duties and responsibilities to maintain peaceful and orderly polling places and ensure that chief election inspectors are prepared to exercise their authority to remove any challengers who fail to abide by state and/or federal law prohibiting voter intimidation. Clerks and election inspectors should promptly refer incidents of voter intimidation, including repeated impermissible voter challenges orchestrated by partisan outside groups, to the Virginia Attorney General’s Office of Civil Rights⁵¹ and U.S. Department of Justice (DOJ).⁵²

⁴⁴ 18 U.S.C. § 594.

⁴⁵ 52 U.S.C. § 10307(b).

⁴⁶ See *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, No. CV 81-03876, 2016 WL 6584915, at *2 (D.N.J. Nov. 5, 2016).

⁴⁷ See *Voter Registration List Maintenance: Guidance under Section 8 of the National Voter Registration Act*, 52 U.S.C. § 20507, U.S. Dept. of Justice at 3 (Sept. 2024), <https://www.justice.gov/crt/media/1366561/dl> [hereinafter “DOJ Guidance”].

⁴⁸ 42 U.S.C. § 1985(3).

⁴⁹ Va. Code Ann. § 24.2-607.

⁵⁰ *Id.*

⁵¹ The Virginia Attorney General’s Office of Civil Rights can be reached at 804-225-2292.

⁵² The DOJ Civil Rights Division can be reached at 800-253-3931, and voter intimidation reports can be submitted online at <https://civilrights.justice.gov/report>. More information on DOJ’s resources to protect voting access can be found at <https://www.justice.gov/opa/pr/justice-department-releases-information-efforts-protect-right-vote>.

C. Uniform and Nondiscriminatory Standards

The U.S. Constitution and federal law require that each state and political subdivision use uniform, nondiscriminatory standards and processes for evaluating voter eligibility challenges.⁵³ Under the U.S. Constitution, counties in the same state are prohibited from “us[ing] varying standards to determine what [i]s a legal vote” when processing ballots in presidential elections.⁵⁴ Similarly, the National Voter Registration Act (NVRA) mandates that any voter registration list maintenance activity be “uniform, nondiscriminatory, and in compliance with the Voting Rights Act[.]”⁵⁵ including “any list maintenance activity based on third party submissions.”⁵⁶ The U.S. Department of Justice has advised that numerous list maintenance methods commonly used in mass voter eligibility challenges might violate the NVRA, including “comparing voter files to outdated or inaccurate records or databases, taking action that erroneously affects a particular class of voters (such as newly naturalized citizens), or matching records based solely on first name, last name, and date of birth.”⁵⁷

The NVRA further mandates that election officials may not “systematically remove” ineligible voters from voter registration rolls within 90 days preceding an election for federal office.⁵⁸ According to the U.S. Department of Justice, this restriction “applies to list maintenance programs based on third-party challenges derived from any large, computerized data-matching process.”⁵⁹

Local officials should work to eliminate any meaningful divergence among them in the standards and processes used to evaluate voter challenges in different localities and replace them with uniform standards and processes. By doing so, Virginia voter challenge processes can avoid the “arbitrary and disparate treatment” of challenged ballots that violates the U.S. Constitution.⁶⁰

D. Removals Based on Change of Address

The NVRA strictly regulates the process for removing a registered voter from the voter registration rolls based on suspected change of address, including when removals are triggered by mass eligibility voter challenges.⁶¹ Election officials may only remove a voter from the list of registered voters based on change in residence when: (1) the voter confirms in writing that they have moved outside of the jurisdiction; or (2) election

⁵³ See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (finding that the lack of uniform standards across counties for when to count a ballot violates the Constitution’s Equal Protection Clause).

⁵⁴ *Id.* at 107.

⁵⁵ 52 U.S.C. § 20507(b).

⁵⁶ DOJ Guidance at 3.

⁵⁷ *Id.*

⁵⁸ 52 U.S.C. § 20507(b)(1).

⁵⁹ DOJ Guidance at 4.

⁶⁰ *Bush*, 531 U.S. at 104-05.

⁶¹ See 52 U.S.C. § 20507(b); DOJ Guidance at 4-6.

officials have satisfied the process outlined in Section 8(d)(2) of the NVRA.⁶² The United States Department of Justice has cautioned that “[a] third-party submission—such as a submission of another individual’s information via an online portal or a challenge based solely on public database information—is not confirmation by the registrant of a change of address.”⁶³ Consequently, **removing individuals from the list of registered voters due to suspected change of address on the basis of mass voter eligibility challenges alone likely violates the NVRA.**⁶⁴

* * *

By ensuring compliance with the processes, requirements, and limitations of Virginia’s voter challenge laws, you can mitigate the potential harm and disruption caused by frivolous voter eligibility challenges. Our hope is that this summary of the relevant law will help you to prepare proactively to develop written procedures and policies for adjudicating such challenges and train your staff, volunteers, and election inspectors on the requirements of Virginia and federal law applicable to voter eligibility challenges.

Please do not hesitate to reach out with any questions. We stand ready to assist you in upholding federal and state law and protecting Virginians’ freedom to vote.

Sincerely,

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⁶² See 52 U.S.C. § 20507(b)-(d); DOJ Guidance at 4. The DOJ Guidance also provides detailed information on the requirements of Section 8(d)(2). Election officials may only remove a voter under Section 8(d)(2) of the NVRA if that voter: (1) does not vote in any election between the date the notice was sent and the second general election following the notice; and (2) does not respond to the notice. 52 U.S.C. § 20507(d)(2).

⁶³ DOJ Guidance at 4.

⁶⁴ *Id.* at 4-5.