



COMMONWEALTH *of* VIRGINIA

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Dear colleague,

As we approach Election Day, I know we all share a commitment to doing what each of us can in our respective roles to ensure a safe, smooth, fair, and accurate election, and a positive experience for voters at their polling place.

Attached you will find an advisory opinion that I issued on September 24, 2020 outlining protections in both state and federal law against voter intimidation and harassment. As you play a critical role in protecting the elections process in the Commonwealth, I thought it important to ensure that you know the protections that are in place and the options available to you should we see any behavior over the next few weeks that could constitute voter intimidation or harassment.

Virginians need to know that they can vote safely and securely if they choose to vote in person, and no matter how they vote, whether in person or by mail, their vote will count. Voting is the bedrock of our democracy and no one should ever feel intimidated or afraid when casting their ballot.

In addition to the guidance included in my opinion, the Virginia Department of Elections also has resources for voters who believe they may have experienced or witnessed voter intimidation. Voters can report complaints of voter intimidation on ELECT's website (www.elections.virginia.gov) or by phone at (800) 552-9745.

This election season has presented us with numerous challenges thus far, but I want to assure you my team and I are preparing to help address issues and challenges that may arise over the next few weeks. Please do not hesitate to reach out to my office if you have any questions or if we can help you in any way during this time.

Very truly yours,

A handwritten signature in dark ink that reads "Mark R. Herring". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Mark R. Herring
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September 24, 2020

The Honorable Marcus B. Simon
Member, Virginia House of Delegates
Post Office Box 958
Falls Church, Virginia 22040

Dear Delegate Simon:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Issue Presented

You explain that, with the start of in-person early voting in Virginia for the 2020 November election, there have been reports of activity near polling places that led some voters to fear for their safety while waiting to cast their vote, or led them to believe that they would be harmed for supporting a particular candidate. You have asked what, if any, protections state and federal law may provide against voter intimidation at a polling place.

Applicable Law and Discussion

In our democratic system of governance, the right to vote is “a fundamental political right.”¹ Voting both ensures “a representative form of government” and also “preserv[es] . . . other basic civil and political rights.”² “[T]he right to exercise the franchise in a free and unimpaired manner” is therefore a “bedrock” principle in any “free and democratic society.”³ Intimidation of citizens who are seeking to vote is both illegal and antithetical to one of the basic promises that binds us together: that of democratic self-governance.

¹ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 98, 376 S.E.2d 525, 530 (1989) (noting that “the right to vote” has “been recognized as fundamental”).

² *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

³ *Id.*; *see also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (describing “the right to vote” as “precious” and “fundamental”).

1. Intimidating a voter in Virginia is a criminal offense.

Both state and federal law include provisions designed to ensure that voters may cast their votes free from interference or harassment. The Code of Virginia, for example, expressly prohibits voter intimidation. Section 24.2-607(A) makes it unlawful “for any person to hinder, intimidate, or interfere with any qualified voter so as to prevent the voter from casting a secret ballot.”⁴ Violations of that provision are punishable as a Class 1 misdemeanor.⁵ Section 24.2-1005 separately makes it a Class 1 misdemeanor to use “threats, bribery, or other means in violation of the election laws” to “attempt[] to influence any person in giving his vote or ballot or . . . deter him from voting.”⁶ And under § 24.2-1015, it is a Class 5 felony to “conspire to injure, oppress, threaten, intimidate, prevent, or hinder any citizen of this Commonwealth in the free exercise or enjoyment of any right or privilege secured to him by the provisions of [the election laws].”⁷ Finally, while polls are open, no person may “hinder or delay a qualified voter in entering or leaving a polling place.”⁸

Federal criminal law similarly provides that any person who “intimidates, threatens, [or] coerces” another person “for the purpose of interfering with the right of such other person to vote or to vote as he may choose” in a federal election—or “attempts” to do the same—may be fined and/or imprisoned for up to one year.⁹

The Code of Virginia also prohibits certain conduct at polling places that might interfere with the right to vote free from influence. First, “[n]o person shall conduct himself in a noisy or riotous manner at or about the polls so as to disturb the election”¹⁰ In addition, while polls are open, it is unlawful to “loiter or congregate,” “give, tender, or exhibit any . . . campaign material,” or “solicit or in any manner attempt to influence any person in casting his vote” within 40 feet of “any entrance of any polling place.”¹¹ It is also unlawful to “use[]” a “loudspeaker . . . within 300 feet of a polling place on an election day.”¹² Should they so choose, officers of election—with the consent of the locality’s chief law-enforcement officer—are empowered to “designate a law-enforcement officer” to “preserve order inside and outside at the polling place.”¹³

2. Virginia and federal law provide that voters shall not be harassed for exercising their rights.

Voters similarly should not fear for their safety when voting, whether they are within the forty-foot zone of a polling place or in socially-distanced lines beyond that zone. Both state and local law protect citizens from violent threats, and in particular from being threatened with firearms. It is a criminal offense in Virginia “to point, hold or brandish any firearm or any air or gas operated weapon or any object

⁴ VA. CODE ANN. § 24.2-607(A) (This and all other citations to the Code of Virginia are from the electronic version of the Code on LexisNexis and are current through the 2020 Regular Session, and 2020 Special Session I, c. 1, of the General Assembly.).

⁵ *Id.*

⁶ *Id.* § 24.2-1005.

⁷ *Id.* § 24.2-1015.

⁸ *Id.* § 24.2-604(A).

⁹ 18 U.S.C. § 594 (LexisNexis, current through Public Law 116-158, approved Aug. 14, 2020).

¹⁰ VA. CODE ANN. § 24.2-607(B).

¹¹ *Id.* § 24.2-604(A).

¹² *Id.* § 24.2-605.

¹³ *Id.* § 24.2-606.

similar in appearance, whether capable of being fired or not, in such manner as to reasonably induce fear in the mind of another or hold a firearm or any air or gas operated weapon in a public place in such a manner as to reasonably induce fear in the mind of another of being shot or injured.”¹⁴ Virginia law also prohibits carrying or possessing firearms or weapons at specific locations that may be used as polling places, such as schools and courthouses.¹⁵ A number of Virginia localities, including Arlington County and Richmond City, have enacted ordinances that restrict individuals from carrying firearms around certain public areas that may also serve as polling locations.¹⁶

Finally, it is a criminal offense for private individuals to usurp the role of actual law enforcement, and it is accordingly unlawful to appear at the polls attempting to exercise roles that rightfully belong to law enforcement. Virginia law makes it a Class 1 misdemeanor to “falsely assume[] or exercise[] the functions, powers, duties, and privileges incident to the office of sheriff, police officer, marshal, or other peace officer, or any local, city, county, state, or federal law-enforcement officer.”¹⁷ This criminal prohibition can apply to “a group of private militia members coming as a unit, heavily armed with assault-style weapons, dressed in fatigues and other military accessories, and acting in a coordinated fashion” where the “militia members patrol[] a line of citizens” and “project[] authority to manage the crowd.”¹⁸

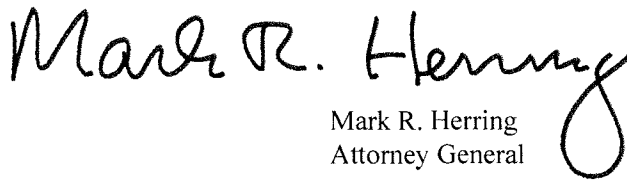
These types of protection have an important history in our law. They have helped vindicate racial equality in voting, ensure the constitutional guarantee of equal protection of the laws, and invoke the basic respect that is due every voter at the polls.

Conclusion

The legitimacy of our government—and its success in fulfilling the promises of our Constitution—rely on the notion of uncoerced choice. Virginia and federal law protect the fundamental right to vote freely. Accordingly, it is my opinion that the conduct you describe could violate state and/or federal law if it threatens or intimidates voters casting their ballots at polling places.

With kindest regards, I am,

Very truly yours, .


Mark R. Herring
Attorney General

¹⁴ *Id.* § 18.2-282(A). A violation of this section is punishable as a Class 1 misdemeanor, unless it occurs “upon any public, private or religious elementary, middle or high school, including buildings and grounds or upon public property within 1,000 feet of such school property,” in which case a violation is punishable as a Class 6 felony. *Id.*

¹⁵ See VA. CODE ANN. § 18.2-308.1 (prohibiting possession of firearms and certain other weapons on “property of any . . . public, private, or religious preschool, elementary, middle, or high school, including buildings and grounds”); *id.* § 18.2-283.1 (prohibiting possession of firearms and certain other weapons in courthouses).

¹⁶ See COUNTY OF ARLINGTON, VA., CODE ch. 13, art. II, § 13-14 (2020); City of Richmond, Va., Ordinance No. 2020-184 (Sept. 8, 2020) (amending City Code § 19-334.1); see also generally VA. CODE ANN. § 15.2-915 (authorizing localities to adopt ordinances prohibiting possession of firearms in certain public areas).

¹⁷ VA. CODE ANN. § 18.2-174.

¹⁸ 2019 Op. Va. Att’y Gen. 81, 84 (Aug. 16, 2019).