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Sarah Warbelow

Cathryn Oakley

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THE VIRGINIA VALUES ACT: A LANDMARK CIVIL RIGHTS
LEGISLATION LEAPFROGS VIRGINIA INTO A LEADER ON
EQUALITY

*Sarah Warbelow and Cathryn Oakley**

*Sarah Warbelow serves as the Legal Director for the Human Rights Campaign and Cathryn Oakley serves as State Legislative Director and Senior Counsel for the Human Rights Campaign. The authors would like to thank Kali Froh and Sarah Connor for their contributions to this project. The authors are deeply appreciative of their longstanding partnership with Equality Virginia, including Vee Lamneck and James Parrish, for their tireless pursuit of equality in the Commonwealth.

ABSTRACT

After more than 25 years of Republican political control, Virginia passed thirteen pieces of pro-equality legislation in 2020, the most sweeping of which was the Virginia Values Act. That legislation modernized Virginia civil rights law, bringing the state into line with the overwhelming majority of other states in addressing discrimination. In addition to adding nondiscrimination protections for lesbian, gay, bisexual, transgender, and queer (LGBTQ) people in existing law - which included housing, public employment, and credit - it created all-new protections from discrimination in employment and places of public accommodation on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, sexual orientation, gender identity, marital status, disability, or status as a veteran.

The legacy of the Virginia Values Act represents tremendous progress for the Commonwealth of Virginia not only on LGBTQ equality, but also in grappling with racism and sexism. It is a manifestation of the transformation of Virginia over time, and it is a reflection of the power of an elected body to make transformative change when the representatives are free to vote in alignment with not only their conscience, but in accord with the will of their constituents. To continue making such progress across the South, it will be imperative that other legislatures undergo similar transformations.

INTRODUCTION

Sometimes progress comes in dribs and drabs, and other times a steady flow. In Virginia, it came in a deluge. Republican control of at least one chamber of the legislature or the governorship for more than 25 years created pent-up demand for change. The dam broke in 2020 with the passing of thirteen pieces of pro-equality legislation, the most sweeping of which was the Virginia Values Act.¹

The Virginia Values Act is landmark civil rights legislation that makes Virginia the first state in the South to have nondiscrimination protections for lesbian, gay, bisexual, transgender and queer (LGBTQ) people.² However, Virginia lagged far behind other states in terms of non-discrimination

¹ S. 868, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); see Matthew F. Nieman & Jeremy S. Schnieder, *Virginia's Values Act Fundamentally Rewrites the Human Rights Act*, JACKSONLEWIS (Apr. 13, 2020), <https://www.jacksonlewis.com/publication/virginia-s-values-act-fundamentally-rewrites-human-rights-act>.

² See Cynthia Silva, *Virginia governor signs LGBTQ nondiscrimination measure into law*, NBC NEWS (Apr. 13, 2020), <https://www.nbcnews.com/feature/nbc-out/virginia-governor-signs-lgbtq-nondiscrimination-measure-law-n1182821>.

protections for any characteristic; only five other states lack any enforceable nondiscrimination protections in places of public accommodation.³ For example, some of the most meaningful developments ushered in by the Virginia Values Act were overshadowed by a myopic assumption that the protections were only for LGBTQ people. Instead, the new law brings Virginia into line with the overwhelming majority of other states that have been in addressing discrimination for decades.⁴ By adding all-new protections from discrimination in employment and places of public accommodation the Virginia Values Act extends vital civil rights protections on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, sexual orientation, gender identity, marital status, disability, or status as a veteran.⁵ The Commonwealth now aligns with forty-four other states and DC that ban discrimination, for at least some characteristics, in places of public accommodations and employment.⁶

The passage of the Act also reflects popular opinion about the rights of LGBTQ people. The Act showcases support for non-discrimination protections for the LGBTQ community cutting across generations, faith traditions, and even partisan leanings.⁷ While some politicians continue to attempt to use LGBTQ equality as a wedge issue, Virginia's 2019 election is proof positive that such tactics are simply no longer effective.⁸ What has happened in Virginia also shows that when elected officials vote consistent with their constituents' positions on equality, that pro-equality legislation—even landmark legislation like the Virginia Values Act—passes with bipartisan support.

The legacy of the Virginia Values Act represents tremendous progress for the Commonwealth of Virginia not only on LGBTQ equality, but also in grappling with racism and sexism. The Act is a manifestation of the transformation of Virginia over time, and it is a reflection of the power of an elected body to make transformative change when their representatives are free to vote in alignment with not only their conscience, but in accord with the will of their constituents. To continue making such progress across the South, it is imperative that other legislatures undergo similar transformations.

³ Nick Morrow, *Historic: Virginia Values Act Goes Into Effect, Extending Critical Protections to LGBTQ Virginians*, HUM. RTS. CAMPAIGN (July 1, 2020), <https://www.hrc.org/news/historic-virginia-values-act-goes-into-effect-extending-critical-protection>.

⁴ See *State Public Accommodation Laws*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 8, 2019), <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx>.

⁵ Va. S. 868.

⁶ See *State Public Accommodation Laws*, *supra* note 4; see also Morrow, *supra* note 3.

⁷ See *Community Partners*, VA. VALUES (2020), <https://vavalues.org/community-partners/> (showing widespread support for the Virginia Values Act across generationally and religiously diverse organizations); see also Va. S. 868 (demonstrating the bill's ability to garner bipartisan support).

⁸ Lucas Acosta, *HRC on Bob Good's Anti-LGBTQ Lies and Fear Mongering*, HUM. RTS. CAMPAIGN (Aug. 16, 2020), <https://www.hrc.org/press-releases/hrc-on-bob-goods-anti-lgbtq-lies-and-fear-mongering>.

I. What Are Nondiscrimination Laws and Why Are They Important

A. General Explanation of How Nondiscrimination Laws Work, Civil Liability

Laws prohibiting discrimination focus in general on three major areas of life in which discrimination is both particularly likely to occur and particularly damaging when it does: employment, housing, and places of public accommodation.⁹ Discrimination is not limited to these three arenas and many states go further by explicitly prohibiting discrimination in credit, jury service, state contracts, government funded programs and services, education, access to healthcare, and more.¹⁰ Federal civil rights laws include: Title VII of the Civil Rights Act of 1964 which forbids discrimination in employment for employers with fifteen or more employees;¹¹ Title II of the Civil Rights Act of 1964 which provides some limited protections from discrimination in places of public accommodation;¹² Title IX of the Education Amendments of 1974 which prohibits discrimination on the basis of sex in education, including sports;¹³ and the Fair Housing Act.¹⁴ Many other federal laws include non-discrimination provisions, including the Affordable Care Act,¹⁵ the Equal Credit Opportunity Act,¹⁶ the Jury Service and Selection Act,¹⁷ and Temporary Assistance for Needy Families.¹⁸

1. The Necessity and Ubiquity of State Nondiscrimination Laws

Every state in the United States prohibits discrimination against at least one protected characteristic in some way. For example, every state but one prohibits discrimination in employment and housing on the basis of religion or creed.¹⁹ Forty-five states plus the District of Columbia prohibit

⁹ See, e.g., 42 U.S.C. §§ 2000e-2(a)(1) to (2)(a)(2), 3604(a), 2000a(a) (serving as examples of federal laws that prohibit discrimination in the context of employment, housing, and places of public accommodation).

¹⁰ See SARAH WARBELOW ET AL., HUM. RTS. CAMPAIGN, 2019 STATE EQUALITY INDEX 46–47 (2019), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/resources/2019-SEI-Final-Report.pdf?mtime=20200807165244&focal=none>.

¹¹ 42 U.S.C. § 2000e(b), 2000e-2(a)(1) to 2(a)(2).

¹² 42 U.S.C. § 2000a(a).

¹³ See 20 U.S.C. § 1681.

¹⁴ 42 U.S.C. §§ 3604–3606.

¹⁵ 42 U.S.C. § 18116.

¹⁶ 15 U.S.C. § 1691(a).

¹⁷ 28 U.S.C. § 1862.

¹⁸ 42 U.S.C. § 608(d).

¹⁹ *Discrimination and Harassment in the Workplace*, NAT’ CONF. OF STATE LEGISLATURES (Mar. 18,

discrimination in places of public accommodation, with all such laws banning discrimination on the basis of race.²⁰ The scope of these laws can vary considerably from state to state, but the principle is nearly universal: state laws banning discrimination are necessary complements to federal law in order to ensure that individuals are able to access the fundamental building blocks of our society.²¹

a. Three Fundamental Areas of Life in Which Discrimination is Nearly Always Prohibited

At their core, employment, housing, and places of public accommodation are the fundamental building blocks of our society.²² If a person's ability to find gainful employment is limited by factors outside their ability to perform the function of the job; if they are not able to find stable, safe housing for themselves and their family because a neighborhood or landlord finds them to be the "wrong kind" of family for that community; or if they are denied service at the gas station, grocery store, library, restaurant, hotel, or other place that is supposedly open to the public, they are effectively denied the ability to live a normal life.²³ When people are forced into segregated neighborhoods and out of promising careers, their dignity is undermined and their future foreclosed.²⁴ Denial of access prevents people not only from being able to get ahead but from being able to survive.²⁵

2019), <https://www.ncsl.org/research/labor-and-employment/employment-discrimination.aspx> ("Mississippi doesn't have an equal employment opportunity law that applies generally to private employers."); *State Fair Housing Protections*, THE POL'Y SURVEILLANCE PROGRAM (Aug. 1, 2019), <https://lawatlas.org/datasets/state-fair-housing-protections-1498143743>.

²⁰ See *State Public Accommodation Laws*, *supra* note 4.

²¹ See *Federal, State, and Local Laws: Conflicts or Compliments?*, MID-ATL. ADA CTR. (2012), <https://www.adainfo.org/content/federal-state-and-local-laws-conflicts-or-complements>.

²² See, e.g., L. Randall Wray, *The Social and Economic Importance of Full Employment* 6 (Univ. of Mo.–Kan. City & Levy Econ. Inst. Bard Coll., Working Paper No. 560, 2009), <http://www.levyinstitute.org/publications/the-social-and-economic-importance-of-full-employment> ("Many job guarantee supporters see employment not only as an economic condition, but also as a human right."); MARTHA GALVEZ ET AL., URBAN INST., *HOUSING AS A SAFETY NET: ENSURING HOUSING SECURITY FOR THE MOST VULNERABLE* 1 (2009), https://www.urban.org/sites/default/files/publication/93611/housing-as-a-safety-net_1.pdf ("Our existing housing system fails to provide our nation's most vulnerable households access to safe, affordable, stable housing. Instead, millions of low-income households pay large portions of their income on rent or live in substandard conditions—triggering chronic economic instability that at best undermines economic security and well-being, and at worst pulls low-income families deeper into poverty.").

²³ See Wray, *supra* note 22; GALVEZ ET AL., *supra* note 22, at 4.

²⁴ See Keeanga-Yamahtta Taylor, *How Real Estate Segregated America*, DISSENT MAG. (Fall 2018), <https://www.dissentmagazine.org/article/how-real-estate-segregated-america-fair-housing-act-race>.

²⁵ *Id.*

b. Protected Characteristics: Which Characteristics Deserve Protection and Why?

Over time and across the country, states have perceived the challenges posed by discrimination differently and moved to address it in divergent ways. The principle that discrimination erodes the society around us is essentially universally adhered to, and the fundamental areas of employment, housing, and places of public accommodation are generally acknowledged to be the building blocks to which all must have access.²⁶ Defining precisely what kinds of discrimination are problematic and should be prohibited is a threshold question that states have taken different approaches to answering; nearly all states recognize and prohibit discrimination on the bases of race or color, religion or creed, ancestry or national origin, particularly as that discrimination manifests in places of public accommodation.²⁷ In addition to these characteristics, employment discrimination often includes sex, conditions related to pregnancy, as well as disability.²⁸ Characteristics like marital status, age, genetic information, military service or veteran's status, sexual orientation, and gender identity are also often covered.²⁹ States also may choose to tackle discrimination on the basis of one particular characteristic or one component of a characteristic in more specific legislation related to pregnancy, disability, age, or other topics. For example, seven states have recently taken action to ban discrimination against people for wearing their natural hair or hair styles associated with a particular race in the workplace, in seeking housing, and in schools.³⁰

c. Immutability

While states have not come to a consensus on which characteristics ought to be protected, one thing remains consistent in federal and state protections: prohibiting discrimination means ensuring that a person is not held back from opportunities they would otherwise have because of something that is fundamental and unchangeable regarding who they are.³¹ From a person's skin color, to their ancestry, to their religion, to their genetic information: these

²⁶ See Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1241–42 (2014).

²⁷ *State Public Accommodation Laws*, *supra* note 4.

²⁸ *Discrimination and Harassment in the Workplace*, *supra* note 19.

²⁹ *Id.*

³⁰ *The Official Campaign of the CROWN Act*, CROWN ACT, <https://www.thecrownact.com/about> (last visited Sept. 23, 2020).

³¹ See Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1517–20 (2011).

are characteristics that are so intrinsic that they are essentially unchangeable.³² As understanding of the LGBTQ community has progressed, there's greater acceptance that a person's identity as LGBTQ is also intrinsic and immutable, which has in turn led to increased inclusion of sexual orientation and gender identity as characteristics that should be protected under law.³³

2. Enforcement and Civil Liability

While some jurisdictions - particularly those cities that are not empowered to create causes of action at the municipal level - enforce local non-discrimination laws with criminal fines, violations of civil rights laws are generally addressed through civil remedies.³⁴ States deploy a combination of administrative and civil remedies that often replicates the process for enforcing federal employment discrimination law via the Equal Employment Opportunity Commission.³⁵

a. Administrative Remedies

Many states have an administrative agency, usually a commission, that is responsible for enforcing the state's nondiscrimination law.³⁶ Much like the Federal Equal Employment Opportunity Commission, a state commission will receive complaints, conduct an initial investigation of the complaint, and then facilitate possible conciliation of the complaint.³⁷ An agency can play an important filtering role by making an initial determination as to whether

³² See *id.* at 1517.

³³ See Dan Brook, Suzanne Goldberg & Kate Diaz, *Is Sexual Orientation Immutable?: Presenting Scientific Evidence in Litigation to Gain Strict Scrutiny*, 27 *FORDHAM URB. L.J.* 348, 349–54 (1999); see also *Sexual orientation and gender identity*, *AM. PSYCH. ASS'N* (2011), <https://www.apa.org/topics/sexual-orientation>.

³⁴ JEROME HUNT, *CTR. FOR AM. PROGRESS ACTION FUND, A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES* 18 (2012), https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf.

³⁵ *State Employment Nondiscrimination Laws*, *MOVEMENT ADVANCEMENT PROJECT* (Aug. 12, 2020), <https://www.lgbtmap.org/img/maps/citations-nondisc-employment.pdf>; HUNT, *supra* note 34, at 1–2.

³⁶ *Federal & State Agencies*, *COAL. AGAINST NONPROFIT HARASSMENT DISCRIMINATION*, <https://www.canhad.org/state-agencies> (last visited Oct. 7, 2020); see generally *State & Regional Resources*, *COAL. AGAINST NONPROFIT HARASSMENT DISCRIMINATION*, <https://static1.squarespace.com/static/595fec88725e258a0c607cf0/t/59670582c534a593f2b0b595/1499923843345/State+Resources.pdf> (last visited Oct. 7, 2020) (listing antidiscrimination agencies and commissions).

³⁷ See, e.g. *The Division of Human Rights*, *ATT'Y GEN. OF VA.*, <https://www.oag.state.va.us/index.php/programs-initiatives/human-rights> (last visited Oct. 2, 2020) (“[T]he DHR investigates complaints alleging discrimination in employment, places of public accommodation, and education institutions in violation of the Virginia Human Rights Act or corresponding federal laws. The DHR will also provide mediation services throughout the complaint process to all the parties to resolve the dispute themselves.”).

discriminatory behavior is likely to have occurred. As experts in recognizing discriminatory behavior, a commission is well-suited to gather the most relevant information that can provide important benefits to both parties.³⁸

First, proving a case of discrimination can be challenging and having an expert in discrimination be part of both collecting and assessing the evidence can help to ensure that a complainant is able to have their case ably considered.³⁹ This can be particularly important when a person is experiencing discrimination as a result of holding more than one marginalized identity, which can compound the impact of discrimination or alter the way in which it presents.⁴⁰ Second, the administrative process provides a relatively speedy resolution for respondents who are wary of frivolous complaints: having an expert on discrimination perform a screening function means that cases with insufficient evidence, or which are maliciously or frivolously brought, are promptly recognized and frequently resolved early in the process.⁴¹ Respondents also value the predictability and relative privacy of an administrative process over the uncertainty—and publicity—of a public litigation process.⁴²

Giving authority to a commission staffed by experts on discrimination also means the person leading the conciliation process will have a sense of the proportionality of the harm and of the impact of proposed remedies. For example, in some cases the discrimination may have been quite real but the actual damages were so limited that an apology coupled with an agreement to change policies and practices may be a sufficient resolution for all parties involved. In other cases, the severity of the discriminatory behavior may simply not be fully understood by the respondent and after education about the impact of the discrimination the respondent may be better able to adjust their future behavior in a meaningful way. Leading the parties to resolutions such as these may lead to a more productive outcome than would a penalty imposed by a court order.

³⁸ See, e.g., *How to Submit an Employment Discrimination Complaint*, TEX. WORKFORCE COMM'N, <https://www.twc.texas.gov/jobseekers/how-submit-employment-discrimination-complaint> (last visited Oct. 7, 2020) (discussing discrimination investigations conducted by Texas Workforce Commission).

³⁹ See Hilary R. Weiner, *Expert Witness in Employment Discrimination Cases*, AM. PSYCH. ASS'N, <https://www.apa.org/careers/resources/profiles/weiner> (last visited Sept. 30, 2020).

⁴⁰ See Alina Tugend, *The Effect of Intersectionality in the Workplace*, N.Y. TIMES (Sept. 30, 2018), <https://www.nytimes.com/2018/09/30/us/the-effect-of-intersectionality-in-the-workplace.html> (discussing intersectional discrimination in the workplace); Weiner, *supra* note 39 (discussing value of expert assistance in complex employment discrimination cases).

⁴¹ See, e.g., *Complaint Process*, CAL. DEP'T FAIR EMP. & HOUS., <https://www.dfeh.ca.gov/ComplaintProcess/> (last visited Oct. 7, 2020) (“DFEH will evaluate the allegations in the intake form and decide whether the laws that DFEH enforces cover these allegations.”).

⁴² See Katie Eyer, *Administrative Adjudication and Rule of Law*, 60 ADMIN. L. REV. 647, 666–67 (2008) (discussing stability and predictability of administrative adjudication).

Most states, however, will allow a complainant to file a claim in court under certain circumstances.⁴³ There are three scenarios in which this is generally occurs. First, when the Commission dismisses a claim as being without sufficient merit to continue through the administrative process;⁴⁴ second, when the Commission is unable to conciliate a matter in which the claim did have sufficient merit, and the complainant needs to turn to the courts to get a sufficient remedy;⁴⁵ and third, when the Commission itself, or another authorized party of the state government, is compelled to bring a civil action against a respondent in the name of protecting the public policy of that state.⁴⁶ This meld of administrative action and civil action is a hybrid approach discussed in further detail below. Finally, the agency may be granted the authority to independently issue subpoenas, request documents, and issue injunctions, or it may need to do so in conjunction with the courts.⁴⁷

b. Civil Action

In some states, a person who has experienced discrimination may file a complaint in state civil court. In a pure model, the complainant can do so without having to engage in any administrative process at all.⁴⁸ In a hybrid model, as described above, the complainant may file only if the Commission attests that they have exhausted the administrative process available to them: either because the complaint was found to be meritless or because the Commission was unable to resolve a claim that did have merit.⁴⁹ In a pure model, the court alone makes that determination through the normal process of civil litigation; while this model means that the parties and the court are not able

⁴³ See, e.g., *Filing a Discrimination Claim - Virginia*, WORKPLACE FAIRNESS, https://www.workplace-fairness.org/file_VA (last visited Sept. 30, 2020).

⁴⁴ See *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/filing-lawsuit> (last visited Sept. 30, 2020).

⁴⁵ See *id.* (“The EEOC has discretion which charges to litigate if conciliation efforts are unsuccessful”).

⁴⁶ See *id.* (“[T]he EEOC can file a lawsuit to enforce the law . . .”).

⁴⁷ Rufino Gaytán, *EEOC Subpoena Power: Where, and When, Does It End?*, NAT'L L. REV. (Mar. 2, 2017), <https://www.natlawreview.com/article/eec-subpoena-power-where-and-when-does-it-end> (noting EEOC subpoena power); Mariah Berry, *EEOC Requests for Documents and Subpoenas: How Much is Too Much to Turn Over?*, M2D INSIGHTS (Aug. 26, 2020), <https://m2dlaw.com/eec-requests-for-documents-and-subpoenas-how-much-is-too-much-to-turn-over/> (noting EEOC ability to request documents); *Application for Temporary Restraining Order or Preliminary Injunction*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/application-temporary-restraining-order-or-preliminary-injunction> (last visited Sept. 27, 2020) (noting EEOC injunction power); see, e.g., *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 283 (2002) (noting EEOC actions in conjunction with courts).

⁴⁸ See e.g., HUNT, *supra* note 34, at 12 (“[I]n order to receive compensation and punitive damages and attorneys’ fees, an employee must file civil action in court instead of with the corresponding administrative agency.”).

⁴⁹ *Filing a Discrimination Claim - Virginia*, *supra* note 43.

to draw from a Commission's expertise and advice, it does offer easy and direct access to the court without a time-consuming administrative process.⁵⁰

c. State-Supported Litigation

In especially severe cases, the Commission, Attorney General, or other branch of the state government may be authorized to initiate a case on behalf of the state where the public policy of the state demands it.⁵¹ Such a case would typically arise if an employer had a pattern or practice of routinely flouting the law or had behaved in such an egregious fashion as to need to be made an example of. Alternatively, the state may join a cause of action as an interested party to represent the state's interest before the court.⁵²

B. Scope and Prevalence of Discrimination Against LGBTQ People

The LGBTQ community is large and extremely diverse with diverse experiences and needs, and discrimination is an experience that too many LGBTQ people unfortunately share.⁵³ An estimated 257,000 LGBTQ adults, and 50,000 LGBTQ youth live in Virginia.⁵⁴ About 40% of LGBT adults are people of color, including more than 18% who are Black and more than 10% who are Latino/a or Hispanic.⁵⁵ More than a quarter of LGBTQ Virginians 25 and older are raising children, comprising more than 14,000 families.⁵⁶

The existence of discrimination against LGBTQ people in Virginia is likely not a surprise—one of the nation's most high-profile cases related to denial of bathroom access for transgender people came from Virginia's Gloucester County⁵⁷—but the scope of the harms might not be well known to many. The 2015 US Transgender Survey reported that 27% of respondents from Virginia who had held a job in the previous year experienced discrimination or mistreatment related to their gender identity in the workplace

⁵⁰ See HUNT, *supra* note 34, at 12.

⁵¹ See *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964> (last visited Sept. 27, 2020).

⁵² See Carr v. Florence, 916 F.2d 1521, 1524 (11th Cir. 1990) (noting that the state can join a cause of action when it is a substantial party in interest).

⁵³ See, e.g., CHRISTY MALLORY ET AL., UCLA SCH. OF L. WILLIAMS INST., THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN VIRGINIA 20 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-VA-Jan-2020.pdf> ("LGBT adults in Virginia experience discrimination in employment, housing, and public accommodations").

⁵⁴ *Id.* at 2.

⁵⁵ *Id.* at 9.

⁵⁶ *Id.* at 10.

⁵⁷ *Grimm v. Gloucester County School Board*, ACLU (Nov. 27, 2019), <https://www.aclu.org/cases/grimm-v-gloucester-county-school-board>.

including being fired, denied a promotion, being forced to use a restroom that did not match their gender identity, or even experiencing violent attack.⁵⁸ 20% of respondents experienced some form of housing discrimination in the past year with 9% of respondents experiencing homelessness in that year.⁵⁹ Of those experiencing homelessness, 15% were so afraid of harassment in a shelter that they avoided going to one.⁶⁰ Unfortunately, this trend continued in places of public accommodation, where the US Transgender Survey found 31% of respondents who patronized a place of public accommodation, and believed that staff knew they were transgender, experienced mistreatment such as denial of equal treatment or service, verbal harassment, or physical attack.⁶¹ These statistics are consistent with the national picture: 30% of transgender employees report having experienced discrimination on the job and transgender people are three times more likely to be unemployed than non-transgender people.⁶² More than half of transgender people who have had to stay in emergency shelter experienced harassment or violence while there.⁶³

LGBTQ youth also experience discrimination at high rates: GLSEN's 2017 School Climate Survey found that the vast majority of LGBTQ students in Virginia regularly heard anti-LGBTQ comments at school, and that overwhelmingly those students experienced harassment and sometimes violence at school.⁶⁴ Over half of transgender or gender expansive youth report being mocked by their own family for their identity, and nearly 3 in 4 transgender and gender expansive youth have had their family make negative remarks about LGBTQ people.⁶⁵ LGBTQ youth are overrepresented among the homeless population making up approximately 40% of all homeless youth.⁶⁶

Finally, transgender people, particularly transgender women of color, have been experiencing an epidemic of violence claiming the lives of more than 130 transgender people in more than 30 states and 100 cities since 2013.⁶⁷

⁵⁸ NAT'L CTR. FOR TRANSGENDER EQUAL., 2015 U.S. TRANSGENDER SURVEY: VIRGINIA STATE REPORT 1 (2017), <https://www.transequality.org/sites/default/files/docs/usts/USTSVASStateReport%281017%29.pdf>.

⁵⁹ *Id.* at 2.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² HUM. RTS. CAMPAIGN FOUND., DISMANTLING A CULTURE OF VIOLENCE: UNDERSTANDING ANTI-TRANSGENDER VIOLENCE AND ENDING THE CRISIS 12 (2018), <https://assets2.hrc.org/files/assets/resources/2018AntiTransViolenceReportSHORTENED.pdf>.

⁶³ *Id.* at 15.

⁶⁴ GLSEN, 2017 STATE SNAPSHOT: SCHOOL CLIMATE IN VIRGINIA (2017), https://www.glsen.org/sites/default/files/2019-11/Virginia_Snapshot_2017_0.pdf.

⁶⁵ HUM. RTS. CAMPAIGN FOUND., *supra* note 62, at 5.

⁶⁶ *Id.*

⁶⁷ *Id.* at 3.

This violence is the manifestation of anti-transgender stigma that begins with a lack of family acceptance. It continues with exclusion from educational opportunities, employment opportunities, health care and social services. It's aggravated by biased policing, criminal justice systems, and cultural marginalization. It flourishes under a hostile political and legal environment.⁶⁸ Each of these factors contribute to high rates of intimate partner violence, engagement in survival sex work, poverty, homelessness, and physical and mental health disparities—all of which are exacerbated by racism and sexism.⁶⁹ Black and Brown transgender women comprise the victims of approximately 80% of anti-transgender homicides.⁷⁰

Discrimination against the LGBTQ community is all too real and its consequences are far reaching. Ensuring that LGBTQ people have the ability to support themselves, live in safe and affordable homes, and have access the goods and services that it takes to live is essential to eradicating negative outcomes. These are the building blocks of American life and real harm comes from not having adequate access to work, shelter, goods and services.

II. LGBTQ Nondiscrimination Laws in Historical Context

Successful legislative action to prohibit discrimination against LGBTQ people spans nearly fifty years. In 1972, the City of East Lansing became the first American jurisdiction to provide statutory legal protections on the basis of sexual orientation.⁷¹ It did so while the State of Michigan criminalized sexual relationships between people of the same sex.⁷² The ordinance narrowly prohibited discrimination in the context of city hiring practices.⁷³ Three years later, Minneapolis became the first American jurisdiction to provide nondiscrimination protections to transgender people.⁷⁴ Specifically, the city prohibited discrimination against an individual “having or projecting a self-image not associated with one’s biological maleness or one’s biological

⁶⁸ See, e.g., *id.* at 7, 16.

⁶⁹ *Id.* at 3.

⁷⁰ *Id.*

⁷¹ Gretchen Millich, *East Lansing Marks 40th Anniversary of Gay Rights Ordinance*, WKAR (Mar. 6, 2012), <https://www.wkar.org/post/east-lansing-marks-40th-anniversary-gay-rights-ordinance#stream/0>.

⁷² MALLORY ET AL., *supra* note 53, at 14–15. Michigan’s laws criminalizing sexual activity between individuals of the same sex remained in effect until the Supreme Court’s 2003 decision in *Lawrence v. Texas*. It was one of 13 States still prohibiting “sodomy” at the time of the Court’s decision. See *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

⁷³ Millich, *supra* note 71.

⁷⁴ Emma Margolin, *How Minneapolis Became the First U.S. City to Pass Trans Protections*, NBC NEWS (June 3, 2016), <https://www.nbcnews.com/feature/nbc-out/how-minneapolis-became-first-u-s-city-pass-trans-protections-n585291>.

femaleness.”⁷⁵ The ordinance, which also prohibited discrimination against LBG people, incorporated a broader scope than the East Lansing ordinance applying to public and private employment in addition to housing, education, and public accommodations.⁷⁶ Since those early adoptions, more than 200 localities have passed nondiscrimination ordinances that ban discrimination on the basis of sexual orientation and gender identity in employment, housing, and public accommodations.⁷⁷

State level nondiscrimination protections slowly trailed municipal action. Wisconsin expanded the state’s civil rights laws in 1982 to cover sexual orientation.⁷⁸ The legislation was signed into law by Republican Governor Lee Sherman Dryfus who reflected, “[i]t is a fundamental tenet of the Republican Party that government ought not intrude in the private lives of individuals where no state purpose is served, and there is nothing more private or intimate than who you live with and who you love.”⁷⁹ Despite being an early leader on LGB equality, Wisconsin remains the only state to provide statutory non-discrimination protections for sexual orientation but not gender identity.⁸⁰

Building upon the leadership of Minneapolis, Minnesota enacted an amendment to the state Human Rights Act in 1993 adding sexual orientation and gender identity as protected characteristics.⁸¹ Unlike more modern statutory inclusion of gender identity, the Minnesota law follows the Minneapolis ordinance in utilizing a definition of gender identity without adopting the actual terminology “gender identity.”⁸² Today, 21 states and the District of Columbia prohibit discrimination on the basis of sexual orientation and gender identity in employment, housing, and public accommodations.⁸³

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ HUM. RTS. CAMPAIGN FOUND., MUNICIPAL EQUALITY INDEX 2019 12 (2019), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/resources/2019-Municipal-Equality-Index-Final.pdf>.

⁷⁸ Assemb. B. 70, 1981 Leg., 85th Sess. (Wis. 1981).

⁷⁹ Pioneer Press, *Wisconsin’s red-vested former governor, Lee Dreyfus, dies*, TWIN CITIES PIONEER PRESS (Jan. 3, 2008), <https://www.twincities.com/2008/01/03/wisconsins-red-vested-former-governor-lee-dreyfus-dies/>.

⁸⁰ Mary Kate McCoy, *Report: Wisconsin Ranks ‘Top Middle of Class’ In Nation for Laws Protecting LGBTQ Community*, WISC. PUB. RADIO (Feb. 15, 2019), <https://www.wpr.org/report-wisconsin-ranks-top-middle-class-nation-laws-protecting-lgbtq-community>; Tom Kertscher, *No gender identity protection in Wisconsin anti-discrimination law, Democratic chair candidate says*, POLITIFACT (May 8, 2015), <https://www.politifact.com/factchecks/2015/may/08/jason-rae/no-gender-identity-protection-wisconsin-anti-discrim/>.

⁸¹ MINN. STAT. § 363.03 (Supp. 1993).

⁸² MINN. STAT. ANN. § 363A.03 (West 2020).

⁸³ CAL. GOV’T CODE § 12940 (West 2019) (prohibiting employment discrimination); CAL. GOV’T CODE § 12955 (West 2020) (prohibiting housing discrimination); CAL. CIV. CODE § 51 (West 2020) (prohibiting discrimination in public accommodations); COLO. REV. STAT. ANN. § 24-34-402 (West 2020) (prohibiting employment discrimination); COLO. REV. STAT. ANN. § 24-34-502 (West 2020) (prohibiting housing discrimination); COLO. REV. STAT. ANN. § 24-34-601 (West 2020) (prohibiting discrimination in public

Prior to Virginia, every state prohibiting discrimination on the basis of sexual orientation and gender identity worked from a pre-existing framework into which sexual orientation and gender identity were added. These laws varied significantly from state to state with respect to scope of coverage and available remedies. Minnesota, for example, defines employer to generally

accommodations); CONN. GEN. STAT. ANN. § 46a-60 (West 2020) (prohibiting employment discrimination); CONN. GEN. STAT. ANN. § 46a-81e (West 2020) (prohibiting housing discrimination); CONN. GEN. STAT. ANN. § 46a-81d (West 2020) (prohibiting discrimination in public accommodations); DEL. CODE ANN. tit. 19, § 711 (West 2020) (prohibiting employment discrimination); DEL. CODE ANN. tit. 6, § 4503 (West 2020) (prohibiting housing discrimination); DEL. CODE ANN. tit. 6, § 4504 (West 2020) (prohibiting discrimination in public accommodations); D.C. CODE § 2-1402.11 (West 2020) (prohibiting employment discrimination); D.C. CODE § 2-1402.21 (West 2020) (prohibiting housing discrimination); D.C. CODE § 2-1402.31 (West 2020) (prohibiting discrimination in public accommodations); HAW. REV. STAT. ANN. § 378-2 (West 2020) (prohibiting employment discrimination); HAW. REV. STAT. ANN. § 515-3 (West 2020) (prohibiting housing discrimination); HAW. REV. STAT. ANN. § 489-3 (West 2020) (prohibiting discrimination in public accommodations); 775 ILL. COMP. STAT. 5/2-102 (West 2020) (prohibiting employment discrimination); 775 ILL. COMP. STAT. 5/3-102 (West 2020) (prohibiting housing discrimination); 775 ILL. COMP. STAT. 5/5-102 (West 2020) (prohibiting discrimination in public accommodations); IOWA CODE ANN. § 216.6 (West 2020) (prohibiting employment discrimination); IOWA CODE ANN. § 216.8 (West 2020) (prohibiting housing discrimination); IOWA CODE ANN. § 216.7 (West 2020) (prohibiting discrimination in public accommodations); ME. REV. STAT. ANN. tit. 5, § 4572 (West 2020) (prohibiting employment discrimination); ME. REV. STAT. ANN. tit. 5, § 4581-A (West 2020) (prohibiting housing discrimination); ME. REV. STAT. ANN. tit. 5, § 4592 (West 2020) (prohibiting discrimination in public accommodations); Md. Code Ann., State Gov't § 20-606 (West 2020) (prohibiting employment discrimination); MD. CODE ANN., STATE GOV'T § 20-705 (West 2020) (prohibiting housing discrimination); MD. CODE ANN., STATE GOV'T § 20-304 (West 2020) (prohibiting discrimination in public accommodations); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2020) (prohibiting housing and employment discrimination); MASS. GEN. LAWS ANN. ch. 272, § 98 (West 2020) (prohibiting discrimination in public accommodations); MINN. STAT. ANN. § 363A.08 (West 2020) (prohibiting employment discrimination); MINN. STAT. ANN. § 363A.09 (West 2020) (prohibiting housing discrimination); MINN. STAT. ANN. § 363A.11 (West 2020) (prohibiting discrimination in public accommodations); NEV. REV. STAT. ANN. § 613.330 (West 2020) (prohibiting employment discrimination); NEV. REV. STAT. ANN. § 118.100 (West 2020) (prohibiting housing discrimination); NEV. REV. STAT. ANN. § 651.070 (West 2020) (prohibiting discrimination in public accommodations); N.H. REV. STAT. ANN. § 354-A:7 (2020) (prohibiting employment discrimination); N.H. REV. STAT. ANN. § 354-A:8 (2020) (prohibiting housing discrimination); N.H. REV. STAT. ANN. § 354-A:17 (2020) (prohibiting discrimination in public accommodations); N.J. STAT. ANN. § 10:5-4 (West 2020) (prohibiting discrimination in employment, housing, and public accommodations); N.M. STAT. ANN. § 28-1-7 (West 2020) (prohibiting discrimination in employment, housing, and public accommodations); N.Y. EXEC. LAW § 296 (McKinney 2020) (prohibiting discrimination in employment, housing, and public accommodations); OR. REV. STAT. ANN. § 659A.030 (West 2020) (prohibiting discrimination in employment, housing, and public accommodations); 28 R.I. GEN. LAWS ANN. § 28-5-7 (West 2020) (prohibiting employment discrimination); 34 R.I. GEN. LAWS ANN. § 34-37-4 (West 2020) (prohibiting housing discrimination); 11 R.I. GEN. LAWS ANN. § 11-24-2 (West 2020) (prohibiting discrimination in public accommodations); VT. STAT. ANN. tit. 21, § 495 (West 2020) (prohibiting employment discrimination); VT. STAT. ANN. tit. 9, § 4503 (West 2020) (prohibiting housing discrimination); VT. STAT. ANN. tit. 9, § 4502 (West 2020) (prohibiting discrimination in public accommodations); VA. CODE ANN. § 2.2-3905 (2020) (prohibiting employment discrimination); VA. CODE ANN. § 36-96.1 (2020) (prohibiting housing discrimination); VA. CODE ANN. § 2.2-3904 (2020) (prohibiting discrimination in public accommodations); WASH. REV. CODE § 49.60.180 (West 2020) (prohibiting employment discrimination); WASH. REV. CODE § 49.60.222 (West 2020) (prohibiting housing discrimination); WASH. REV. CODE § 49.60.030 (West 2020) (prohibiting discrimination in public accommodations). *See also State Equality Index 2019: Public Accommodations*, HUM. RTS. CAMPAIGN (Apr. 15, 2020), <https://www.hrc.org/resources/state-equality-index>; *State Equality Index 2019: Employment*, HUM. RTS. CAMPAIGN (Sept. 2, 2020), <https://www.hrc.org/resources/state-equality-index>.

be employers with one or more employees⁸⁴ while Maryland's definition applies to employers with fifteen or more employees.⁸⁵ However, each already had laws that prohibited discrimination at a minimum on the basis of race, sex, and religion.⁸⁶ Thus, when those state legislatures took up bills to prohibit discrimination on the basis of sexual orientation and gender identity the debate was mostly about whether to provide protections on those bases rather than how the state civil rights law would function.⁸⁷

Congressional efforts to provide nondiscrimination protections to LGBTQ people date back to the 1970s. The first piece of legislation addressing sexual orientation discrimination, the Equality Act of 1974, was introduced by Representative Bella Abzug to alleviate discrimination in housing, public accommodations, public education, and federally assisted programs.⁸⁸ The bill was reintroduced in the subsequent Congress but never received a vote.⁸⁹ Efforts to add explicit federal protections were revived with the 1994 introduction of the Employment Non-Discrimination Act (ENDA).⁹⁰ As its name suggests, the legislation narrowly focused on employment and the first version of the bill covered only sexual orientation.⁹¹ Gender identity was added in 2007, but was stripped out of the legislation prior to House passage.⁹² The bill failed in the Senate in part because President George W. Bush threatened a veto.⁹³ Every subsequent version of ENDA included both sexual orientation and

⁸⁴ MINN. STAT. ANN. § 363A.03 (West 2020) (defining "employer" as having one or more employees under civil rights statute).

⁸⁵ MD. CODE ANN., STATE GOV'T § 20-601 (West 2020) (defining "employer" as having 15 or more employees under civil rights statute).

⁸⁶ MD. CODE ANN., STATE GOV'T § 20-705 (West 2020) (prohibiting employment discrimination); MD. CODE ANN., STATE GOV'T § 20-304 (West 2020) (prohibiting discrimination in public accommodations); MINN. STAT. § 363A.08 (2020) (prohibiting employment discrimination); MINN. STAT. § 363A.09 (2020) (prohibiting housing discrimination); MINN. STAT. § 363A.11 (2020) (prohibiting discrimination in public accommodations).

⁸⁷ See Carolyn Muyskens, *Holland Adopts Anti-Discrimination Protections for LGBTQ, Others*, HOLLAND SENTINEL (Aug. 20, 2020), <https://www.hollandsentinel.com/news/20200820/holland-adopts-anti-discrimination-protections-for-lgbtq-others>; see also Bill Chappell, *Massachusetts Lawmakers Poised to Send Gender Identity Bill to Governor*, NPR (June 1, 2016), <https://www.npr.org/sections/thetwo-way/2016/06/01/480372067/massachusetts-lawmakers-poised-to-send-gender-identity-bill-to-governor>; see also Kate Steinmetz, *Meet the Republican Who Lost His Election Fighting for LGBT Rights*, TIME (Dec. 5, 2014), <https://time.com/3619470/frank-foster-lgbt-nondiscrimination-michigan/>.

⁸⁸ Equality Act of 1974, H.R. 14752, 93rd Cong. (1974). The legislation also addressed discrimination "on account of sex [and] marital status."

⁸⁹ Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS (July 19, 2011), <https://www.americanprogress.org/issues/lgbtq-rights/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/>.

⁹⁰ See Employment Non-Discrimination Act of 1994, H.R. 4636, 103rd Cong. (2d Sess. 1994).

⁹¹ *Id.*

⁹² Lauren Smith, *ENDA Has Been Waiting 2 Decades for Passage*, ROLL CALL (July 10, 2013), <https://www.rollcall.com/2013/07/10/enda-has-been-waiting-2-decades-for-passage/>.

⁹³ *Id.*

gender identity, including the 2013 version that passed the Senate but was never taken up for a vote by the House.⁹⁴

In the wake of the Supreme Court decision in *Obergefell v. Hodges*, the Equality Act of 2015 (Equality Act) replaced ENDA as the primary nondiscrimination legislation endorsed by LGBTQ advocacy organizations.⁹⁵ The legislation addresses not only employment, but also credit, education, federally funded programs, housing, jury services, and public accommodations.⁹⁶ The legislation carried with it support from more than 200 of the nation's leading businesses,⁹⁷ endorsements from major civil rights organizations and professional associations,⁹⁸ and consistent polling showing majority approval from the American public.⁹⁹ In May 2019, the House passed the Equality Act with bipartisan support.¹⁰⁰ The bill languished in the Senate.

A. Virginia Civil Rights Law Prior to the Virginia Human Rights Act

The majority of states adopted nondiscrimination laws, frequently referred to as the state human rights or civil rights law, between the 1950s and 1970.¹⁰¹

⁹⁴ Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Congress (1st Sess. 2009); Employment Non-Discrimination Act of 2011, H.R. 1397, 112th Congress (1st Sess. 2011); Employment Non-Discrimination Act of 2013, S.815, 113th Congress (2013).

⁹⁵ Chris Johnson, *Equality Act Introduced with Great Fanfare*, WASH. BLADE (July 23, 2015), <https://www.washingtonblade.com/2015/07/23/equality-act-introduced-with-great-fanfare/>.

⁹⁶ Equality Act of 2015, H.R. 3185, 114th Congress (1st Sess. 2015).

⁹⁷ *HRC: 200+ of the Nation's Leading Businesses Support Equality Act*, BOOM MAG. (May 8, 2019), <https://www.boom.lgbt/index.php/news-a/100-national/1704-hrc-200-of-the-nation-s-leading-businesses-support-equality-act>.

⁹⁸ *547 Organizations Endorsing the Equality Act*, HUM. RTS. CAMPAIGN (July 8, 2020), https://assets2.hrc.org/files/assets/resources/Orgs_Endorsing_EqualityAct.pdf.

⁹⁹ Robert P. Jones et al., *Fifty Years After Stonewall: Widespread Support for LGBT Issues – Findings from American Values Atlas 2018*, PRRI (Mar. 26, 2019), <https://www.prii.org/research/fifty-years-after-stonewall-widespread-support-for-lgbt-issues-findings-from-american-values-atlas-2018/>.

¹⁰⁰ Chris Cioffi, *The Equality Act has languished in McConnell's Senate but sponsor says it's still historic*, ROLL CALL (June 1, 2020), <https://www.rollcall.com/2020/06/01/the-equality-act-has-languished-in-mcconnells-senate-but-sponsor-says-its-still-historic/>.

¹⁰¹ See e.g., Unruh Civil Rights Act, ch. 1866, 1959 Cal. Stat. 4424 (codified as amended at CAL. CIV. CODE § 51 (West 2016)); Act of June 3, 1963, ch. 180, 1963 Haw. Sess. Laws 223–25 (codified as amended at HAW. REV. STAT. § 378-2 (West 2019)); (1961) *Idaho Fair Employment Practices Act*, BLACKPAST (Oct. 24, 2013), <https://www.blackpast.org/african-american-history/idaho-fair-employment-practices-act-1961/>; Robert Benjamin Stone, *The legislative struggle for civil rights in Iowa: 1947-1965* (1990) (unpublished M.A. thesis, Iowa State University) (on file with Iowa State University Digital Repository); KAN. HUMAN RIGHTS COMM'N, KANSAS ACT AGAINST DISCRIMINATION (KAAD) AND KANSAS AGE DISCRIMINATION IN EMPLOYMENT ACT (KADEA) 4 (2012); John J. Johnson, *Opinion, Celebrating 50th Anniversary of Civil Rights Act*, COURIER J. (Jan. 20, 2016), <https://www.courier-journal.com/story/opinion/2016/01/20/celebrating-50th-anniversary-civil-rights-act/79067608/>; *About MCCR*, STATE OF MD. COMM'N ON C.R., <https://mccr.maryland.gov/Pages/About-MCCR.aspx> (last visited Sept. 27, 2020); Mel Larsen, *Opinion, Larsen: Mich. Civil Rights Act was Meant to Include LGBTQ*, *I Know because I Wrote It*, LANSING STATE J. (May 20, 2020), <https://www.lansingstatejournal.com/story/opinion/contributors/viewpoints/2020/05/20/elliott-larsen-civil-rights-act-should-include->

As previously noted, these laws typically prohibited discrimination in employment, housing, and places of public accommodation on the basis of race and religion. Virginia's civil rights laws postdated the federal Civil Rights Act of 1964 and the Fair Housing Act, as their construction reflects.¹⁰² The Virginia Fair Housing Act became law in 1972 and the original statute closely tracked federal law in terms of protected characteristics, scope of coverage, and exemptions.¹⁰³ Not until 1987 did the Virginia General Assembly pass the Virginia Human Rights Act.¹⁰⁴ Unlike many other states, the original Virginia Human Rights Act lacked teeth. The law served more as a reflection of purported values than a tool for addressing discrimination in employment or public accommodations. Individuals were unable to pursue claims in state court and complaints to the Virginia Division of Human Rights had to be based in federal civil rights violations.¹⁰⁵

B. Early Efforts to Add Sexual Orientation and Gender Identity Nondiscrimination Protections

1. Actual and Perceived Limitations Due to Dillon's Rule

Frequently, the adoption of nondiscrimination ordinances by cities and counties precedes enactment of statewide nondiscrimination protections for LGBTQ people.¹⁰⁶ In Virginia, municipal efforts were hampered by the state's "Dillon's Rule."¹⁰⁷ A common-law principle of statutory construction, Dillon's Rule was coined in 1868 when Iowa Supreme Court Justice John Dillon described the supremacy of state law over municipal ordinances declared, "municipal corporations owe their origin to, and derive their powers and rights wholly from, the [state] legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it

lgbtq-viewpoint/5212644002/; *Fair Housing: It's Your Right!*, CITY OF BILLINGS, <https://ci.billings.mt.us/509/Fair-Housing> (last visited Sept. 27, 2020); (1955) *New Mexico Civil Rights Act*, BLACKPAST (Mar. 27, 2007), <https://www.blackpast.org/african-american-history/new-mexico-civil-rights-act-1955/>; *A Historical Perspective of Ohio's Laws Against Discrimination*, OHIO C.R. COMM'N, <https://crc.ohio.gov/AboutUs/History.aspx> (last visited Sept. 27, 2020).

¹⁰² Compare Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964), with Virginia Human Rights Act, VA. CODE ANN. § 2.2-3900 (2020) (became law in 1987); compare Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968), with Virginia Fair Housing Law, VA. CODE ANN. § 36.96.1 (2020) (became law in 1972).

¹⁰³ Compare Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968), with Virginia Fair Housing Law, VA. CODE ANN. § 36.96.1 (2020).

¹⁰⁴ See Virginia Human Rights Act, VA. CODE ANN. § 2.2-3900 (2020).

¹⁰⁵ Patricia K. Epps, *Annual Survey of Virginia Law: Employment Law*, 21 U. RICH. L. REV. 769, 773 (1987).

¹⁰⁶ See HUM. RTS. CAMPAIGN, *supra* note 77.

¹⁰⁷ See *id.* at 21–22.

may destroy, it may abridge and control.”¹⁰⁸ Subsequently, some states have used the principles of Dillon’s Rule in narrowly interpreting cities’ scope of regulatory power.

Precise application of Dillon’s Rule varies significantly state by state. Some states apply it only in certain areas of municipal law,¹⁰⁹ or apply it so narrowly that the practical impact is considerably different from states with a more literal application.¹¹⁰ The Virginia Supreme Court is among the latter, determining when it first opined on the issue in 1896 that “[a Virginia municipality] possesses no powers except those conferred upon it, expressly or by fair implication . . . and such other powers as are essential to the attainment and maintenance of its declared objects and purposes. It can do no act, nor make any contract, nor incur any liability, that is not thus authorized.”¹¹¹ Since that case, the Virginia Supreme Court has remained steadfast in its application of Dillon’s Rule.¹¹²

In 1997, Arlington County began considering domestic partners as eligible dependents for county employee health care plans.¹¹³ Several county taxpayers challenged Arlington County’s authority to offer domestic partner health benefits under Dillon’s Rule.¹¹⁴ The Virginia Supreme Court held that the County’s expanded benefits were “not a reasonable method of implementing its implied authority.”¹¹⁵ Though ostensibly the case was related to benefits, fears arose that a similar theory would be applied to other policies and ordinances implicating LGBTQ people.¹¹⁶ This created a chilling effect on efforts to provide sexual orientation and gender identity nondiscrimination protections. That perception was reinforced when Attorney General Ken Cuccinelli issued a controversial opinion in 2010 asserting that Virginia public colleges and universities were forbidden by the Dillon’s Rule from extending non-discrimination protections to their employees.¹¹⁷ While some municipalities,

¹⁰⁸ *City of Clinton v. Cedar Rapids and Missouri River R.R. Co.*, 24 Iowa 455, 475 (Iowa 1868).

¹⁰⁹ See e.g., Travis Moore, *Dillon Rule and Home Rule: Principles of Local Governance*, LEG. RSCH. OFF. (Feb. 2020), https://nebraskalegislature.gov/pdf/reports/research/snapshot_localgov_2020.pdf; *Cities 101 – Delegation of Power*, NAT’L LEAGUE OF CITIES (Dec. 13, 2016), <https://www.nlc.org/resource/cities-101-delegation-of-power>.

¹¹⁰ See e.g., *City of Winchester v. Redmond*, 25 S.E. 1001, 1002 (Va. 1896).

¹¹¹ *Id.*

¹¹² See *Marble Tech., Inc. v. City of Hampton*, 690 S.E.2d 84, 88 (Va. 2010); *Commonwealth v. County Board of Arlington County*, 232 S.E.2d 30, 39–40 (Va. 1977).

¹¹³ See Patricia Davis, *Court Finds Arlington’s Benefits Policy Illegal*, WASH. POST, Mar. 5, 1999, at B01.

¹¹⁴ See *id.*

¹¹⁵ *Arlington County v. White*, 528 S.E.2d 706, 709 (2000) (finding the inclusion of “domestic partners” in the county’s employee health plan violated the Dillon Rule).

¹¹⁶ See Davis, *supra* note 113.

¹¹⁷ See Letter from Kenneth T. Cuccinelli, Att’y Gen. of Virginia, to Presidents, Rectors, and Visitors of Virginia’s Pub. Colls. and Univs. (Mar. 4, 2010) (on file with the Washington Post) (advising school policies which include sexual orientation and gender identity as protected categories for non-

such as the City of Alexandria and Arlington County, did adopt nondiscrimination protections that included sexual orientation,¹¹⁸ during this period there was significant concern about the enforceability of those protections and whether they would be rendered impotent by a Dillon's Rule-based challenge.¹¹⁹ That uncertainty was reflected in legislation introduced in multiple legislative sessions to explicitly authorize cities to pass nondiscrimination ordinances inclusive of sexual orientation and gender identity.¹²⁰ Not until after Attorney General Mark Herring opined about the powers of public schools (see below) was there more confidence advancing nondiscrimination ordinances. The City of Richmond moved forward with a sexual orientation and gender identity inclusive ordinance in 2018.¹²¹

Passage of the Virginia Values Act makes the Dillon's Rule argument moot when applied to LGBTQ-inclusive nondiscrimination ordinances. In addition, as a result of legislation sponsored by Delegate Danica Roem and signed into law on March 4, 2020, Virginia law now expressly allows municipalities to pass non-discrimination laws in employment, housing, public accommodations, education and credit on the basis of sexual orientation and gender identity.¹²²

2. Administrative Actions

Early efforts to extend statewide nondiscrimination protections to LGBTQ people came through administrative actions. In December 2005 at the end of his tenure, Governor Mark Warner revised his 2002 "Equal Opportunity" executive order to explicitly prohibit employment discrimination against state employees on the basis of sexual orientation.¹²³ This marked the first time that the state of Virginia offered legal protections to LGB people.¹²⁴ Upon taking office in 2006, Governor Tim Kaine reissued the "Equal Opportunity"

discrimination are prohibited without explicit General Assembly permission).

¹¹⁸ See HUM. RTS. CAMPAIGN, *supra* note 77, at 46, 49.

¹¹⁹ See *id.* at 22, 45–46.

¹²⁰ See, e.g., HUM. RTS. CAMPAIGN, 2018 LGBTQ-RELATED BILLS CONSIDERED 15–24 (2018), <https://assets2.hrc.org/files/assets/resources/SEI-2018-BillsConsidered.pdf>; HUM. RTS. CAMPAIGN, LGBTQ-RELATED BILLS CONSIDERED 2017, at 14–28 (2017), <https://assets2.hrc.org/files/assets/resources/SEI-2017-BillsConsidered.pdf>; HUM. RTS. CAMPAIGN, LGBTQ-RELATED BILLS CONSIDERED IN 2016, at 33–68 (2016), <https://assets2.hrc.org/files/assets/resources/SEI-2016-BillsConsidered.pdf>.

¹²¹ RICHMOND, VA., Ordinance No. 2018-044 (2018).

¹²² VA. CODE ANN. § 15.2-965 (2020).

¹²³ Exec. Order 1 (2002) Equal Opportunity (Dec. 6, 2005) (on file with the Library of Virginia) (revising the 2002 executive order on equal opportunity for state employees to include sexual orientation).

¹²⁴ See Aaron Blake, *Sen. Mark Warner backs gay marriage*, WASH. POST (Mar. 25, 2013), <https://www.washingtonpost.com/news/post-politics/wp/2013/03/25/sen-mark-warner-backs-gay-marriage/>.

executive order maintaining the protections for sexual orientation.¹²⁵ Less than a year later, the Virginia voters ratified the Marshall-Newman Amendment barring same-sex couples from marrying and restricting the government from providing any legal status “approximating” marriage.¹²⁶

Administrative actions are subject to change along with the individuals who occupy the position of governor. Among the first ten executive orders issued by Governor Bob McDonnell was a revised “Equal Opportunity” policy eliminating sexual orientation as a protected characteristic.¹²⁷ A month later, Virginia Attorney General Ken Cuccinelli issued an advisory letter to Virginia’s public colleges and universities opining that the schools were in violation of state law and policy by including sexual orientation and gender identity as part of their institutional nondiscrimination policies.¹²⁸ The State Council of Higher Education for Virginia, a legislatively established coordinating body for higher education across the state,¹²⁹ rejected Cuccinelli’s analysis instead asserting that public universities have the autonomy to make these types of policy determinations.¹³⁰

The “Equal Opportunity” executive order including sexual orientation was reinstated and expanded by Governor Terry McAuliffe to include gender identity in 2014,¹³¹ and was continued inclusive of sexual orientation and gender identity upon Governor Ralph Northam taking office.¹³² The executive branch also took actions to bring greater rights to Virginia’s LGBTQ residents statewide through official legal opinions and amicus briefs.¹³³

¹²⁵ See 22 Va. Regs. Regs. 1781 (Feb. 6, 2006) (affirming the previous equal opportunity policy for state employees).

¹²⁶ VA. CONST. art. 1 § 15-A; see Emily Williams, *Proposed Virginia Amendment May Strike Down More than Same-Sex Marriage, Panelists Say*, UNIV. OF VA. SCH. OF L. (Sept. 25, 2006), <https://www.law.virginia.edu/news/200609/proposed-virginia-amendment-may-strike-down-more-same-sex-marriage-panels-say>; Timothy Williams & Trip Gabriel, *Virginia’s New Attorney General Opposes Ban on Gay Marriage*, N.Y. TIMES, Jan. 23, 2014, at A12.

¹²⁷ See 26 Va. Regs. Reg. 2302 (Mar. 29, 2010) (removing sexual orientation as a protected characteristic from state employees’ equal opportunity policy).

¹²⁸ See Letter from Kenneth T. Cuccinelli, *supra* note 117.

¹²⁹ See *State Council of Higher Education for Virginia*, VIRGINIA.GOV, <https://www.virginia.gov/agencies/state-council-of-higher-education-for-virginia/> (last visited Sept. 27, 2020).

¹³⁰ See Mary Hellen Miller, *Virginia Attorney General Tells Public Colleges to Drop Gay-Rights Protections*, CHRON. OF HIGHER EDUC. (Mar. 7, 2010), <https://www.chronicle.com/article/virginia-attorney-general-tells-public-colleges-to-drop-gay-rights-protections/>.

¹³¹ See 30 Va. Regs. Reg. 1605 (Jan. 27, 2014) (including sexual orientation and gender identity as protected categories in state employees equal opportunity policy).

¹³² See 34 Va. Regs. Reg. 1306 (Feb. 5, 2018).

¹³³ See, e.g., Brief for States of Illinois, New York, et al. as Amici Curiae Supporting the Employees, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623); Letter from Mark R. Herring, Att’y Gen. of Va., to Adam P. Ebbin, Member, Senate of Va. (Mar. 4, 2015) (on file with the Office of the Attorney General) (concluding the Dillon Rule does not prevent school boards from amending their anti-discrimination policies to prohibit discrimination on the basis of sexual orientation and gender identity); Letter from Mark R. Herring, Att’y Gen. of Va., to John T. Frey, Clerk of Ct., Fairfax Cnty. Cir. Ct.

Virginia Attorney General Mark Herring, for example, issued an official advisory opinion that public school boards had the authority to adopt nondiscrimination policies covering sexual orientation and gender identity with respect to both students and employees.¹³⁴ In addition, Herring advocated for the Supreme Court of the United States to affirm that federal law statutorily prohibiting employment discrimination on the basis sex ought to be understood to also prohibit discrimination on the basis of sexual orientation and gender identity.¹³⁵

3. Pre-2020 Session Legislation

Efforts to pass legislation providing at least some nondiscrimination protections to LGBTQ people under Virginia law date to 2005. Limited to protections for state employment and services on the basis of sexual orientation, that initial bill failed in the House General Laws Committee on a 15 to 5 vote.¹³⁶ Introduced each subsequent year, a version of the legislation barring discrimination in state employment on the basis of sexual orientation and gender identity passed the Senate in 2013, 2015, 2016, 2017, 2018, and 2019.¹³⁷ In addition, legislation to add sexual orientation to the state housing nondiscrimination law was introduced beginning in 2006.¹³⁸ Despite bipartisan passage of both bills through the Senate in multiple years and public support from several House Republicans, Republican leadership in the House of Delegates consistently blocked the bills from coming to the floor for a vote.¹³⁹ A more comprehensive approach to nondiscrimination was introduced beginning in 2016 with legislation that would have amended every existing

(Dec. 18, 2014) (on file with the Office of the Attorney General) (concluding married couples of the same sex are exempt from recordation taxes).

¹³⁴ Letter from Mark R. Herring, Att’y Gen. of Va., to Adam P. Ebbin, Member, Senate of Va. (Mar. 4, 2015) (on file with the Office of the Attorney General) (concluding the Dillon Rule does not prevent school boards from amending their anti-discrimination policies to prohibit discrimination on the basis of sexual orientation and gender identity).

¹³⁵ Brief for State of Illinois et al. as Amici Curiae Supporting the Employees at 39, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107).

¹³⁶ HUM. RTS. CAMPAIGN, EQUALITY FROM STATE TO STATE 2005: GAY LESBIAN, BISEXUAL AND TRANSGENDER AMERICANS AND STATE LEGISLATION IN 2005, at 49 (2005), <https://assets2.hrc.org/files/assets/resources/2005statetostate.pdf>.

¹³⁷ *Successes*, EQUALITY VA., <https://www.equalityvirginia.org/about-ev/successes/> (last visited Sept. 27, 2020); H.D. 2550, 2007 Gen. Assemb., Reg. Sess. (Va. 2007) (introducing the first bill to include gender identity in 2007, defining sexual orientation to include gender identity).

¹³⁸ HUM. RTS. CAMPAIGN, *supra* note 136, at 44.

¹³⁹ Graham Moomaw, *Va. House Republicans let LGBT non-discrimination bills die without a hearing*, RICH. TIMES-DISPATCH (Feb. 15, 2019), https://richmond.com/news/local/government-politics/va-house-republicans-let-lgbt-non-discrimination-bills-die-without-a-hearing/article_ea3fce20-6359-5bfc-9a0f-0c09a0f640aa.html; James Wellemeyer, *Va. Republicans kill nondiscrimination bills in committee*, WASH. BLADE (Jan. 31, 2019), <https://www.washingtonblade.com/2019/01/31/va-republicans-kill-nondiscrimination-bills-in-committee/>.

nondiscrimination provision in Virginia law to add sexual orientation and gender identity.¹⁴⁰ Provided the unwillingness of Republican leadership to bring the more limited bills to the floor for a vote, this legislation was never fully considered by the legislature.¹⁴¹

III. Creation of the Virginia Values Act

A. Legislative Path to Passage

The 2019 state legislative election seated pro-equality majorities in both chambers of the General Assembly as well as in the Governor's mansion, opening a new opportunity to move beyond the piecemeal legislation that had been pushed in previous sessions toward a comprehensive non-discrimination effort that became the Virginia Values Act. Two members of Virginia's LGBTQ Caucus, Delegate Mark Sickles and Senator Adam Ebbin, introduced companion bills in January 2020 with the support of House Speaker Eileen Filler-Corn, Senate Majority Leader Dick Saslaw, and Governor Ralph Northam.¹⁴² The House and Senate bills passed the General Laws Committee with strong bipartisan support on January 28th¹⁴³ and January 29th, respectively.¹⁴⁴ The following week both identical bills passed their respective full chambers, again with overwhelming bipartisan support.¹⁴⁵

Following crossover, the bills each were heard by the General Laws Committees in the opposite chamber, where both passed handily.¹⁴⁶ Before the bills were heard on the floor, however, some changes were made to conform the Virginia Values Act more closely to the federal enforcement process and to ensure that the remedies allowed were consistent with other parts of Virginia law; specifically, the bills were amended to streamline the process by which a person who had experienced discrimination would bring a claim, mirroring the process that a federal claim would go through by forcing a person who had experienced discrimination to exhaust the administrative

¹⁴⁰ H.D. 1005, 2016 Gen. Assemb. Sess. (Va. 2016).

¹⁴¹ See Wellemeyer, *supra* note 139; Va. H.D. 1005.

¹⁴² Nick Morrow, *Virginia Values Act Legislation Unveiled to Protect LGBTQ Virginians from Discrimination*, HRC (Jan. 10, 2020), <https://www.hrc.org/news/virginia-values-act-legislation-unveiled-to-protect-lgbtq-virginians-from-d/>; *Incoming House Speaker Eileen Filler-Corn Joins Virginia Values Coalition to Announce Support for LGBTQ Nondiscrimination Protections in 2020 General Assembly*, VA. VALUES (Dec. 19, 2019), <https://vavalues.org/2019/12/19/incoming-house-speaker-virginia-values-coalition-for-campaign-kickoff/>.

¹⁴³ H.D. 1663, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

¹⁴⁴ S. 868, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

¹⁴⁵ Va. H.D. 1663; Va. S. 868.

¹⁴⁶ Va. H.D. 1663; Va. S. 868.

process prior to filing a claim in civil court.¹⁴⁷ A second amendment clarified that any award of punitive damages would be subject to the caps that exist in other parts of Virginia law relating to punitive damages in situations where a person experiences harm.¹⁴⁸ These revisions, which were ultimately incorporated into both the House and Senate versions of the bill, were made to ensure that the Virginia Values Act continued to enjoy strong bipartisan support.

During the period of time that these revisions were being made, a few far-right groups began a misinformation campaign to try to convince legislators that the Virginia Values Act posed a threat to religious liberty.¹⁴⁹ Contrary to their assertion, the Virginia Values Act adds new and important non-discrimination protections on the basis of religion in both employment and places of public accommodation.¹⁵⁰ The law also includes standard exemptions consistent with those in federal and other state laws to ensure that, for example, a religious organization that wishes to employ only people who are members of that faith is able to do so.¹⁵¹ While this effort to mischaracterize and undermine the Virginia Values Act was unsuccessful, the House version of the Virginia Values Act was scrapped due to a last-minute floor amendment added in the Senate that purported to affirm religious liberty but significantly altered the public accommodations portion of the bill.¹⁵² The House rejected the Senate amendment and the bill died, making the surviving Senate bill the bill that advanced to the Governor.¹⁵³

Governor Northam formally signed the bill on April 11, 2020 and conducted a ceremonial signing on July 23. The Virginia Values Act took effect on July 1, 2020.

B. Provisions and Protections of the Virginia Values Act

The Virginia Values Act extends critical and long-overdue non-discrimination protections to Virginia residents and visitors. At the same time, it

¹⁴⁷ See generally Va. S. 868 (describing the process through which claimants can bring discrimination claims to court).

¹⁴⁸ See *id.*

¹⁴⁹ See *Virginia lawmakers send 'Virginia Values Act' to the governor*, WHSV (Feb. 24, 2020), <https://www.wHSV.com/content/news/Lawmakers-officially-pass-Virginia-Values-Act-to-prohibit-LGBTQ-discrimination-568147211.html>.

¹⁵⁰ See Va. S. 868.

¹⁵¹ See Va. S. 868.

¹⁵² See generally H.D. 1663, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (noting that the bill provided more public accommodation amendments than the religious liberty portion of the bill).

¹⁵³ See generally Va. S. 868 (noting that the Senate Bill was enacted by the General Assembly as Virginia Laws Ch. 1140).

brings Virginia in line with the laws of the majority of other states. Prior to passage, only six states did not have nondiscrimination protections in places of public accommodation for any protected characteristic.¹⁵⁴ The Virginia Human Rights Act declared that discrimination in public accommodations was against public policy, however, the law was unenforceable.¹⁵⁵ In addition, the law also had basically unenforceable protections relating to employment discrimination for any protected characteristic and the only real recourse available for employment discrimination under state law was limited to public employees.¹⁵⁶

The new law extends existing state non-discrimination protections in public employment, housing and credit to Virginians on the basis of sexual orientation, gender identity, pregnancy, childbirth or related medical conditions, marital status, and status as a veteran.¹⁵⁷ This makes Virginia the first state in the South to provide statutory non-discrimination protections to LGBTQ people.¹⁵⁸ Further, the law also creates all-new protections for Virginians in private employment and places of public accommodation on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, and status as a veteran.¹⁵⁹ Contrary to the narrative advanced by opponents of the legislation, the Virginia Values Act increases protections for people of faith by ensuring that discrimination on the basis of religion is prohibited in places of public accommodation as well as in employment.¹⁶⁰ After being so far behind in offering state level remedies for civil rights violations, Virginia leapfrogged ahead becoming a leader basically overnight.

1. Employment

Prior to the Virginia Values Act, the non-discrimination protections that existed in the Commonwealth were quite limited. State employees had substantial protections, including a grievance process and protections against retaliation.¹⁶¹ Employees working for small employers that had between six

¹⁵⁴ See *State Public Accommodation Laws*, *supra* note 4 (noting, in the months after the 2020 Virginia General Assembly session, only five states did not have a public accommodation law).

¹⁵⁵ See VA. CODE ANN. § 2.2-3900 (2020).

¹⁵⁶ See 2020 Session: S. 868, LEGIS. INFO. SERV., <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB868> (last visited Sept. 21, 2020); Va. S. 868.

¹⁵⁷ See Va. S. 868.

¹⁵⁸ *Virginia Becomes First State in South to Enact Comprehensive Protections for LGBTQ Community*, WWBT (Apr. 11, 2020), <https://www.nbc12.com/2020/04/11/virginia-becomes-first-state-south-enact-comprehensive-protections-lgbtq-community-several-areas/>.

¹⁵⁹ Va. S. 868.

¹⁶⁰ See *id.*

¹⁶¹ VA. CODE ANN. § 2.2-3000 (2020).

and fourteen employees who were not covered by Title VII's federal non-discrimination prohibitions had limited ability to bring complaints related to improper discharge on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, and age.¹⁶² Discharge is only one of the many ways that employment discrimination can manifest. For example, discrimination also includes failure to hire, failure to promote, denial of benefits, unequal pay, harassment, and unequal opportunities.¹⁶³ Discrimination on the basis of disability is covered in another, separate law.¹⁶⁴

The Virginia Values Act significantly overhauled employment discrimination under state law. Now, private employers with 15 or more employees (including unions, employment agencies, apprenticeship programs and the like) are prohibited by state law from refusing to hire, firing, failing to promote, underpaying, giving less favorable conditions of employment, or otherwise discriminating against any employee because of their race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including lactation, status as a veteran, or national origin.¹⁶⁵ Employers with twenty or more employees are prohibited from taking any of the prohibited actions against an employee because the employee is forty years of age or older.¹⁶⁶ The law also creates a robust enforcement process, ensuring that these protections are infused with the meaning that was lacking under the former statement of policy.¹⁶⁷ As the maxim goes, there is no right without a remedy. Under previous law the lack of an enforceable remedy under state law meant there was essentially no right.¹⁶⁸

In addition to these important changes, the Virginia Values Act also addressed discrimination by smaller employers. Employers with between six and fourteen employees are now forbidden from improperly discharging an employee on the basis of marital status, sexual orientation, gender identity, and status as a veteran in addition to the characteristics previously enumerated.¹⁶⁹

Finally, protections from discrimination for public employees are also extended to additional characteristics by the Virginia Values Act. Public employees means employees of Virginia state government including those at

¹⁶² See 42 U.S.C. § 2000e; see also Va. S. 868.

¹⁶³ 42 U.S.C. § 2000e-2.

¹⁶⁴ VA. CODE ANN. § 51.5-41 (2020).

¹⁶⁵ Va. S. 868.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See Nieman & Schneider, *supra* note 1; see also Va. S. 868 (describing the complaint process).

¹⁶⁹ Va. S. 868.

state agencies, boards, bureaus, and employees of public subdivisions such as municipalities and schools.¹⁷⁰ The existing protections for these public employees now also apply to individuals who have experienced discrimination on the basis of sexual orientation, gender identity, marital status and status as a veteran.¹⁷¹

2. Housing

Virginia's Fair Housing Act protects individuals who are looking to buy or rent a house or apartment, or who are working with realtors, from discrimination.¹⁷² It prohibits discrimination in the buying, selling, or leasing of homes in: the negotiations or in the terms or conditions of the sale; reporting whether a home is still available; and appraising, listing, or brokering services.¹⁷³ It also prohibits restrictive covenants which serve to segregate neighborhoods.¹⁷⁴ The Virginia Values Act updates Virginia's Fair Housing act to add protections on the basis of sexual orientation, gender identity, and veteran's status to the list of characteristics covered in the existing law.¹⁷⁵

The Virginia Values Act does not change the exemptions to the non-discrimination protections that existed in the underlying Fair Housing Act. These exemptions include that religious nonprofits and private clubs who wish to restrict lodging to members of their own religion or club are allowed to do so.¹⁷⁶ People who are renting out a unit or room in a residence in which they currently live, so long as no more than four total units or rooms are for rent, are not subject to the law.¹⁷⁷ These are typical exemptions often found in housing nondiscrimination laws, and the addition of new protected characteristics does not impact these exemptions.¹⁷⁸

a. Public Accommodations

Nearly all states prohibit discrimination in places of public accommodation, that is, places where generally any member of the public, provided they are not behaving badly, can enter and enjoy the space, services, or offerings

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² VA. CODE ANN. § 36-96.1 (2020).

¹⁷³ *Id.* § 36-96.3.

¹⁷⁴ *Id.*

¹⁷⁵ Va. S. 868.

¹⁷⁶ VA. CODE ANN. § 36-96.2.

¹⁷⁷ *Id.*

¹⁷⁸ *See generally*, VA. CODE ANN. § 36-96; Va. S. 868; *cf.* 42 U.S.C. § 3607 (noting that federal law has similar exemptions).

of the establishment.¹⁷⁹ From coffee shops, to libraries, to grocery stores, to gas stations, places of public accommodation are the places in which we live our lives. Prior to the effective date of the Virginia Values Act, Virginia was one of six states that had no enforceable protections from discrimination in places of public accommodation for any protected characteristic.¹⁸⁰ Virginia and others such as Alabama, Georgia, Mississippi, North Carolina and Texas, are all states with a history of segregation.¹⁸¹

Ensuring that people have access to places of public accommodation without discrimination is critical because places of public accommodation are places that people spend significant time. A coffee shop, corner store, dry cleaner, laundromat, daycare center, gas station, public transportation, newspaper stand, restaurant, public park, bank, bar, repair shop, hair salon, movie theater, hotel, concert venue, or transportation service all qualify as places of public accommodation. As do doctors' offices and hospitals, insurance companies, tax service providers, government buildings, government funded services including emergency shelters and food banks, and most educational institutions.¹⁸² Denial of access to those spaces diminishes a person's ability to participate meaningfully in society.

Access to these spaces is not limitless. Establishments may choose to set their own policies about acceptable conduct on the premises, such as "no shirt, no shoes, no service," provided that those policies are not a proxy for discrimination nor are they selectively enforced with respect to a protected characteristic.¹⁸³ A person who engages in disruptive behavior may be denied services or asked to leave.¹⁸⁴ In addition, establishments may be encouraged or required by law to set limits on patronage, such as a theater that limits entry based upon a movie rating or bar that limits entry to people who are of drinking age.¹⁸⁵ Further, not all places qualify as places of public

¹⁷⁹ See 42 U.S.C. § 2000a.

¹⁸⁰ See *State Public Accommodation Laws*, *supra* note 4 (listing five states without a public accommodation law for nondisabled people); Donald P. Boyle Jr., *Annual Survey of Virginia Law: Article: Civil Practice and Procedure*, 28 U. RICH. L. REV. 959, 965 (1994) (noting the Virginia Human Rights Act did not create any private causes of action); Va. S. 868 (creating a private cause of action for discrimination in places of public accommodation).

¹⁸¹ See generally *Martin Luther King, Jr.: Jim Crow Laws*, NAT'L PARK SERV., https://www.nps.gov/malu/learn/education/jim_crow_laws.htm (last visited Sept. 24, 2020).

¹⁸² See 42 U.S.C. § 2000a; see also 28 C.F.R. § 36.104 (2019) (enumerating more places of public accommodation, in the context of the Americans with Disabilities Act).

¹⁸³ See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018); Richard Dahl, *No Shirt, No Mask, No Service?*, FINDLAW (May 28, 2020), https://blogs.findlaw.com/law_and_life/2020/05/no-shirt-no-mask-no-service.html.

¹⁸⁴ *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115, 124 (Cal. 1982) (quoting *In re Cox*, 474 P.2d 992, 999 (Cal. 1970)).

¹⁸⁵ See, e.g., Richard M. Mosk, *The Jurisprudence of Ratings Symposium Part 1: Motion Picture Ratings in the United States*, 15 CARDOZO ARTS & ENT. L.J. 135, 137 (1997) (noting movie theaters are not

accommodation. Private clubs, for example, are permitted to be open exclusively to members and prospective members.¹⁸⁶ Similarly, churches—even those with an “All Are Welcome” sign inviting newcomers to worship—are commonly understood to be open to members and prospective members only.¹⁸⁷ In general, an establishment must be truly open to members of the public to qualify as a place of public accommodation.¹⁸⁸ This does not preclude some degree of limitation. A bar that limits services to patrons over 21 is not exempt from following nondiscrimination requirements.¹⁸⁹ Similarly, a job training program that limits enrollment based both upon age and income level is also considered a place of public accommodation.¹⁹⁰

The Virginia Values Act modernized Virginia law by banning discrimination in places of public accommodation on the bases of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, sexual orientation, gender identity, marital status, disability, or status as a veteran.

3. Education

Discrimination in education is prohibited by the Virginia Values Act through the provisions that prohibit discrimination in places of public accommodation.¹⁹¹ Public schools, which draw students from members of the public, are the very definition of a place of public accommodation. Statutory limitations on age and residency do not obviate schools from the public sphere.¹⁹²

required to comply with the MPAA ratings system, but that 85% utilize it for information and admission policies); *Preventing Underage Sales*, VA. ALCOHOLIC BEVERAGE CONTROL AUTH. (June 20, 2019), <https://www.abc.virginia.gov/licenses/retail-resources/preventing-underage-sales> (noting that Virginia law does not prohibit a person under 21 years of age from sitting at a bar, but an operator may establish in-house policies prohibiting it).

¹⁸⁶ 42 U.S.C. § 2000a.

¹⁸⁷ *See, e.g.*, *Traggis v. St. Barbara’s Greek Orthodox Church*, 851 F.2d 584, 586 (2d Cir. 1988).

¹⁸⁸ *See Roberts v. United States Jaycees*, 468 U.S. 609, 621 (1984) (referring to *Tillman v. Wheaton-Haven Recreation Assn., Inc.*, 410 U.S. 431, 438 (1973)); *see also United States v. Trs. of Fraternal Ord. of Eagles*, 472 F. Supp. 1174, 1175–76 (E.D. Wis. 1979) (citing *Runyon v. McCrary*, 427 U.S. 160, 172 n. 10 (1976)).

¹⁸⁹ *See generally Marina Point, Ltd. v. Wolfson*, 640 P.2d 115, 124 (Cal. 1982) (quoting *In re Cox*, 474 P.2d 992, 999 (Cal. 1970)) (noting that the Civil Rights Act prohibits businesses from arbitrarily excluding prospective customers).

¹⁹⁰ 42 U.S.C. § 2000e-2(d) (prohibiting discrimination in job training programs); *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 584 (2004) (holding that the Age Discrimination in Employment Act does not prohibit favoring the old over the young).

¹⁹¹ *See S. 868*, 2020 Va. Gen. Assembly, Reg. Sess. (Va. 2020).

¹⁹² *See id.*

Application of the law to private schools is more complex. If a private religious school, for example, limits enrollment to members of its particular faith, it would be akin to a private club and exempt from the public accommodation law.¹⁹³ Similarly, under the employment portion of the statute, the school may limit employment to members of the faith.¹⁹⁴ If, however, the school allows people outside its faith to apply and enroll, it is a place of public accommodation and would be governed by the Virginia Values Act. Nothing in the law prohibits or dictates the teaching of the faith regardless of enrollment.

4. Credit

Discrimination in credit, like discrimination in places of public accommodation, can be a factor that limits people's ability to participate meaningfully in society. Whether the discrimination comes in the context of a car loan, mortgage loan, or a credit card, access to credit is vital to building a future. The Virginia Values Act updates Virginia's underlying credit nondiscrimination law to include protections on the basis of sexual orientation, gender identity, pregnancy, childbirth or related medical conditions, and status as a veteran so individuals are not denied credit or given less favorable terms simply because of who they are.¹⁹⁵ For example, transgender people have experienced discrimination when they have changed their legal name to reflect their true gender identity and same-sex couples have been denied mortgage loans when the lender refuses to recognize the marriage.

C. Enforcement of the Virginia Values Act

Prior to the passage of the Virginia Values Act, the Virginia Division of Human Rights (situated within the office of the Attorney General) worked in tandem with the federal government to help enforce federal nondiscrimination laws.¹⁹⁶ The Division also processed complaints filed under the limited provisions of the Human Rights Act.¹⁹⁷ The Virginia Values Act invests the Division of Human Rights with significant new responsibilities because the Division is the administrative agency tasked with receiving, investigating,

¹⁹³ *See id.*

¹⁹⁴ *See id.*

¹⁹⁵ *See id.*

¹⁹⁶ Attorney General Mark Herring: *The Division of Human Rights*, VIRGINIA.GOV, <https://www.oag.state.va.us/programs-initiatives/human-rights> (last visited Sept. 25, 2020).

¹⁹⁷ *Id.*

assessing, and helping to conciliate complaints.¹⁹⁸ The process and timeline for these enforcement activities is still under development via new regulations, but it substantially mirrors the process used by the federal Equal Employment Opportunity Commission and echoed by many state agencies tasked with enforcing nondiscrimination laws.

Further, the Virginia Values Act authorizes the Office of the Attorney General to initiate lawsuits, as needed, on behalf of individuals experiencing discrimination.¹⁹⁹ This authority is comparable to the authority granted to the EEOC and the Department of Justice under federal law.²⁰⁰ While unlikely to be a common occurrence, this authority allows the Attorney General to bring action against repeat offenders or to seek final clarity on a contested question of law.

Finally, a private party may only file a civil action in court if the Division of Human Rights attests that the person has exhausted their administrative remedies.²⁰¹ Government employees who experience discrimination must go through a separate grievance process established under prior law.²⁰² Remedies for discrimination may include an injunction, compensatory damages, punitive damages, and attorneys' fees or costs.²⁰³

IV. The Virginia Values Act and the New South

The Virginia Values Act undoubtedly brings Virginia into the 21st century, and into alignment with the values of Virginia voters, by modernizing and expanding existing civil rights law. It incorporated the piecemeal legislation that had been introduced in previous sessions to ban discrimination on the basis of sexual orientation and gender identity in public employment²⁰⁴ and in housing,²⁰⁵ creating more comprehensive legislation inclusive of protections for private employees, credit users, and patrons of public accommodations. It also extended additional protections on the basis of marital status

¹⁹⁸ See Va. S. 868.

¹⁹⁹ See *id.*

²⁰⁰ See Memorandum of Understanding Between the U.S. Equal Emp. Opportunity Comm'n and The U.S. Dep't of Just. (Dec. 21, 2018) (on file with the U.S. Equal Employment Opportunity Commission).

²⁰¹ See Va. S. 868.

²⁰² *Employment Dispute Resolution*, DEP'T OF HUM. RES. MGMT., <https://www.dhrm.virginia.gov/employment-dispute-resolution> (last visited Sept. 25, 2020).

²⁰³ See *Virginia Adds LGBTQ Protections to Anti-Discrimination*, MCGUIREWOODS (Apr. 14, 2020), <https://www.mcguirewoods.com/client-resources/Alerts/2020/4/virginia-adds-lgbtq-protections-to-anti-discrimination-law>.

²⁰⁴ VA. CODE ANN. § 2.2-3905 (2020) (prohibiting employment discrimination).

²⁰⁵ § 36-96.1 (prohibiting housing discrimination).

and status as a veteran.²⁰⁶ The Virginia Values Act was not the only bill this session to amend civil rights law. The CROWN Act and pregnancy discrimination legislation were both adopted to ensure that prohibitions on discrimination on the basis of race and sex were properly construed.²⁰⁷ Elsewhere in Virginia code, old segregation statutes were repealed²⁰⁸ and voting reforms were enacted. The dam that broke in 2019 carried along many overdue reforms. The 2020 General Assembly session enacted many laws necessary for lived equality.

Virginia is now the first state in the South to provide nondiscrimination protections for the LGBTQ community,²⁰⁹ but that was not inevitably the case. Despite overwhelming popular support for nondiscrimination protections, even among Republicans and from people across religious traditions, there was resistance to passing nondiscrimination protections for LGBTQ people.²¹⁰ Progress stalled until the issue was able to garner overwhelming, bipartisan support in the wake of a wave election.²¹¹ Given the popularity of these issues, the reluctance of legislative leadership to move forward seems quite incongruent. Unfortunately, the explanation is painfully clear: many legislators shied away from issues that their more fringe colleagues had come to rely upon as political wedges. Drummed-up polarization around LGBTQ equality combined with fear of a primary challenge from the right trumped main street support. It took a wave election and all-new House legislative leadership to shake a nondiscrimination bill loose.²¹² Other Southern states may or may not recreate the environment that led to enshrining sexual orientation and gender identity nondiscrimination protections into law.

²⁰⁶ See *id.*

²⁰⁷ See § 2.2-3901 (prohibiting discrimination on the basis of pregnancy); *The Official Campaign of the CROWN Act*, *supra* note 30.

²⁰⁸ See S. 874, 2020 Gen. Assemb., Reg. Sess. (Va. 2011) (repealing statute that established separate accommodation for white and African American passengers on steamboats).

²⁰⁹ See Nick Morrow, *Virginia Values Act Signed Into Law—Extending Long-Delayed, Critical Protections to LGBTQ Virginians*, HUM. RTS. CAMPAIGN (Apr. 11, 2020), <https://www.hrc.org/news/virginia-values-act-signed-into-law-extends-protections-to-lgbtq-virginians>.

²¹⁰ See Vee Lamneck, *Vee Lamneck column: The push for LGBTQ nondiscrimination protections*, RICH. TIMES-DISPATCH (Feb. 4, 2020), https://richmond.com/opinion/columnists/vee-lamneck-column-the-push-for-lgbtq-nondiscrimination-protections/article_95a4a675-3b69-5410-b090-6234f7431d70.html (reporting that 3 in 4 Virginia citizens support nondiscrimination policies for LGBTQ people); Justin Mattingly, *‘Virginia is for all lovers’: House and Senate pass legislation to ban LGBTQ discrimination*, RICH. TIMES-DISPATCH (Feb. 6, 2020), https://richmond.com/news/plus/virginia-is-for-all-lovers-house-and-senate-pass-legislation-to-ban-lgbtq-discrimination/article_71712074-184d-524a-895f-e6e03ff7350.html (referencing opposition to the Virginia Values Act).

²¹¹ See Mattingly, *supra* note 210.

²¹² See *id.*

A. Ongoing Legislative Attacks on LGBTQ Rights

When the *Obergefell v. Hodges* case landed before the United States Supreme Court, conventional wisdom from supporters and detractors of marriage equality alike was that the Court was inclined to decide that marriage equality was guaranteed under the United States Constitution.²¹³ The Court's watershed decision did not arrive until the summer of 2015, but in the preceding months state legislators sprang into action introducing a slew of legislation intended to limit or resist the outcome.²¹⁴ More than 800 anti-LGBTQ bills have been introduced in state legislatures since then, ranging from religious refusals to bills targeting LGBTQ prospective foster or adoptive parents to bills trying to restrict bathroom access for transgender people or denying transgender youth access to best-practice, medically necessary care.²¹⁵ Many of these bills arose in the South. The vast majority (95%) have been defeated, but the narrative that the South has a long way to go on LGBTQ issues certainly remains.²¹⁶

The diminishment of LGBTQ rights in the South is far from assured. In fact, North Carolina and Arkansas were examples of early, bipartisan success to come together to protect some of the most vulnerable members of the LGBTQ community: youth. At the time, legislators from across the aisle could agree that bullying was both harmful and preventable. In 2009, North Carolina passed legislation prohibiting bullying and requiring schools to respond.²¹⁷ Notably, the law enumerated protected characteristics including sexual orientation and gender identity. Arkansas followed suit in 2011.²¹⁸ A bipartisan approach to LGBTQ issues did not last long in either state.

In 2015, following the passage of a Fayetteville ordinance prohibiting discrimination on the basis of sexual orientation and gender identity,²¹⁹ Arkansas adopted a law eliminating the ability of cities to enact nondiscrimination

²¹³ See Emma Margolin, *What if gay marriage loses?*, MSNBC (May 2, 2015), <http://www.msnbc.com/msnbc/what-if-gay-marriage-loses>.

²¹⁴ See, e.g., S. 100, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2015); H.D. 2398, 27th Leg. (Haw. 2014); Oklahoma Religious Freedom Reformation Act of 2015, S. 440, 55th Leg., 1st Sess. (Okla. 2015); H.D. 1251, 89th Leg., Reg. Sess. (S.D. 2014); H.D. 2467, 108th Gen. Assemb., 2d Sess. (Tenn. 2014).

²¹⁵ See, e.g., Keep Faith In Adoption and Foster Care Act, S. 375, 154th Gen. Assemb., Reg. Sess. (Ga. 2018) (allowing religiously affiliated child-placement agencies to decline placement to same-sex couples); Texas Health Care Right of Conscience Act, H.R. 2878, 85th Leg. (Tex. 2017) (granting a right to refuse to perform medical services when services conflict with a medical care provider's religious beliefs); H.D. 2B, 2015 Gen. Assemb., 2d Extra Sess. (N.C. 2016) (mandating single-sex multiple occupancy bathrooms in schools and public agencies based on biological sex).

²¹⁶ See David Crary, *Bills to Curtail LGBT Rights Are Failing in US Legislatures*, ASSOCIATED PRESS (Apr. 17, 2018), <https://apnews.com/article/627d0ed9297848769d2f35a2892f3972>.

²¹⁷ N.C. GEN. STAT. §§ 115C-407.15 to 407.18 (2019); S. 526, 2009 Gen. Assemb. (N.C. 2009).

²¹⁸ ARK. CODE ANN. § 6-18-514 (2020); S. 892, 88th Gen. Assemb., Reg. Sess. (Ark. 2011).

²¹⁹ FAYETTEVILLE, ARK., CODE OF ORDINANCES, ch.130, art. V, § 130.50 (2015).

ordinance that exceeded state law.²²⁰ The next year, North Carolina became infamous for passing HB2, a law that barred transgender people from using restrooms and other facilities consistent with their gender identity in government buildings including schools, airports, libraries, convention centers, and stadiums.²²¹ The law also overturned city ordinances banning discrimination on the basis of sexual orientation and gender identity. Despite efforts to repeal HB2, the law replacing HB2 continues to perpetuate anti-transgender discrimination.²²² In both Arkansas and North Carolina, as well as in many other states, the basic existence of transgender people was weaponized as an electoral wedge and a bipartisan approach to LGBTQ issues was consigned, at least for now, to the dustbin.

B. Demographics and Elections

In Virginia, Delegate Bob Marshall proudly declared himself Virginia's "chief homophobe,"²²³ having orchestrated the state's constitutional ban on same-sex marriage in addition to sponsoring numerous other anti-LGBTQ bills.²²⁴ In 2017, Marshall introduced his own version of a bathroom bill, though it never advanced out of committee.²²⁵ Later that year, he lost his seat to a Democratic challenger, Danica Roem, a transgender woman.²²⁶ Delegate Roem went on to patron several important pieces of pro-equality legislation²²⁷ and was an outspoken advocate for the Virginia Values Act.²²⁸

Major shifts in Virginia's demographics have played a significant role in

²²⁰ ARK. CODE ANN. § 14-1-403 (2020).

²²¹ H.D. 2B, 2015 Gen. Assemb., 2d Extra Sess. (N.C. 2016).

²²² Mark Abadi, *'This Is a Bait and Switch': Liberal Groups Furious Over North Carolina's 'Bathroom Law' Replacement*, BUS. INSIDER (Mar. 30, 2017), <https://www.businessinsider.com/north-carolina-bathroom-bill-repeal-hb2-replacement-2017-3>.

²²³ Antonio Olivo, *Danica Roem of Virginia to be first openly transgender person elected, seated in a U.S. statehouse*, WASH. POST (Nov. 18, 2017), https://www.washingtonpost.com/local/virginia-politics/danica-roem-will-be-vas-first-openly-transgender-elected-official-after-unseating-conservative-robert-g-marshall-in-house-race/2017/11/07/d534bdde-c0af-11e7-959c-fe2b598d8c00_story.html.

²²⁴ *Marriage*, DEL. BOB MARSHALL, <https://delegatebob.com/marriage/> (last visited Oct. 3, 2020).

²²⁵ Nico Lang, *What the Death of Virginia's 'Bathroom Bill' Means for LGBTQ Rights*, NBC NEWS (Jan. 20, 2017), <https://www.nbcnews.com/feature/nbc-out/what-death-virginia-s-bathroom-bill-means-lgbtq-rights-n710066>.

²²⁶ Olivo, *supra* note 223.

²²⁷ *See, e.g.*, H.D. 1864, 2019 Gen. Assemb., Reg. Sess. (Va. 2019) (prohibiting a health carrier from imposing additional costs on transgender individuals); H.D. 2104, 2019 Gen. Assemb., Reg. Sess. (Va. 2019) (requiring religious and gender neutrality in school dress codes); H.D. 696, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (providing that localities may prohibit instances of discrimination on the basis of sexual orientation and gender identity); H.D. 1429, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (prohibiting health carriers from denying coverage to or imposing additional costs on transgender individuals).

²²⁸ *See* Graham Moomaw, *Transgender Delegate Blasts 'Discriminatory Politicians' Who Opposed LGBTQ Bill*, VA. MERCURY (Feb. 5, 2020), <https://www.virginiamercury.com/blog-va/transgender-delegate-blasts-discriminatory-politicians-who-opposed-lgbtq-bill/>.

the transformation of Virginia into a state that's more blue than purple.²²⁹ Between 2000 and 2010, the state underwent a 13 percent growth in population with more than half of those new residents settling in Northern Virginia.²³⁰ During this timeframe, the Latinx population doubled and the API population increased by more than 60 percent.²³¹ A significant percentage of people relocating to Virginia came from New York and other northeastern states that had adopted laws protecting LGBTQ rights.²³² In 2000, 29 percent of Virginia residents had attained a bachelor's degree or higher.²³³ By 2018, the number grew to 38 percent.²³⁴ These demographic shifts correlate both to support for LGBTQ rights²³⁵ and a propensity to identify as a Democrat.²³⁶

C. Popular Support for LGBTQ Rights

Popular support for nondiscrimination laws has been high for quite some time. One study shows that a majority of Republicans continued to support nondiscrimination laws during the period of 2015-2018 even as those numbers faltered as a result of the increased partisanship over LGBTQ issues (note that North Carolina's HB2 passed in 2016).²³⁷ Even so, nearly seven in ten Americans favor laws that would protect LGBT people from

²²⁹ See Sabrina Tavernise and Robert Gebeloff, *How Voters Turned Virginia From Deep Red to Solid Blue*, N.Y. TIMES (Nov. 9, 2019), <https://www.nytimes.com/2019/11/09/us/virginia-elections-democrats-republicans.html>.

²³⁰ Lisa A. Sturtevant, *Virginia's Changing Demographic Landscape*, VA. ISSUES & ANSWERS, Winter 2011-12, at 2-3.

²³¹ See *id.* at 5.

²³² See Gregor Aisch, Robert Gebeloff & Kevin Quealy, *Where We Came From and Where We Went, State by State*, N.Y. TIMES (Aug. 19, 2014), <https://www.nytimes.com/interactive/2014/08/13/upshot/where-people-in-each-state-were-born.html#Virginia> (according to the interactive chart 17% of Virginians came from Northeast states in 2012).

²³³ U.S. CENSUS BUREAU, VIRGINIA: 2000, at 3 (2002).

²³⁴ *QuickFacts Virginia*, U.S. CENSUS BUREAU (2018), <https://www.census.gov/quickfacts/fact/table/VA/EDU685218#EDU685218>.

²³⁵ See *Broad Support for LGBT Rights Across all 50 States: Findings from the 2019 American Values Atlas*, PUB. RELIGION RSCH. INST. (Apr. 14, 2020), <https://www.prii.org/research/broad-support-for-lgbt-rights/> (discussing statistical findings showing particular support for LGBT rights among people who identify as Latinx, API, Northeasterner, or have attained a bachelor's degree or higher education).

²³⁶ See *In Changing U.S. Electorate, Race and Education Remain Stark Dividing Lines*, PEW RSCH. CTR. (June 2, 2020), <https://www.pewresearch.org/politics/2020/06/02/democratic-edge-in-party-identification-narrows-slightly> (noting the nationwide shift of people with bachelor's degrees identifying as Democrat).

²³⁷ See Daniel Greenberg et al., *Fifty Years After Stonewall: Widespread Support for LGBT Issues - Findings from American Values Atlas 2018*, PUB. RELIGION RSCH. INST. (Mar. 26, 2019), <https://www.prii.org/research/fifty-years-after-stonewall-widespread-support-for-lgbt-issues-findings-from-american-values-atlas-2018> (noting how the support for LGBTQ issues has declined amongst Republicans but the majority of Republicans still support them); Michael Gordon et al., *Understanding HB2: North Carolina's Newest Law Solidifies State's Role in Defining Discrimination*, CHARLOTTE OBSERVER (Mar. 26, 2016), <https://www.charlotteobserver.com/news/politics-government/article68401147.html> (describing the passage of HB2 and its significance for LGBTQ rights).

discrimination in jobs, public accommodations, and housing, including majorities of Democrats (79%), Independents (70%) and Republicans (56%).²³⁸ Support is also cross-generational: younger people have higher levels of support, with 18-19 year olds supporting nondiscrimination laws by 76%.²³⁹ Declines in support are marginal with age and at no point drop below the majority mark. Among those 30-49 support is at 72%, and 66% of people between 50-64 support nondiscrimination laws as do 59% of those 65 and above.²⁴⁰ This trend of majority support stays consistent across faith traditions as well, with majorities of all the religious groups assessed reporting majority support.²⁴¹

A poll fielded at the end of 2019 told this same story about Virginians: 72% of Virginians surveyed supported updating nondiscrimination laws covering places of public accommodations, including 53% of Republicans; 78% supported updating laws relating to employment, including 64% of Republicans.²⁴² Support was not limited to Northern Virginia and the Richmond suburbs; there was majority support in the Shenandoah region (64% support for public accommodations protections and 74% for employment protections) as well as the Lynchburg area (56% support for protections in public accommodations and 64% in employment).²⁴³

CONCLUSION

As the first state in the South to have nondiscrimination protections that encompass the LGBTQ community, Virginia is a pioneer. The combination of updates to existing law and creation of new protections for all Virginians means that the Virginia Values Act has brought Virginia into line with other states while simultaneously creating its own landmark. After being so far behind on codifying civil rights protections, Virginia leapfrogged ahead, becoming a leader overnight. Popular support for LGBTQ nondiscrimination remains extremely high, and not only among liberals, suburbanites, and Democrats.²⁴⁴ Republicans and independents, as well as a majority of people of many faiths, in urban and rural areas of the states, recognize why

²³⁸ Greenberg et al., *supra* note 237.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *New Poll Shows Supermajority Support for Protecting LGBTQ Virginians from Discrimination*, VA. VALUES COAL. (Jan. 13, 2020), <https://vavalues.org/2020/01/13/new-poll-shows-supermajority-support-for-protecting-lgbtq-virginians-from-discrimination>.

²⁴³ *Id.*

²⁴⁴ *See id.*

nondiscrimination laws are so vitally important: allowing barriers to the fundamental building blocks of American life is fundamentally unfair.

The “Blue Wave” election that swept Virginia in 2019 brought a pro-equality majority and pro-equality leadership into Virginia for the first time in decades.²⁴⁵ It is because legislators were allowed to vote not only their conscience, but consistently with their constituents, that this landmark piece of civil rights legislation passed so decisively. Potential for change exists throughout the South, but protections for LGBTQ people depend upon many factors. At a minimum, lawmakers must be willing to resist the pressure to allow matters of LGBTQ equality to be wielded as a wedge issue, and they may take comfort in the popular support for nondiscrimination protections that transcends party, age, and even religious belief.

²⁴⁵ See Ella Nilsen, *Democrats Just Pulled off a Huge Win, Taking Control of Virginia’s State Legislature*, VOX (Nov. 5, 2019), <https://www.vox.com/policy-and-politics/2019/11/5/20944109/virginia-elections-legislature-results-democrats> (noting how Democrats became the majority in the Virginia legislature in the 2019 election); Lucas Acosta, *HRC Applauds New Pro-Equality Majorities in Virginia Legislature*, HUM. RTS. CAMPAIGN (Nov. 5, 2019), <https://www.hrc.org/news/hrc-applauds-new-pro-equality-majorities-in-virginia-legislature> (noting how the Virginia 2019 election resulted in a pro-equality majority in the legislature).