



Sent via email

October 2, 2023

Members of the Virginia Municipal League
13 E. Franklin Street
Richmond, VA 23219

Dear Members of the Virginia Municipal League,

We write to ask that you rescind your support, as members of the Virginia Municipal League, for racial profiling practices by Virginia law enforcement—euphemistically known as “pretextual policing”—and to invite you to an informal presentation on this important criminal justice issue.

Pretextual policing is the practice of stopping motorists or pedestrians for minor offenses like vehicle equipment violations in hopes of learning that the person stopped has committed a more serious crime, despite having no evidence to suggest the person has committed that crime. The reason it has become synonymous with racial profiling is because the law has placed no restrictions on the subjective motivations of police. In fact, in *Whren v. United States* (1996), the Supreme Court declared that the subjective motivations of a police officer for conducting a stop are entirely irrelevant. This means a police officer can pull a Black driver over simply because he’s Black—and can even use racially charged language in the process—without violating the Fourth Amendment’s proscription against unreasonable searches and seizures.

Pretextual policing is the main reason Black Americans are so much more likely than white Americans to be subjected to encounters with law enforcement. In Virginia, Black motorists are nearly two times more likely than white drivers to be stopped on the roadways, and nearly three times more likely to be searched. These encounters are also the common thread between so many tragic instances of the police killing Black drivers: Sandra Bland, Philando Castile, Samuel Dubose, Daunte Wright, and many others all were killed at the hands of police after an encounter that began with a “pretextual hunch.”

During the 2020 special session of the Virginia General Assembly, the Commonwealth of Virginia passed landmark legislation limiting many of the most commonly used pretexts, such as objects hanging from the rearview mirror (e.g., a tree air freshener), dark tint, broken “tag lights” (i.e., license plate lights), jaywalking, and marijuana odor. The effect of the legislation is that those infractions are still the law, but they cannot be used as the primary basis for a stop or a search. In

other words, a person can still be cited for having one of two license plate lights broken, but only if there is another reason for the stop.

These limitations were always viewed by advocates as a first step in ending Virginia's most egregious police practice. After all, police still have hundreds of traffic infractions they can use to regulate traffic safety—or to engage in racial profiling, if they wish. The data bears this out—although racial disparities in vehicle searches have narrowed, overall traffic stops have actually increased since passage of the legislation.

Moreover, this legislation has had no detrimental impact on traffic safety. Indeed, if one considers the effect of the reforms, traffic safety should be improving, since police are now expected to focus on actual bad driving behavior, rather than flimsy pretexts or revenue streams, such as a registration or inspection being expired by 1 day (that's also one of the pretexts that can no longer be used as a primary basis for a stop). Prior experiences with limits on racial profiling have confirmed this suspicion. For example, in 2013, the police chief in Fayetteville, NC, announced that his officers would no longer stop motorists based on vehicle equipment violations, such as those targeted by Virginia's reforms. In the years that followed, traffic safety improved, and there was no detrimental effect at all on violent crime.

The latter is the second common justification for racial profiling. Police claim that pretexts are an important tool for seizing illegal contraband, such as narcotics or illegal firearms. On its face, this statement deserves scrutiny, since what they are essentially saying is they can't get guns off the street without acting on race-based hunches. However, data does even more to dispel the myth that pretextual policing is what keeps communities safe. According to research published by Prof. Frank Baumgartner of the University of North Carolina, and by the Stanford Open Policing Project, pretextual policing practices are an extraordinarily inefficient waste of resources, with narcotics found roughly 1 in 200 traffic stops (overwhelmingly personal use quantities), and illegal guns found about 1 in 900 traffic stops. Pretextual policing really is a racist dragnet: round up the people against whom officers are implicitly or explicitly biased, then search for a needle in a haystack.

Since Virginia passed its reforms—the first of their kind in the United States—many other states and localities have sought to pass similar reforms, recognizing the inordinate power police possess to do their jobs in a discriminatory manner without accountability. In most of those states and localities, like Connecticut, Chicago, Philadelphia and Montgomery County, MD, they are attempting to go well beyond the scope of Virginia's reforms, which advocates here have always viewed as merely a first step. In addition to limiting stops for vehicle equipment violations, those places have attempted to ban requests for "consent" searches, create civil remedies for discrimination claims, and establish civilian traffic enforcement agencies, to take police out of the business of traffic enforcement entirely.

Virginia's cities, counties and towns ought to expect more from their police departments. There is no reason police need to rely on race-based hunches to end gun violence. In fact, doing so damages community trust in law enforcement, while doing almost nothing to solve the problem sought to be addressed. We are living in an era of data and analytics, and we ought to expect police to embrace advancements in violence prevention—namely, community violence prevention initiatives such as Cure Violence, or—if implemented appropriately—even Operation Ceasefire, a program for which Governor Youngkin has expressed support. These are community-based, data-driven programs that focus on identifying high-risk individuals and neighborhoods, then engaging in evidence-based interventions to redirect and reform those individuals, and ensure that risk does not become reality.

Tragically, just before a bill to repeal pretextual policing reform was presented during the 2023 session of the Virginia General Assembly, Memphis police stopped Tyre Nichols, falsely claiming he had violated traffic laws, in order to shake him down. Their conduct was immediately aggressive and violent, and only escalated from there, resulting in him being savagely beaten to death. The officers have since been indicted on state and federal criminal charges. Upon the racial profiling bill being called in the Virginia Senate Judiciary Committee in January, it was Senate President Pro Tempore Louise Lucas who essentially cut off debate, invoking Nichols' name and tragic death, and stated that Virginia was not about to stand for race-based policing practices.

Mere days later, Virginians learned that a high-profile example of racial profiling in the Commonwealth resulted in a military serviceman being denied justice for the harm caused to him by City of Windsor Police. After being stopped for the pretext of a license plate tag violation, police immediately drew weapons, and when he hesitated exiting his car out of fear, pepper sprayed and were physically aggressive with him, for no reason whatsoever. Partly because their race-based motivations could not be deemed malicious, a jury was able to conclude his civil rights were violated, but were prohibited by law from awarding him a just verdict.

These are the types of injustices our Commonwealth needs to start caring about. We all want safe communities, but “public safety” must not be misguided, anachronistic and misguided, and must not subject Black people and communities to disproportionate harm. These are the original sins of our criminal legal system. In the 21st century, we need to expect better from our police, and they need to expect better of themselves.

It is for these reasons that we strongly urge you—if you’ve already expressed support for VML’s policy proposal—to rescind support for racial profiling practices in Virginia. Moreover, we invite you to attend one of two informal presentations and Q&As regarding pretextual policing, which we will be hosting via Zoom on:

1. Thursday, Oct. 5 from 12–1 p.m.
2. Thursday, Oct. 5 from 6:30–7:30 p.m.

We will be joined by other experts to both explain the foregoing in greater detail, answer any questions you might have, and direct you to other resources.

Sincerely,

Justice Forward Virginia
Pretrial Justice Institute
RISE for Youth
SAARA of Virginia
New Virginia Majority
The Center for Policing Equity
Law Enforcement Action Partnership
Network NOVA
Nolef Turns Inc.
Julian
Activate Virginia
The Humanization Project
Marijuana Justice
The Neighborhood Resource Center

The Commonwealth Institute for Fiscal
Analysis
Legal Aid Justice Center
RIHD Inc. (Resource Information Help for the
Disadvantaged and Disenfranchised)
Richmond For All
Virginia Association of Criminal Defense
Lawyers
ACLU of Virginia
National Association of Criminal Defense
Lawyers
Coming Together Virginia
Interfaith Action for Human Rights Virginia