



February 12, 2021

*Via Email*

The Honorable John Edwards  
Senate of Virginia  
Pocahontas Building  
900 E. Main Street  
Richmond, VA 23218  
[district21@senate.virginia.gov](mailto:district21@senate.virginia.gov)

The Honorable Charniele Herring  
Virginia House of Delegates  
Pocahontas Building  
900 E. Main Street  
Richmond, VA 23218  
[DelCHerring@house.virginia.gov](mailto:DelCHerring@house.virginia.gov)

Dear Leader Herring and Chairman Edwards:

We write to express our support for expanding the Court of Appeals this session, as well as filling the currently open seat on the Court of Appeals. Having a fully staffed Court and an automatic right to appellate review are critical for a well-functioning legal system, and we hope both the House of Delegates and the Senate will support expansion and fund these important priorities.

Passing this legislation will result in several openings on the Court of Appeals. Unfortunately, for many years our appellate courts have suffered from a lack of diversity in many respects. The Court of Appeals currently only has one judge who is African American. Seven of the ten current judges worked as prosecutors or in the Office of the Attorney General. None of the current judges spent their careers as public defenders, legal aid lawyers, or civil rights lawyers.

This lack of racial, ethnic, and professional diversity is particularly troubling when a majority of the cases that come before the Court of Appeals currently come from the criminal system that we know disproportionately affects communities of color and poor communities. Having judges on the court who understand the issues facing those communities, either through lived experience or professional experience is critical to ensuring our law in the casebooks accurately reflects the law as it is enforced on the ground.<sup>1</sup>

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<sup>1</sup> See, e.g., *Hill v. Commonwealth*, 297 Va. 804 (2019) (permitting officers to approach and seize people for reaching while inside their car in minority neighborhoods. This case demonstrates how our current judges and justices permit police to stop and frisk people of color absent suspicion of specific criminal activity being conducted, or about to be conducted, and with no context for how these types of stops affect minority communities and its citizens) and *Church v. Commonwealth*, 71 Va. App. 107 (2019) (holding that the disclosure of exculpatory evidence during the second day of a jury trial did not violate *Brady v. Maryland*. This case demonstrates how the current judges of the Court of Appeals do not

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Brad Haywood, Executive Director

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The overrepresentation of government lawyers, and the under representation of attorneys who fought against the government for their career or represented poor people, is a problem endemic to courts across the country. For example, the Biden Administration has reached out to senators stating that the administration will be “focused on nominating individuals whose legal experiences have been historically underrepresented on the federal bench, including those who are public defenders, civil rights and legal aid attorneys, and those who represent Americans in every walk of life.”<sup>2</sup> Both the Center for American Progress<sup>3</sup> and CATO Institute<sup>4</sup> have written reports in recent years that also highlight the lack of professional diversity at the federal level.

Luckily, there are at least eight applicants to the Court of Appeals that have spent an important part of their careers, if not their entire careers, as criminal defense attorneys. Even if the Court of Appeals is expanded, and every position went to someone with substantial experience in criminal defense, legal aid, or civil rights, we would still not have a professional balance on our Court. We hope the General Assembly will at least start to address the imbalance in professional diversity this year, and certainly not make this imbalance worse by appointing more former prosecutors, attorneys general, or other government lawyers to the bench.

Finally, we wish to comment on the judicial evaluation results from the Virginia State Bar. Our understanding is that twenty-six lawyers and judges applied for evaluation by the Bar for the positions on the Court of Appeals.<sup>5</sup>

All four women defense attorneys were found not qualified, while male defense attorneys, and women with experience as prosecutors, were. This was particularly curious given that all of the women who are defense attorneys are at least equally as qualified, if not more qualified, than the men with criminal experience who were deemed qualified and the women who were found qualified who worked at the Office of the Attorney General. We ask that the General Assembly take the recommendations of the Virginia State Bar Committee with a grain of salt and give an extra look especially at the four women who have prior experience in criminal defense, and public defense, who seemed to be overlooked by that Committee. It is also worth noting that

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understand the defense function and how an accused person would use evidence at trial. This opinion also incentivizes late disclosure of exculpatory evidence by prosecutors).

<sup>2</sup> Harper Neidig, “Biden team asks Senate Democrats to recommend public defenders, civil rights lawyers for federal bench,” The Hill, December 30, 2020, available at <https://thehill.com/regulation/court-battles/532164-biden-team-asks-senate-dems-to-recommend-public-defenders-civil>

<sup>3</sup> Maggie Jo Buchanan “Pipelines to Power: Encouraging Professional Diversity on the Federal Appellate Bench,” Center for American Progress, August 13, 2020, available at <https://www.americanprogress.org/issues/courts/reports/2020/08/13/489312/pipelines-power-encouraging-professional-diversity-federal-appellate-bench/>

<sup>4</sup> Clark Neily, “Are a Disproportionate Number of Federal Judges Former Government Advocates?” CATO Institute, September 18, 2019, available at <https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates>

<sup>5</sup> Peter Vieth, “26 Apply for Appeals Court Seats,” Virginia Lawyers Weekly, January 8, 2021.

those four women were found qualified by other bar associations who did their own independent evaluations.<sup>6</sup>

Thank you for your consideration of these matters and your commitment to improving our legal and judicial systems in the Commonwealth. We are happy to meet with you or any other members of the General Assembly to discuss these issues further.

Sincerely,

Justice Forward Virginia

cc: Members of the Senate Judiciary Committee  
Members of the House Courts of Justice Committee

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<sup>6</sup> Peter Vieth, "VSB ranks candidates for Appeals Court seats" Virginia Lawyers Weekly, January 8, 2021.