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HOUSE BILL NO. 1993
Offered January 9, 2019
Prefiled January 7, 2019
A BILL to amend and reenact § 24.2-802, as it is currently effective and as it shall become effective, of the Code of Virginia, relating to recounts; special election to be held in the case of a tie vote.
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Patrons—Price, Bagby, Bourne, Gooditis, Hope, Kory, Levine, Lindsey, Mullin, Rasoul, Rodman, Roem, Sickles and Ward; Senator: Dance
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Referred to Committee on Privileges and Elections
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Be it enacted by the General Assembly of Virginia:
1. That § 24.2-802, as it is currently effective and as it shall become effective, of the Code of Virginia is amended and reenacted as follows:
§ 24.2-802. (Effective until July 1, 2020) Procedure for recount.
A. The State Board of Elections shall promulgate standards for (i) the proper handling and security of voting and counting machines, ballots, and other materials required for a recount, (ii) accurate determination of votes based upon objective evidence and taking into account the counting machine and form of ballots approved for use in the Commonwealth, and (iii) any other matters that will promote a timely and accurate resolution of the recount. The chief judge of the circuit court or the full recount court may, consistent with State Board of Elections standards, resolve disputes over the application of the standards and direct all other appropriate measures to ensure the proper conduct of the recount.

The recount procedures to be followed throughout the election district shall be as uniform as practicable, taking into account the types of ballots and voting and counting machines in use in the election district.

In preparation for the recount, the clerks of the circuit courts shall (a) secure all printed ballots and other election materials in sealed boxes; (b) place all of the sealed boxes in a vault or room not open to the public or to anyone other than the clerk and his staff; (c) cause such vault or room to be securely locked except when access is necessary for the clerk and his staff; and (d) certify that these security measures have been taken in whatever form is deemed appropriate by the chief judge.

B. Within seven calendar days of the filing of the petition for a recount of any election other than an election for presidential electors, or within five calendar days of the filing of a petition for a recount of an election for presidential electors, the chief judge of the circuit court shall call a preliminary hearing at which (i) motions may be disposed of and (ii) the rules of procedure may be fixed, both subject to review by the full court. As part of the preliminary hearing, the chief judge may permit the petitioner and his counsel, together with each other party and his counsel and at least two members of the electoral board and the custodians, to examine any direct recording electronic machine of the type that prints returns when the print-out sheets are not clearly legible. The petitioner and his counsel and each other party and their counsel under supervision of the electoral board and its agents shall also have access to pollbooks and other materials used in the election for examination purposes, provided that individual ballots cast in the election shall not be examined at the preliminary hearing. The chief judge during the preliminary hearing shall review all security measures taken for all ballots and voting and counting machines and direct, as he deems necessary, all appropriate measures to ensure proper security to conduct the recount.

The chief judge, subject to review by the full court, may set the place or places for the recount and may order the delivery of election materials to a central location and the transportation of voting and counting machines to a central location in each county or city under appropriate safeguards.

After the full court is appointed under § 24.2-801 or 24.2-801.1, it shall call a hearing at which all motions shall be disposed of and the rules of procedure shall be fixed finally. The court shall call for the advice and cooperation of the Department, the State Board, or any local electoral board, as appropriate, and such boards or agency shall have the duty and authority to assist the court. The court shall fix procedures that shall provide for the accurate determination of votes in the election.

The determination of the votes in a recount shall be based on votes cast in the election and shall not take into account (a) any absentee ballots or provisional ballots sought to be cast but ruled invalid and not cast in the election, (b) ballots cast only for administrative or test purposes and voided by the officers of election, or (c) ballots spoiled by a voter and replaced with a new ballot.

The eligibility of any voter to have voted shall not be an issue in a recount. Commencing upon the filing of the recount, nothing shall prevent the discovery or disclosure of any evidence that could be used pursuant to § 24.2-803 in contesting the results of an election.

58   C. The court shall permit each candidate, or petitioner and governing body or chief executive officer,
59 to select an equal number of the officers of election to be recount officials and to count printed ballots,
60 or in the case of direct recording electronic machines, to redetermine the vote. The number shall be
61 fixed by the court and be sufficient to conduct the recount within a reasonable period. The court may
62 permit each party to the recount to submit a list of alternate officials in the number the court directs.
63 There shall be at least one team of recount officials to recount printed ballots and to redetermine the
64 vote cast on direct recording electronic machines of the type that prints returns for the election district at
65 large in which the recount is being held. There shall be at least one team from each locality using ballot
66 scanner machines to insert the ballots into one or more scanners. The ballot scanner machines shall be
67 programmed to count only votes cast for parties to the recount or for or against the question in a
68 referendum recount. Each team shall be composed of one representative of each party.
69   The court may provide that if, at the time of the recount, any recount official fails to appear, the
70 remaining recount officials present shall appoint substitute recount officials who shall possess the same
71 qualifications as the recount officials for whom they substitute. The court may select pairs of recount
72 coordinators to serve for each county or city in the election district who shall be members of the county
73 or city electoral board and represent different political parties. The court shall have authority to summon
74 such officials and coordinators. On the request of any party to the recount, the court shall allow that
75 party to appoint one representative observer for each team of recount officials. The representative
76 observers shall have an unobstructed view of the work of the recount officials. The expenses of its
77 representatives shall be borne by each party.
78   D. The court (i) shall supervise the recount and (ii) may require delivery of any or all pollbooks used
79 and any or all ballots cast at the election, or may assume supervision thereof through the recount
80 coordinators and officials.
81   The redetermination of the vote in a recount shall be conducted as follows:
82   1. For paper ballots, the recount officials shall hand count the paper ballots using the standards
83 promulgated by the State Board pursuant to subsection A.
84   2. For direct recording electronic machines (DREs), the recount officials shall open the envelopes
85 with the printouts and read the results from the printouts. If the printout is not clear, or on the request
86 of the court, the recount officials shall rerun the printout from the machine or examine the counters as
87 appropriate.
88   3. For ballot scanner machines, the recount officials shall rerun all the machine-readable ballots
89 through a scanner programmed to count only the votes for the office or issue in question in the recount
90 and to set aside all ballots containing write-in votes, overvotes, and undervotes. The ballots that are set
91 aside, any ballots not accepted by the scanner, and any ballots for which a scanner could not be
92 programmed to meet the programming requirements of this subdivision, shall be hand counted using the
93 standards promulgated by the State Board pursuant to subsection A. If the total number of
94 machine-readable ballots reported as counted by the scanner plus the total number of ballots set aside by
95 the scanner do not equal the total number of ballots rerun through the scanner, then all ballots cast on
96 ballot scanner machines for that precinct shall be set aside to be counted by hand using the standards
97 promulgated by the State Board pursuant to subsection A. Prior to running the machine-readable ballots
98 through the ballot scanner machine, the recount officials shall ensure that logic and accuracy tests have
99 been successfully performed on each scanner after the scanner has been programmed. The result
100 calculated for ballots accepted by the ballot scanner machine during the recount shall be considered the
101 correct determination for those machine-readable ballots unless the court finds sufficient cause to rule
102 otherwise.
103   There shall be only one redetermination of the vote in each precinct.
104   At the conclusion of the recount of each precinct, the recount officials shall write down the number
105 of valid ballots cast, this number being obtained from the ballots cast in the precinct, or from the ballots
106 cast as shown on the statement of results if the ballots cannot be found, for each of the two candidates
107 or for and against the question. They shall submit the ballots or the statement of results used, as to the
108 validity of which questions exist, to the court. The written statement of any one recount official
109 challenging a ballot shall be sufficient to require its submission to the court. If, on all direct recording
110 electronic machines, the number of persons voting in the election, or the number of votes cast for the
111 office or on the question, totals more than the number of names on the pollbooks of persons voting on
112 the voting machines, the figures recorded by the machines shall be accepted as correct.
113   At the conclusion of the recount of all precincts, after allowing the parties to inspect the questioned
114 ballots, and after hearing arguments, the court shall rule on the validity of all questioned ballots and
115 votes. After determining all matters pertaining to the recount and redetermination of the vote as raised
116 by the parties, the court shall certify to the State Board and the electoral board or boards (a) the vote for
117 each party to the recount and declare the person who received the higher number of votes to be
118 nominated or elected, as appropriate, or (b) the votes for and against the question and declare the
119 outcome of the referendum. The Department shall post on the Internet any and all changes made during

120 the recount to the results as previously certified by it pursuant to § 24.2-679.
121   *Except in the case of a recount of an election for Governor, Lieutenant Governor, or Attorney*
122 *General, if the court finds that each party to the recount has received an equal number of votes, it shall*
123 *issue a writ promptly ordering a special election to be held to determine which candidate is elected to*
124 *the office.*
125   E. Costs of the recount shall be assessed against the counties and cities comprising the election
126 district when (i) the candidate petitioning for the recount is declared the winner; (ii) the petitioners in a
127 recount of a referendum win the recount; or (iii) there was between the candidate apparently nominated
128 or elected and the candidate petitioning for the recount a difference of not more than one-half of one
129 percent of the total vote cast for the two such candidates as determined by the State Board or electoral
130 board prior to the recount. Otherwise the costs of the recount shall be assessed against the candidate
131 petitioning for the recount or the petitioners in a recount of a referendum. If more than one candidate
132 petitions for a recount, the court may assess costs in an equitable manner between the counties and
133 cities and any such candidate if both are liable for costs under this subsection. Costs incurred to date
134 shall be assessed against any candidate or petitioner who defaults or withdraws his petition.
135   F. The court shall determine the costs of the recount subject to the following limitations: (i) no per
136 diem payment shall be assessed for salaried election officials; (ii) no per diem payment to officers of
137 election serving as recount officials shall exceed two-thirds of the per diem paid such officers by the
138 county or city for service on election day; and (iii) per diem payments to alternates shall be allowed
139 only if they serve.
140   G. Any petitioner who may be assessed with costs under subsection E shall post a bond with surety
141 with the court in the amount of $10 per precinct in the area subject to recount. If the petitioner wins the
142 recount, the bond shall not be forfeit. If the petitioner loses the recount, the bond shall be forfeit only to
143 the extent of the assessed costs. If the assessed costs exceed the bond, he shall be liable for such excess.
144   H. The recount proceeding shall be final and not subject to appeal.
145   I. For the purposes of this section:
146   "Overvote" means a ballot on which a voter casts a vote for a greater number of candidates or
147 positions than the number for which he was lawfully entitled to vote and no vote shall be counted with
148 respect to that office or issue.
149   "Undervote" means a ballot on which a voter casts a vote for a lesser number of candidates or
150 positions than the number for which he was lawfully entitled to vote.
151   **§ 24.2-802. (Effective July 1, 2020) Procedure for recount.**
152   A. The State Board of Elections shall promulgate standards for (i) the proper handling and security
153 of voting systems, ballots, and other materials required for a recount, (ii) accurate determination of votes
154 based upon objective evidence and taking into account the voting system and form of ballots approved
155 for use in the Commonwealth, and (iii) any other matters that will promote a timely and accurate
156 resolution of the recount. The chief judge of the circuit court or the full recount court may, consistent
157 with State Board of Elections standards, resolve disputes over the application of the standards and direct
158 all other appropriate measures to ensure the proper conduct of the recount.
159   The recount procedures to be followed throughout the election district shall be as uniform as
160 practicable, taking into account the types of ballots and voting systems in use in the election district.
161   In preparation for the recount, the clerks of the circuit courts shall (a) secure all printed ballots and
162 other election materials in sealed boxes; (b) place all of the sealed boxes in a vault or room not open to
163 the public or to anyone other than the clerk and his staff; (c) cause such vault or room to be securely
164 locked except when access is necessary for the clerk and his staff; and (d) certify that these security
165 measures have been taken in whatever form is deemed appropriate by the chief judge.
166   B. Within seven calendar days of the filing of the petition for a recount of any election other than an
167 election for presidential electors, or within five calendar days of the filing of a petition for a recount of
168 an election for presidential electors, the chief judge of the circuit court shall call a preliminary hearing
169 at which (i) motions may be disposed of and (ii) the rules of procedure may be fixed, both subject to
170 review by the full court. The petitioner and his counsel and each other party and their counsel under
171 supervision of the electoral board and its agents shall have access to pollbooks and other materials used
172 in the election for examination purposes, provided that individual ballots cast in the election shall not be
173 examined at the preliminary hearing. The chief judge during the preliminary hearing shall review all
174 security measures taken for all ballots and voting systems and direct, as he deems necessary, all
175 appropriate measures to ensure proper security to conduct the recount.
176   The chief judge, subject to review by the full court, may set the place or places for the recount and
177 may order the delivery of election materials to a central location and the transportation of voting
178 systems to a central location in each county or city under appropriate safeguards.
179   After the full court is appointed under § 24.2-801 or 24.2-801.1, it shall call a hearing at which all
180 motions shall be disposed of and the rules of procedure shall be fixed finally. The court shall call for

181 the advice and cooperation of the Department, the State Board, or any local electoral board, as
182 appropriate, and such boards or agency shall have the duty and authority to assist the court. The court
183 shall fix procedures that shall provide for the accurate determination of votes in the election.
184   The determination of the votes in a recount shall be based on votes cast in the election and shall not
185 take into account (a) any absentee ballots or provisional ballots sought to be cast but ruled invalid and
186 not cast in the election, (b) ballots cast only for administrative or test purposes and voided by the
187 officers of election, or (c) ballots spoiled by a voter and replaced with a new ballot.
188   The eligibility of any voter to have voted shall not be an issue in a recount. Commencing upon the
189 filing of the recount, nothing shall prevent the discovery or disclosure of any evidence that could be
190 used pursuant to § 24.2-803 in contesting the results of an election.
191   C. The court shall permit each candidate, or petitioner and governing body or chief executive officer,
192 to select an equal number of the officers of election to be recount officials and to count printed ballots.
193 The number shall be fixed by the court and be sufficient to conduct the recount within a reasonable
194 period. The court may permit each party to the recount to submit a list of alternate officials in the
195 number the court directs. There shall be at least one team from each locality using ballot scanner
196 machines to insert the ballots into one or more scanners. The ballot scanner machines shall be
197 programmed to count only votes cast for parties to the recount or for or against the question in a
198 referendum recount. Each team shall be composed of one representative of each party.
199   The court may provide that if, at the time of the recount, any recount official fails to appear, the
200 remaining recount officials present shall appoint substitute recount officials who shall possess the same
201 qualifications as the recount officials for whom they substitute. The court may select pairs of recount
202 coordinators to serve for each county or city in the election district who shall be members of the county
203 or city electoral board and represent different political parties. The court shall have authority to summon
204 such officials and coordinators. On the request of any party to the recount, the court shall allow that
205 party to appoint one representative observer for each team of recount officials. The representative
206 observers shall have an unobstructed view of the work of the recount officials. The expenses of its
207 representatives shall be borne by each party.
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221 the scanner do not equal the total number of ballots rerun through the scanner, then all ballots cast on
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227 correct determination for those machine-readable ballots unless the court finds sufficient cause to rule
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231 of valid ballots cast, this number being obtained from the ballots cast in the precinct, or from the ballots
232 cast as shown on the statement of results if the ballots cannot be found, for each of the two candidates
233 or for and against the question. They shall submit the ballots or the statement of results used, as to the
234 validity of which questions exist, to the court. The written statement of any one recount official
235 challenging a ballot shall be sufficient to require its submission to the court. If, on all ballot scanners,
236 the number of persons voting in the election, or the number of votes cast for the office or on the
237 question, totals more than the number of names on the pollbooks of persons voting on the voting
238 machines, the figures recorded by the machines shall be accepted as correct.
239   At the conclusion of the recount of all precincts, after allowing the parties to inspect the questioned
240 ballots, and after hearing arguments, the court shall rule on the validity of all questioned ballots and
241 votes. After determining all matters pertaining to the recount and redetermination of the vote as raised
242 by the parties, the court shall certify to the State Board and the electoral board or boards (a) the vote for

243 each party to the recount and declare the person who received the higher number of votes to be
244 nominated or elected, as appropriate, or (b) the votes for and against the question and declare the
245 outcome of the referendum. The Department shall post on the Internet any and all changes made during
246 the recount to the results as previously certified by it pursuant to § 24.2-679.
247   *Except in the case of a recount of an election for Governor, Lieutenant Governor, or Attorney*
248 *General, if the court finds that each party to the recount has received an equal number of votes, it shall*
249 *issue a writ promptly ordering a special election be held to determine which candidate is elected to the*
250 *office.*
251   E. Costs of the recount shall be assessed against the counties and cities comprising the election
252 district when (i) the candidate petitioning for the recount is declared the winner; (ii) the petitioners in a
253 recount of a referendum win the recount; or (iii) there was between the candidate apparently nominated
254 or elected and the candidate petitioning for the recount a difference of not more than one-half of one
255 percent of the total vote cast for the two such candidates as determined by the State Board or electoral
256 board prior to the recount. Otherwise the costs of the recount shall be assessed against the candidate
257 petitioning for the recount or the petitioners in a recount of a referendum. If more than one candidate
258 petitions for a recount, the court may assess costs in an equitable manner between the counties and
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260 shall be assessed against any candidate or petitioner who defaults or withdraws his petition.
261   F. The court shall determine the costs of the recount subject to the following limitations: (i) no per
262 diem payment shall be assessed for salaried election officials; (ii) no per diem payment to officers of
263 election serving as recount officials shall exceed two-thirds of the per diem paid such officers by the
264 county or city for service on election day; and (iii) per diem payments to alternates shall be allowed
265 only if they serve.
266   G. Any petitioner who may be assessed with costs under subsection E shall post a bond with surety
267 with the court in the amount of $10 per precinct in the area subject to recount. If the petitioner wins the
268 recount, the bond shall not be forfeit. If the petitioner loses the recount, the bond shall be forfeit only to
269 the extent of the assessed costs. If the assessed costs exceed the bond, he shall be liable for such excess.
270   H. The recount proceeding shall be final and not subject to appeal.
271   I. For the purposes of this section:
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273 positions than the number for which he was lawfully entitled to vote and no vote shall be counted with
274 respect to that office or issue.
275   "Undervote" means a ballot on which a voter casts a vote for a lesser number of candidates or
276 positions than the number for which he was lawfully entitled to vote.