

19103933D

HOUSE BILL NO. 2625

Offered January 10, 2019

A *BILL to amend and reenact §§ 24.2-800 and 24.2-802, as it is currently effective and as it shall become effective, of the Code of Virginia, relating to recounts; rules of procedure; multiple simultaneous recounts.*

Patrons—Lindsey, Adams, D.M., Kory, Levine, Plum and Simon; Senator: Lewis

Referred to Committee on Privileges and Elections

Be it enacted by the General Assembly of Virginia:

1. That §§ 24.2-800 and 24.2-802, as it is currently effective and as it shall become effective, of the Code of Virginia are amended and reenacted as follows:

§ 24.2-800. Recounts in all elections.

A. The provisions of this article apply to all elections held in the Commonwealth.

B. When there is between any candidate apparently nominated or elected and any candidate apparently defeated a difference of not more than one percent of the total vote cast for the two such candidates as determined by the State Board or the electoral board, the defeated candidate may appeal from the determination of the State Board or the electoral board for a recount of the vote as set forth in this article. When there is between any write-in candidate apparently nominated or elected and any candidate apparently defeated, or between any candidate apparently nominated or elected and any write-in candidate apparently defeated, a difference of not more than five percent of the total vote cast for the two such candidates as determined by the State Board or the electoral board, the defeated candidate may appeal from the determination of the State Board or the electoral board for a recount of the vote as set forth in this article. In an election of electors for the President and Vice President of the United States, the presidential candidate shall represent the vice presidential candidate and slate of electors and be the party to the recount for purposes of this article.

C. When there is between the vote for a question and the vote against a question a difference of not more than fifty votes or one percent of the total vote cast for and against the question as determined by the State Board or the electoral board, whichever is greater, fifty or more voters qualified to vote on the question, by signing and filing their petition, may appeal from the determination of the State Board or the electoral board for a recount of the vote as set forth in this article.

D. The State Board shall promulgate standards and instructions for the conduct of simultaneous recounts of two or more elections in a single election district.

§ 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

INTRODUCED

HB2625

59 access to pollbooks and other materials used in the election for examination purposes, provided that
60 individual ballots cast in the election shall not be examined at the preliminary hearing. The chief judge
61 during the preliminary hearing shall review all security measures taken for all ballots and voting and
62 counting machines and direct, as he deems necessary, all appropriate measures to ensure proper security
63 to conduct the recount.

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

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

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

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

80 C. The court shall permit each candidate, or petitioner and governing body or chief executive officer,
81 to select an equal number of the officers of election to be recount officials and to count printed ballots,
82 or in the case of direct recording electronic machines, to redetermine the vote. The number shall be
83 fixed by the court and be sufficient to conduct the recount within a reasonable period. The court may
84 permit each party to the recount to submit a list of alternate officials in the number the court directs.
85 There shall be at least one team of recount officials to recount printed ballots and to redetermine the
86 vote cast on direct recording electronic machines of the type that prints returns for the election district at
87 large in which the recount is being held. There shall be at least one team from each locality using ballot
88 scanner machines to insert the ballots into one or more scanners. The ballot scanner machines shall be
89 programmed to count only votes cast for parties to the recount or for or against the question in a
90 referendum recount. Each team shall be composed of one representative of each party.

91 The court may provide that if, at the time of the recount, any recount official fails to appear, the
92 remaining recount officials present shall appoint substitute recount officials who shall possess the same
93 qualifications as the recount officials for whom they substitute. The court may select pairs of recount
94 coordinators to serve for each county or city in the election district who shall be members of the county
95 or city electoral board and represent different political parties. The court shall have authority to summon
96 such officials and coordinators. On the request of any party to the recount, the court shall allow that
97 party to appoint one representative observer for each team of recount officials. The representative
98 observers shall have an unobstructed view of the work of the recount officials. The expenses of its
99 representatives shall be borne by each party.

100 D. The court (i) shall supervise the recount and (ii) may require delivery of any or all pollbooks used
101 and any or all ballots cast at the election, or may assume supervision thereof through the recount
102 coordinators and officials.

103 The redetermination of the vote in a recount shall be conducted as follows:

104 1. For paper ballots, the recount officials shall hand count the paper ballots using the standards
105 promulgated by the State Board pursuant to subsection A.

106 2. For direct recording electronic machines (DREs), the recount officials shall open the envelopes
107 with the printouts and read the results from the printouts. If the printout is not clear, or on the request
108 of the court, the recount officials shall rerun the printout from the machine or examine the counters as
109 appropriate.

110 3. For ballot scanner machines, the recount officials shall rerun all the machine-readable ballots
111 through a scanner programmed to count only the votes for the office or issue in question in the recount
112 and to set aside all ballots containing write-in votes, overvotes, and undervotes. The ballots that are set
113 aside, any ballots not accepted by the scanner, and any ballots for which a scanner could not be
114 programmed to meet the programming requirements of this subdivision, shall be hand counted using the
115 standards promulgated by the State Board pursuant to subsection A. If the total number of
116 machine-readable ballots reported as counted by the scanner plus the total number of ballots set aside by
117 the scanner do not equal the total number of ballots rerun through the scanner, then all ballots cast on
118 ballot scanner machines for that precinct shall be set aside to be counted by hand using the standards
119 promulgated by the State Board pursuant to subsection A. Prior to running the machine-readable ballots
120 through the ballot scanner machine, the recount officials shall ensure that logic and accuracy tests have

121 been successfully performed on each scanner after the scanner has been programmed. The result
122 calculated for ballots accepted by the ballot scanner machine during the recount shall be considered the
123 correct determination for those machine-readable ballots unless the court finds sufficient cause to rule
124 otherwise.

125 There shall be only one redetermination of the vote in each precinct.

126 At the conclusion of the recount of each precinct, the recount officials shall write down the number
127 of valid ballots cast, this number being obtained from the ballots cast in the precinct, or from the ballots
128 cast as shown on the statement of results if the ballots cannot be found, for each of the two candidates
129 or for and against the question. They shall submit the ballots or the statement of results used, as to the
130 validity of which questions exist, to the court. The written statement of any one recount official
131 challenging a ballot shall be sufficient to require its submission to the court. If, on all direct recording
132 electronic machines, the number of persons voting in the election, or the number of votes cast for the
133 office or on the question, totals more than the number of names on the pollbooks of persons voting on
134 the voting machines, the figures recorded by the machines shall be accepted as correct.

135 At the conclusion of the recount of all precincts, after allowing the parties to inspect the questioned
136 ballots, and after hearing arguments, the court shall rule on the validity of all questioned ballots and
137 votes. After determining all matters pertaining to the recount and redetermination of the vote as raised
138 by the parties, the court shall certify to the State Board and the electoral board or boards (a) the vote for
139 each party to the recount and declare the person who received the higher number of votes to be
140 nominated or elected, as appropriate, or (b) the votes for and against the question and declare the
141 outcome of the referendum. The Department shall post on the Internet any and all changes made during
142 the recount to the results as previously certified by it pursuant to § 24.2-679.

143 E. Costs of the recount shall be assessed against the counties and cities comprising the election
144 district when (i) the candidate petitioning for the recount is declared the winner; (ii) the petitioners in a
145 recount of a referendum win the recount; or (iii) there was between the candidate apparently nominated
146 or elected and the candidate petitioning for the recount a difference of not more than one-half of one
147 percent of the total vote cast for the two such candidates as determined by the State Board or electoral
148 board prior to the recount. Otherwise the costs of the recount shall be assessed against the candidate
149 petitioning for the recount or the petitioners in a recount of a referendum. If more than one candidate
150 petitions for a recount, the court may assess costs in an equitable manner between the counties and
151 cities and any such candidate if both are liable for costs under this subsection. Costs incurred to date
152 shall be assessed against any candidate or petitioner who defaults or withdraws his petition.

153 F. The court shall determine the costs of the recount subject to the following limitations: (i) no per
154 diem payment shall be assessed for salaried election officials; (ii) no per diem payment to officers of
155 election serving as recount officials shall exceed two-thirds of the per diem paid such officers by the
156 county or city for service on election day; and (iii) per diem payments to alternates shall be allowed
157 only if they serve.

158 G. Any petitioner who may be assessed with costs under subsection E shall post a bond with surety
159 with the court in the amount of \$10 per precinct in the area subject to recount. If the petitioner wins the
160 recount, the bond shall not be forfeit. If the petitioner loses the recount, the bond shall be forfeit only to
161 the extent of the assessed costs. If the assessed costs exceed the bond, he shall be liable for such excess.

162 H. The recount proceeding shall be final and not subject to appeal.

163 I. For the purposes of this section:

164 "Overvote" means a ballot on which a voter casts a vote for a greater number of candidates or
165 positions than the number for which he was lawfully entitled to vote and no vote shall be counted with
166 respect to that office or issue.

167 "Undervote" means a ballot on which a voter casts a vote for a lesser number of candidates or
168 positions than the number for which he was lawfully entitled to vote.

169 **§ 24.2-802. (Effective July 1, 2020) Procedure for recount.**

170 A. The State Board of Elections shall promulgate standards for (i) the proper handling and security
171 of voting systems, ballots, and other materials required for a recount, (ii) accurate determination of votes
172 based upon objective evidence and taking into account the voting system and form of ballots approved
173 for use in the Commonwealth, and (iii) any other matters that will promote a timely and accurate
174 resolution of the recount. The chief judge of the circuit court or the full recount court may, consistent
175 with State Board of Elections standards, resolve disputes over the application of the standards and direct
176 all other appropriate measures to ensure the proper conduct of the recount.

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

179 In preparation for the recount, the clerks of the circuit courts shall (a) secure all printed ballots and
180 other election materials in sealed boxes; (b) place all of the sealed boxes in a vault or room not open to
181 the public or to anyone other than the clerk and his staff; (c) cause such vault or room to be securely

182 locked except when access is necessary for the clerk and his staff; and (d) certify that these security
183 measures have been taken in whatever form is deemed appropriate by the chief judge.

184 B. Within seven calendar days of the filing of the petition for a recount of any election other than an
185 election for presidential electors, or within five calendar days of the filing of a petition for a recount of
186 an election for presidential electors, the chief judge of the circuit court shall call a preliminary hearing
187 at which (i) motions may be disposed of and (ii) the rules of procedure may be fixed, both subject to
188 review by the full court. The petitioner and his counsel and each other party and their counsel under
189 supervision of the electoral board and its agents shall have access to pollbooks and other materials used
190 in the election for examination purposes, provided that individual ballots cast in the election shall not be
191 examined at the preliminary hearing. The chief judge during the preliminary hearing shall review all
192 security measures taken for all ballots and voting systems and direct, as he deems necessary, all
193 appropriate measures to ensure proper security to conduct the recount.

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

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

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

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

210 C. The court shall permit each candidate, or petitioner and governing body or chief executive officer,
211 to select an equal number of the officers of election to be recount officials and to count printed ballots.
212 The number shall be fixed by the court and be sufficient to conduct the recount within a reasonable
213 period. The court may permit each party to the recount to submit a list of alternate officials in the
214 number the court directs. There shall be at least one team from each locality using ballot scanner
215 machines to insert the ballots into one or more scanners. The ballot scanner machines shall be
216 programmed to count only votes cast for parties to the recount or for or against the question in a
217 referendum recount. Each team shall be composed of one representative of each party.

218 The court may provide that if, at the time of the recount, any recount official fails to appear, the
219 remaining recount officials present shall appoint substitute recount officials who shall possess the same
220 qualifications as the recount officials for whom they substitute. The court may select pairs of recount
221 coordinators to serve for each county or city in the election district who shall be members of the county
222 or city electoral board and represent different political parties. The court shall have authority to summon
223 such officials and coordinators. On the request of any party to the recount, the court shall allow that
224 party to appoint one representative observer for each team of recount officials. The representative
225 observers shall have an unobstructed view of the work of the recount officials. The expenses of its
226 representatives shall be borne by each party.

227 D. The court (i) shall supervise the recount and (ii) may require delivery of any or all pollbooks used
228 and any or all ballots cast at the election, or may assume supervision thereof through the recount
229 coordinators and officials.

230 The redetermination of the vote in a recount shall be conducted as follows:

231 1. For paper ballots, the recount officials shall hand count the paper ballots using the standards
232 promulgated by the State Board pursuant to subsection A.

233 2. For ballot scanner machines, the recount officials shall rerun all the machine-readable ballots
234 through a scanner programmed to count only the votes for the office or issue in question in the recount
235 and to set aside all ballots containing write-in votes, overvotes, and undervotes. The ballots that are set
236 aside, any ballots not accepted by the scanner, and any ballots for which a scanner could not be
237 programmed to meet the programming requirements of this subdivision, shall be hand counted using the
238 standards promulgated by the State Board pursuant to subsection A. If the total number of
239 machine-readable ballots reported as counted by the scanner plus the total number of ballots set aside by
240 the scanner do not equal the total number of ballots rerun through the scanner, then all ballots cast on
241 ballot scanner machines for that precinct shall be set aside to be counted by hand using the standards
242 promulgated by the State Board pursuant to subsection A. Prior to running the machine-readable ballots
243 through the ballot scanner machine, the recount officials shall ensure that logic and accuracy tests have

been successfully performed on each scanner after the scanner has been programmed. The result calculated for ballots accepted by the ballot scanner machine during the recount shall be considered the correct determination for those machine-readable ballots unless the court finds sufficient cause to rule otherwise.

There shall be only one redetermination of the vote in each precinct.

At the conclusion of the recount of each precinct, the recount officials shall write down the number of valid ballots cast, this number being obtained from the ballots cast in the precinct, or from the ballots cast as shown on the statement of results if the ballots cannot be found, for each of the two candidates or for and against the question. They shall submit the ballots or the statement of results used, as to the validity of which questions exist, to the court. The written statement of any one recount official challenging a ballot shall be sufficient to require its submission to the court. If, on all ballot scanners, the number of persons voting in the election, or the number of votes cast for the office or on the question, totals more than the number of names on the pollbooks of persons voting on the voting machines, the figures recorded by the machines shall be accepted as correct.

At the conclusion of the recount of all precincts, after allowing the parties to inspect the questioned ballots, and after hearing arguments, the court shall rule on the validity of all questioned ballots and votes. After determining all matters pertaining to the recount and redetermination of the vote as raised by the parties, the court shall certify to the State Board and the electoral board or boards (a) the vote for each party to the recount and declare the person who received the higher number of votes to be nominated or elected, as appropriate, or (b) the votes for and against the question and declare the outcome of the referendum. The Department shall post on the Internet any and all changes made during the recount to the results as previously certified by it pursuant to § 24.2-679.

E. Costs of the recount shall be assessed against the counties and cities comprising the election district when (i) the candidate petitioning for the recount is declared the winner; (ii) the petitioners in a recount of a referendum win the recount; or (iii) there was between the candidate apparently nominated or elected and the candidate petitioning for the recount a difference of not more than one-half of one percent of the total vote cast for the two such candidates as determined by the State Board or electoral board prior to the recount. Otherwise the costs of the recount shall be assessed against the candidate petitioning for the recount or the petitioners in a recount of a referendum. If more than one candidate petitions for a recount, the court may assess costs in an equitable manner between the counties and cities and any such candidate if both are liable for costs under this subsection. Costs incurred to date shall be assessed against any candidate or petitioner who defaults or withdraws his petition.

F. The court shall determine the costs of the recount subject to the following limitations: (i) no per diem payment shall be assessed for salaried election officials; (ii) no per diem payment to officers of election serving as recount officials shall exceed two-thirds of the per diem paid such officers by the county or city for service on election day; and (iii) per diem payments to alternates shall be allowed only if they serve.

G. Any petitioner who may be assessed with costs under subsection E shall post a bond with surety with the court in the amount of \$10 per precinct in the area subject to recount. If the petitioner wins the recount, the bond shall not be forfeit. If the petitioner loses the recount, the bond shall be forfeit only to the extent of the assessed costs. If the assessed costs exceed the bond, he shall be liable for such excess.

H. The recount proceeding shall be final and not subject to appeal.

I. For the purposes of this section:

"Overvote" means a ballot on which a voter casts a vote for a greater number of candidates or positions than the number for which he was lawfully entitled to vote and no vote shall be counted with respect to that office or issue.

"Undervote" means a ballot on which a voter casts a vote for a lesser number of candidates or positions than the number for which he was lawfully entitled to vote.