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## HOUSE BILL NO. 178

Offered January 8, 2020

Prefiled December 26, 2019

A *BILL to amend and reenact §§ 24.2-674, 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 determination of tie votes; recounts; special elections.*

Patrons—Levine and Kory

Referred to Committee on Privileges and Elections

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 24.2-674, 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:**

**§ 24.2-674. Determination by lot in case of tie.**

A. If two or more persons have an equal number of votes *for member of the General Assembly or for any county, city, town, or district office, and a higher number than any other person, the electoral board shall proceed publicly to determine by lot which of the candidates shall be declared elected there shall be a recount pursuant to Article 1 (§ 24.2-800 et seq.) of Chapter 8.*

B. If any two or more persons have an equal number of votes and a higher number than any other person for member of the General Assembly or of the Congress of the United States, or elector of President and Vice President of the United States, the State Board of Elections shall proceed publicly to determine by lot which of them shall be declared elected. Reasonable notice shall be given to such candidates of the time when such elections shall be so determined; and if they, or either of them, shall fail to appear in accordance with such notice, the Board shall proceed so as to determine the election in their absence.

Any person who loses the determination by lot may petition for a recount pursuant to Article 1 (§ 24.2-800 et seq.) of Chapter 8 of this title.

**§ 24.2-800. Recounts in all elections.**

A. The provisions of this article apply to all elections held in the Commonwealth. *There shall be only one recount of any election.*

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. *When two or more persons have an equal number of votes for member of the General Assembly or for any county, city, town, or district office, and a higher number than any other person, as determined by the State Board or the electoral board, there shall be a recount of the vote initiated as set forth in this article without any action being required by any of the candidates receiving the equal number of votes.*

E. 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

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59 form of ballots approved for use in the Commonwealth, and (iii) any other matters that will promote a  
60 timely and accurate resolution of the recount. The chief judge of the circuit court or the full recount  
61 court may, consistent with State Board of Elections standards, resolve disputes over the application of  
62 the standards and direct all other appropriate measures to ensure the proper conduct of the recount.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Except in the case of a recount of an election for Governor, Lieutenant Governor, or Attorney General, if the court finds that each party to the recount has received an equal number of votes, it shall issue a writ promptly after the time for filing the notice of intent for a contest has passed without such notice being given, ordering a special election be held to determine which candidate is elected to the office.*

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

182 county or city for service on election day; and (iii) per diem payments to alternates shall be allowed  
183 only if they serve.

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

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

189 I. For the purposes of this section:

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

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

195 **§ 24.2-802. (Effective July 1, 2020) Procedure for recount.**

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

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

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

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

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

223 After the full court is appointed under § 24.2-801 or 24.2-801.1, it shall call a hearing at which all  
224 motions shall be disposed of and the rules of procedure shall be fixed finally, and it shall issue a written  
225 order setting out such rules of procedure. The court shall call for the advice and cooperation of the  
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227 shall have the duty and authority to assist the court. The court shall fix procedures that shall provide for  
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230 take into account (a) any absentee ballots or provisional ballots sought to be cast but ruled invalid and  
231 not cast in the election, (b) ballots cast only for administrative or test purposes and voided by the  
232 officers of election, or (c) ballots spoiled by a voter and replaced with a new ballot.

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

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

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

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

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

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

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

*Except in the case of a recount of an election for Governor, Lieutenant Governor, or Attorney General, if the court finds that each party to the recount has received an equal number of votes, it shall issue a writ promptly after the time for filing the notice of intent for a contest has passed without such notice being given, ordering a special election be held to determine which candidate is elected to the office.*

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

305 cities and any such candidate if both are liable for costs under this subsection. Costs incurred to date  
306 shall be assessed against any candidate or petitioner who defaults or withdraws his petition.

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

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

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

317 I. For the purposes of this section:

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

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322 positions than the number for which he was lawfully entitled to vote.