# **2020 SESSION**

**ENROLLED** 

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## VIRGINIA ACTS OF ASSEMBLY - CHAPTER

2 An Act to amend and reenact § 24.2-802, as it is currently effective and as it shall become effective, of 3 the Code of Virginia, relating to recounts; procedure for certain ballots.

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## Approved

#### 6 Be it enacted by the General Assembly of Virginia:

7 1. That § 24.2-802, as it is currently effective and as it shall become effective, of the Code of 8 Virginia is amended and reenacted as follows: 9

### § 24.2-802. (Effective until July 1, 2020) Procedure for recount.

10 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 11 12 determination of votes based upon objective evidence and taking into account the counting machine and 13 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 14 15 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. 16

17 The recount procedures to be followed throughout the election district shall be as uniform as 18 practicable, taking into account the types of ballots and voting and counting machines in use in the 19 election district.

In preparation for the recount, the clerks of the circuit courts shall (a) secure all printed ballots and 20 21 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 22 23 locked except when access is necessary for the clerk and his staff; and (d) certify that these security 24 measures have been taken in whatever form is deemed appropriate by the chief judge.

25 B. Within seven calendar days of the filing of the petition for a recount of any election other than an 26 election for presidential electors, or within five calendar days of the filing of a petition for a recount of 27 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 28 29 review by the full court. As part of the preliminary hearing, the chief judge may permit the petitioner 30 and his counsel, together with each other party and his counsel and at least two members of the 31 electoral board and the custodians, to examine any direct recording electronic machine of the type that 32 prints returns when the print-out sheets are not clearly legible. The petitioner and his counsel and each 33 other party and their counsel under supervision of the electoral board and its agents shall also have 34 access to pollbooks and other materials used in the election for examination purposes, provided that 35 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 36 37 counting machines and direct, as he deems necessary, all appropriate measures to ensure proper security 38 to conduct the recount.

39 The chief judge, subject to review by the full court, may set the place or places for the recount and 40 may order the delivery of election materials to a central location and the transportation of voting and 41 counting machines to a central location in each county or city under appropriate safeguards.

42 After the full court is appointed under § 24.2-801 or 24.2-801.1, it shall call a hearing at which all 43 motions shall be disposed of and the rules of procedure shall be fixed finally, and it shall issue a written order setting out such rules of procedure. The court shall call for the advice and cooperation of the 44 45 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 46 47 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 48 49 take into account (a) any absentee ballots or provisional ballots sought to be cast but ruled invalid and 50 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. 51

The eligibility of any voter to have voted shall not be an issue in a recount. Commencing upon the 52 53 filing of the recount, nothing shall prevent the discovery or disclosure of any evidence that could be 54 used pursuant to § 24.2-803 in contesting the results of an election.

55 C. The court shall permit each candidate, or petitioner and governing body or chief executive officer, 56 to select an equal number of the officers of election to be recount officials and to count printed ballots,

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or in the case of direct recording electronic machines, to redetermine the vote. The number shall be 57 58 fixed by the court and be sufficient to conduct the recount within a reasonable period. The court may 59 permit each party to the recount to submit a list of alternate officials in the number the court directs. 60 There shall be at least one team of recount officials to recount printed ballots and to redetermine the 61 vote cast on direct recording electronic machines of the type that prints returns for the election district at 62 large in which the recount is being held. There shall be at least one team from each locality using ballot 63 scanner machines to insert the ballots into one or more scanners. The ballot scanner machines shall be 64 programmed to count only votes cast for parties to the recount or for or against the question in a 65 referendum recount. Each team shall be composed of one representative of each party.

66 The court may provide that if, at the time of the recount, any recount official fails to appear, the 67 remaining recount officials present shall appoint substitute recount officials who shall possess the same 68 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 69 70 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 71 party to appoint one representative observer for each team of recount officials. The representative 72 73 observers shall have an unobstructed view of the work of the recount officials. The expenses of its 74 representatives shall be borne by each party.

75 D. The court (i) shall supervise the recount and (ii) may require delivery of any or all pollbooks used 76 and any or all ballots cast at the election, or may assume supervision thereof through the recount 77 coordinators and officials. 78

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

79 1. For paper ballots, the recount officials shall hand count the paper ballots using the standards 80 promulgated by the State Board pursuant to subsection A.

81 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 82 of the court, the recount officials shall rerun the printout from the machine or examine the counters as 83 84 appropriate.

85 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 86 87 and to set aside all ballots containing write-in votes, overvotes, and undervotes. The ballots that are set 88 aside, any ballots not accepted by the scanner, and any ballots for which a scanner could not be 89 programmed to meet the programming requirements of this subdivision, shall be hand counted using the 90 standards promulgated by the State Board pursuant to subsection A. If the total number of 91 machine-readable ballots reported as counted by the scanner plus the total number of ballots set aside by 92 the scanner do not equal the total number of ballots rerun through the scanner, then all ballots cast on 93 ballot scanner machines for that precinct shall be set aside to be counted by hand using the standards 94 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 95 96 been successfully performed on each scanner after the scanner has been programmed. The result 97 calculated for ballots accepted by the ballot scanner machine during the recount shall be considered the 98 correct determination for those machine-readable ballots unless the court finds sufficient cause to rule 99 otherwise. 100

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

Prior to the conclusion of the recount of each precinct, the recount officials shall segregate all 101 102 ballots for which there is a question regarding the ballot's validity.

At the conclusion of the recount of each precinct, the recount officials shall write down the number 103 104 of valid ballots cast, this number being obtained from the ballots cast in the precinct, or from the ballots 105 cast as shown on the statement of results if the ballots cannot be found, for each of the two candidates 106 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 107 108 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 109 110 office or on the question, totals more than the number of names on the pollbooks of persons voting on 111 the voting machines, the figures recorded by the machines shall be accepted as correct.

112 At the conclusion of the recount of all precincts, after allowing the parties to inspect the questioned 113 ballots, and after hearing arguments, the court shall rule on the validity of all questioned ballots and 114 votes. The court may not consider the validity of any ballots not set aside prior to the conclusion of the recount of each precinct. After determining all matters pertaining to the recount and redetermination of 115 the vote as raised by the parties, the court shall certify to the State Board and the electoral board or 116 boards (a) the vote for each party to the recount and declare the person who received the higher number 117

118 of votes to be nominated or elected, as appropriate, or (b) the votes for and against the question and 119 declare the outcome of the referendum. The Department shall post on the Internet any and all changes 120 made during the recount to the results as previously certified by it pursuant to § 24.2-679.

121 E. Costs of the recount shall be assessed against the counties and cities comprising the election 122 district when (i) the candidate petitioning for the recount is declared the winner; (ii) the petitioners in a 123 recount of a referendum win the recount; or (iii) there was between the candidate apparently nominated 124 or elected and the candidate petitioning for the recount a difference of not more than one-half of one 125 percent of the total vote cast for the two such candidates as determined by the State Board or electoral 126 board prior to the recount. Otherwise the costs of the recount shall be assessed against the candidate 127 petitioning for the recount or the petitioners in a recount of a referendum. If more than one candidate 128 petitions for a recount, the court may assess costs in an equitable manner between the counties and 129 cities and any such candidate if both are liable for costs under this subsection. Costs incurred to date 130 shall be assessed against any candidate or petitioner who defaults or withdraws his petition.

131 F. The court shall determine the costs of the recount subject to the following limitations: (i) no per 132 diem payment shall be assessed for salaried election officials; (ii) no per diem payment to officers of 133 election serving as recount officials shall exceed two-thirds of the per diem paid such officers by the 134 county or city for service on election day; and (iii) per diem payments to alternates shall be allowed 135 only if they serve.

136 G. Any petitioner who may be assessed with costs under subsection E shall post a bond with surety 137 with the court in the amount of \$10 per precinct in the area subject to recount. If the petitioner wins the 138 recount, the bond shall not be forfeit. If the petitioner loses the recount, the bond shall be forfeit only to 139 the extent of the assessed costs. If the assessed costs exceed the bond, he shall be liable for such excess. 140

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

I. For the purposes of this section:

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142 "Overvote" means a ballot on which a voter casts a vote for a greater number of candidates or 143 positions than the number for which he was lawfully entitled to vote and no vote shall be counted with 144 respect to that office or issue.

145 "Undervote" means a ballot on which a voter casts a vote for a lesser number of candidates or 146 positions than the number for which he was lawfully entitled to vote. 147

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

148 A. The State Board of Elections shall promulgate standards for (i) the proper handling and security 149 of voting systems, ballots, and other materials required for a recount, (ii) accurate determination of votes 150 based upon objective evidence and taking into account the voting system and form of ballots approved 151 for use in the Commonwealth, and (iii) any other matters that will promote a timely and accurate 152 resolution of the recount. The chief judge of the circuit court or the full recount court may, consistent 153 with State Board of Elections standards, resolve disputes over the application of the standards and direct 154 all other appropriate measures to ensure the proper conduct of the recount.

155 The recount procedures to be followed throughout the election district shall be as uniform as 156 practicable, taking into account the types of ballots and voting systems in use in the election district.

157 In preparation for the recount, the clerks of the circuit courts shall (a) secure all printed ballots and 158 other election materials in sealed boxes; (b) place all of the sealed boxes in a vault or room not open to 159 the public or to anyone other than the clerk and his staff; (c) cause such vault or room to be securely 160 locked except when access is necessary for the clerk and his staff; and (d) certify that these security 161 measures have been taken in whatever form is deemed appropriate by the chief judge.

162 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 163 164 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 165 review by the full court. The petitioner and his counsel and each other party and their counsel under 166 167 supervision of the electoral board and its agents shall have access to pollbooks and other materials used 168 in the election for examination purposes, provided that individual ballots cast in the election shall not be 169 examined at the preliminary hearing. The chief judge during the preliminary hearing shall review all 170 security measures taken for all ballots and voting systems and direct, as he deems necessary, all 171 appropriate measures to ensure proper security to conduct the recount.

172 The chief judge, subject to review by the full court, may set the place or places for the recount and 173 may order the delivery of election materials to a central location and the transportation of voting 174 systems to a central location in each county or city under appropriate safeguards.

175 After the full court is appointed under § 24.2-801 or 24.2-801.1, it shall call a hearing at which all 176 motions shall be disposed of and the rules of procedure shall be fixed finally, and it shall issue a written 177 order setting out such rules of procedure. The court shall call for the advice and cooperation of the 178 Department, the State Board, or any local electoral board, as appropriate, and such boards or agency

179 shall have the duty and authority to assist the court. The court shall fix procedures that shall provide for 180 the accurate determination of votes in the election.

181 The determination of the votes in a recount shall be based on votes cast in the election and shall not 182 take into account (a) any absentee ballots or provisional ballots sought to be cast but ruled invalid and 183 not cast in the election, (b) ballots cast only for administrative or test purposes and voided by the 184 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 185 186 filing of the recount, nothing shall prevent the discovery or disclosure of any evidence that could be 187 used pursuant to § 24.2-803 in contesting the results of an election.

188 C. The court shall permit each candidate, or petitioner and governing body or chief executive officer, 189 to select an equal number of the officers of election to be recount officials and to count printed ballots. 190 The number shall be fixed by the court and be sufficient to conduct the recount within a reasonable 191 period. The court may permit each party to the recount to submit a list of alternate officials in the 192 number the court directs. There shall be at least one team from each locality using ballot scanner 193 machines to insert the ballots into one or more scanners. The ballot scanner machines shall be 194 programmed to count only votes cast for parties to the recount or for or against the question in a 195 referendum recount. Each team shall be composed of one representative of each party.

196 The court may provide that if, at the time of the recount, any recount official fails to appear, the 197 remaining recount officials present shall appoint substitute recount officials who shall possess the same 198 qualifications as the recount officials for whom they substitute. The court may select pairs of recount 199 coordinators to serve for each county or city in the election district who shall be members of the county 200 or city electoral board and represent different political parties. The court shall have authority to summon 201 such officials and coordinators. On the request of any party to the recount, the court shall allow that 202 party to appoint one representative observer for each team of recount officials. The representative 203 observers shall have an unobstructed view of the work of the recount officials. The expenses of its 204 representatives shall be borne by each party.

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