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HOUSE BILL NO. 692

Offered January 8, 2020

Prefiled January 6, 2020

A *BILL to amend and reenact §§ 24.2-709 and 24.2-802, as they are currently effective and as they shall become effective, of the Code of Virginia, relating to recounts; absentee ballots received after close of polls.*

Patron—Simonds

Referred to Committee on Privileges and Elections

Be it enacted by the General Assembly of Virginia:

1. That §§ 24.2-709 and 24.2-802, as they are currently effective and as they shall become effective, of the Code of Virginia are amended and reenacted as follows:

§ 24.2-709. (Effective for elections prior to the general election on November 3, 2020) Ballot to be returned in manner prescribed by law.

A. Any ballot returned to the office of the general registrar in any manner except as prescribed by law shall be void. Absentee ballots shall be returned to the general registrar before the closing of the polls. The registrar receiving the ballot shall (i) seal the ballot in an envelope with the statement or declaration of the voter, or both, attached to the outside and (ii) mark on each envelope the date, time, and manner of delivery. No returned absentee ballot shall be deemed void because the inner envelope containing the voted ballot is imperfectly sealed so long as the outside envelope containing the ballot envelope is sealed.

B. Notwithstanding the provisions of subsection A, absentee ballots (i) received after the close of the polls on any election day, (ii) received before 5:00 p.m. on the second business day before the State Board meets to ascertain the results of the election pursuant to this title, (iii) requested on or before but not sent by the deadline for making absentee ballots available under § 24.2-612, and (iv) cast by an absentee voter who is eligible for an absentee ballot under subdivision 2 of § 24.2-700 shall be counted pursuant to the procedures set forth in this chapter and, if the voter is found entitled to vote, included in the election returns. The electoral board shall prepare an amended certified abstract, which shall include the results of such ballots, and shall deliver such abstract to the State Board by the business day prior to its meeting pursuant to this title, and shall deliver a copy of such abstract to the general registrar to be available for inspection when his office is open for business.

C. Notwithstanding the provisions of clause (i) of subsection B of § 24.2-427, an absentee ballot returned by a voter in compliance with § 24.2-707 and this section who dies prior to the counting of absentee ballots on election day shall be counted pursuant to the procedures set forth in this chapter if the voter is found to have been entitled to vote at the time that he returned the ballot.

D. *Notwithstanding the provisions of subsection A or B, any absentee ballot received after the close of polls on any election day but before the time has expired for initiating a recount that is postmarked on or before the date of the election shall be set aside in accordance with the provisions of this subsection. Upon receipt of such absentee ballot, the general registrar shall deposit the return envelope and the unopened ballot envelope in an appropriate container provided for the purpose, in which they shall remain until the time has expired for initiating a recount. The general registrar shall, on the order of a court before which there is pending a proceeding for recount under Chapter 8 (§ 24.2-800 et seq.), deliver the container containing the unopened ballot envelopes to the clerk of such court. If no recount proceeding is initiated, the general registrar shall deliver the unopened ballot envelopes to the clerk of the circuit court.*

For purposes of this subsection, "postmark" includes any official indicia of confirmation of mailing by the United States Postal Service or other postal or delivery service.

§ 24.2-709. (Effective for elections beginning with the general election on November 3, 2020) Ballot to be returned in manner prescribed by law.

A. Any ballot returned to the office of the general registrar in any manner except as prescribed by law shall be void. Absentee ballots shall be returned to the general registrar before the closing of the polls. The registrar receiving the ballot shall (i) seal the ballot in an envelope with the statement or declaration of the voter, or both, attached to the outside and (ii) mark on each envelope the date, time, and manner of delivery. No returned absentee ballot shall be deemed void because the inner envelope containing the voted ballot is imperfectly sealed so long as the outside envelope containing the ballot envelope is sealed.

B. Notwithstanding the provisions of subsection A, absentee ballots (i) received after the close of the

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polls on any election day, (ii) received before 5:00 p.m. on the second business day before the State Board meets to ascertain the results of the election pursuant to this title, (iii) requested on or before but not sent by the deadline for making absentee ballots available under § 24.2-612, and (iv) cast by an absentee voter who is eligible for an absentee ballot under subdivision A 2 of § 24.2-700 shall be counted pursuant to the procedures set forth in this chapter and, if the voter is found entitled to vote, included in the election returns. The electoral board shall prepare an amended certified abstract, which shall include the results of such ballots, and shall deliver such abstract to the State Board by the business day prior to its meeting pursuant to this title, and shall deliver a copy of such abstract to the general registrar to be available for inspection when his office is open for business.

C. Notwithstanding the provisions of clause (i) of subsection B of § 24.2-427, an absentee ballot returned by a voter in compliance with § 24.2-707 and this section who dies prior to the counting of absentee ballots on election day shall be counted pursuant to the procedures set forth in this chapter if the voter is found to have been entitled to vote at the time that he returned the ballot.

D. Notwithstanding the provisions of subsection A or B, any absentee ballot received after the close of polls on any election day but before the time has expired for initiating a recount that is postmarked on or before the date of the election shall be set aside in accordance with the provisions of this subsection. Upon receipt of such absentee ballot, the general registrar shall deposit the return envelope and the unopened ballot envelope in an appropriate container provided for the purpose, in which they shall remain until the time has expired for initiating a recount. The general registrar shall, on the order of a court before which there is pending a proceeding for recount under Chapter 8 (§ 24.2-800 et seq.), deliver the container containing the unopened ballot envelopes to the clerk of such court. If no recount proceeding is initiated, the general registrar shall deliver the unopened ballot envelopes to the clerk of the circuit court.

For purposes of this subsection, "postmark" includes any official indicia of confirmation of mailing by the United States Postal Service or other postal or delivery service.

§ 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, and it shall issue a written order setting out such rules of procedure. 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 absentee ballots set aside for recount purposes pursuant to subsection D of § 24.2-709* 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, *except as provided in subdivision D 4*. 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.

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

4. *For absentee ballots set aside for recount purposes pursuant to subsection D of § 24.2-709, the recount officials shall open the container of such absentee ballots. For each ballot envelope, the name of the voter shall be checked, and if the voter is found entitled to vote, the ballot envelope shall be opened and the ballot shall be counted.*

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

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

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

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

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

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

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

219 I. For the purposes of this section:

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

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

225 **§ 24.2-802. (Effective July 1, 2020) Procedure for recount.**

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

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

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

240 B. Within seven calendar days of the filing of the petition for a recount of any election other than an
241 election for presidential electors, or within five calendar days of the filing of a petition for a recount of
242 an election for presidential electors, the chief judge of the circuit court shall call a preliminary hearing
243 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. The petitioner and his counsel and each other party and their counsel under supervision of the electoral board and its agents shall 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 systems 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 systems 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, and it shall issue a written order setting out such rules of procedure. 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 absentee ballots set aside for recount purposes pursuant to subsection D of § 24.2-709* 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, *except as provided in subdivision D 3*. 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.

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

305 otherwise.

306 3. *For absentee ballots set aside for recount purposes pursuant to subsection D of § 24.2-709, the*
307 *recount officials shall open the container of such absentee ballots. For each ballot envelope, the name*
308 *of the voter shall be checked, and if the voter is found entitled to vote, the ballot envelope shall be*
309 *opened and the ballot shall be counted.*

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

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

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

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

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

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

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

348 I. For the purposes of this section:

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

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