

1 **ENROLLED**

2 COMMITTEE SUBSTITUTE

3 for

4 **H. B. 2438**

5 (By Delegates Miley, Hunt, Brown, Frazier,
6 Barker, Moore, Hamilton and Ellem)

7
8 [Passed March 9, 2011; in effect ninety days from passage.]

9
10 AN ACT to amend and reenact §3-1-2 of the Code of West Virginia,
11 1931, as amended; and to amend and reenact §3-4A-9 and §3-4A-
12 20 of said code, all relating to independent voters; defining
13 independent voters; reforming conflicts in voting procedures;
14 and making technical corrections throughout.

15 *Be it enacted by the Legislature of West Virginia:*

16 That §3-1-2 of the Code of West Virginia, 1931, as amended, be
17 amended and reenacted; and that §3-4A-9 and §3-4A-20 of said code
18 be amended and reenacted, all to read as follows:

19 **ARTICLE 1. GENERAL PROVISIONS AND DEFINITIONS.**

20 **§3-1-2. Scope of chapter; definitions.**

21 Unless restricted by the context, the provisions of this
22 chapter apply to every general, primary and special election in
23 which candidates are nominated or elected or in which voters pass
24 upon any public question submitted to them, except that the
25 provisions hereof shall be construed to be operative in municipal
26 elections only in those instances in which they are made expressly
27 so applicable.

1 Unless the context clearly requires a different meaning, as
2 herein used:

3 "Voter" means any person who possesses the statutory and
4 Constitutional qualifications for voting;

5 "Independent" means a registered voter who declined to state
6 a preference for party affiliation on their voter registration or
7 who listed a party affiliation which is not qualified as a
8 political party as defined in section eight, article one of this
9 chapter.

10 "Election" means the procedures whereby the voters of this
11 state or any subdivision thereof elect persons to fill public
12 offices, or elect members of a Constitutional convention, or vote
13 on public questions;

14 "Any election" or "all elections" means every general, primary
15 or special election held in this state, or in any of its
16 subdivisions, for the purpose of nominating or electing federal or
17 state officers, or county, city, town or village officers of any
18 subdivision now existing or hereafter created, or for the purpose
19 of electing members of a Constitutional convention, or for voting
20 upon any public question submitted to the people of the state or
21 any of the aforesaid subdivisions;

22 "Office" or "public office" means: (1) Any elective office
23 provided for by the Constitution or laws of the United States or of
24 this state to which a salary or other compensation attaches; or (2)
25 membership in a Constitutional convention.

26 "Candidate" means any person to be voted for at an election;

1 "Public question" means any issue or proposition, now or
2 hereafter required by the governing body of this state or any of
3 its subdivisions to be submitted to the voters of the state or
4 subdivision for decision at elections;

5 The term "minor" as used in article four, section one of the
6 State Constitution and as used in this chapter means a person who
7 has not become eighteen years of age.

8 **ARTICLE 4A. ELECTRONIC VOTING SYSTEMS.**

9 **§3-4A-9. Minimum requirements of electronic voting systems.**

10 An electronic voting system of particular make and design may
11 not be approved by the State Election Commission or be purchased,
12 leased or used by any county commission unless it meets the
13 following requirements:

14 (1) It secures or ensures the voter absolute secrecy in the
15 act of voting or, at the voter's election, provides for open
16 voting;

17 (2) It is constructed to ensure that, except in instances of
18 open voting as provided in this section, the contents of a ballot
19 may not be seen or known by anyone other than the voter who has
20 voted or is voting;

21 (3) It permits each voter to vote at any election for all
22 persons and offices for whom and which he or she is lawfully
23 entitled to vote, whether or not the name of any person appears on
24 a ballot as a candidate; and it permits each voter to vote for as
25 many persons for an office as he or she is lawfully entitled to
26 vote for; and to vote for or against any question upon which he or

1 she is lawfully entitled to vote. The automatic tabulating
2 equipment used in electronic voting systems is to reject choices
3 recorded on any ballot if the number of choices exceeds the number
4 to which a voter is entitled;

5 (4) It permits each voter to, write in, the names of persons
6 for whom he or she desires to vote whose names do not appear upon
7 the ballots or ballot labels;

8 (5) It permits each voter to change his or her vote for any
9 candidate and upon any question appearing upon the ballots or
10 ballot labels up to the time when his or her ballot is deposited in
11 the ballot box or his or her ballot is cast by electronic means;

12 (6) It contains programming media containing sequentially
13 numbered program instructions and coded or otherwise protected from
14 tampering or substitution of the media or program instructions of
15 unauthorized persons and capable of tabulating all votes cast in
16 each election;

17 (7) It contains two standard validation test decks approved as
18 to form and testing capabilities by the State Election Commission;

19 (8) It correctly records and counts accurately all votes cast
20 for the candidate and for and against each question appearing upon
21 the ballots;

22 (9) It permits each voter at any election, other than a primary
23 election, to vote a straight party ticket, as provided in section
24 five, article six of this chapter, by one mark or punch;

25 (10) It permits a voter in a primary election to: (A) vote only
26 for the candidates of the party for which the voter is legally

1 permitted to vote; (B) vote for the candidates, if any, for
2 nonpartisan nominations or election; and (C) vote on public
3 questions; and precludes the voter from voting for any candidate
4 seeking nomination by any other political party unless that
5 political party has determined that the voter may participate in its
6 primary election;

7 (11) It, where applicable, is provided with means for sealing
8 or electronically securing the vote recording device to prevent its
9 use and to prevent operation of the vote recording device for an
10 election is begun and immediately after the polls are closed of
11 after the operation of the vote recording device for an election is
12 completed;

13 (12) It has the capacity to contain the names of candidates
14 constituting the tickets of at least nine political parties and
15 accommodates the wording of at least fifteen questions;

16 (13) (A) Direct recording electronic voting machines must
17 generate a paper copy of each voter's vote that will be
18 automatically kept within a storage container, that is locked,
19 closely attached to the direct recording electronic voting machine,
20 and inaccessible to all but authorized voting officials, who will
21 handle such storage containers and such paper copies contained
22 therein in accordance with section nineteen of this article.

23 (B) The paper copy of the voter's vote shall be generated at
24 the time the voter is at the voting station using the direct
25 recording electronic voting machine.

26 (C) The voter may examine the paper copy visually or through

1 headphone readout, and may accept or reject the printed copy.

2 (D) The voter may not touch, handle or manipulate the printed
3 copy manually in any way.

4 (E) Once the printed copy of the voter's votes is accepted by
5 the voter as correctly reflecting the voter's intent, but not
6 before, it will automatically be stored for recounts or random
7 checks and the electronic vote will be cast within the computer
8 mechanism of the direct recording electronic voting machine.

9 (F) Direct recording electronic voting machines with a
10 mandatory paper copy shall be approved by the Secretary of State.
11 The Secretary of State may promulgate rules and emergency rules to
12 implement or enforce this subsection pursuant to the provisions of
13 section five, article three, chapter twenty-nine-a of this code.

14 (14) Where vote recording devices are used, they shall:

15 (A) Be durably constructed of material of good quality and in
16 a workmanlike manner and in a form which makes it safely
17 transportable;

18 (B) Bear a number that will identify it or distinguish it from
19 any other machine;

20 (C) Be constructed to ensure that a voter may easily learn the
21 method of operating it and may expeditiously cast his or her vote
22 for all candidates of his or her choice and upon any public
23 question;

24 (D) Be accompanied by a mechanically or electronically operated
25 instruction model which shows the arrangement of ballot labels,
26 party columns or rows, and questions;

1 (15) For electronic voting systems that utilize a screen upon
2 which votes may be recorded by means of a stylus or by means of
3 touch:

4 (A) Be constructed to provide for the direct electronic
5 recording and tabulating of votes cast in a system specifically
6 designed and engineered for the election application;

7 (B) Be constructed to prevent any voter from voting for more
8 than the allowable number of candidates for any office, to include
9 an audible or visual signal, or both, warning any voter who attempts
10 to vote for more than the allowable number of candidates for any
11 office or who attempts to cast his or her ballot prior to its
12 completion and are constructed to include a visual or audible
13 confirmation, or both, to the voter upon completion and casting of
14 the ballot;

15 (C) Be constructed to present the entire ballot to the voter,
16 in a series of sequential pages, and to ensure that the voter sees
17 all of the ballot options on all pages before completing his or her
18 vote and to allow the voter to review and change all ballot choices
19 prior to completing and casting his or her ballot;

20 (D) Be constructed to allow election commissioners to spoil a
21 ballot where a voter fails to properly cast his or her ballot, has
22 departed the polling place and cannot be recalled by a poll clerk
23 to complete his or her ballot;

24 (E) Be constructed to allow election commissioners, poll
25 clerks, or both, to designate, mark or otherwise record provisional
26 ballots;

1 (F) Consist of devices which are independent, nonnetworked
2 voting systems in which each vote is recorded and retained within
3 each device's internal nonvolatile electronic memory and contain an
4 internal security, the absence of which prevents substitution of any
5 other device;

6 (G) Store each vote in no fewer than three separate,
7 independent, nonvolatile electronic memory components and that each
8 device contains comprehensive diagnostics to ensure that failures
9 do not go undetected;

10 (H) Contain a unique, embedded internal serial number for
11 auditing purposes for each device used to activate, retain and
12 record votes;

13 (I) Be constructed to record all preelection, election and
14 post-election activities, including all ballot images and system
15 anomalies, in each device's internal electronic memory and are to
16 be accessible in electronic or printed form;

17 (J) Be constructed with a battery backup system in each device
18 to, at a minimum, prevent the loss of any votes, as well as all
19 preelection, election and post-election activities, including all
20 ballot images and system anomalies, stored in the device's internal
21 electronic memory and to allow voting to continue for two hours of
22 uninterrupted operation in case of an electrical power failure; and

23 (K) Be constructed to prevent the loss of any votes, as well
24 as all preelection, election and post-election activities, including
25 all ballot images and system anomalies, stored in each device's
26 internal electronic memory even in case of an electrical and battery

1 power failure.

2 **§3-4A-20. Non-affiliated voters in primary elections.**

3 Unless voter not affiliated with a party, is permitted to
4 participate in the primary election of a political party, the
5 following provisions apply to voters, not affiliated with a party,
6 in primary elections that include non-partisan candidates or public
7 questions:

8 (1) Election officers shall provide a vote recording device,
9 where applicable, or the appropriate ballot to be marked by an
10 electronically sensible pen or ink, or by means of a stylus or by
11 means of touch, or by other electronic means, so that voters not
12 affiliated with a party may vote only those portions of the ballot
13 relating to the nonpartisan candidates and the public questions
14 submitted, or shall provide a ballot containing only provisions for
15 voting for those candidates and upon those issues submitted common
16 to the ballots provided to all voters regardless of political party
17 affiliation, or both.

18 (2) In counties utilizing electronic voting systems in which
19 votes are recorded by perforating, if vote recording devices are not
20 available for the voters not affiliated with a party, provisions are
21 to be made for sealing the partisan section or sections of the
22 ballot or ballot labels on a vote recording device using temporary
23 seals, thus permitting the voter not affiliated with a party to vote
24 for the nonpartisan section or sections of the ballot or ballot
25 labels.

26 (3) After a voter not affiliated with a party has voted,

1 temporary seals may be removed and the device may then be used by
2 partisan voters.