

SENATE BILL REPORT

ESHB 1745

As Reported by Senate Committee On:
Government Operations & Security, March 31, 2015

Title: An act relating to establishing a voting rights act to promote equal voting opportunity in certain political subdivisions by authorizing district-based elections, requiring redistricting and new elections in certain circumstances, and establishing a cause of action to redress lack of voter opportunity.

Brief Description: Enacting the Washington voting rights act.

Sponsors: House Committee on State Government (originally sponsored by Representatives Moscoso, Bergquist, S. Hunt, Haler, Orwall, Sawyer, Stanford, Walkinshaw, Appleton, Reykdal, Fitzgibbon, Tharinger, Fey, Jinkins, Wylie, Goodman, Ormsby, Farrell, Riccelli, Sells, Hudgins, Lytton, McBride and Santos).

Brief History: Passed House: 3/05/15, 52-46.

Committee Activity: Government Operations & Security: 3/23/15, 3/30/15, 3/31/15 [DP, DNP].

SENATE COMMITTEE ON GOVERNMENT OPERATIONS & SECURITY

Majority Report: Do pass.

Signed by Senators Roach, Chair; Benton, Vice Chair; Liias, Ranking Minority Member; Habib and McCoy.

Minority Report: Do not pass.

Signed by Senators Pearson, Vice Chair; Dandel.

Staff: Samuel Brown (786-7470)

Background: Section 2 of the Federal Voting Rights Act of 1965 (VRA). The VRA prohibits discriminatory practices in state and local elections, based on the protections provided under the Fifteenth Amendment to the Constitution. Special protections extend to members of a racial, color, or certain language minority group.

Section 2 of the VRA (Section 2) prohibits any voting practice or procedure that effectively impairs the equal opportunity for members of a minority group to participate in the nomination and election of candidates. A violation may be shown based on the totality of

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circumstances of the election process that resulted in a discriminatory impact on a minority group. Proof of intentional discrimination is not required to show a violation. While Section 2 protects the equal opportunity to participate in elections, it does not create a right for minority groups to be proportionally represented in elected offices.

Courts have considered cases under Section 2 that raise claims of minority voter dilution based on the method of drawing voting districts. In a voter dilution claim, the discriminatory effect is that minority votes are dispersed throughout the districts, weakening the minority group's ability to influence the election. Voter dilution claims have also been raised in jurisdictions holding at-large general elections for bodies with multiple positions.

In *Thornburg v. Gingles* (1986), the Supreme Court defined three elements that must be established to make a claim of voter dilution under Section 2:

- the minority group is sufficiently large and geographically compact to be a majority within a district;
- the minority group is politically cohesive; and
- the majority generally votes as a bloc, which usually defeats the election of the minority group's preferred candidate.

In addition to these three prerequisites, courts also consider a list of factors in determining the totality of circumstances regarding discriminatory impact.

Local Elections. Local governments are responsible for periodically changing their voting districts to account for population shifts. Within eight months after receiving federal census data, a local government must prepare a plan for redistricting its election districts. Each district must be relatively equal in population, compact, and geographically contiguous. The plan should also try to preserve existing communities of related and mutual interest. The census data may not be used to favor any racial or political group in redistricting.

Summary of Bill: The Washington Voting Rights Act (Act) is established, creating a cause of action where local and district elections exhibit polarized voting between voters in a protected class and other voters, and where members of the protected class do not have an equal opportunity to elect their preferred candidate or influence the election. A protected class is a class of voters who are members of a race, color, or language minority group.

The Act applies to elections held within certain political subdivisions including counties; cities; towns; school districts; fire protection districts; port districts; and public utility districts. It does not apply to state elections, elections in a city or town under 1000, or school districts under 250 students.

Making a Claim. Any voter who is a member of a protected class and resides within a particular political subdivision may file a legal action alleging that the subdivision has violated the Act. To make a claim, a person must allege the following:

- the subdivision's elections show polarized voting, meaning a difference of choice between voters of a protected class and other voters in the election; and
- members of the protected class do not have an equal opportunity to elect members of their choice or influence the outcome of an election.

To determine the existence of polarized voting, the court may only analyze the elections conducted prior to the legal action, including the election of candidates, ballot measure elections, and elections that affect the rights and privileges of the protected class. The election of candidates who are in the protected class does not preclude a court from finding the existence of polarized voting that resulted in unequal election participation.

Proof of intent to discriminate against the protected class is not required to show a violation under the Act. The protected class does not have to be geographically compact or concentrated to constitute a majority in any proposed or existing district. Members of different protected classes may jointly demonstrate polarized voting by showing that their combined voting preferences differ from the rest of the electorate.

No lawsuit may be filed alleging a violation of the Act before January 15, 2016.

Notice Procedures. Before filing a legal action, a person must notify the political subdivision that the person intends to challenge the election system. The notice must provide information, including the protected class impacted, a reasonable analysis of the data regarding vote dilution and polarized voting underlying the person's claim, and proposed remedies. The subdivision must work in good faith with any person providing notice to implement a remedy that provides members of the protected class or classes equal opportunity to elect candidates of their choice or influence electoral outcomes.

Any person may file an action against the subdivision under the Act if the subdivision does not adopt a remedy within 180 days. If the subdivision receives a different notice within the initial 180-day period, it has an additional 90 days to respond from the date the second notice was received.

Court Procedures. The action may be filed in the superior court of the county in which the political subdivision is located. If the action is against a county, it may instead be filed in the superior court of either of the two nearest judicial districts. The trial must be set for no later than one year after the filing of a complaint, with a corresponding discovery and motions calendar. For purposes of the statute of limitations, a cause of action under the Act arises every time there is an election under a districting method that is the subject of the court action. Courts may look to federal case law for guidance in applying the terms of the Act.

Redistricting. Any political subdivision may take corrective action to change its election system in order to remedy a violation of the Act. The remedy may include implementation of a district-based election system, which includes a method of electing candidates from within a district that is a divisible part of the subdivision. Districts must be reasonably equal in population, compact, and geographically contiguous, must coincide with natural boundaries, and must preserve communities of related and mutual interest as much as possible.

If the subdivision adopts a new election plan between the date of the general election and January 15 of the following year, it must implement the plan at the next general election. If the plan is adopted during the remaining period of the year, the plan must be implemented at the general election of the following year. Any subdivision that implemented a district-based election system must prepare a redistricting plan within eight months of receiving federal census data.

The adopted plan must apply to any elected officer who has at least two years remaining in the officer's term of office. Such positions are subject to new elections, pursuant to the implementation of the plan.

Remedies. The court may order appropriate remedies for a violation, including requiring the subdivision to redistrict or create a district-based election system.

If the court issues a final order between the date of the general election and January 15 of the following year, the order applies to the next general election. If the court issues a final order between January 16 and the next general election date, the order only applies starting from the general election of the following year.

The court's order applies to any elected officer who has at least two years remaining in the officer's term of office. Such positions are subject to new elections, pursuant to the implementation of the court's order.

A court may allow a prevailing plaintiff to recover reasonable attorneys' fees, all non-attorney fee costs, and all reasonable expert witness fees. A prevailing defendant may recover fees or costs if the judge finds that the claim was frivolous and without reasonable cause.

Immunity From Suit. If the subdivision adopts the proposed remedy in the notice within 180 days of receipt, no legal action may be brought against the subdivision for four years alleging a violation of the Act if the subdivision does not modify the scheme in the remedy. The subdivision may propose a different remedy in response to a notice of potential claim and seek a court order approving the remedy and providing that no legal action may be brought against the subdivision for four years alleging a violation of the Act if the subdivision does not modify the scheme in the remedy. If the jurisdiction adopts a remedy either after a suit is filed or in response to a court order, the same plaintiff may not bring a suit alleging a violation of the Act against the jurisdiction for four years if the subdivision does not modify the scheme in the remedy.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This bill will enable local governments to fix broken election procedures and ensure participation for all. The changing demographics of our state make this bill necessary. My experience has taught me that you need to represent a district. This is not a bill about lawsuits; it's a bill that's meant to enable local governments to avoid lawsuits. Local governments can look at the data and, if they so choose, they can go to a form of elections that best meets their needs. The bill provides two very good steps before jurisdictions have to go to court. The city of Yakima has been involved in federal voting rights litigation for a long time, and attorneys' fees in that case total \$2.8 million from the

plaintiffs alone. State law served as an impediment to our city's needs for diverse representation. Amendments are suggested to exclude smaller jurisdictions, provide a defense to liability if members of a protected class have been elected, prevent filing actions in both federal and state court, allow officials to finish their terms, and allow for modified at-large voting. Modified at-large voting would allow minority communities to coalesce behind certain candidates. The bill's delayed implementation provision will allow local governments to analyze their own situations. This bill has a number of provisions unavailable under federal law, where litigation is the only tool. This bill will likely only impact a small number of communities. The safe harbor from litigation provision is unavailable under federal law. If this bill is passed, there will be no incentive for plaintiffs to go to federal court, which is expensive. Washington cannot rely on the vagaries of federal law to enforce the rights of its citizens. The bill provides safeguards from frivolous suits for local governments. This bill furthers the principle that every person gets a say in decisions that affect them, rather than deferring to a hierarchy.

OTHER: There are concerns that the bill creates a state cause of action, creating potential administrative costs for county governments, and that individuals who have served less than two years would have to run again for office. There is also a concern that a federal cause of action is not precluded by the bill. Certain port districts cannot voluntarily redistrict and would support a technical amendment to give them that ability. There are concerns about creating a cause of action for circumstances jurisdictions have no control over, such as who runs for offices or who votes. Avoiding litigation by hiring experts to review the situation could also be costly. We are supportive of the amendment extending the time in the notice period.

Persons Testifying: PRO: Representative Moscoso, prime sponsor; Representative Haler; Representative Hunt; Stuart Halsan, Micah Cawley; Krist Novoselic, FairVote.org; Eric Gonzalez, OneAmerica; Shankar Narayan, American Civil Liberties Union of WA; Kelli Schmidt, WA State Bar Assn. Civil Rights Law Section.

OTHER: Jennifer Ziegler, WA State Assn. of Counties; Ginger Eagle, WA Public Ports Assn.; Dan Steele, WA Assn. of School Administrators.

Signed In, Unable to Testify & Submitted Written Testimony: PRO: Jolinda Stephens, Unitarian Universalist Voices for Justice.

Persons Signed in to Testify But Not Testifying: CON: Deb Merle, WA State School Directors' Assn.