

SENATE BILL REPORT

SB 5067

As of January 20, 2017

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: Senator Miloscia.

Brief History:

Committee Activity: State Government: 1/18/17.

Brief Summary of Bill

- Creates a state voting rights act to protect the equal opportunity for minority groups to participate in local elections and elect candidates of choice.
- Creates a cause of action and authorizes courts to order appropriate remedies for a violation of the voting rights act, including redistricting within a political subdivision.
- Authorizes local governments to change their election system to remedy violations of the voting rights act.

SENATE COMMITTEE ON STATE GOVERNMENT

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

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nomination and election of candidates. A violation may be shown based on the totality of 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.

Elements of a Voter Dilution Claim. 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. These factors were included in a United States Senate Judiciary Committee report accompanying a 1982 update to the VRA and include:

- the history of official voting-related discrimination in the state or political subdivision;
- the extent to which voting in the elections of the state or political subdivision is racially polarized;
- the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group;
- the exclusion of members of the minority group from candidate slating processes;
- the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, hindering their ability to participate effectively in the political process;
- the use of overt or subtle racial appeals in political campaigns; and
- the extent to which members of the minority group have been elected to public office in the jurisdiction.

A plaintiff need not prove existence of these factors to succeed on their vote dilution claim. Courts may consider additional factors; this list is not exhaustive.

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.

Alternative Proportional Voting Systems. Several jurisdictions have adopted alternative systems for allocating votes to voters to determine the winner of an election. These systems are known as alternative proportional voting systems, and include:

- limited voting, where a voter receives fewer votes than there are candidates to elect;
- cumulative voting, where a voter receives as many votes as there are candidates to elect, but may cast multiple votes for a single candidate; and
- single transferrable or ranked choice voting, where a voter ranks candidates in order of preference, and votes are transferred to lower-ranked candidates who are not elected on first-place votes if a majority is not reached.

Summary of Bill: The Washington Voting Rights Act (Act) is established, creating a cause of action where members of a protected class do not have an equal opportunity to participate in the political process or elect their preferred candidate. 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, and school districts. It does not apply to state elections, elections in a city or town with a population under 2000, or school districts with under 500 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 establish by prima facie evidence the following:

- the protected class is sufficiently large and geographically compact to be a majority within a single-member voting district;
- the protected class is politically cohesive; and
- the majority generally votes as a bloc, enabling defeat of the minority group's preferred candidate.

The person must establish that, under the totality of the circumstances, members of a protected class do not have an equal opportunity to participate in the political process or elect their preferred candidate. In making this determination, courts must consider, at a minimum, the following factors:

- the history of official voting-related discrimination in the state or political subdivision;
- the extent to which voting in the elections of the state or political subdivision is racially polarized;
- the extent to which the political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group;
- the exclusion of members of the minority group from candidate slating processes;
- the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, hindering their ability to participate effectively in the political process;
- the use of overt or subtle racial appeals in political campaigns;
- the extent to which members of the minority group have been elected to public office in the jurisdiction; and

- whether there is a significant lack of responsiveness by elected officials to needs of the protected class.

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, but courts may consider whether the proportion of the jurisdiction's legislative body who are members of the protected class is the same as the proportion of the jurisdiction's population who are members of the protected class.

Proof of intent to discriminate against the protected class is not required to show a violation under the Act. Members of different protected classes may jointly file a claim under the Act if the joint protected class meets the above pleading thresholds.

No lawsuit may be filed alleging a violation of the Act before January 15, 2018.

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 person bringing the notice and subdivision must work in good faith to implement a remedy that provides members of the protected class or classes equal opportunity to elect candidates of their choice. Representatives of the subdivision must facilitate and participate in meetings at least once a month with the person bringing notice to work toward a solution.

Any person may file an action against the subdivision under the Act if the subdivision does not adopt a remedy within 18 months. If the subdivision receives a different notice within the initial 18-month period, it has an additional six months 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.

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. The remedy may also include an alternative proportional voting method, such as limited voting, cumulative voting, or single transferrable voting. 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 15th 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.

In a subdivision voluntarily adopting a new election plan, any elected officer who has at least two years remaining in the officer's term of office may be, but is not required to be, subject to a new election.

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

If the court issues a final order between the date of the general election and January 15th of the following year, the order applies to the next general election. If the court issues a final order between January 16th 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 party to recover reasonable attorneys' fees, all non-attorney fee costs, and all reasonable expert witness fees.

Immunity From Suit. If the subdivision adopts the proposed remedy in the notice, 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. If a person files an unsuccessful Section 2 claim against a subdivision, that person may not bring a suit under the Act against the subdivision for four years from the beginning of the Section 2 claim.

Appropriation: None.

Fiscal Note: Requested on January 17, 2017.

Creates Committee/Commission/Task Force that includes Legislative members: No.

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

Staff Summary of Public Testimony: PRO: We need good standards before charging municipalities with suppressing minority votes, and federal law, which is mirrored in this bill, provides those standards. The issue warrants having a cause of action. This would provide better, more accurate representation. Better reflecting community demographics leads to increased voter turnout in minority communities. This bill give cities a variety of options; it doesn't mandate one particular system. The bill sets out alternative dispute resolution mechanisms, which help settle disputes without the expense, time, and animosity of litigation. There should be a lower burden of proof and courts should be directed to follow federal law to ensure cases aren't re-litigated at the federal level at increased state cost.

CON: Counties are split on the issue, and the opposition revolves around creating additional liability. Counties don't have the revenue to provide the resources the state asks of them. This creates a new cause of action that will make it easier and cheaper to sue in state court. California has done this, and there has been a lot of litigation and local liability. We don't need state law to have a conversation between a claimant and a jurisdiction about vote dilution.

OTHER: The timeline, which allows for as much as 24 months before a suit can be filed, does not create enough incentive to keep cases out of federal court. A six month timeline would be preferable. We support the spirit of the bill, but are concerned about the speed with which disenfranchised communities will get recourse. This is an economic justice issue - there is compelling data about outcomes when school boards reflect the demographics of their students. County auditors do not have the capability in their elections systems to process votes via alternative proportional voting methods. County auditors are also concerned about the impact on the top-two primary from alternative proportional voting methods.

Persons Testifying: PRO: Senator Mark Miloscia, Prime Sponsor; Mynor Lopez, Commission on Hispanic Affairs; Stuart Halsan, FairVote.

CON: Josh Weiss, Washington State Association of Counties.

OTHER: Alex Hur, OneAmerica; Yuriy Rudensky, Columbia Legal Services; Monty Cobb, WACO/WSACA (County Auditors).

Persons Signed In To Testify But Not Testifying: No one.