# HOUSE BILL REPORT
# E2SSB 5597

**As Reported by House Committee On:**
State Government & Tribal Relations

**Title:** An act relating to the Washington voting rights act.

**Brief Description:** Concerning the Washington voting rights act.

**Sponsors:** Senate Committee on Ways & Means (originally sponsored by Senators Saldaña, Hunt, Conway, Das, Dhingra, Frockt, Hasegawa, Kuderer, Liias, Lovelett, Nguyen, Nobles, Pedersen, Stanford and Wilson, C.).

**Brief History:**

**Committee Activity:**

State Government & Tribal Relations: 2/16/22, 2/23/22 [DPA].

**Brief Summary of Engrossed Second Substitute Bill**
**(As Amended By Committee)**

- Requires certain jurisdictions to obtain preclearance that certain proposed changes to their election systems will not violate the Washington Voting Rights Act (WVRA) before those changes may take effect.
- Provides that persons or organizations who file a notice of intent to challenge an election system under the WVRA may recover costs incurred in conducting the necessary research, if the notice causes the political subdivision to adopt a remedy that is approved by the court.
- Establishes a data repository at the University of Washington to assist the state and political subdivisions with evaluating their compliance with election laws, implementing best practices, and investigating potential infringements of the right to vote.
- Makes minor language changes to other aspects of the WVRA.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.*

## HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL RELATIONS

**Majority Report:** Do pass as amended. Signed by 4 members: Representatives Valdez, Chair; Lekanoff, Vice Chair; Dolan and Gregerson.

**Minority Report:** Do not pass. Signed by 3 members: Representatives Volz, Ranking Minority Member; Walsh, Assistant Ranking Minority Member; Graham.

**Staff:** Jason Zolle (786-7124).

**Background:**

Federal Voting Rights Act of 1965.
The federal Voting Rights Act (VRA) prohibits racial discrimination in state and local elections in order to enforce the provisions of the Fifteenth Amendment to the United States Constitution.

*Vote Dilution*. Section 2 of the VRA (Section 2) prohibits any voting practice or procedure that results in the denial or abridgment of the right to vote on account of race, color, or language-minority status. Intentional discrimination based on race or color is prohibited. Also prohibited are practices that have the effect of impairing the ability of members of a racial group to participate equally in the nomination and election of candidates. In these cases, proof of intentional discrimination is not required to show a violation; instead, a violation is established when the totality of circumstances of the election process demonstrates a racially discriminatory impact. A court considers multiple factors in making this determination. Vote dilution claims under Section 2 often allege that the method of drawing voting districts spreads minority votes throughout the districts ("cracking"), or concentrates minority votes into a small number of districts ("packing"), or both, effectively weakening the minority group's ability to elect its candidates of choice.

*Preclearance*. Section 5 of the VRA (Section 5) prohibits covered jurisdictions from changing their voting laws, practices, or procedures until they have first obtained a determination from a federal court or the United States Attorney General that the change does not have the purpose or effect of discriminating on the basis of race or language-minority status. The coverage formula to determine which jurisdictions are covered by the preclearance requirement considers: (1) whether the jurisdiction used tests such as literacy tests or proof of good moral character in 1964 through 1972; and (2) whether fewer than half of the jurisdictions eligible citizens were registered to vote or participated in the elections of 1964, 1968, and 1972.

In a 2013 case, *Shelby County v. Holder*, the United States Supreme Court held that this coverage formula was unconstitutional because it was no longer responsive to the current environment and thus violated principles of equal state sovereignty. Because Congress has not updated the formula since the court decision, no jurisdictions are currently subject to

preclearance under the VRA.

Washington Voting Rights Act.
In 2018 the state enacted the Washington Voting Rights Act (WVRA) to regulate elections in counties, cities, towns, school districts, fire protection districts, port districts, and public utility districts (all together, "political subdivisions"). A violation of the WVRA is established when a political subdivision's elections exhibit polarized voting and there is a significant risk that members of a protected class do not have an equal opportunity to elect candidates of choice as a result of dilution or abridgement of their rights.

Any voter who resides in a political subdivision may challenge its electoral system by filing a notice of intent. The political subdivision has 90 days to adopt a remedy to the alleged violation; if it fails to do so, the challenger may sue. To determine whether voting is polarized, the court assesses the elections pragmatically based on local election conditions. No one factor is necessary to establish a violation, but the court may consider factors such as a history of discrimination or the use of racial appeals in political campaigns. If a violation is found, the court may order appropriate remedies, including requiring the political subdivision to redistrict or create a district-based election system. The court may award attorneys' fees and costs to a prevailing plaintiff. Prevailing defendants may be awarded certain costs, but not attorney's fees. No fees or costs may be awarded if no lawsuit is filed.

Political subdivisions may take corrective action to change election systems in order to remedy a potential violation of the WVRA, including through implementation of a district-based election system. If corrective action is taken in response to a notice of intent to challenge, the political subdivision must obtain a court order certifying that the remedy complies with the WVRA and was prompted by a plausible violation. Courts apply a rebuttable presumption against adopting a political subdivision's proposed remedy. If the court approves the remedy, it may not be challenged by lawsuit for at least four years.

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**Summary of Amended Bill:**

Changes to Existing Washington Voting Rights Act Provisions.
*Standing*. An organization whose membership includes or is likely to include a voter who resides in the political subdivision is given the ability to challenge the political subdivision's electoral system.

*Remedies for Violations*. In tailoring a remedy, the court may not give deference to a proposed remedy just because it was proposed by the political subdivision. The court may not approve a remedy that has a dilutive effect on the protected class. Language permitting a court to order a political subdivision that has violated the WVRA to draw or redraw district boundaries is removed. If the court orders a district-based remedy, the court must approve the proposed district boundaries before they are implemented.

*Cost Recovery*. A person or organization who files a notice of intent to challenge an election system under the WVRA may recover certain costs if the notice causes the political subdivision to adopt a remedy that is approved by the court. The political subdivision must reimburse the costs incurred in conducting the research necessary to send the notice, up to $50,000. The request must include financial documentation and be filed within 30 days of the adoption of the new electoral system.

A person or organization may recover attorney's fees and costs even if they do not achieve court relief or a favorable judgment if the lawsuit altered the political subdivision's behavior to correct a claimed harm. When awarding attorney's fees, a court may consider whether the political subdivision had obtained preclearance of the challenged practice. A person or organization who prevails in a WVRA lawsuit may recover reasonable fees and costs incurred before filing the action.

*Language Changes*. Language in the WVRA is changed to specify that a violation occurs when a political subdivision imposes a method of electing its governing body that constitutes vote dilution. Language is added to clarify that a class of citizens protected by the WVRA may include a cohesive coalition of members of different racial, ethnic, or language-minority groups. Language is added to specify that the parties may stipulate to a violation of the WVRA.

<u>New Washington Voting Rights Act Provisions</u>.
*Preclearance*. A preclearance requirement is instituted for covered jurisdictions. Covered jurisdictions are:

- counties in which, according to data from the American Community Survey, the proportion of members of a protected class consisting of at least 10,000 voting age citizens, or whose members comprise at least 10 percent of the citizen voting age population of the county, that has an income below the poverty level, that is considered uninsured in terms of health coverage, or that lacks a high school diploma, exceeds that of the total population of the county by at least 5 percent at any point in the previous 10 years;
- school districts that have a difference of at least 10 percent between the graduation rates of students of any protected class and the district as a whole;
- political subdivisions subject to a court order or enforcement action due to a voting-related violation in the last 25 years; and
- political subdivisions that failed to provide data to the statewide election data repository within the last five years.

The Secretary of State must determine which political subdivisions qualify as covered jurisdictions and notify them every five years.

Preclearance must be obtained any time a covered jurisdiction seeks to change:

- the method of electing members of its governing body by adding seats elected at large

or by converting single-member districts to a multimember district;
- its boundaries, if it reduces the proportion of its voting age population composed of a single racial or language-minority group by more than 5 percent;
- the boundaries of election districts or wards;
- anything that restricts the ability of any person to provide interpreter services or voting materials in any language other than English; and
- any aspect of the covered jurisdiction's plan of government, i.e., the structure of elected officials serving executive and legislative functions.

Such changes may not take effect until preclearance is obtained.

Preclearance may be obtained by filing an action in county superior court for a declaratory judgment or by submitting a request to the Attorney General for a certification of no objection. Preclearance must be granted if the change does not violate the WVRA's prohibition on vote dilution, and it will not result in retrogression for members of racial and language-minority groups, i.e., it will not diminish their ability to participate in the electoral process or elect their candidates of choice. If the Attorney General does not grant preclearance, the political subdivision may appeal to the Thurston County Superior Court. If the Attorney General grants preclearance, a person whose opportunity to vote is affected by the change may appeal to the Thurston County Superior Court. Changes that have received preclearance may still be challenged in court by a person or organization under the WVRA.

The Attorney General or a person whose opportunity to vote has been affected by such a change already made may file a lawsuit to compel the covered jurisdiction to seek a certification of no objection to declare that the change did not violate the WVRA or result in retrogression.

The provisions relating to preclearance expire June 30, 2029. By December 1, 2028, the Attorney General must submit a report to the Legislature that includes statistics about the preclearance program, including the number of practices in which preclearance was sought and the number of instances in which it was granted. The report must also provide a narrative summary of the overall outcomes of the preclearance program, as well as information about the program's fiscal impact on the Attorney General.

*Data Collection and Required Reporting*. A statewide data repository is established at the University of Washington to assist the state and political subdivisions with evaluating their compliance with election laws, implementing best practices, and investigating potential infringements of the right to vote. The repository must maintain for at least 12 years the following data and records:
- estimates of total population, voting age population, and citizen voting age population by race, ethnicity, and language-minority group status for each political subdivision and precinct in the state;
- election results at the precinct level;

- voter registration lists, history files, and locations where ballots may be returned;
- election district maps and shapefiles;
- ballot rejection and curing lists, along with the reasoning for rejections; and
- apportionment plans.

The information in the repository must be posted online and available to the public at no cost. Beginning January 1, 2023, the repository must publish a list of subdivisions required to provide language-minority assistance every five years. Repository staff may provide nonpartisan technical assistance to political subdivisions, scholars, and the general public.

*Voluntary Changes by Counties*. Counties are authorized to increase from three to five commissioners in order to prevent a violation of the WVRA.

The act contains a severability clause.

**Amended Bill Compared to Engrossed Second Substitute Bill:**

The jurisdictions that are subject to the preclearance requirement are modified in the following ways:

- a different population-based threshold is used for counties;
- cities are not subject to preclearance based on a population threshold;
- port districts are not subject to preclearance;
- school districts are subject to preclearance based on their high school graduation rates, not a population threshold; and
- political subdivisions that have engaged in three or more civil rights violations related to racial discrimination are not subject to preclearance.

Courts are permitted to consider whether the political subdivision had obtained preclearance of the challenged practice when awarding attorney's fees to a successful plaintiff.

The Attorney General's ability to invoke up to two 90-day extensions when reviewing certain covered practices for preclearance is removed.

The Attorney General must submit a report to the Legislature as described above.

Language clarifying that the Secretary of State must determine which jurisdictions are subject to the preclearance requirement is added.

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**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Amended Bill:** This bill takes effect 90 days after adjournment of the

session in which the bill is passed, except for sections 1 through 4, 6 through 9, and 15, relating to establishing preclearance requirements, creating a cost-recovery provision for catalyst WVRA notices, modifying attorney's fees provisions for successful WVRA lawsuits, providing organizational standing for WVRA challenges, and making minor language changes to the WVRA, which take effect January 1, 2023.

**Staff Summary of Public Testimony:**

(In support) When the WVRA was passed, there was much negotiation. This bill is the work of the Legislature returning a few years later to make some improvements. One big point in the bill is the creation of a repository to provide reliable data about demographics across the state, housed in the University of Washington so all community groups and jurisdictions can access it to see how they are doing and consider changes for better representation. Another big piece of the bill is the preclearance requirement to ensure in advance that changes will not have the purpose or effect of denying or abridging the right to vote based on race or color. Given what is happening with the federal VRA, which has effectively been dismantled, the WVRA must stand on its own two feet. The goal is to create opportunities for local jurisdictions and communities to be proactive about changes without costly and drawn-out lawsuits. This bill will deepen equity in the electoral system. It was drafted with local conditions in mind and is specific to Washington. The Legislature is continuing to perfect the bill by working with cities and the Attorney General.

(Opposed) None.

(Other) Many provisions in the bill are good, but there is concern that this would add expense and make it harder for cities to heal from past fights over voting rights. The change in standing to allow any organization with "likely" membership in the jurisdiction is too expansive. The change in the definition of prevailing plaintiff is too broad. There is a concern that the preclearance program delegates the legislative function and violates the separation of powers doctrine. Under the bill, even if a jurisdiction obtains preclearance it can still be sued, and the appeals process can be costly and litigious too. There is no finality and no reward for a jurisdiction that acts in good faith. There is too loose of a definition for who must obtain preclearance; as drafted, at least 64 cities and 22 counties would be automatically included, even without any indication of violations in the past. This undermines public trust by implying bad behavior without any such evidence. Preclearance should be tied to prior violations, not population, which fluctuates. Overall, these provisions disincentivize change because jurisdictions will assume they will get sued anyway.

**Persons Testifying:** (In support) Senator Rebecca Saldaña, prime sponsor; Cindy Madigan, League of Women Voters Washington; Roxana Norouzi, OneAmerica; Breanne Schuster, American Civil Liberties Union of Washington; and Aseem Mulji, Campaign Legal Center.

(Other) Blanche Barajas; Matt Watkins; Eric Ferguson, Kerr Law Group; Sharon Swanson, Association of Washington Cities; and Mike Hoover, Washington State Association of Counties.

**Persons Signed In To Testify But Not Testifying:** None.