

SENATE BILL REPORT

SB 5597

As of January 14, 2022

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

Brief Description: Concerning the Washington voting rights act.

Sponsors: Senators Saldaña, Hunt, Conway, Das, Dhingra, Frockt, Hasegawa, Kuderer, Lias, Lovelett, Nguyen, Pedersen, Stanford and Wilson, C..

Brief History:

Committee Activity: State Government & Elections: 1/14/22.

Brief Summary of Bill

- Codifies factors which establish a presumptive case of vote dilution in violation of the Washington Voting Rights Act (WVRA).
- Establishes a mechanism for claimants who send successful notices of potential WVRA violations to recover costs of up to \$50,000 from jurisdictions for research needed to send the notice.
- Requires certain jurisdictions to obtain preclearance for changes to covered voting practices.
- Establishes a data repository at the University of Washington to assist jurisdictions and researches in election best practices.

SENATE COMMITTEE ON STATE GOVERNMENT & ELECTIONS

Staff: Samuel Brown (786-7470)

Background: Federal Voting Rights Act of 1965. The Federal Voting Rights Act (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

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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 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. Section 2 does not create a right for minority groups to be proportionally represented in elected offices.

Vote dilution claims under Section 2 allege that the method of drawing voting districts has the discriminatory effect of dispersing minority votes throughout the districts, weakening the minority group's ability to influence the election. Vote dilution claims have also been raised in jurisdictions holding at-large general elections for bodies with multiple positions.

Preclearance. Section 5 of the VRA (Section 5) prohibits enforcement of any change to voting laws, practices, or procedures in a covered jurisdiction—or any political unit within it—until the jurisdiction first obtains a determination by a federal court or the Attorney General that the proposed voting change does not deny or abridge the right to vote on account of race, color, or membership in a language minority group.

In 2013, the Supreme Court found the formula used to establish which jurisdictions are covered by Section 5's preclearance provisions was no longer responsive to current needs and situations, holding it unconstitutional in *Shelby County v. Holder*, 570 U.S. 529 (2013). Congress has not since updated the formula, and no jurisdictions are currently subject to preclearance under the VRA.

Washington Voting Rights Act. In 2018, ESSB 6002 was signed into law, creating the Washington Voting Rights Act (WVRA). A violation of the WVRA is established where a jurisdiction's elections exhibit polarized voting and where there is a significant risk 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. The WVRA applies to elections held within counties, cities, towns, school districts, fire protection districts, port districts, and public utility districts (political subdivisions). Any voter in an affected political subdivision may challenge the electoral system. The political subdivision has 90 days to adopt a remedy to the alleged violation; if it fails to do so, it is subject to a lawsuit.

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. 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, and all facts and reasonable inferences must be viewed in favor of those opposing the proposed remedy.

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.

Summary of Bill: Violations of the Washington Voting Rights Act. A violation of WVRA is presumptively established if:

- the political subdivision used race, ethnicity, language-minority group status, or a proxy of any of those characteristics, for apportionment; or
- electoral district boundaries "crack" or "pack" minority communities of interest.

Exceptions are made in both instances to the extent needed to comply with WVRA, the VRA, or the state or federal constitutions.

Evidence of a Washington Voting Rights Act Violation. Additional factors which may show a WVRA violation, but are not necessary to do so, include:

- lower voter participation, contributions to political campaigns, or other participation in the political process by protected class members;
- the extent to which protected class members bear the effects of past discrimination in criminal justice, housing, land use, and environmental protection;
- a significant lack of responsiveness by elected officials to the needs of protected class members; and
- the lack of a compelling justification for the challenged policy or boundaries.

Statistical evidence is considered more probative. Evidence from other jurisdictions may be considered, but is less probative than evidence concerning the jurisdiction which is the subject of the WVRA claim.

Defending a Washington Voting Rights Act Claim. The following evidence is not probative in defending a claim of an alleged WVRA violation:

- the size of the burden on protected class members;
- standard practices when a voting method was adopted;
- disparities in a voting method's impact on different racial or ethnic groups;
- additional avenues available to protected class members to vote; and
- facial neutrality in time, place, or manner.

The use of partisanship data or characteristics associated with partisanship data cannot be used as a defense to a WVRA claim.

Standing to File a Washington Voting Rights Act Claim. An organization whose membership includes or is likely to include a voter in the political subdivision may challenge the subdivision's electoral system.

Remedies. Courts may not approve a remedy that has a dilutive effect on the protected class.

Cost Recovery. A claimant who alleged a violation of the WVRA may make a demand to the political subdivision for reimbursement of the costs incurred in conducting the research necessary to send the notice when the subdivision adopts a remedy that takes the notice into account and a court has issued an order certifying the remedy complies with the WVRA and was prompted by a plausible violation. The demand must be received within 30 days of the adoption of the new electoral system, and it must include financial documentation. The demand must be paid within 60 days, up to \$50,000.

Preclearance. Certain jurisdictions must obtain either a certification from the Attorney General or a judgment in superior court that some changes to election practices will not deny or abridge the right to vote on account of protected class status or result in retrogression of the electoral position of protected classes. The following political subdivisions are subject to preclearance:

- subdivisions where members of a single protected class are at least 10 percent of the population;
- subdivisions subject to a court order or enforcement action due a voting-related violation in the last 25 years;
- subdivisions which failed to provide data to the statewide election data repository within the last five years; and
- subdivisions subject to at least three court orders or enforcement actions for civil rights violations in the last 25 years.

Practices for which covered jurisdictions must seek preclearance include:

- adding at-large seats to the governing body;
- changing the jurisdiction's boundaries in a manner that reduces the proportion of a single protected class by at least 5 percent;
- redistricting;
- changes restricting access to interpreter services or reductions in availability of non-English voting materials;
- reduction or consolidation of voting centers or ballot drop boxes; and
- changes to the plan of government.

The Attorney General must make a determination as to whether to object to a proposed practice within 60 days, or within 30 days for changes to voting centers or ballot drop boxes. The Attorney General may seek two extensions of up to 90 days each to make a determination regarding the establishment of a district-based election system, an apportionment plan, or changes to the form of a jurisdiction's governing body.

If the Attorney General objects to a proposed practice, the jurisdiction may challenge the determination in superior court. Any person whose right to vote is affected by the proposed practice may challenge the practice in superior court if the Attorney General issues a

certification of no objection to the practice. The superior court must enjoin the practice unless it determines it will not deny or abridge the right to vote on account of protected class status or result in retrogression of the electoral position of protected classes.

As early as practicable each year, the Secretary of State, in conjunction with the Attorney General, the Office of Financial Management, and other relevant agencies, must notify jurisdictions where members of a single protected class are at least 10 percent of the population that they are subject to the preclearance requirements.

Data Collection. A statewide repository is established at the University of Washington to assist with compliance with election laws, including WVRA. The repository must maintain the following information for at least the previous 12-year period:

- estimates of total population, voting age population, and citizen voting age population by race, ethnicity, and language-minority group status for each political subdivision in the state;
- election results;
- voter registration lists, history files, and locations where ballots may be returned;
- election district maps and shapefiles;
- ballot rejection and curing lists; and
- apportionment plans.

The information in the repository must be posted online and available at no cost to the public. Beginning January 1, 2023, the repository must publish a list of subdivisions required to provide language-minority assistance every three years.

Appropriation: None.

Fiscal Note: Requested on January 5, 2022.

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: It doesn't look like Congress will update the federal Voting Rights Act, so it's up to Washington to strengthen our Voting Rights Act. Vote dilution creates the conditions for generational poverty and violence, as elected representatives don't consider the concerns of marginalized communities. Cities are still divided based on historical housing discrimination. Language around presumptive violations will help keep progress that is made. People don't think their votes matter, and we can't persuade them they do when there is vote dilution. The east side of Yakima finally saw equitable investment after a federal VRA lawsuit—WVRA creates positive impacts to the quality of life of future generations. This will save jurisdictions time and resources that can be spent on infrastructure and maintenance.

Local jurisdictions are already making changes based on the 2020 census, and preclearance will give them certainty that changes comply with existing laws. This legislation promotes core democratic values and accountability by ensuring we can design systems that promote equality of opportunity for voters and candidates. Preclearance blocks changes that would weaken minority voting power and serves as a deterrent against discriminatory changes. Without federal preclearance, there has been an escalation in these types of practices.

Data collection provisions will make important information available to counties so elections are held in a manner consistent with good public policy and best practices. Currently, this data doesn't exist in one location, so efforts to produce the information are often duplicated. This will provide an important resource for decision makers and the public.

CON: We should be repealing the WVRA, not adding to it. WVRA is divisive and adds to voter distrust. Lawsuits under WVRA cause division based on race. WVRA allows incumbents to reach settlements writing challengers out of their district, making our representative government less diverse.

OTHER: Cities and counties would like definitions of terms in the bill such as plan of government, retrogression, and when elected officials are unresponsive. The bill should provide a preclearance timeline for courts to follow, and that anyone can appeal a determination of no objection or superior court order does not allow for finality of decisions. Triggers for preclearance are broad and should be tightened.

Persons Testifying: PRO: Senator Rebecca Saldaña, Prime Sponsor; Jacob Grumbach; Vallerie Fisher, Washington Education Association, Black Caucus; Audel Ramirez, OneAmerica; Sharlett Mena; Melissa Rubio, OneAmerica; Girmay Zahilay, King County Councilmember; Derek Young, Pierce County Council; Breann Schuster, ACLU of WA; Cindy Madigan, League of Women Voters Washington; Dulce Gutierrez.

CON: Autumn Torres; Tamborine Borrelli, Washington Election Integrity Coalition United (WEiCU).

OTHER: Sharon Swanson, Association of Washington Cities; Sheila Gall, Association of Washington Cities; Mike Hoover, Washington State Association of Counties.

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