

SENATE BILL REPORT

SB 5668

As Reported by Senate Committee On:
Government Operations & Security, February 19, 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: Senators Habib, Hasegawa, McCoy, Jayapal, Kohl-Welles, Liias, Chase, Pedersen, Mullet, Keiser, Darneille, Conway and Fraser.

Brief History:

Committee Activity: Government Operations & Security: 2/10/15, 2/19/15 [DP, DNP, w/oRec].

SENATE COMMITTEE ON GOVERNMENT OPERATIONS & SECURITY

Majority Report: Do pass.

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

Minority Report: Do not pass.

Signed by Senator Dandel.

Minority Report: That it be referred without recommendation.

Signed by Senators Benton, Vice Chair; Pearson, Vice Chair.

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 circumstances of the election process that resulted in a discriminatory impact on a minority

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

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 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.

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.

If the subdivision adopts the proposed remedy in the notice within 90 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. After 90 days, any person

may file an action under the Act if the subdivision does not adopt the proposed remedy. If the subdivision receives a different notice within the initial 90-day period, it has an additional 90 days to respond from the date the second notice was received. If the multiple notices propose different remedies, the subdivision must work in good faith to implement a remedy that addresses both concerns. The subdivision may seek a court order approving any chosen remedy, with opportunity for the notice providers to support or oppose the remedy.

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.

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. Districts must be reasonably equal in population, compact, geographically contiguous, 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 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 orders remedies 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 orders remedies 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.

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: Some of these challenges that end up in federal court can be resolved through notice-making and collaboration. This bill gives jurisdictions certainty that they won't be sued again and the state a better set of voting guidelines. Our redistricting process has been called one of the least partisan and most fair, and this puts us at the vanguard of this work to make our election free and fair. The bill does not require that communities change their election systems or that a person of any particular race be elected. This bill will lead to more engaged citizens. The current path to litigation is onerously expensive, and federal judges have a one-size-fits-all solution: new districts. This allows local governments to determine the solution that works for them. This provides a unique opportunity to extend America's promise by allowing more to have a voice in governing.

This bill has unique features: the notice provision requires challengers to explain and disclose the data underlying the problem and propose a remedy to local jurisdictions, and the safe harbor provision gives jurisdictions four years after implementing a remedy to be free from litigation. Polarized voting is not a single candidate of color losing an election. It's statistically showing over a period of time that a substantial minority votes one way,

everyone else votes the other, and the electoral system could make a difference in the outcome of those elections. Most jurisdictions will not have these issues – where this applies is where a substantial minority population and the electoral system makes a difference as to whether they're represented.

CON: We are concerned about the lack of diversity on school boards and have taken steps to address serious issues with the pipeline of candidates of ethnic minorities. We don't think this bill is the answer to these problems. We have trouble finding candidates to run for part to full-time jobs for no pay with lots of responsibility. Losing the ability to get candidates from an at-large district will exacerbate that problem.

OTHER: We like the provision for code cities to correct their systems themselves, but are concerned that the bill contains no compactness requirement, because it creates a cause of action that's difficult to defend against. The bill creates a justification to bring an action based on existence of a protected class, even if there's no real violation. When notice is provided to a local government, they have 90 days to make a change or the person can file a cause of action; it becomes a litigation bill in very short order. Jurisdictions have to hold public processes to change the electoral system and this is a short timeframe. People in their positions for less than two years will be subject to new elections in redistricting. This will cost money, time, and expertise for local governments to figure out what they're going to do in response. Cities are on all sides of this bill.

Persons Testifying: PRO: Senator Habib, prime sponsor; Eric Gonzalez Alfaro, OneAmerica; Shankar Narayan, American Civil Liberties Union of WA; Shelley Kloba, city of Kirkland, Councilwoman; Brian Yambe, city of Fife, Councilman; David Perez, Korematsu Center.

CON: Deb Merle, WA State School Directors' Assn.

OTHER: Alex Soldano, city of Pasco; Victoria Lincoln, Assn. of WA Cities.