

SENATE BILL REPORT

E2SSB 5597

As Passed Senate, February 10, 2022

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, Lias, Lovelett, Nguyen, Nobles, Pedersen, Stanford and Wilson, C.).

Brief History:

Committee Activity: State Government & Elections: 1/14/22, 1/26/22 [DPS-WM, DNP].
Ways & Means: 2/05/22, 2/07/22 [DP2S, DNP].

Floor Activity: Passed Senate: 2/10/22, 29-20.

Brief Summary of Engrossed Second Substitute Bill

- Establishes a mechanism for claimants who send successful notices of potential Washington Voting Rights Act (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.
- Explicitly authorizes counties to expand commissions from three to five members to remedy a potential WVRA violation.

SENATE COMMITTEE ON STATE GOVERNMENT & ELECTIONS

Majority Report: That Substitute Senate Bill No. 5597 be substituted therefor, and the

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.

substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Hunt, Chair; Kuderer, Vice Chair; Hasegawa.

Minority Report: Do not pass.

Signed by Senators Wilson, J., Ranking Member; Hawkins.

Staff: Samuel Brown (786-7470)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Second Substitute Senate Bill No. 5597 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Rolfes, Chair; Frockt, Vice Chair, Capital; Robinson, Vice Chair, Operating & Revenue; Billig, Carlyle, Conway, Dhingra, Hasegawa, Hunt, Keiser, Mullet, Pedersen, Van De Wege and Wellman.

Minority Report: Do not pass.

Signed by Senators Wilson, L., Ranking Member; Brown, Assistant Ranking Member, Operating; Schoesler, Assistant Ranking Member, Capital; Honeyford, Ranking Minority Member, Capital; Braun, Gildon, Muzzall, Rivers, Wagoner and Warnick.

Staff: Julie Murray (786-7711)

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 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.

Section 203 of the VRA requires jurisdictions to provide language assistance with voter registration, ballots, and election information when there are more than 10,000 or over 5 percent of the total voting age citizens in that jurisdiction who are members of a single

language minority group, have depressed literacy rates, and do not speak English very well. A separate process determines coverage requirements on Indian reservations.

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 Engrossed Second Substitute Bill: 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:

- cities with at least 10,000 residents where members of a single protected class are at least 10 percent of the voting age population;
- counties with at least 50,000 residents where members of a single protected class are at least 10 percent of the voting age population;
- port districts where members of a single protected class are at least 10 percent of the population;
- school districts with at least 2000 students;
- 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; 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 Thurston County 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 fifth year, the Secretary of State, in conjunction with the Attorney General, the Office of Financial Management, and other relevant agencies, must notify qualifying jurisdictions that they are subject to the preclearance requirements.

Preclearance requirements sunset on June 30, 2029.

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 and precinct 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 under section 203 of the VRA every five years.

County Commissions. Counties may explicitly expand commissions from three to five members to remedy a potential WVRA violation.

Appropriation: None.

Fiscal Note: Available.

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

Effective Date: The bill contains several effective dates. Please refer to the bill.

Staff Summary of Public Testimony on Original Bill (State Government & Elections):
The committee recommended a different version of the bill than what was heard. 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 (State Government & Elections): 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 (State Government & Elections): No one.

Staff Summary of Public Testimony on First Substitute (Ways & Means): *The committee recommended a different version of the bill than what was heard.* PRO: We urge you to pass this bill. Not only does it strengthen voting rights for Washingtonians, it helps localities avoid potentially costly litigation. The process will help prevent new changes that have starkly, often unintentionally, been discriminatory. We have worked hard in response to local government concerns. We are providing more time to act on a notice in the violation. Washington has an opportunity lead the nation in protecting this fundamental right to vote. The bill is before you because the 2020 census has been provided to local governments and jurisdictions will be using that data to make changes to their electoral systems. The bill will provide assurance to local governments that their actions are lawful and in compliance with the Washington and federal voting rights acts. It has common sense updates to avoid lawsuits. It only applies if a jurisdiction proposes changes to its practices. We believe the preclearance process is a critical tool to ensure changes to electoral systems are transparent and fair. The right to vote is under attack in all 50 states. We are in strong support of this legislation and Washington State can be a leader and a model for everyone. Disadvantaged populations are spread out throughout Washington State. We understand the concerns of cities and counties, but echo there is a fundamental right to vote. Laws are being passed to encourage voter disenfranchisement and most of the time the people being impacted look like me. This is a great bill.

OTHER: Preclearance did not exist in prior law and we expect new costs at the county level to implement this bill. Counties are uncertain about the frequency of preclearance and think it should be tied to actual violations. Even if you obtain preclearance, a counties can still be sued and remediation can be used against you. These concerns should be addressed. Cities share many of the counties' concerns. Cities are supportive of preventing any type of dilution and very supportive of protecting everyone's right to vote. Once in preclearance, there is no timelines or metrics to get out. The notice period to a city is insufficient to prevent a lawsuit. Litigants only need to show that they altered behavior to receive attorney fees, not a judgment or bad action.

Persons Testifying (Ways & Means): PRO: Breanne Schuster, ACLU of Washington; Alex Hur, OneAmerica; Paula Sardinas, WA Build-Back Black Alliance (WBBA).

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

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.