

BILL REQ. #: H-3465.2

 HOUSE BILL 2612

State of Washington

62nd Legislature

2012 Regular Session

By Representatives Kenney, Hunt, Appleton, Hasegawa, Reykdal, Moscoso, Ladenburg, Ryu, Jinkins, Upthegrove, Pettigrew, Ormsby, McCoy, Roberts, and Hudgins

Read first time 01/18/12. Referred to Committee on State Government & Tribal Affairs.

AN ACT Relating to the Washington **voting rights act**; and adding a new chapter to Title 29A RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1** This act may be known and cited as the Washington **voting rights act** of 2012.

NEW SECTION. **Sec. 2** The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "At-large method of election" means any of the following methods of electing members of the governing body of a political subdivision:

(a) One in which the voters of the entire jurisdiction elect the members to the governing body;

(b) One in which the candidates are required to reside within given areas of the jurisdiction and the voters of the entire jurisdiction elect the members to the governing body; or

(c) One which combines at-large elections with district-based elections.

(2) "District-based elections" means a method of electing members to the governing body of a political subdivision in which the candidate must reside within an election district that is a divisible part of the political subdivision and is elected only by voters residing within that election district. District-based elections shall include elections where only one official is elected in a district-based election district and shall include the election districts within existing boundaries of a city, a school district, or other district organized pursuant to state, county, or local law.

(3) "Political subdivision" means a geographic area of representation created for the provision of government services including, but not limited to, a state, a county, a city, a school district, or other district organized pursuant to state law.

(4) "Protected class" means a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal **voting rights act** 42 U.S.C. Sec. 1973 et seq.

(5) "Racially polarized voting" means **voting** in which there is a difference, as defined in case law regarding enforcement of the federal **voting rights act**, 42 U.S.C. Sec. 1973 et seq., in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate. The methodologies for estimating group **voting** behavior as approved in applicable federal cases to enforce the federal **voting rights act**, 42 U.S.C. Sec. 1973 et seq., to establish racially polarized **voting** or other evidence and methodologies which a court finds relevant and admissible may be used for purposes of this section to prove that elections are characterized by racially polarized **voting**.

NEW SECTION. Sec. 3 (1) At-large elections and district-based elections may not be drawn or maintained in a manner that denies an equal opportunity of a protected class to elect candidates of its choice or an equal opportunity to influence the outcome of an election, as a result of the vote dilution of voters who are members of a protected class.

(2) An at-large election district or a district-based election district is dilutive, and in violation of this section, when it is shown that:

(a) A political subdivision utilizes an at-large or district-based election district;

(b) The elections in the political subdivision are racially polarized;

(c) The racially polarized **voting** in the political subdivision results in vote dilution where the protected class members do not have an equal opportunity to elect candidates of their choice or an equal opportunity to influence the outcome of an election; and

(d) A remedy exists that will provide members of the protected class with an equal opportunity to elect candidates of their choice or an equal opportunity to influence the outcome of an election. Such a remedy will not adversely affect or diminish the impact of those district-based election districts that are protected by the federal **voting rights act**, 42 U.S.C. Sec. 1973, et seq.

(3) The fact that members of a protected class are not geographically compact or concentrated to constitute a numerical majority in a proposed district-based election district shall not preclude a finding of racially polarized **voting** that results in vote dilution.

(4) Racially polarized **voting** that results in vote dilution is shown by demonstrating that there is a difference in **voting** preferences between members of a protected class and the rest of the electorate. Such a difference in **voting** preferences may be demonstrated by the methodologies specified in section 2(5) of this **act** or other evidence and methodologies that a court finds relevant and admissible.

(5) In determining whether there is racially polarized **voting** that results in vote dilution under this section, elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision shall be analyzed. Only elections conducted prior to the filing of an action pursuant to this chapter shall be used to establish or rebut the existence of racially polarized **voting** that results in vote dilution.

(6) The occurrence of racially polarized **voting** that results in vote dilution will be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the **rights** and privileges of members of a protected class who are voters of the political subdivision which is the subject of an action filed pursuant to this chapter.

(7) The election of candidates who are members of a protected class and who are preferred by voters of the protected class and who were elected prior to the filing of this action pursuant to this chapter, as determined by an analysis of **voting** behavior, shall not preclude a finding of racially polarized **voting** that results in vote dilution.

(8) Members of different protected classes may file an action jointly pursuant to this chapter if they demonstrate that their combined **voting** preferences as a group are different from the rest of the electorate and demonstrate that there is racially polarized **voting** that results in vote dilution consistent with the standards established in this section.

(9) In an action filed pursuant to this section, ninety days after the defendant or defendants file an answer, the plaintiff shall disclose to the other parties the identity of any expert witness retained to testify regarding the existence of racially polarized **voting** that results in vote dilution in elections occurring within the political subdivision that is the subject of the action. This time period may be adjusted by the court for good cause.

(10) Ninety days after the defendant or defendants have been served with the identity and written report of the expert witness retained by the plaintiff or plaintiffs, the defendant or defendants shall disclose to the plaintiffs the identity of any expert witness retained to testify regarding the existence of racially polarized **voting**.

(11) Disclosure and written reports shall not be required for an expert that is retained as a nontestifying consultant.

(12) The fact that members of a protected class are not geographically compact or concentrated to constitute a majority within an existing district-based election may not preclude a finding of racially polarized **voting** that results in vote dilution.

(13) Proof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required.

(14) For purposes of any applicable statute of limitations, a cause of action under this section arises every time there is an election pursuant to an at-large method of election or a district-based election district that is the subject of an action pursuant to this section.

(15) A plaintiff initiating an action under this section shall not be required to disclose pursuant to any discovery request or judicial proceeding under this section whether the plaintiff voted in favor of a candidate or did not vote in favor of a candidate. A plaintiff initiating an action under this section shall not be required to disclose pursuant to any discovery request or proceeding under this section whether the plaintiff voted in favor or in opposition of any state propositions and referenda, state initiatives, local measures and referenda, or local initiatives. The plaintiff's right to the secrecy of the plaintiff's vote is preserved and is not waived by the filing of an action pursuant to this section.

(16) In seeking a temporary restraining order or a preliminary injunction a plaintiff shall not be required to post a bond or any other security in order to secure such equitable relief.

(17) An action filed pursuant to this section is a suit based in equity. As a suit in equity, there is no right to trial by jury.

NEW SECTION. Sec. 4 (1) Upon a finding of a violation of section 3 of this **act**, the court shall implement appropriate remedies, including the imposition of a district-based election district that is tailored to remedy the violation. The court may direct the affected jurisdiction to draw or redraw district boundaries or appoint an individual or panel to draw or redraw district lines.

(2) In tailoring a remedy consisting of district-based elections, the court shall implement a district-based election district that is geographically compact. The fact that members of a protected class do not constitute a numerical majority within a proposed district-based election district shall not preclude the implementation of such a district-based election district. In tailoring a remedy, the court shall order the implementation of a district-based election district where the members of the protected class are not a numerical majority in order to provide the protected class an equal opportunity to elect candidates of their choice or an equal opportunity to influence the outcome of an election.

(3) In tailoring a remedy after a finding of a violation of section 3 of this **act**, the court shall order new elections to be scheduled at the next date authorized by state law for conducting elections. All of the positions that were elected pursuant to the at-large or district-based election district that was the subject of the action filed pursuant to this chapter and have at least two years remaining in their terms of office shall be subject to new elections in order to continue their term of office.

NEW SECTION. Sec. 5 (1) In any action to enforce this chapter, the court shall allow the prevailing plaintiff, other than the state or political subdivision thereof, reasonable attorneys' fees and a fees multiplier that takes into account the contingency, the novelty and complexity of the filed action, and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs.

(2) Prevailing defendants shall not recover any award of attorneys' fees.

(3) Prevailing defendants shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

(4) A fees multiplier is determined by the court by multiplying a numerical value and the fees lodestar. The fees lodestar is determined by multiplying the number of reasonable hours expended by an attorney or support personnel, such as law clerks, paralegals, and legal assistants in the action filed pursuant to this chapter, times a reasonable hourly rate that is consistent with the rates charged by attorneys and firms located within a city or an area where the attorneys and firms filing the action are located.

(5) A prevailing plaintiff shall not be required to first notify a political subdivision prior to the filing of an action pursuant to this chapter that such an action will be filed against the political subdivision in

order for a prevailing plaintiff to be awarded reasonable attorneys' fees, a fees multiplier, and costs pursuant to this section.

(6) A plaintiff shall be deemed to be a prevailing party for purposes of this section if the political subdivision which is the subject of an action filed pursuant to this chapter adopts or implements a district-based election district after the action is filed that is different from the district-based election district that is the subject of the action filed.

(7) A prevailing plaintiff shall recover, as part of reasonable attorneys' fees and fees multiplier award, work performed in any ancillary administrative, legislative, or citizen redistricting commission proceeding where the prevailing plaintiff party sought to secure a district-based election district that was different from the district-based election district ultimately adopted by a governing body or a citizen's redistricting commission and that was ultimately declared by a court to be in violation of section 3 of this **act** in an action filed by the prevailing plaintiff.

NEW SECTION. Sec. 6 Any voter who is a member of a protected class and who resides in a political subdivision where a violation of section 3 of this **act** is alleged may file an action in the superior court of the county in which the political subdivision is located. If the action is against a county, the action may be filed in the superior court of such county, or in the superior court of either of the two nearest judicial districts as determined pursuant to RCW 36.01.050(2). There is no requirement that an action filed pursuant to this chapter be filed as a class action.

NEW SECTION. Sec. 7 Sections 1 through 6 of this **act** constitute a new chapter in Title 29A RCW.

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HOUSE BILL REPORT

HB 2612

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.

As Reported by House Committee On:
State Government & Tribal Affairs

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

Brief Description: Enacting the Washington voting rights act of 2012.

Sponsors: Representatives Kenney, Hunt, Appleton, Hasegawa, Reykdal, Moscoso, Ladenburg, Ryu, Jinkins, Upthegrove, Pettigrew, Ormsby, McCoy, Roberts and Hudgins.

Brief History:

Committee Activity:

State Government & Tribal Affairs: 1/26/12, 1/30/12 [DP].

Brief Summary of Bill

- Enacts the Washington **Voting Rights Act** of 2012.
- Prohibits at-large elections and district-based elections that are drawn or maintained in a manner that denies an equal opportunity for a protected class to elect candidates of its choice or an equal opportunity to influence the outcome of an election as a result of the vote dilution of voters who are members of a protected class.
- Establishes procedures for filing suit and remedies for violation.

HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL AFFAIRS

Majority Report: Do pass. Signed by 6 members: Representatives Hunt, Chair; Appleton, Vice Chair; Darneille, Dunshee, McCoy and Miloscia.

Minority Report: Do not pass. Signed by 5 members: Representatives Taylor, Ranking Minority Member; Overstreet, Assistant Ranking Minority Member; Alexander, Condotta and Hurst.

Staff: Cece Clynch (786-7195).

Background:

Federal Voting Rights Act.

The **Voting Rights Act** of 1965 (VRA) prohibits discrimination in elections. The VRA contains several sections, some of which impact all states and localities and some which do not. For instance,

finding of racially polarized **voting** that results in vote dilution. Racially polarized **voting** that results in vote dilution is shown by demonstrating that there is a difference in **voting** preferences between members of a protected class and the rest of the electorate. The occurrence of racially polarized **voting** that results in vote dilution may be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the **rights** and **privileges** of members of a protected class who are voters of the political subdivision which is the subject of an action filed.

Proof of an intent on the part of voters or elected officials to discriminate against a protected class is not required.

Upon a finding a violation, a court must implement appropriate remedies, including the imposition of a district-based election district that is tailored to remedy the violation, but it must be geographically compact. The court may direct the affected jurisdiction to draw or redraw district boundaries, or appoint an individual or panel to draw or redraw district lines. In tailoring a remedy after a finding of a violation of the WVRA, the court must order new elections to be scheduled at the next date authorized by state law for conducting elections. All of the positions that were elected pursuant to the at-large or district-based election that was the subject of the action and have at least two years remaining in their terms of office must be subject to new elections in order to continue their term in office.

Prevailing plaintiffs, but not defendants, are entitled to recover attorneys' fees, as well as a fees multiplier. Plaintiffs are also entitled to recover attorneys' fees and fees multiplier awarded for work performed in any ancillary administrative, legislative, or citizen redistricting commission proceeding where the prevailing plaintiff sought to secure a district-based election district that was different from the one adopted and that was ultimately declared by a court to violate the WVRA. Prevailing defendants may recover costs, but only if the action is frivolous, unreasonable, or without foundation.

There is no prior claim filing requirement, nor is the plaintiff required to file a bond. A cause of action arises every time there is an election. There is no right to a jury trial. An action is to be filed in the superior court of the county where the political subdivision is located, except if the action is against a county, in which case it may be filed in either of the two nearest counties.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The state needs this bill. There have been significant population changes in this state. Without the growth in Latino and Asian populations, Washington would not have gotten the new tenth district. There are seven counties with more than a 20 percent Latino population. There are two with over a 50 percent Latino population. The term "racially polarized **voting**" refers to outcomes; it does not describe the motives of voters. Different patterns in **voting** can be easily shown. In order to prevail in a suit brought under the WVRA, this must be coupled with an election system that dilutes the ability of one group to elect candidates they prefer. One example that might illustrate this issue is to imagine that Washington was divided, as it is now, into legislative districts and that the candidates for a legislative district had to live within that district, but that, rather than be a district-based election system in which only voters in that legislative district could vote, the population of the entire state got to vote for the office-holder for each legislative district. It is probable that the people of King County would determine the outcome of every single election. Racially polarized **voting** is a standard used under the federal VRA. An at-large election district is not automatically violative.

There would have to be a lawsuit filed under the WVRA, the plaintiff would have to prove there was racially polarized **voting** that was dilutive, and only then would the remedies be available.

OneAmerica has registered more than 25,000 new Americans to vote. People need to know that their votes count, and if they do not believe that, they do not participate. Representative democracy only works if people participate. It is possible to analyze **voting** to determine if there is racially polarized **voting** by analyzing those races in which there are quality candidates, because it is to be expected that quality candidates will win some elections. The City of Yakima is 45 percent Latino, but no Latinos have ever been elected to the City Council. Recently, a Latina was appointed to fill a vacancy on the City Council. Despite the fact that she was the incumbent, very qualified, the local newspaper spoke highly of her, and meanwhile her opponent had bad publicity, she lost the election by 5 percent when ordinarily an incumbent wins by 15 percent. People need to know that their votes matter. There is a need to promote representativeness. With this bill voters can move their governments to change to district-based elections. In analyzing **voting**, the voters' motives are unknown. The analysis is done by looking at data. It is time to restore democracy and local control. The current numbers paint a grim picture. This does not criminalize at-large election systems. Rather, there must be proof that there is racially polarized **voting** and that an at-large system prevents the minority candidate from winning.

(Information only) There have been studies done in eastern Washington that have shown that Latino candidates lose due to racially polarized **voting**. This is a statewide issue. Ninety-nine percent of elections in Washington are at-large. Latinos are dramatically under-represented in every office and in every place analyzed across 10 counties in eastern Washington. While there is a federal VRA, it is costly for plaintiffs and this discourages suits. The WVRA will enable the use of state courts. In most cases, state law prevents a fix because the current RCWs limit the ability of political subdivisions to employ a district-based election. Many of the RCWs require at-large election systems. There is almost a complete lack of Latino representation in eastern Washington. It stands at 6 percent if one includes Yakima County, and only 2 percent if Yakima County is excluded. If district-based elections were adopted all across the state, there would be more Latino representation.

(Opposed) None.

Persons Testifying: (In support) Representative Kenney, prime sponsor; Matt Barreto, University of Washington; Pramila Jayapal, Jaszmin Santa Cruz; Toby Guevin, OneAmerica; Kim Abel, League of Women Voters of Washington; and David Perez, Korematsu Center of Seattle University.

(Information only) Paul Apostolidis, Seth Dawson, and Zach Duffy, Whitman College.

Persons Signed In To Testify But Not Testifying: None.