

BILL REQ. #: S-3964.1

 SENATE BILL 6381

State of Washington

62nd Legislature

2012 Regular Session

By Senators Prentice, Pridemore, Nelson, Chase, Murray, Conway, Kline, Harper, Keiser, and McAuliffe

Read first time 01/19/12. Referred to Committee on Government Operations, Tribal Relations & Elections.

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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SENATE BILL REPORT

SB 6381

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 Senate Committee On:
Government Operations, Tribal Relations & Elections, February 2, 2012

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

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

Sponsors: Senators Prentice, Pridemore, Nelson, Chase, Murray, Conway, Kline, Harper, Keiser and McAuliffe.

Brief History:

Committee Activity: Government Operations, Tribal Relations & Elections: 1/24/12, 2/02/12 [DPS, DNP, w/oRec].

SENATE COMMITTEE ON GOVERNMENT OPERATIONS, TRIBAL RELATIONS & ELECTIONS

Majority Report: That Substitute Senate Bill No. 6381 be substituted therefor, and the substitute bill do pass.

Signed by Senators Pridemore, Chair; Prentice, Vice Chair; Chase and Nelson.

Minority Report: Do not pass.

Signed by Senator Swecker, Ranking Minority Member.

Minority Report: That it be referred without recommendation.

Signed by Senator Benton.

Staff: Sharon Swanson (786-7447)

Background: The Voting Rights Act of 1965 was enacted by Congress in 1965. The act was passed to enforce the fifteenth amendment of the United States Constitution to prohibit states from imposing any voting qualifications or prerequisite to voting, or standard, practice, or procedure to deny or abridge the right of any citizen of the United States to vote on account of race or color. The act was extended in 1970, 1975, 1982, and 2006.

Summary of Bill (Recommended Substitute): 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.

An at-large election district or a district-based election district is dilutive, and in violation of the act when it is show that:

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

- the elections in the political subdivisions are racially polarized;
- 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
- a remedy exists that provides 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.

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 must not preclude a 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 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.

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

Upon a finding of a violation of the **Voting Rights Act** of 2012, a court must 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. In tailoring a remedy after a finding of a violation of the **act**, 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 district election district 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.

An at-large method of election means any of the following methods of electing members of the governing body of a political subdivision:

- one in which the voters of the entire jurisdiction elected the members to the governing body;
- one in which the candidates must reside within given areas of the jurisdiction and the voters of the entire jurisdiction elect the members of the governing body; or
- one which combines at-large elections with district-based elections.

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.

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 etc seq.

EFFECT OF CHANGES MADE BY GOVERNMENT OPERATIONS, TRIBAL RELATIONS & ELECTIONS COMMITTEE (Recommended Substitute): The definition of political subdivision is amended to remove a reference to the state. The definition of racially polarized **voting** is amended to remove a reference to federal case law. Various other grammatical and technical changes are made.

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 on Original Bill: PRO: Minorities in Washington are not equally or fairly represented in elections because of racially polarized **voting**. At-large elections polarize minority voters. Yakima County is 44 percent Latino in population but 0 percent of countywide representatives are Latino. The remedy for this disproportionate outcome is district based elections. Local control is the solution. The federal **voting rights act** is too costly and time consuming to pursue. Washington needs to enact the **voting rights act** at a state level. Minority candidates have shown time and again that they cannot get elected through the at large election system.

OTHER: The fee shifting aspect of this bill is the most one sided and onerous I have ever seen. State and local governments carry all the cost burden. Not only does the government entity pay attorney's fees, the government must also pay the costs for the expert witnesses and administrative costs of the plaintiffs. The government, even if they win the suit, cannot recover their own costs. Under the bill, even if candidates who are members of protected classes get elected, this is not a defense to a charge of racially polarized **voting** or vote dilution. The state is already covered by the **voting rights act** " why do we need this legislation?

Persons Testifying: PRO: Matt Baretto, University of Washington; Paul Apostolidis, Seth Dawson, Zach Duffy, Whitman College; David Perez, Seattle University School of Law; Cherry Cayabyab, Asian Pacific Americans for Civic Empowerment; Fe Lopez, Latino/Latina Bar Association; Pat Dickason, League of Women Voters; Toby Guevin, One America; Tom Hilyard, Black Collective.

OTHER: Jeffrey Even, Attorney General's office.

