



February 25, 2022

Washington House of Representatives
House Appropriations Committee
P.O. Box 40600
Olympia, WA 98504-0600

Electronic Submission

Re: Fiscal Impact of SB 5597 – Washington Voting Rights Act

Dear Members of the Committee,

On behalf of Campaign Legal Center (“CLC”), we are pleased to offer this testimony in support of SB 5597, which amends the Washington Voting Rights Act (“WVRA”).

CLC is a nonpartisan, nonprofit organization dedicated to advancing democracy through law. Through its extensive work on redistricting and voting rights, CLC seeks to ensure that every United States resident receives fair representation at the federal, state, and local levels. As such, CLC has supported the passage of state-level voting rights acts throughout the nation. In the State of Washington, CLC represented Latino community members in Yakima County in the first ever suit filed under the WVRA, which successfully settled last year.¹

The preclearance provisions in SB 5597 reflect an innovative, localized solution to combatting voting practices which deprive voters the equal opportunity to elect candidates of choice in local jurisdictions throughout Washington state. At the federal level, preclearance under the federal Voting Rights Act prevented hundreds of thousands of discriminatory voting practices from going into effect. In SB 5597, the preclearance coverage formula intends to cover jurisdictions which have a history of racial discrimination at the local level, and combat voting practices which pose a unique threat to the equal opportunity to participate in Washington. As Congress, thousands of federal courts, and the U.S. Supreme Court have recognized, the extent to which racial minority groups continue to bear the effects of racial discrimination impairs the ability of that group to participate in the political process. By considering

¹ *Aguilar v. Yakima County.*, No. 20-2.0018019, Sup. Ct. of Wash. for Kittitas Cty. (filed 13 July, 2022).

the manners of racial discrimination facing Washington voters, the preclearance provisions are tailored to the specific needs of the state.

As a general matter, CLC urges the Legislature to enact SB 5597. Today we write specifically to clarify the fiscal impact of the bill's preclearance provisions (Section 9), and to challenge the cost estimates and assumptions in the bill's current fiscal note.² As we discuss below, the bill helps covered local jurisdictions avoid the substantial cost of defending against WVRA and federal Voting Rights Act lawsuits by ensuring compliance with the WVRA through an efficient, low-cost administrative preclearance process. In addition, the current fiscal note vastly overestimates the anticipated cost of administering preclearance. Indeed, preclearance is a low-cost way to ensure all Washingtonians have an equal opportunity to participate in the political process.

i. Preclearance reduces the need for costly litigation to remedy voting rights violations.

Litigating cases to remedy discriminatory election systems can be costly. Such cases entail expensive expert testimony, extensive discovery periods, and long trials. When local governments decide to defend discriminatory voting practices and ultimately lose in court, taxpayers are left to foot the bill for potentially millions of dollars in attorneys' fees and costs, particularly in cases brought under the federal Voting Rights Act ("VRA").³

The existing provisions of the WVRA already serve to reduce the cost of litigation, by requiring voters and jurisdictions to negotiate in good faith to determine a remedy for a potential violation before a lawsuit can be filed, and by streamlining the standard of liability under the Act, requiring voters to expend fewer resources to demonstrate that a jurisdiction is in violation of the Act than they would under the federal VRA.

SB 5597's preclearance process would even further reduce these costs for covered jurisdictions. Preclearance would require covered jurisdictions to submit certain proposed changes to their election systems and district boundaries to the Attorney General or the Thurston County Superior Court for review to ensure compliance with the WVRA *before* the changes go into effect. This low-cost administrative process would ensure that a covered jurisdiction does not enact a change that would violate the WVRA and thus saves taxpayers the far greater cost of lawsuits brought by private plaintiffs to challenge that change in court. In other words, preclearance provides covered jurisdictions and their voters the benefit of a

² See generally, SB 5597, Multiple Agency Fiscal Note Summary (Feb. 17, 2022), <https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=64901>.

³ See, e.g., NAACP, Spring Valley Branch v. East Ramapo Central School District, No. 17-cv-8934, ECF No. 710 (S.D.N.Y. 2021) (awarding a total of \$5,446,139.99 in fees and costs to prevailing plaintiffs for vote dilution case under federal Voting Rights Act); Montes v. City of Yakima, No. 12-CV-3108-TOR, ECF 186 (E.D.Wa. June 19, 2015) (awarding a total of \$1,521,911.50 in fees and \$320,461.26 in costs to prevailing plaintiffs for vote dilution case under federal Voting Rights Act); Yumori Kaku v. City of Santa Clara, No.17CV319862 (Ca. Sup. Ct. Jan. 22, 2019).

free compliance check by the Attorney General or the courts to ensure that proposed changes to election systems do not have the purpose or effect of denying voters the equal opportunity to participate in the political process.

By way of comparison, the Virginia Voting Rights Act—the first state to implement a preclearance formula—did not estimate a fiscal impact for the Virginia Attorney General, even though the Act designates the Office of the Attorney General as the primary enforcing agency for the preclearance provision.⁴ Since its passage, there has been no evidence that the preclearance provisions of the Virginia Voting Rights Act—which covers substantially more jurisdictions and practices—has had a significant fiscal impact.

ii. Preclearance will not impose a substantial cost burden on the state.

Although preclearance will place new responsibilities on the Office of the Attorney General to evaluate submissions by covered jurisdictions, the burden, and therefore the cost, will not be nearly as high as the fiscal note appears to anticipate. Specifically, the Office of the Attorney General anticipates hiring 23 new full-time employees, initiating 41 actions to compel covered jurisdictions to undergo preclearance for a covered action, and defending one-fourth of its preclearance actions in superior court between fiscal year 2022-2027.⁵

The Attorney General’s cost estimates are vastly overstated. Its assumptions as to the number of covered jurisdictions and covered practices it will likely have to review each year are inflated. The preclearance system proposed in the revised SB 5597 is in fact narrow in scope in terms of covered practices and covered jurisdictions, which should result in a far smaller fiscal impact. In addition, preclearance review can be streamlined so that jurisdictions have clear guidance, and the enforcing agency can efficiently make determinations. Finally, the vast majority of jurisdictions will likely seek preclearance through the administrative process instead of superior court, reducing the cost of litigation for both the covered jurisdiction and the Attorney General.

The United States Department of Justice’s (“DOJ”) administration of the preclearance formula under the federal Voting Rights Act (“VRA”) is informative. From 1965 to 2013, DOJ precleared hundreds of thousands of voting practices across 15 states (and the thousands of jurisdictions comprising those states), as well as dozens of individual jurisdictions.⁶ The vast majority of covered jurisdictions sought

⁴ SB 1395, 2021 Special Session I Fiscal Impact Statement (Feb. 17, 2021), <https://lis.virginia.gov/cgi-bin/legp604.exe?212+oth+SB1395FER122+PDF>.

⁵ SB 5597, Multiple Agency Fiscal Note Summary at 11-12 (Feb. 17, 2022), <https://fnspublic.ofm.va.gov/FNSPublicSearch/GetPDF?packageID=64901>.

⁶ See DEPT. OF JUSTICE, *Jurisdictions Previously Covered by Section 5* (Nov. 29, 2021), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> (listing jurisdictions covered at the time of the *Shelby County* decision); DEPT. OF JUSTICE, *Section 4 of the Voting Rights Act* (May 5, 2020), https://www.justice.gov/crt/section-4-voting-rights-act#bailout_list (listing jurisdictions previously covered by preclearance who were able to terminate their coverage).

preclearance through DOJ; less than 1 percent of covered jurisdictions sought preclearance in federal court.⁷ The VRA covered any change to any voting practice within a covered jurisdiction. Importantly, DOJ was able to minimize the fiscal impact of preclearance for both the covered jurisdiction and the department by developing a streamlined process for submissions over the nearly 50-year period that federal preclearance operated.

The experience of DOJ in administering preclearance can inform the administration of preclearance under the WVRA, thereby reducing the fiscal impact. Several factors should be considered with respect to the administrative burden of preclearance:

1. *The scope of covered practices under SB 5597.*

The preclearance provisions in SB 5597 are limited to practices that pose a particular risk of racial discrimination in voting in Washington. Specifically, SB 5597 limits the practices subject to preclearance to changes to methods of elections, redistricting changes, changes to bilingual language services, and changes to a jurisdiction's plan of government.⁸

It is difficult to estimate the number of preclearance submissions that will occur every year across Washington jurisdictions, in part because Washington had never been subject to federal preclearance under the Voting Rights Act. We do know, however, that the scope of covered practices is so narrow that the state should not expect submissions from every covered jurisdiction every single year. This is especially true because many of the covered practices—especially changes to redistricting, methods of elections, and plan of government—only occur every several years.

The current fiscal note anticipates a total of 365 preclearance actions per year in Washington.⁹ However, the fiscal note estimates that one-third of those actions will account for changes to drop boxes, which are no longer included as a covered practice. And, the fiscal note does not account for the fact that most of the covered practices—redistricting, form of government, and method of election changes—do not occur every year. As such, the expected number of preclearance-required voting changes should be substantially less than 365 per year.

The scope of covered practices under the WVRA is far more limited than the practices covered by the prior preclearance regime under the federal VRA. The federal VRA covered virtually every conceivable act with respect to voting, but DOJ divided these practices into several categories: redistricting, annexation, polling places, precincts, voter purges, incorporation, bilingual procedures, methods of elections, form of government, consolidation of political units, special election, voting methods,

⁷ *Oversight of the Voting Rights Act: Potential Legislative Reforms Before the Subcomm. On the Constitution, Civil Rights Act, and Civil Liberties of the H. Comm. on the Judiciary*, 117th Cong. 5 (statement of Kristen Clarke, Assistant Attorney General, U.S. Department of Justice), <https://www.justice.gov/file/1425226/download>.

⁸ Section 9(1)(b), SB 5597 (Wash. 2022).

⁹ SB 5597, Multiple Agency Fiscal Note Summary at 3 (Feb. 17, 2022), <https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=64901>.

candidate qualifications, voter registration procedures, and other practices.¹⁰ This totaled approximately 556,268 actions between 1965 and 2013.¹¹ But, among those changes, only 7 percent of all actions (40,691 actions) represented the types of changes that would need preclearance under the WVRA—including changes to a method of election, form of government, redistricting, or bilingual election procedure. Again, DOJ hired 30-40 attorneys for voting rights actions. Even if every DOJ attorney handled preclearance actions (they did not), 7 percent of all actions would only comprise 2-3 attorneys.

In other words, the covered practices contemplated by the WVRA represent a significantly smaller scope of voting practices overall, which should be reflected in the number of annual submissions. The WVRA is appropriately limited in scope based on the covered practices of concern in Washington and should reflect a drastically less burdensome administrative process compared to other preclearance systems.

2. *The scope of jurisdictions covered by the SB 5597.*

SB 5597 covers all Washington counties, cities, and school districts that satisfy one or more specified criteria.¹² These criteria narrow the list of covered jurisdictions to include only those jurisdictions with a history of racial discrimination or large racial disparities in health, education, and employment that impair the ability protected classes to participate equally in the political process.¹³ As a result, among the 39 counties, 281 cities, and 295 school districts in the state, only a fraction of these jurisdictions will be subject to preclearance. This reflects a narrow tailoring of jurisdictions, significantly decreasing the scope of work compared to the number of jurisdictions previously anticipated in earlier versions of the bill.

The most recent fiscal note anticipates 271 covered jurisdictions, including 22 counties, 80 cities, 60 port districts, and 109 school districts.¹⁴ Based on that estimate, the fiscal note anticipates 365 preclearance actions every year. This is a significant overestimate. First, the revised version of SB 5597 does not include port districts.¹⁵ Furthermore, the revised formula should only include 12 counties, as well as the school districts “with a difference of at least 10 percent between the graduation rates

¹⁰ See DEPT. OF JUSTICE, *Total Section 5 Changes Received By The Attorney General 1965 Through 2013* (updated August 6, 2015), <https://www.justice.gov/crt/section-5-changes-type-and-year-2>.

¹¹ Section 9(b), SB 5597 (Wash. 2022).

¹² Section 9(1)(a), SB 5597 (Wash. 2022).

¹³ See *Thornburg v. Gingles*, 478 U.S. 30, 64 (1986) (recognizing that “share[d] socioeconomic characteristics, such as income level, employment status, amount of education, housing and other living conditions, religion, language,” impair a racial minority’s ability to participate in the political process).

¹⁴ SB 5597, Multiple Agency Fiscal Note Summary at 11 (Feb. 17, 2022), <https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=64901>.

¹⁵ Section 9(1)(a), SB 5597 (Wash. 2022) (with striker). Based on Section 9(i)(C), which covers counties based on the disparity in education attainment within the county, we estimate that the following counties would be subject to preclearance: Adams, Benton, Chelan, Douglas, Franklin, Klickitat, Lewis, Okanogan, Pierce, Walla Walla, Whitman, and Yakima.

of students of any protected class and the district as a whole.”¹⁶ This represents a significantly lower number of jurisdictions than currently estimated. Even if the number of school districts and cities did not change, the estimated number of covered jurisdictions would still be reduced to 201 jurisdictions. By way of comparison, DOJ covered 864 counties across 15 states, and thousands of local subdivisions.¹⁷

But that estimate is conservative, as the new formula reduces substantially the scope of covered cities and school districts. Again, the number of covered practices *and* covered jurisdictions has decreased since SB 5597 has been revised, and port districts are no longer included. As stated *supra* Part 1, the fiscal note estimates that one-third of the submissions included changes in drop boxes, which is no longer a covered practice under the revised bill. And, federal preclearance covered thousands of local jurisdictions in addition to the 9 states and 864 counties it covered.

Therefore, we estimate that the number of covered jurisdictions is substantially lower than estimated in the fiscal note.

3. *The burden on the Attorney General to determine whether the covered jurisdictions satisfy the requirements for preclearance under SB 5597.*

By requiring the covered jurisdiction to submit a covered practice for preclearance, SB 5597 places on the covered jurisdiction the burden of proving that the covered practice meets the standard for preclearance.¹⁸ The superior court or the Attorney General, then, must determine whether the submission by the local jurisdiction has met the standard for preclearance; that is, whether the local jurisdiction has shown that the covered practice does not 1) violate the WVRA nor 2) result in the retrogression in the position of members of a racial or ethnic group with respect to their effective exercise of the electoral franchise.¹⁹ The burden-shifting mechanism in SB 5597 should decrease the amount of time needed for full-time attorneys employed by the Office of the Attorney General to act on preclearance decisions.

The cost will also be dependent on the administrative process implemented by the Attorney General; that is, there are means by which preclearance can be administered that would result in a lower fiscal impact. It is likely that the vast majority of local jurisdictions will opt to seek preclearance with the Attorney General to avoid the greater cost of seeking a declaratory judgment in Thurston County Superior Court. Indeed, 99 percent of jurisdictions covered by federal preclearance sought preclearance through DOJ rather than a declaratory judgment in federal court.

¹⁶ Section 9(1)(a)(iii), SB 5597 (Wash. 2022) (with striker).

¹⁷ *Review of the Operations of the Voting Section of the Civil Rights Division* at 81, U.S. Dep’t of Justice Office of the Inspector General (Mar. 2013), <https://oig.justice.gov/reports/2013/s1303.pdf>.

¹⁸ Section 9(2)(a), SB 5597 (Wash. 2022) (requiring the covered jurisdiction to submit the covered practice for preclearance); Section 9(2)(b), SB 5597 (Wash. 2022) (requiring that the covered practice submitted by the jurisdiction may only be precleared if the covered practice does not violate the WVRA and does not result in retrogression).

¹⁹ *See* Section 9, SB 5597 (Wash. 2022).

This is far fewer than estimated in the fiscal note, which anticipates that ten percent of jurisdictions will seek preclearance in Thurston County Superior Court.

DOJ developed a process by which preclearance submissions could be made by mail, fax, or online, and provided a form process that jurisdictions used to make the submissions.²⁰ Submissions could be brief and did not require the expertise of an attorney to submit to DOJ.²¹ Though DOJ received thousands of submissions, the department only required some of the approximately 40 lawyers regularly employed by DOJ's Voting Rights Section to undertake the preclearance process.²²

By developing a streamlined process, DOJ made preclearance time-effective for both the covered jurisdiction and the attorney working on preclearance within DOJ. Indeed, attorneys and election officials who previously handled federal preclearance submissions on behalf of local governments have testified that preclearance was “not a burdensome task. It is a task that is typically a tiny reflection of the work, thought, planning, and effort that had to go into making the change to begin with.”²³ Likewise, DOJ noted that “the overwhelming majority of [preclearance] submissions involve routine changes that are precleared with minimal scrutiny.”²⁴

Relatedly, the deterrent effect of preclearance can reduce the time to preclear submissions and the number of submissions overall, thereby reducing the cost of administration. DOJ has noted that federal preclearance worked efficiently in part because jurisdictions were deterred from making potentially discriminatory voting changes in the first instance, and thus did not propose a change that might receive an objection by DOJ.²⁵ This is reflected in the fact that DOJ ultimately objected to less than one percent of submissions between 1965 and 2013.²⁶ The deterrent effect reduces administrative costs because jurisdictions will self-police their submissions, only proposing to make voting changes that do not violate the WVRA, which reduces the burden for the Attorney General to make determinations or object.

Importantly, several Washington counties and the jurisdictions within those counties are already subject to the language minority provisions of the Voting Rights Act—including Adams, Franklin, King, and Yakima Counties.²⁷ Under the language minority provisions of the Voting Rights Act, those counties are required to provide all election materials and assistance in the language designated by the U.S. Census Bureau to a language minority group within the jurisdiction.²⁸ As such, those jurisdictions, which will also be covered jurisdictions under SB 5597, will already have

²⁰ *Supra*, note 7 at 10.

²¹ *Id.*

²² *Supra*, note 17 at 9, 21.

²³ *Understanding the Benefits and Costs of Section 5 Pre-Clearance Before the S. Comm. on the Judiciary*, 109 Cong. 10 (2006), <https://www.govinfo.gov/content/pkg/CHRG-109shrg29625/pdf/CHRG-109shrg29625.pdf>.

²⁴ *Supra*, note 17 at 81.

²⁵ *Supra*, note 7 at 9.

²⁶ *Supra*, note 17 at 81.

²⁷ 86 FR 69611, 69617 (Dec. 8, 2021).

²⁸ 52 U.S.C.A. § 10503(c).

a record to assist with their respective submission processes, at least with respect to any changes to bilingual election materials.

* * *

In sum, preclearance is a cost-effective way to tackle voting practices which are discriminatory in their purpose or effect, thereby ensuring that all Washington voters have the equal opportunity to elect the candidates of their choice and participate in elections. All things being equal, Washington would only see a fraction of preclearance submissions that the federal government received, and the federal government only employed 30-40 attorneys. Thus, the Office of the Attorney General should only expect an increase by 2-3 attorneys, far fewer than the 23 attorneys estimated in the fiscal note. We urge this committee to reconsider the fiscal impact of preclearance relative to the documented prior experience.

We therefore urge this committee to pass SB 5597.

Respectfully submitted,

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