Date of Hearing: April 29, 2015

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING
Sebastian Ridley-Thomas, Chair
AB 1301 (Jones-Sawyer) – As Introduced February 27, 2015

SUBJECT: Voting rights: preclearance.

SUMMARY: Establishes a state "preclearance" system under which certain political subdivisions are required to get approval from the Secretary of State (SOS) before implementing specified policy changes related to elections. Specifically, **this bill**:

1) Defines the following terms, for the purposes of this bill:

    a) "Citizen voting-age population" to mean the population of citizens who are 18 years of age or older within a political subdivision, as calculated by the United States (U.S.) Census Bureau in the most recent federal decennial census.

    b) "Electoral jurisdiction" to mean a geographic area within which reside the voters who are qualified to vote for an elective office.

    c) "Multilingual voting materials" to mean registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, provided in the language of one or more language minority groups.

    d) "Political subdivision" to mean a geographic area of representation created for the provision of government services, including, but not limited to, a city, a school district, a community college district, or other district organized pursuant to state law.

    e) "Protected class" to mean 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 of 1965 (VRA) (52 U.S.C. Sec. 10101 et seq.).

    f) "Voting locations" to mean places for casting a ballot.

2) Provides that to ensure that the right of citizens who reside in California to vote is not denied or abridged on account of race, color, or language minority status through the enforcement of a voting-related law, regulation, or policy that is enacted or administered after the enactment date of this bill, the following voting-related laws, regulations, and policies are subject to preclearance by the SOS:

    a) A change to an at-large method of election that adds offices elected at-large or converts offices elected by single-member districts to one or more at-large or multimember districts.

    b) A change to the boundaries of an electoral jurisdiction, or a series of changes within a year to the boundaries of an electoral jurisdiction, that reduces the proportion of the citizen voting-age population of a protected class by 5 or more percent.

c) A change through redistricting that alters the boundaries of districts within an electoral jurisdiction in which a protected class has experienced a population increase of at least 25,000 residents or at least 20 percent of the citizen voting-age population of the protected class over the preceding decade, as determined by the five-year estimates of the U.S. Census American Community Survey.

d) A change to voting locations that reduces, consolidates, or relocates one or more voting locations, including an early, absentee, or election-day voting location, and results in a net loss, on a per voter basis, of voting locations in 20 percent of the total number of census tracts in a political subdivision with the highest proportion of voters from a protected class that represents at least 20 percent of the citizen voting-age population in the political subdivision, provided that the net loss is greater than the net loss resulting from the changes in 20 percent of the total number of census tracts in a political subdivision with the highest proportion of voters of any other racial or ethnic group that represents at least 20 percent of the citizen voting-age population in the political subdivision.

e) A change to multilingual voting materials that reduces the voting materials available in languages other than English, or alters the manner in which the materials are provided or distributed, if no similar reduction or alteration occurred in materials provided in English.

3) Provides that if a political subdivision enacts or seeks to administer a voting-related law, regulation, or policy that is subject to preclearance, as described above, and that is different from that in force or effect on the date this bill is enacted, the governing body of the political subdivision shall submit the law, regulation, or policy to the SOS for approval. Provides that the law, regulation, or policy shall not take effect or be administered in the political subdivision until the law, regulation, or policy is approved by the SOS.

a) Requires the SOS to provide a written decision to the governing body of the political subdivision within 60 days of a request to enact or administer a covered voting-related law, regulation, or policy. Provides that if the SOS fails to provide a written decision within 60 days, the governing body of the political subdivision may implement the law, regulation, or policy. Permits the governing body of the political subdivision to make a written request for an expedited review if the political subdivision has a demonstrated need to implement the proposed change before the end of the 60-day review period. Requires the written request to describe the basis for the request in light of conditions in the political subdivision and to specify the date by which a decision is needed. Requires the SOS to attempt to accommodate a reasonable request.

b) Provides that the governing body of the political subdivision shall have the burden of establishing, by objective and compelling evidence, that the law, regulation, or policy satisfies both of the following:

i) Is not likely to result in a discriminatory effect on the participation of voters from a protected class that constitutes at least 20 percent of the political subdivision's citizen voting-age population; and,

ii) Is not motivated in whole or substantially in part by an intent to reduce the participation of voters from a protected class.

c) Provides that if the SOS denies a request to enact or administer a law, regulation, or policy, the governing body of the political subdivision may seek review of the decision by means of an action filed in superior court. Permits the SOS to file suit to enjoin the governing body of a political subdivision from implementing a law, regulation, or policy in violation of this bill. Provides that the venue for such actions shall be the Sacramento County Superior Court.

4) Permits a political subdivision, notwithstanding the preclearance requirements outlined above, to enact or administer a voting-related law, regulation, or policy that is different from that in force or effect on the date this bill is enacted if doing so is necessary because of an unexpected circumstance that occurred during the 30 days immediately preceding an election, in which case the political subdivision is permitted to enact or administer the law, regulation, or policy only for purposes of that election. Requires the political subdivision, after the election, to immediately submit the law, regulation, or policy to the SOS for approval pursuant to this bill.

5) Permits the Attorney General, or a registered voter who resides in a political subdivision where the change to a voting-related law, regulation, or policy occurred, to file an action in superior court to compel the political subdivision to satisfy the requirements of this bill. Provides that in an action brought pursuant to this provision, a court shall provide as a remedy that the voting-related law, regulation, or policy be enjoined unless the court determines that it is not subject to this bill or has been approved by the SOS, as specified.

6) Provides that, for the purposes of this bill, any data provided by the U.S. Census Bureau, whether based on enumeration or statistical sampling, shall not be subject to challenge or review by any court.

7) Prohibits a political subdivision with two or more racial or ethnic groups that each represent at least 20 percent of the citizen voting-age population in the political subdivision from implementing a previously enacted or adopted voting-related law, regulation, or policy, as described above that has not yet been implemented unless it is approved by the SOS, as specified.

EXISTING LAW:

1) Pursuant to the VRA, provides that a change in voting procedures may not take effect in a state or political subdivision that is covered by the preclearance requirements of Section 5 of the VRA until the change is approved by a specified federal authority. A state or political subdivision is covered by the preclearance requirements of the VRA if it maintained a specified test or device as a prerequisite to voting, and had low voter registration or turnout in the 1960s and early 1970s. However, the U.S. Supreme Court on June 25, 2013 in *Shelby County v. Holder* (2013) 133 S.Ct. 2612, held that the coverage formula of the VRA is unconstitutional and may not be used as a basis for requiring a jurisdiction to subject a proposed change in voting procedures to federal preclearance. Prior to that decision, the

counties of Kings, Monterey, and Yuba were covered jurisdictions subject to the federal preclearance requirements.

2) Provides that the SOS is the chief elections officer of the state.

FISCAL EFFECT: Unknown. State-mandated local program; contains reimbursement direction.

COMMENTS:

1) **Purpose of the Bill**: According to the author:

> Protecting…voting rights is critical to ensuring a working democracy. Often entire communities across the state are shut out of the important decision-making process that impacts their day-to-day lives. Providing voter protections not only increases civic participation, but ensures that communities have a fair say in representation in all levels of government.
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> When Congress enacted the [VRA], it determined that racial discrimination in voting had been more prevalent in certain areas of the country. Section 4 of the VRA established a formula to identify those areas and provided for more stringent remedies where appropriate.
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> The preclearance provision of the VRA, better known as Section 5, was the result of realizing that attempting to block voter disenfranchisement on a case-by-case basis was ineffective. For nearly 50 years, Section 5 of the VRA served as our democracy's checkpoint in protecting millions of voters of color from racially discriminatory voting practices.
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> On June 25, 2013, the U.S. Supreme Court shamefully held that the coverage formula as set forth under Section 4(b) of the VRA is unconstitutional, and can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5 of the VRA. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Prior to that holding, the Counties of Kings, Monterey, and Yuba were covered jurisdictions subject to the federal preclearance requirements.
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> In an effort to remedy the abrupt ending of Section 5 coverage and ensure that the right to vote is not abridged or denied in California, this bill requires California's Secretary of State to approve any changes to at-large elections, jurisdiction boundaries, redistricting, voting locations, and/or multilingual voting materials in covered jurisdictions. In doing so, this bill will eliminate the inordinate amount of time and effort needed to pursue costly and repetitive litigation.

2) **Federal Voting Rights Act of 1965 & *Shelby County v. Holder***: The 15th Amendment to the U.S. Constitution provides, in part, that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous conditions of servitude." Additionally, the 15th Amendment authorizes Congress

to enact legislation to enforce its provisions. The 15th Amendment was ratified in February 1870.

In 1965, Congress determined that state officials were failing to comply with the provisions of the 15th Amendment. Congressional hearings found that litigation to eliminate discriminatory practices was largely ineffective because state and local jurisdictions would institute new discriminatory practices to replace any such practices that were struck down in court. As a result, Congress passed and President Johnson signed the VRA. The VRA, among other provisions, prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" from being imposed by any "State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."

Section 2 of the VRA is a nationwide prohibition against voting practices and procedures, including redistricting plans and at-large election systems, poll worker hiring, and voting registration procedures, that discriminate on the basis of race, color, or membership in a language minority group. Section 2 allows the U.S. Attorney General, as well as affected private citizens, to bring lawsuits in federal court to challenge practices that may violate the VRA. Section 4 of the VRA sets the criteria for determining whether a jurisdiction is covered under certain provisions of the VRA, including the requirement for review of changes affecting voting under Section 5. Section 5 of the VRA requires certain states and covered jurisdictions to receive approval for any changes to law and practices affecting voting from the U.S. Department of Justice (DOJ) or the U.S. District Court of the District of Colombia to ensure that the changes do not have the purpose or effect of "denying or abridging the right to vote on account of race or color." The requirement to obtain approval under Section 5 is commonly referred to as a "preclearance" requirement.

While much of the VRA is permanent, certain special provisions of the VRA are temporary, including Section 5. When the VRA was enacted, Section 5 was scheduled to expire in five years. Subsequently, Congress extended those provisions for another five years in 1970, an additional seven years in 1975, and an additional 25 years in 1982, and again for an additional 25 years in 2006. As a result, Section 5 currently is scheduled to expire in 2031.

In April 2010, Shelby County in Alabama filed suit in the U.S. District Court for the District of Columbia challenging the constitutionality of Section 5 of the VRA, and of the coverage formulas contained in Section 4 (b) of the VRA. Because the State of Alabama was covered under the preclearance requirements of Section 5, Shelby County was also covered as a political subdivision of Alabama. In the lawsuit, Shelby County argued that Congress exceeded its authority under the 15th Amendment and thus violated the 10th Amendment and Article IV of the U.S. Constitution when it voted to reauthorize Section 5 without changing or updating the formulas that determined which jurisdictions were covered under Section 5. The District Court rejected Shelby County's arguments, and upheld the constitutionality of the Section 5 reauthorization and the coverage formulas contained in Section 4 (b). On appeal, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the ruling of the District Court, and Shelby County subsequently appealed to the U.S. Supreme Court.

On June 25, 2013, the U.S. Supreme Court, in *Shelby County v. Holder*, held that the coverage formula in Section 4 (b) of the VRA is unconstitutional and can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5 of the VRA. The Court stated that although the formula was rational and necessary at the time of its enactment, it is no longer responsive to current conditions. The Court, however, did not strike down Section 5, which contains the preclearance conditions. Without Section 4 (b), however, no jurisdiction will be subject to Section 5 preclearance unless Congress enacts a new coverage formula.

The effect of the *Shelby County* decision is that the jurisdictions identified by the coverage formula in Section 4 (b) no longer need to seek preclearance from the U.S. Attorney General or the U.S. District Court for the District of Columbia before implementing new voting changes, unless they are covered by a separate court order entered under Section 3 (c) of the VRA.

All or specific portions of the following states were required to have their voting changes precleared before the U.S. Supreme Court decision in Shelby: Alabama, Alaska, Arizona, Florida, Georgia, Louisiana, Michigan, Mississippi, New Hampshire, New York, North Carolina, South Carolina, South Dakota, Texas, and Virginia. Also included were the California counties of Kings, Monterey, and Yuba. Merced County previously was subject to the preclearance requirement, but it successfully bailed out from Section 5 coverage in 2012 through a court approved consent decree negotiated with the U.S. DOJ. These four California counties were covered by the preclearance requirements because of compliance with certain state laws in effect at the time (including English-only ballots). Additionally, all four counties had large military populations that were highly transient and otherwise unlikely to register to vote or to vote in elections in the counties where they were stationed. Those military populations lowered the percentage of eligible voters in those counties who were registered or voted for President.

According to the U.S. DOJ, the ruling in Shelby County does not affect Section 3 (c) of the VRA. Jurisdictions covered by a preclearance requirement pursuant to court orders under Section 3 (c) remain subject to the terms of those court orders. Additionally, the Supreme Court's decision states that Section 2 of the VRA, which prohibits discrimination in voting based on race or language minority status, and which applies on a permanent nationwide basis, is unaffected by the decision. Likewise, other provisions of the VRA that prohibit discrimination in voting remain in full force and effect, as do other federal laws that protect voting rights, including the Uniformed and Overseas Citizens Absentee Voting Act, the National Voter Registration Act, and the Help America Vote Act.

3) **Formula Identifying Covered Jurisdictions**: Under the federal VRA, the preclearance requirement was targeted at jurisdictions that had low voter registration or participation rates, and that used a "test or device" for the purpose or with the effect of denying or abridging the right to vote on account of race or color. This targeting was intended to direct the greatest level of scrutiny to laws and policies that were enacted in areas where voting discrimination had been most flagrant and where, absent federal oversight, discriminatory voting laws and policies were likely to persist.

This bill, on the other hand, targets specific voting practices and policies that have been found to be discriminatory in the past, rather than requiring all changes in voting practices and policies in covered jurisdictions to be subject to preclearance. This type of targeting, which is sometimes referred to as "known practices coverage," has been suggested as one way to adjust the preclearance requirements in federal law in response to the Supreme Court's decision in *Shelby County*. However, not all jurisdictions that attempt to implement policy changes that are "known practices" are required to submit those changes for preclearance under this bill. Furthermore, the formula for determining the jurisdictions that are required to submit voting changes for preclearance with the SOS is based entirely on the racial and ethnic makeup of an area, without any necessity to demonstrate that the political subdivision in question has engaged in discriminatory practices or otherwise has low or unrepresentative voter participation. Jurisdictions with less racial and ethnic diversity would not be required to have voting changes precleared by the SOS under this bill even if those jurisdictions adopted discriminatory policies that harmed voter participation, while jurisdictions that are more racially and ethnically diverse would be subject to preclearance regardless of how inclusive their electoral policies are.

4) **Covered Political Subdivisions and Suggested Amendment**: Although the current version of the bill is somewhat unclear, according to the author and the sponsor, it is their intent that the preclearance requirements created by this bill should apply only to those political subdivisions with two or more racial or ethnic groups that each represent at least 20 percent of the citizen voting-age population. Committee staff recommends that this bill be amended to clarify that intent.

   If amended to reflect that intent, according to census data, this bill would apply to approximately 25 counties, approximately 240 cities, and approximately 490 school districts.

5) **Arguments in Support**: The sponsor of this bill, the Mexican American Legal Defense and Educational Fund, writes in support:

   > Before the decision in *Shelby County v. Holder*, the federal VRA required certain jurisdictions with histories of low participation in voting to submit all of their elections changes to the Department of Justice for review and pre-clearance. Three California counties were covered by this pre-clearance requirement, which ensured a quick and efficient process of reviewing the submitted changes for potential discrimination. The process ensured that the entire nation, including California, obtained a clear indication of changes to be avoided because of their discriminatory potential, without plaintiffs and defendants having to go through the extreme time and costs of federal litigation. The loss of this efficient dispute resolution process continues to burden jurisdictions and voters across the country.
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   > AB 1301 identifies specific practices that have historically been correlated with deterring the participation of minority voters and the growth of minority voting power, including that of emerging, fast-growing minority communities – the precise communities whose growing political power may cause some incumbent elected officials to take steps to entrench themselves against a nascent political force. By identifying these elections-related changes and subjecting them to a

swift and efficient review for potential discrimination, California can avoid the costs of federal VRA litigation by private parties that would otherwise ensue. The bill also would ensure that these potentially problematic changes are reviewed prior to implementation at any election – before any voter's right to cast a meaningful ballot is infringed.

6) **Concerns Raised**: While they have not taken an official position on this bill, the California State Association of Counties, the Rural County Representatives of California (RCRC), and the Urban Counties Caucus (UCC) all have expressed concerns with this bill. In a joint letter, RCRC and UCC write:

> AB 1301 requires state preclearance for a number of elections-related activities. Most concerning are the provisions regarding the establishment of voting locations. Elections must be consistently administered and deadlines are established to ensure that the various tasks, including the siting of polling stations, result in a fair election. Polling locations must be established no later than 29 days prior to an election; however changes and replacement sites are often needed when unforeseen problems arise with a particular location. This can happen even days before Election Day. The movement of polling stations is minimal, yet it does occur and county elections officials need to make theses change to correspond with the circumstances.
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> AB 1301 gives the Secretary of State in an affected county 60 days to approve a change to polling locations. We believe this condition dramatically reduces the flexibility that county elections officials need while at the same time driving up the costs to conduct the election. We are also concerned about the impact a delay in approving a change in polling stations (or the inability to do so) would have on voters when circumstances call for an immediate change.
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> RCRC and UCC are equally concerned about the impact of AB 1301 as it relates county's role administering the elections for cities, special districts, and school districts. We assume that other jurisdictions would be responsible for costs associated with preclearance activities, however the bill does not specify what level of legal exposure a county has with respect to administering these elections or if a county elections official has the authority to require that other jurisdictions comply with this [statute]. With AB 1301's private right of action provisions that allow individuals to sue and compel a jurisdiction to comply with its provisions, counties are concerned about incurring the costs of legal challenges for other entities.

7) **Related Legislation**: AB 182 (Alejo), which is also being heard in this committee today, expands the California Voting Rights Act (CVRA) to allow challenges to district-based elections to be brought under the CVRA, as specified.

AJR 13 (Ridley-Thomas), which is pending in this committee, recognizes August 6, 2015, as the 50th Anniversary of the signing of the VRA, and urges the Congress and the President of

the United States to continue to secure citizens' right to vote and remedy any racial discrimination in voting.

8) **Previous Legislation**: This bill is similar to AB 280 (Alejo) of 2014. The preclearance provisions of AB 280 were added to the bill in the Senate, and were never considered by the Assembly. AB 280 was approved by the Senate Elections & Constitutional Amendments Committee, but was held on the Senate Appropriations Committee's suspense file.

   SB 1365 (Padilla) of 2014 would have expanded the CVRA in a manner similar to that proposed by AB 182 of this session (as detailed above). SB 1365 was vetoed by Governor Brown. In his veto message, the Governor stated "[w]hile there is progress to be made, the federal Voting Rights Act and the California Voting Rights Act already provide important safeguards to ensure that the voting strength of minority communities is not diluted."

REGISTERED SUPPORT / OPPOSITION:

Support

Mexican American Legal Defense and Educational Fund (sponsor)
American Civil Liberties Union of California
California Immigrant Policy Center

Opposition

None on file.

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