

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Ethics and Elections

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BILL: SB 352

INTRODUCER: Senator Hutson

SUBJECT: Legislative Redistricting and Congressional Reapportionment

DATE: February 14, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
2.	<u>Fox</u>	<u>Ulrich</u>	<u>EE</u>	<b>Pre-meeting</b>
3.	_____	_____	<u>RC</u>	_____

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## I. Summary:

SB 352 provides clarity to courts and candidates when redistricting challenges are unresolved and elections are approaching.

Courts are required to set immediate hearings and act expeditiously to resolve redistricting challenges for senatorial, representative, or congressional districts. Additionally, courts are encouraged to follow certain enumerated procedures to maintain public oversight when drafting a remedial redistricting plan.

If a redistricting challenge is pending 71 days before a primary election, the district boundaries in place on the 71st day before the primary election will control for the upcoming election cycle. If revisions are ordered after that point, the revised district boundaries will control beginning with future primary and general elections.

If congressional district boundaries are revised after federal qualifying ends on the 116<sup>th</sup> day before a primary election, then a congressional candidate must requalify in accordance with the revised districts during the qualifying period for state candidates that runs between the 71<sup>st</sup> and 67<sup>th</sup> days before the primary election.

The bill states that its provisions do not supersede or impair the State Constitutional provisions governing the judicial review of apportionment.

## II. Present Situation:

The terms “redistricting” and “reapportionment” are often used interchangeably to describe the process of drawing new congressional and state legislative district boundaries. Legislative and congressional districts are redrawn after each decennial census to accommodate population

growth and shifts. Redistricting also ensures that each district contains nearly equal populations as required by law. In Florida, redistricting recently involved the Legislature redrawing 27 congressional districts and 160 legislative districts.

At the federal level, through congressional reapportionment, the 435 seats in the United States House of Representatives are redistributed after the decennial census among the 50 states based upon their relative population changes as determined by the decennial census. Each state then determines how to draw its congressional districts. In addition to case law and federal legislation, the State Constitution and the United States Constitution provide direction on legislative redistricting and congressional reapportionment.

### **State Legislative Districts**

The State Constitution provides the framework for establishing and validating geographical districts for state senators and representatives. In the second year after each decennial census, the Legislature is directed to apportion the state into no fewer than 30, nor more than 40 senate districts, and into no fewer than 80, nor more than 120 representative districts. The districts must consist of contiguous territory. The redistricting process must be completed in compliance with the State and United States Constitutions,<sup>1</sup> and is subject to mandatory review by the Florida Supreme Court.

### **U.S. Congressional Districts**

The United States Constitution provides that members of the United States House of Representatives will be apportioned among the states according to their respective numbers.<sup>2</sup> Additionally, the Constitution requires an “enumeration” or census to be made every 10 years. Surprisingly, the Constitution does not require an apportionment after a census nor does it describe a particular method for the process. The Apportionment Act of 1941 specifies the apportionment method, establishes the House membership at 435 representatives, mandates an apportionment every 10 years, and designates the administrative procedures that will be used for apportionment.<sup>3</sup> Florida is entitled to 27 U.S. Representatives in Congress based upon the 2010 Census.<sup>4,5</sup>

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<sup>1</sup> FLA. CONST. art. III, s. 16. Florida currently has 40 Senate districts and 120 House of Representatives districts. The House of Representative districts are described in s. 10.12, F.S. The Senate districts described in s. 10.13, F.S., represent the districts as drawn in legislation that was later held unconstitutional and, thus, do not represent the districts as ordered by the Florida Supreme Court.

<sup>2</sup> Amendment XIV, section 2, modified Article 1, section 2, of the United States Constitution. The original language specified that the “Number of Representatives shall not exceed one for every thirty Thousand,” with each state having at least one Representative.

<sup>3</sup> Congressional Research Service, *The U.S. House of Representatives Apportionment Formula in Theory and Practice*, (Aug. 2, 2013), available at <https://www.everycrsreport.com/reports/R41357.html> (last accessed Feb. 14, 2017)

<sup>4</sup> Directory of Representatives, United States House of Representatives, available at [http://www.house.gov/representatives/#state\\_fl](http://www.house.gov/representatives/#state_fl). (last accessed Feb. 14, 2017).

<sup>5</sup> The single-member districts for the U.S. House of Representatives are described in s. 8.002, F.S. However, the districts described there represent the last legislation passed by the Legislature and do not contain the revisions required by the Florida Supreme Court in *The League of Women Voters of Florida v. Detzner*, Case No. SC14-1905 (2015).

While the State Constitution does not contain any direction on the process for establishing congressional districts, the United States Constitution provides that “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; . . . .”<sup>6</sup>

### **Process for Developing and Reviewing District Maps**

During the regular session of the Legislature in the second year following the decennial census, the Legislature is required to adopt a joint resolution that apportions the state into Senate and House districts. Because the Legislature adopts a joint resolution, rather than passing a general bill, the measure does not require the Governor’s approval, nor is it subject to a veto. The district boundaries are subject to mandatory review by the Florida Supreme Court.

The State Constitution prescribes the process that must be followed when the Court determines that the newly created districts are valid and when they are invalid. When the Supreme Court enters a judgment that the plan is valid, the plan becomes binding upon all citizens of the state.

In contrast, the process for enacting Congressional districts differs in two ways. The districts are not established in a joint resolution, but in a general bill that is subject to a Governor’s veto. Additionally, the maps do not require mandatory review by the Florida Supreme Court.

### ***If the Legislature Fails to Adopt an Apportionment Resolution***<sup>7</sup>

If the Legislature adjourns without apportioning the state into the necessary districts, the Governor shall, within 30 days, issue a proclamation reconvening the Legislature in a special apportionment session. That session may not exceed 30 consecutive days. It is the Legislature’s mandatory duty to adopt a joint resolution of apportionment during that session and no other business may be transacted.<sup>8</sup> If the Legislature adjourns without adopting the joint resolution of apportionment, the Attorney General must, within 5 days, petition the Florida Supreme Court to make the apportionment. The Court then has 60 days after the Attorney General’s petition is filed to file its order with the custodian of state records making the apportionment.<sup>9</sup>

### ***Judicial Review and Procedure***

Within 15 days after the Legislature passes a joint resolution of apportionment, the Attorney General must petition the Florida Supreme Court for a declaratory judgment that determines the validity of the apportionment. The Court is required to permit adversary interests to present their views challenging the validity of the apportionment. The Court then must enter its judgment within 30 days after the filing of the Attorney General’s petition.<sup>10</sup> If the Court determines that the apportionment made by the Legislature is not valid, the Governor is required to reconvene the Legislature, by proclamation, within 5 days, in an extraordinary apportionment session that

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<sup>6</sup> U.S. CONST. art. I, s. 4.

<sup>7</sup> This process only applies to the regular session in the second year after the decennial census.

<sup>8</sup> FLA. CONST. art. III, s. 16(a).

<sup>9</sup> FLA. CONST. art. III, s. 16(b).

<sup>10</sup> FLA. CONST. art. III, s. 16(c).

may not exceed 15 days. The Legislature is required to then adopt a joint resolution of apportionment that conforms to the Supreme Court's judgment.<sup>11</sup>

Within 15 days after the Legislature adjourns the extraordinary apportionment session, the Attorney General is required to petition the Florida Supreme Court and provide the apportionment resolution. The Court will then consider the validity of the resolution as though it were adopted at a regular or special apportionment session. The court will permit adversary interests to present their views and, within 30 days of the Attorney General's petition, render a judgment. If no resolution was adopted, the Attorney General must so inform the Court.<sup>12</sup>

If the Legislature does not adopt an apportionment resolution during the extraordinary apportionment session, or the Supreme Court declares it invalid, the Court must, within 60 days after receiving the Attorney General's petition, file an order with the custodian of state records making an apportionment.<sup>13</sup>

According to the Senate Reapportionment website,<sup>14</sup> in 1972 and 2002 the process progressed smoothly from the Legislature to the Attorney General and Supreme Court without problems and was soon binding on all citizens of the state. In 1982 and 1992, the Legislature did not adopt a joint resolution initially and was reconvened by the Governor. The resulting plan progressed to the Attorney General and the Supreme Court and was declared valid.

What occurred in 2012 was quite different from previous redistricting efforts. The redistricting plans were litigated over almost four years through different state courts before being declared valid. A detailed discussion follows below at "2012 Apportionment and Ensuing Litigation."

### **Election Dates and Qualifying Periods for Nomination and Election to Office**

A general election is conducted in November of each even-numbered year.<sup>15</sup> A primary election, held for nominating a party candidate to run in the general election, is conducted 10 weeks before the general election.<sup>16</sup> In 2016, the primary election was held on Tuesday, August 30, and the general election was held on Tuesday, November 8.

### ***Federal Office***

The Florida Election Code<sup>17</sup> prescribes the qualifying dates for candidates seeking office. Qualifying periods for federal office differ depending upon whether it is an apportionment or non-apportionment year. In non-apportionment years, candidates seeking a congressional office

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<sup>11</sup> FLA. CONST. art. III, s. 16(d).

<sup>12</sup> FLA. CONST. art. III, s. 16(e).

<sup>13</sup> FLA. CONST. art. III, s. 16(f).

<sup>14</sup> *Florida Constitution, Article III, Section 16*, available at <http://www.flsenate.gov/usercontent/session/redistricting/ReapportionmentProcess.pdf>.

<sup>15</sup> Section 100.031, F.S. The statute provides that the "general election shall be held in each county on the first Tuesday after the first Monday in November . . . to choose a successor to each elective federal, state, county, and district officer whose term will expire before the next general election and . . . to fill each vacancy in elective office for the unexpired portion of the term."

<sup>16</sup> Section 100.061, F.S.

<sup>17</sup> The Florida Election Code is contained in chapters 97-106, F.S.

must qualify between noon on the 120th day and noon on the 116th day before the primary election.<sup>18</sup>

In years when the Legislature apportions the state, the qualifying period occurs 7 weeks later in the calendar year, between noon on the 71st day and no later than noon of the 67th day before the primary election.<sup>19</sup> This later qualifying period is apparently done as an accommodation to the possibility that a protracted reapportionment session or multiple sessions might be required to sort out a final redistricting plan before it is time to qualify. The courts delayed the qualifying period in 2016 because of the apportionment litigation. The qualifying dates were Monday, June 20 – Friday, June 24, 7 weeks later than the 2014 qualifying dates that were April 28 – May 2.<sup>20</sup>

### ***State Senators and Representatives***

The qualifying dates for state senator and state representative begin at noon on the 71st day before the primary election and end no later than noon of the 67th day before the primary election.<sup>21</sup> The election laws do not prescribe any different qualifying dates in a year in which the Legislature apportions state Senate or House of Representatives offices.

### **The Fair Districts Amendments to the State Constitution**

The State Constitution was amended in November 2010 to incorporate legislative standards for establishing congressional district boundaries<sup>22</sup> and legislative district boundaries.<sup>23</sup> These amendments are commonly known as the Fair District Amendments. They are set forth in two tiers. In general terms, the new standards require that an apportionment plan or individual district:

- Not be drawn with the intent to favor or disfavor a political party or incumbent;
- Not be drawn to deny or abridge the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice; and
- Consist of contiguous territory.

Unless compliance with the standards creates a conflict in complying with federal law, the districts are to be drawn as nearly equal in population as is practicable, be compact, and use existing political and geographical boundaries where feasible.

### ***2012 Apportionment and the Ensuing Litigation***

In February 2012, the Legislature established new congressional, state Senate and House districts based upon the 2010 Census. The newly drawn Congressional and state Senate districts soon met constitutional challenges and extensive litigation ensued. The House districts, however, were

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<sup>18</sup> Section 99.061(1), F.S.

<sup>19</sup> Section 99.061(9), F.S.

<sup>20</sup> *2014 Federal Qualifying Handbook*, Florida Division of Elections, available at <http://dos.myflorida.com/media/695447/federal-qualifying-handbook-2014.pdf>.

<sup>21</sup> Section 99.061(1), F.S.

<sup>22</sup> FLA. CONST. art. III, s. 20.

<sup>23</sup> FLA. CONST. art. III, s. 21.

approved by the Supreme Court and were not further challenged in court. They stood as originally enacted. At issue in the litigation was whether the Legislature had complied with the new 2010 Fair Districts Amendments when drawing the plans. The Senate plan created one line of cases that began in the Florida Supreme Court and then involved the Second Judicial Circuit Court of Leon County. The separate Congressional line of cases involved those same courts, in varying patterns, but with different litigants. The Florida Supreme Court issued eight separate apportionment opinions, the trial court issued additional opinions, and litigation spanned nearly 4 years in the state courts.

The litigation often proved confusing to candidates hoping to qualify and run for office because the candidates were uncertain where the district boundaries were located. Below is a brief synopsis of some of the highlights of the redistricting timeline.<sup>24</sup>

### *Congressional Districts*

#### 2012

The Legislature passed a congressional redistricting plan that was signed by the Governor in February. The congressional reapportionment plan is not subject to mandatory Florida Supreme Court review like the House and Senate plans are. If someone wants to challenge the congressional plan, he or she must initiate a lawsuit in the Second Judicial Circuit in and for Leon County, located in Tallahassee.

#### 2013

Issues of legislative privilege arose during discovery and the Florida Supreme Court ruled that legislators do not have an absolute privilege against discovery in those proceedings. Two additional appeals raised pretrial issues before the Supreme Court.

#### 2014

Two separate groups of plaintiffs filed civil complaints in circuit court challenging the validity of the Congressional plan. The cases were consolidated and a 12-day bench trial began in June. In July, the Second Judicial Circuit Court declared two of the 27 congressional districts invalid and concluded that the Legislature had acted with impermissible partisan intent. The court directed the Legislature to convene and redraw the congressional districts. In August, the revised plan passed and was approved by the circuit court. The plaintiffs appealed the circuit court's approval of the revised plan. The circuit court, recognizing the late time involved, chose to require that the 2012 maps govern for the 2014 elections and any new maps control for subsequent elections. The primary election was held in August and the general election was held in November.

#### 2015

Upon appeal in July, the Florida Supreme Court invalidated eight of the 27 congressional districts. The Court affirmed the judgment of the trial court but concluded that the court erred in some respects. The Court relinquished the case to the trial court for 100 days and instructed the Legislature to draw another remedial map. The Legislature met in August but was unable to agree on a remedial congressional plan and adjourned without adopting one. The House and Senate submitted two separate plans to the court and the plaintiffs submitted five plans. In

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<sup>24</sup> See also Redistricting Timeline, The Florida Senate, available at [http://www.flsenate.gov/Session/Redistricting/About.\(last accessed Feb. 14, 2017\)](http://www.flsenate.gov/Session/Redistricting/About.(last%20accessed%20Feb.%2014,%202017))

October, the circuit court selected one of the plaintiff's maps. In December, the Florida Supreme Court approved the trial court's decision and ordered its use for the 2016 election. That plan was used in the 2016 primary and general elections and will be used in future congressional elections until the next decennial redistricting.

#### 2016

The qualifying period was held in June, the primary election was held August 30, and the general election was held on November 8.

#### *State Senate and House Districts*

#### 2012

After the Legislature passed redistricting plans in February, the Florida Supreme Court issued a decision in March, based upon a facial review of the State Senate and State House districts, and declared that all 120 House districts were valid and that 32 of the 40 Senate districts were valid. The Court determined that eight districts did not comply with the Fair Districts standards. This Supreme Court review is mandated in the State Constitution. The Legislature then met in an extraordinary apportionment session in March and passed a revised Senate plan. In April, the Florida Supreme Court declared the revised Senate plan valid, based upon a facial review conducted on a limited record.

Candidates qualified for office between June 4 and 8. The primary election was held on August 14 and the general election on November 6.

In September, however, a group of 10 plaintiffs filed a lawsuit in the Second Judicial Circuit of Leon County challenging the constitutionality of the Senate plan. The Legislature petitioned the Florida Supreme Court and argued that it had exclusive jurisdiction over the redistricting challenges.

#### 2013

In July, the Florida Supreme Court rejected the Legislature's position and determined that the plaintiffs could proceed with their lawsuit challenging the validity of the 2012 Senate redistricting plan. The Court determined that the circuit court had subject matter jurisdiction over the case and permitted the litigation to continue.

#### 2015

In July, the Senate entered into a Stipulation and Consent Judgment after an additional apportionment ruling was rendered by the Florida Supreme Court. The 2012 Enacted Plan was invalidated and the Legislature was given another opportunity to enact a proposed remedial plan. The Senate convened in October to redraw the Senate plan, but adjourned in November without adopting a plan. On December 30, the circuit court selected one of the Plaintiff's remedial plans and gave the Legislature three days to randomly renumber the districts to ensure that the longer four-year terms in office were not unfairly distributed to the majority party.

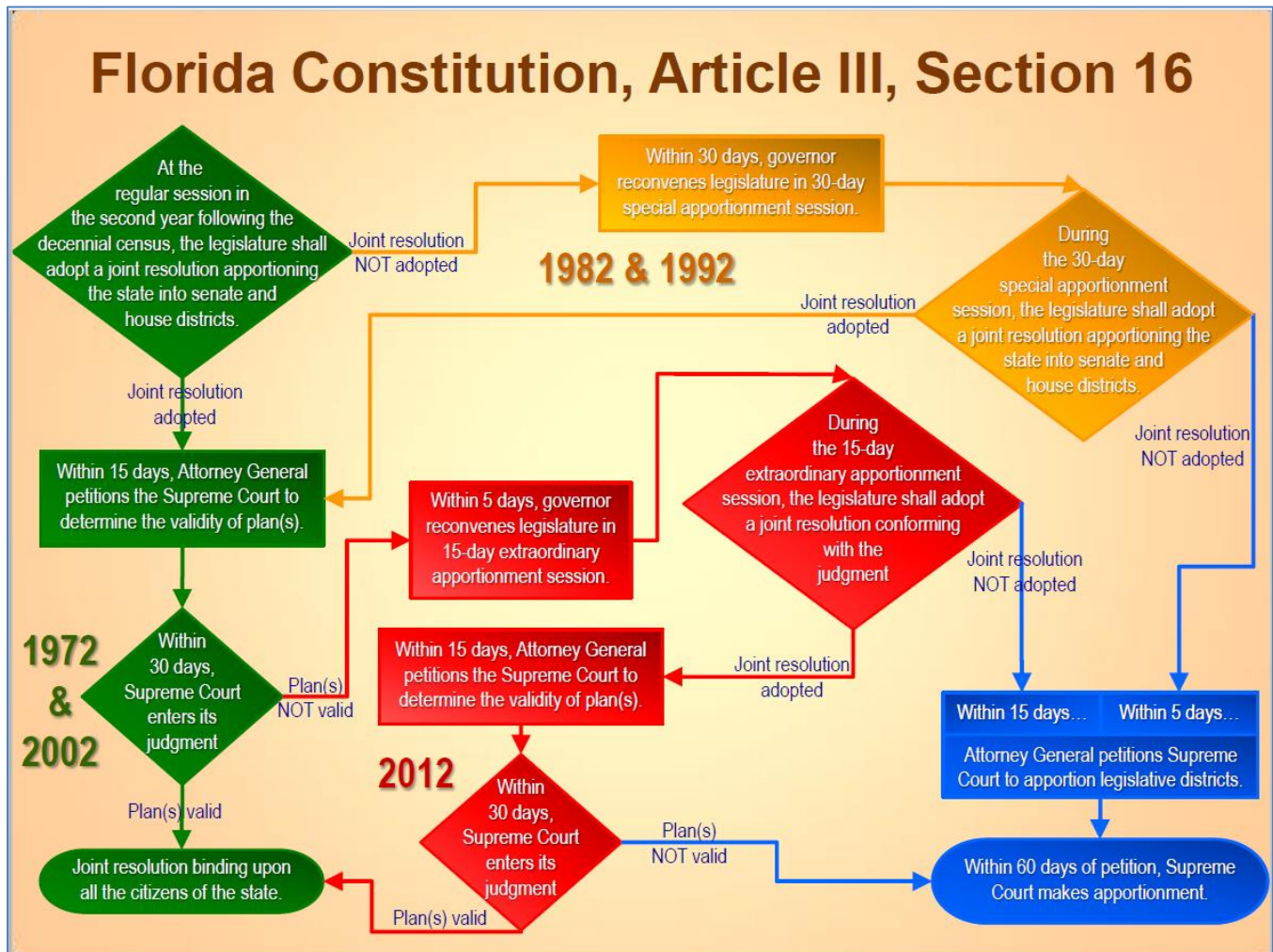
#### 2016

On January 5, the Legislature complied with the order from the circuit court and randomly renumbered the new Senate districts.



The qualifying period was held between June 20 and 24 for state and federal offices. The primary election was held on August 30 and the general election was held on November 8, based upon the maps that were adopted in December 2015. The maps will be used in all state senatorial elections until the next decennial redistricting.

The Senate Reapportionment Committee developed the flow chart below demonstrating the redistricting procedures outlined in the State Constitution.<sup>25</sup>



**III. Effect of Proposed Changes:**

SB 352 provides clarity to courts and candidates when redistricting challenges are pending and an election is approaching. Courts are required to act expeditiously to resolve redistricting disputes and are encouraged to use specific procedures to draft remedial plans. The bill provides

<sup>25</sup> The chart is available at <http://www.flsenate.gov/usercontent/session/redistricting/ReapportionmentProcess.pdf>. (last accessed Feb 14, 2017)



which boundaries control when a challenge is unresolved and explains when a congressional candidate needs to requalify.

### **Subsection (1) – Direction to State Courts**

When congressional, senatorial, or representative district boundaries are challenged in a state court, the bill requires a trial or appellate court to set an “immediate hearing”<sup>26</sup> and give the case priority over pending cases. These courts are also directed to render a decision as expeditiously as possible.

### **Subsection (2) – State Qualifying Periods when a Challenge is Pending**

Under the bill, if a court challenge is pending when the qualifying period begins for a state or multicounty district office, then the qualifying period, primary, and general election must proceed using the boundaries of the districts that are in place 71 days before the primary election. This has the effect of assuring candidates and supervisors of elections that the legislative boundaries in place at qualifying time will be used in the primary and general elections of that year. This further allows supervisors to “geo-code” voters into the proper voting districts based on their addresses of records, and notify them of the location of their polling sites.

If a court revises the district boundaries to senatorial, representative, or congressional districts after the 71st day before a primary election, the revised district boundaries will not govern the immediate election, but will control beginning with the next primary and general elections held in the next even-numbered year. This is similar to what occurred earlier during the reapportionment litigation involving the validity of the congressional maps. In 2014, the Circuit Court of Leon County required that the 2014 congressional elections proceed under the 2012 remedial map, even though two of the 27 congressional districts had been declared invalid. The court concluded that there was not enough time to create new maps to correct the deficiencies in the remedial maps and have the elections proceed at the originally scheduled time.<sup>27</sup>

### **Subsection (3) - Qualifying for Congressional Districts**

This subsection of the bill addresses qualifying for congressional districts. As discussed above, congressional candidates currently qualify 120 to 116 days before the primary election in a non-apportionment year and 71-67 days before the primary in an apportionment year. If a court orders district boundary revisions after the qualifying period ends 116 days before the primary, then congressional candidates must requalify during the later qualifying period of 71-67 days before the primary, in accordance with the districts in place on the 71st day before the primary.

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<sup>26</sup> There is precedence in statute for the Legislature to direct state courts to set an “immediate hearing.” Some examples occur in s. 76.24, F.S., dissolution of an attachment; s. 77.031, F.S., dissolution of a writ of garnishment; s. 97.012, F.S., the Secretary of State bringing an action to enforce duties of certain election officials; s. 102.168, F.S., contesting an election; and s. 119.11, F.S., enforcing a public records request.

<sup>27</sup> *Romo v. Detzner*, (Trial Court Order) Nos. 2012-CA-00412 & 2012-CA-00490, Order Approving Remedial Redistricting Plan at 4 (Fla. 2d Jud. Cir. Ct. Aug. 22, 2014).

#### **Subsection (4) – Guidelines to a Court Drafting a Remedial Map**

This subsection of the bill encourages a court to follow specific procedures if it is required to draft a remedial redistricting plan after a successful challenge of senatorial, representative, or congressional districts. These items are encouraged to maintain public oversight of the court's process. These are essentially the same items that the Court imposed on the Legislature during the last redistricting process. The Court also required members of the Legislature and its staff to submit to depositions and give testimony at trial. However, the bill stops short of encouraging judges to submit to similar examinations of their intent.

The court is encouraged to:

- Conduct public hearings involving proposed district configurations;
- Record and maintain minutes of meetings on the plan if the meetings are closed to the public;
- Provide a method for the public to submit and comment on additional maps;
- Offer the public an opportunity to review and comment on any map before a plan is finalized; and
- Maintain all e-mails and documents related to the creation of the remedial plan.

#### **Subsection (5) – Clarification that Constitutional Apportionment Language is Precedent**

This subsection of the bill declares that it does not supersede or impair the apportionment prescriptions of the State Constitution.

The bill takes effect upon becoming a law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

##### **D. Other Constitutional Issues:**

Subsection (2) of the bill establishes which district boundaries will control when a challenge is unresolved 71 days before a primary election. By providing default boundaries, the Legislature reduces the remedies that a court may choose from when trying to develop a response to an invalid plan. How a court would resolve a constitutional challenge to the provision of a plan by default is unclear, and the resolution of the challenge may depend upon the specific facts and circumstances surrounding the challenged plan.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

None.

## C. Government Sector Impact:

No agency bill analysis has been provided at this time and it would be difficult to predict how the bill would affect the costs of redistricting litigation.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 97.029, Florida Statutes.

**IX. Additional Information:**

## A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

## B. Amendments:

None.