

**Overview of Redistricting Provisions
in the Freedom to Vote Act¹**

(September 14, 2021 Senate Introduced Version)²

1. Mapdrawer

Current:

- State law determines what entity is responsible for enacting the state's congressional plan.

Changes:

- None. Each state would continue to have discretion to decide what entity draws and enacts its congressional plans. Language in the version of the bill passed by the House requiring states to use independent commissions has been omitted from the current Senate bill.

2. Ban on Partisan Gerrymandering

Current:

- There are currently no enforceable limits on partisan gerrymandering in light of the Supreme Court's 2019 decision in *Rucho v. Common Cause* holding that gerrymandering claims under the Constitution are non-justiciable political questions.

Changes:

- Statutory Gerrymandering Ban and Cause of Action. A state would be barred by statute from using a plan if it was drawn with either discriminatory intent or effect when considered on a statewide basis.³ This claim would be broader than claims previously brought under the Constitution because discriminatory effect alone would be enough to invalidate a map. Claims could be asserted in federal court, where they would be heard by three-judge panels.

- Trigger of Presumption of Discriminatory Effect. For claims alleging discriminatory effect, a rebuttable presumption of a violation would be triggered if analysis of the two most recent presidential and two most recent Senate elections in the state shows that a party's candidates for president and/or Senate would have carried a disproportionate share of districts (as defined in the statute) in two of four of the elections.⁴
 - Process for Invoking. A party in a partisan gerrymandering case may ask the court to determine whether the presumption has been triggered by filing a motion within 30 days of enactment of the plan (or, if later, 30 days of the effective date of the bill). The court must hold a hearing on whether the presumption has been triggered within 15 days of filing.
 - Automatic Stay and Rebuttal of Presumption. Upon filing of a presumption motion, a state is stayed from using its map until the court can determine whether a presumption exists.⁵ If upon consideration of the motion, the court determines that the presumption is triggered, a state is automatically barred from using the challenged map to conduct elections until and unless the state rebuts the presumption in further litigation.⁶
 - Power to Adopt Interim Map or Move Primary. If full litigation of the claim cannot be completed in time for upcoming elections, the court is directed to either adopt an interim plan or move the state's primary election to allow more time for resolution of litigation.⁷

3. Strengthened Protections for Communities of Color

Current:

- Currently, minority groups only have an enforceable claim under Section 2 of the Voting Rights Act if they can show that they are sufficient in number to be the citizen voting age majority of a proposed district. This numerosity requirement can be difficult for minority groups to meet, particularly as minority groups increasingly move from highly segregated city centers to more diverse suburbs.

Changes:

- The bill would give minority groups a chance to demonstrate that they could elect preferred candidates outside of a majority-minority district.⁸ If this showing is made, a state would be barred from drawing districts in a way that dilutes or takes away the minority community's demonstrated

ability to elect. This would add protections for communities of color in diverse suburban communities where growing minority communities have proven increasingly politically effective but are not yet sufficiently large in number or geographically concentrated to be the majority of a district.

4. Ban on Mid-Decade Redistricting

Current:

- There is currently no limit on how many times a decade a state can redraw congressional maps. In 2003, Republicans in Texas controversially redrew the state's 2001 congressional map after winning control of the Texas legislature in the 2002 midterms. Other states have from time to time redrawn maps mid-decade to shore up vulnerable incumbents.

Changes:

- Once a congressional map is adopted for a state by the body responsible for redistricting or by a court, the state may not be redistricted again until the next census unless a court finds that the map violates law.

5. Transparency and Public Participation

Current:

- Federal law at present does not contain any requirements governing the process for drawing and enacting congressional redistricting plans. State-law requirements vary widely and are often functionally non-existent. For example, in 2011, Pennsylvania Republicans released a proposed map the same day as a committee hearing and then proceeded to vote the map out of the committee and have it approved in the state senate the same day.
- Lawmakers commonly assert that discussions about redistricting are shielded by legislative privileges. Although courts often overrule these assertions of privilege, that requires time-consuming litigation.

Changes:

- Data and Website. States would be required to maintain a redistricting website where proposed maps and the population and demographic data used to create them would be available to the public at no cost.⁹ The website would also be required to provide a means for members of the public to submit comments on maps.¹⁰

- Required Hearings. States would be required to hold hearings both before and after releasing congressional plans, where members of the public could provide comments on maps.¹¹ Hearings would have to be held in locations around the state, livestreamed on the redistricting website maintained by the state, and scheduled at times and places to allow meaningful input from communities of color.¹²
- Posting of Maps Before Hearings or Votes. Maps and data needed to analyze the map would need to be made publicly available for at least five days before the hearing or vote on the map.¹³
- Legislative Privilege. All legislative privileges under state or federal law would be abrogated by statute.¹⁴

6. Timing and Failure of State to Adopt Map

Current:

- Deadlines, if any, for completing congressional redistricting are determined under state law. Many states do not have a deadline for congressional redistricting.

Changes:

- In order to allow enough time for judicial review of maps, states would be required to complete the earlier of: (a) the deadline set in state law, (b) February 15 of years ending in two, or (c) 90 days before the state's next regularly scheduled primary.¹⁵
- If a state does not meet this deadline, a three-judge federal panel is empowered to draw a map or, if necessary, create an interim map for upcoming elections.¹⁶

7. Litigation

Current:

- The venue for redistricting cases is not specifically addressed in current federal law.
- Cases are heard by a three-judge panel. Appeals of rulings bypass circuit courts of appeal and go instead directly to the Supreme Court. A decision by the Supreme Court to hear or not hear the case is considered a ruling on

the merits with precedential value.

- Development of remedial maps is routinely stayed by the Supreme Court during appeal. This stay means that, even if plaintiffs win on appeal, it often will be too late to remedy violations before the next election.
- Current law does not require courts to expedite cases and courts, in some instances, have taken years to resolve cases. During this time, states continue to use discriminatory maps.
- If a map is struck down, custom is for states to be given an opportunity to redraw the map to correct any violations, even if the violation was found to be the product of intentional discrimination.

Changes:

- Venue for Redistricting Cases. Challenges to congressional redistricting plans could either be brought in the federal district court sitting in the state's capital or in the District of Columbia, except that partisan gerrymandering claims would have to be brought in the District of Columbia.¹⁷ Cases would continue to be heard by three-judge panels.¹⁸
- Appeals. Rather than going directly to the Supreme Court, appeals in redistricting cases, regardless of where brought, would be heard by the D.C. Circuit.¹⁹ This would allow the D.C. Circuit to function as a specialized intermediate court and ensure that the standards in the bill are interpreted and applied uniformly nationwide. This parallels the structure for patent law cases, which are heard at the trial level in district courts around the country but are appealed to the Federal Circuit in Washington.
- Role of Supreme Court. Parties could ask the Supreme Court to review decisions of the D.C. Circuit, but this would no longer be an appeal of right.²⁰ Instead, parties would have to request Supreme Court review by seeking a writ of certiorari. The Supreme Court would have the discretion to deny certiorari, allowing the ruling below to stand, without being deemed to opine on whether the case below was correctly decided.
- Limit on Stays During Appeals. Courts would be prohibited from halting the development and adoption of remedial plans while a case is on appeal.²¹ This would ensure that a remedial plan is available for use once an appeal is resolved. In addition, once a remedial plan has been adopted, appellate courts would be barred from blocking its use if the court rules that adoption of the remedial plan was an abuse of discretion.²²

- Replacement of Maps Found to Violate Law. If a map is struck down for intentional discrimination against racial and ethnic minorities or for intentional partisan gerrymandering, the court will redraw the map to remedy violations.²³ A state will not be given first opportunity to draw a remedial map. If a map is struck down on non-intentional grounds, the court has the discretion either to develop its own remedial plan or to allow a state the opportunity to fix violations, subject to court approval.²⁴
- Power to Move Primary or Adopt Interim Map. If litigation of claims cannot be completed within three months of a state's primary, the court is empowered either to create an interim map for the state or to move the date of the state's congressional primary.²⁵ The interim map may make changes to a state's enacted plan to address violations for which plaintiffs have shown a substantial likelihood of success.²⁶
- All Cases Required to Be Expedited. All trial and appellate courts hearing redistricting cases would be required to expedite cases "to the greatest extent possible."²⁷

8. Applicability.

The redistricting provisions of the bill would apply to all congressional maps drawn in the 2021-22 redistricting cycle regardless of whether the map was passed before or after enactment of the bill except that the transparency and public participation requirements in section 5004 would only apply starting with the 2030 redistricting cycle.²⁸

Endnotes

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² Freedom to Vote Act, S. ____, 117th Cong. (2021), https://www.klobuchar.senate.gov/public/_cache/files/e/4/e448657f-914b-43a3-9153-05cabfb31c76/68440D88BF5EF1F90133FCB5AD2865D9.freedom-to-vote-act-text.pdf.

³ Section 5003(c)(1).

⁴ Section 5003(c)(3).

⁵ Section 5003(c)(3)(D)(i).

⁶ Section 5003(c)(3)(D)(ii).

⁷ Section 5006(c)(1)(C).

⁸ Section 5003(a)(2) & (3).

⁹ Section 5004(a)(2)(A)(i) & (iii).

¹⁰ Section 5004(a)(2)(A)(iv).

¹¹ Section 5004(b)(1).

¹² Section 5004(b)(1)(A) & (B).

¹³ Section 5004(b)(2).

¹⁴ Section 5006(f).

¹⁵ Section 5005(a).

¹⁶ Section 5005(b), (d), and (f).

¹⁷ Section 5006(a)(4).

¹⁸ Section 5006(a)(5).

¹⁹ Section 5006(a)(6).

²⁰ Section 5006(a)(6).

²¹ Section 5006(c)(2).

²² Section 5006(c)(2).

²³ Section 5006(c)(1)(A)(ii)(I).

²⁴ Section 5006(c)(1)(A).

²⁵ Section 5006(c)(1)(C).

²⁶ Section 5006(c)(1)(C)(i)(I).

²⁷ Section 5006(b).

²⁸ Section 5008(b).