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.)

Prepared By: The Professional Staff of the Reapportionment Committee

BILL:	SB 2-A
INTRODUCER:	Senator Galvano
SUBJECT:	Establishing Congressional Districts of the State
DATE:	August 7, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Levesque	Guthrie	RE	**Pre-meeting**
2.				
3.				
4.				
5.				
6.				

I. Summary:

As required by state and federal law, the bill apportions Florida into congressional districts.

In its current form, this bill contains Redistricting Plan H000C9047 as adopted by the Legislature in 2012, and reenacts Chapter 8 of the Florida Statutes (Chapter 2012-2 Laws of Florida).

II. Present Situation:

The United States Constitution requires the Legislature periodically to reapportion the state into congressional districts.[1] Florida currently is apportioned into 27 single-member congressional districts.[2] The congressional apportionment plan the Legislature adopted in 2012 was challenged in *Romo v. Detzner*, consolidated case nos. 2012-CA-412 and 2012-CA-490 in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida. In the Final Judgment issued July 10, 2104, Judge Terry Lewis found Congressional Districts 5 and 10 to be unconstitutional. In a subsequent ruling issued August 1, 2014, the judge ordered the Legislature to present a remedial plan to the court no later than noon on August 15, 2014.

As a result, the President of the Senate and the Speaker of the House issued a Joint Proclamation convening the Legislature for the sole and exclusive purpose of considering revisions to Congressional Districts 5 and 10, as established in Chapter 2012-2, Laws of Florida, and to make conforming changes to districts that are a direct result of the changes to Congressional Districts 5 and 10.

[1] *See* U.S. Const. Amend. XIV; *Wesberry v. Sanders*, 376 U.S. 1 (1964).
[2] Fla. SB 1174 (2012).

Redistricting plans must comply with all requirements of the United States Constitution, the federal Voting Rights Act of 1965, the Florida Constitution, and applicable court decisions.

The United States Constitution

The United States Supreme Court has interpreted Article I, Section 2 of the United States Constitution to require that congressional districts be as nearly equal in population as practicable.[3] In the creation of congressional districts, the so-called "one person, one vote" requires the Legislature to make a good-faith effort to achieve precise mathematical equality.[4] The Constitution permits population variances that are (1) unavoidable despite a good-faith effort to achieve absolute equality; or (2) necessary to achieve a legitimate goal.[5] In the case of congressional districts, however, the Court has allowed no *de minimis* population variances.[6]

The Equal Protection Clause limits the influence of race in redistricting. If race is the predominant factor in redistricting, such that traditional, race-neutral redistricting principles are subordinated to considerations of race, the redistricting plan will be subject to strict scrutiny.[7] To satisfy strict scrutiny, the use of race as a predominant factor must be narrowly tailored to achieve a compelling interest.[8] The United States Supreme Court has held that the interest of the state in remedying the effects of identified racial discrimination may be compelling,[9] and it has assumed, but has not decided, that compliance with the requirements of the federal Voting Rights Act likewise justifies the use of race as a predominant factor in redistricting.[10]

The United States Supreme Court has construed the Equal Protection Clause to prohibit political gerrymanders,[11] but it has not identified judicially discernible and manageable standards by which such claims are to be resolved.[12] Political gerrymandering cases, therefore, remain sparse.

The Federal Voting Rights Act

In some circumstances, Section 2 of the federal Voting Rights Act requires the creation of a district that performs for minority voters. Section 2 requires, as necessary preconditions, that (1) the minority group be sufficiently large and geographically compact to constitute a numerical majority in a single-member district; (2) the minority group be politically cohesive; and (3) the majority vote sufficiently as a bloc to enable it usually to defeat the candidate preferred by the minority group.[13] If each of these preconditions is established, Section 2 will require the creation

[3] *Wesberry*, 376 U.S. 1.
[4] *Karcher v. Daggett*, 462 U.S. 725, 730 (1983).
[5] *Id*. at 730-31.
[6] *Id*. at 734.
[7] *Miller v. Johnson*, 515 U.S. 900, 916 (1995).
[8] *Id*. at 920.
[9] *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).
[10] *Id*. at 915; *Bush v. Vera*, 517 U.S. 952, 982-83 (1996) (plurality opinion).
[11] *Davis v. Bandemer*, 478 U.S. 109 (1986). The term "political gerrymander" has been defined as "the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." *Vieth v. Jubelirer*, 541 U.S. 267, 272 n.1 (2004) (plurality opinion) (quoting Black's Law Dictionary 696 (7th ed. 1999)).
[12] *Davis*, 478 U.S. at 123; *Vieth*, 541 U.S. at 281.
[13] *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *Bartlett v. Strickland*, 556 U.S. 1 (2009) (plurality opinion).

of a performing minority district if, based on the totality of the circumstances, it is demonstrated that members of the minority group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[14]

Section 5 of the Voting Rights Act protects the electoral opportunities of minority voters in covered jurisdictions from retrogression, or backsliding.[15] In Florida, Section 5 covered five counties: Collier, Hardee, Hendry, Hillsborough, and Monroe.[16] Section 5 requires that, before its implementation in a covered jurisdiction, any change in electoral practices (including the enactment of a new redistricting plan) be submitted to the United States Department of Justice or to the federal District Court for the District of Columbia for review and preclearance.[17] A change in electoral practices is entitled to preclearance if, with respect to minority voters in the covered jurisdictions, the change has neither a discriminatory purpose nor diminishes the ability of any citizens on account of race or color to elect their preferred candidates.[18] In *Shelby County v. Holder*, which was decided after the redistricting process concluded, the United States Supreme Court declared that the "coverage formula" in Section 4 of the VRA—the formula by which Congress selected the jurisdictions that Section 5 covered— exceeded Congress's enforcement authority under the Fifteenth Amendment.[19] The preclearance process established by Section 5 of the VRA is thus no longer in effect. But *Shelby County* does not affect the validity of the statewide diminishment standard embodied in Article III, section 20, of the Florida Constitution. *Shelby County*'s holding regarding the enforcement powers of Congress has no apparent application to the statewide standard embodied in the Florida Constitution.

The Florida Constitution

In 2010, voters amended the Florida Constitution to create standards for establishing congressional district boundaries.[20] The new standards are set forth in two tiers. To the extent that compliance with second-tier standards conflicts with compliance with first-tier standards, the second-tier standards do not apply.[21] The order in which the standards are set forth within either tier does not establish any priority of one standard over another within the same tier.[22]

[14] 42 U.S.C. § 1973(b).
[15] 42 U.S.C. § 1973c.
[16] 28 C.F.R. pt. 51 app.
[17] 42 U.S.C. § 1973c(a).
[18] 42 U.S.C. § 1973c(b), (c). Apart from the Voting Rights Act, federal law directs that congressional districts be single-member districts. 2 U.S.C. § 2c. Congress enacted this requirement pursuant to its authority to regulate the times, places, and manner of holding congressional elections. *See* U.S. Const. Art. I, § 4, cl. 1.
[19] *See Shelby County v. Holder*,133 S. Ct. 2612 (2013).
[20] Art. III, § 20, Fla. Const. Before the adoption of the amendment, the Florida Constitution did not regulate congressional redistricting. Two members of Congress have challenged the constitutionality of the new standards in federal court. They allege that, because the new standards purport to regulate congressional elections, its method of enactment violates Article I, Section 4 of the United States Constitution. The plaintiffs were unsuccessful in the district court but have appealed to the Eleventh Circuit. *See Brown v. Browning*, No. 1:10-cv-23968-UU, slip op. (S.D. Fla. Sep. 9, 2011), *appeal docketed*, No. 11-14554 (11th Cir. Oct. 3, 2011).
[21] Art. III, § 20(c), Fla. Const.
[22] *Id*.

The first tier provides that no apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent.[23] Redistricting decisions unconnected with an intent to favor or disfavor a political party and incumbent do not violate this provision of the Florida Constitution, even if their effect is to favor or disfavor a political party or incumbent.[24]

The first tier of the new standards also provides two distinct protections for racial and language minorities. First, districts may not be drawn with the intent or result of denying or abridging the equal opportunity of minorities to participate in the political process. Second, districts may not be drawn to diminish the ability of racial or language minorities to elect representatives of their choice.[25] The first standard is comparable in its text to Section 2 of the federal Voting Rights Act. The second standard is comparable in its text to Section 5 of the federal Voting Rights Act, as amended in 2006, but is not limited to the five counties protected by Section 5.[26]

On March 29, 2011, the Florida Legislature submitted the new standards to the United States Department of Justice for preclearance. In the submission, the Legislature took the position that the two protections for racial and language minorities collectively ensure that the Legislature's traditional power to maintain and even increase minority voting opportunities is not impaired or diminished by other, potentially conflicting standards in the constitutional amendment, and that the Legislature may continue to employ, without change, the same methods to preserve and enhance minority representation as it has employed with so much success in recent decades.[27] Without comment, the Department of Justice granted preclearance on May 31, 2011.[28]

The first tier also requires that districts consist of contiguous territory.[29] In the context of state legislative districts, the Florida Supreme Court has held that a district is contiguous if no part of the district is isolated from the rest of the district by another district.[30] In a contiguous district, a person can travel from any point within the district to any other point without departing from the district.[31] A district is not contiguous if its parts touch only at a common corner, such as a right

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[23] Art. III, § 20(a), Fla. Const. The statutes and constitutions of several states contain similar prohibitions. *See*, *e.g.*, Cal. Const. Art. XXI, § 2(e); Del. Const. Art. II, § 2A; Haw. Const. Art. IV, § 6; Wash. Const. Art. II, § 43(5); Iowa Code § 42.4(5); Mont. Code Ann. § 5-1-115(3); Or. Rev. Stat. § 188.010(2); Wash. Rev. Code § 44-05-090(5). These standards have been the subject of little litigation. In *Hartung v. Bradbury*, 33 P.3d 972, 987 (Or. 2001), the court held that "the mere fact that a particular reapportionment may result in a shift in political control of some legislative districts (assuming that every registered voter votes along party lines)," does not show that a redistricting plan was drawn with an improper intent.

[24] It is well recognized that political *consequences* are inseparable from the redistricting process. *See*, *e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 343 (2004) (Souter, J., dissenting) ("The choice to draw a district line one way, not another, always carries some consequence for politics, save in a mythical State with voters of every political identity distributed in an absolutely gray uniformity.").

[25] Art. III, § 20(a), Fla. Const.

[26] *Compare id*. *with* 42 U.S.C. § 1973c(b).

[27] Letter from Andy Bardos, Special Counsel to the Senate President, and George Levesque, General Counsel to the Florida House of Representatives, to T. Christian Herren, Jr., Chief of the Voting Section, Civil Rights Division, United States Department of Justice (Mar. 29, 2011) (on file with the Senate Committee on Reapportionment).

[28] Letter from T. Christian Herren, Jr., Chief of the Voting Section, Civil Rights Division, United States Department of Justice, to Andy Bardos, Special Counsel to the Senate President, and George Levesque, General Counsel to the Florida House of Representatives (May 31, 2011) (on file with the Senate Committee on Reapportionment).

[29] Art. III, § 20(a), Fla. Const.

[30] *In re Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 279 (Fla. 1992) (citing *In re Apportionment Law, Senate Joint Resolution 1E*, 414 So. 2d 1040, 1051 (Fla. 1982))

[31] *Id*.

angle.[32] The Court has also concluded that the presence in a district of a body of water without a connecting bridge, even if it requires land travel outside the district in order to reach other parts of the district, does not violate contiguity.[33]

The second tier of standards requires that districts be compact.[34] The various measures of compactness that courts in other states have utilized include mathematical calculations that compare districts according to their areas, perimeters, and other geometric and geographical criteria[35] In *In re Senate Joint Resolution of Legislative Apportionment 1176,* 83 So. 3d 597, 631 (Fla. 2012) (*Apportionment I*), the Florida Supreme Court rejected broader considerations of compactness like functional compactness that would look to commerce, transportation, communication, and other practical measures that unite communities, facilitate access to elected officials, and promote the integrity and cohesiveness of districts for representational purposes.[36] In applying the compactness criterion, the Florida Supreme Court has counseled to look to the shape of the district. "Compact districts should not have an unusual shape, a bizarre design, or an unnecessary appendage unless it is necessary to comply with some other requirement."[37] Compactness may be assessed visually or mathematically using a variety of mathematical scores. Two mathematical measures of compactness specifically referenced by the Florida Supreme Court are the Reock or circle dispersion method[38] and the area/convex hull method.[39] It is unclear whether these are the only compactness measures to be considered.

Courts recognize that perfect geometric compactness, which consists of circles or regular simple polygons, is impracticable and not required.[40] The criterion of compactness needs to be measured and balanced against the other tier two criteria of equal population and utilization of political and geographic boundaries as well as tier one criteria of not denying the equal opportunity of racial or language minorities to participate in the political process or diminishing their ability to elect representatives of their choice.[41] Because the considerations that influence compactness are multi-faceted and fact-intensive, courts tend to agree that mere visual inspection is ordinarily

[32] *Id*. (citing *In re Apportionment Law, Senate Joint Resolution 1E*, 414 So. 2d at 1051)
[33] *Id*. at 280.
[34] Art. III, § 20(b), Fla. Const.
[35] *See, e.g., In re Senate Joint Resolution of Legislative Apportionment 1176,* 83 So. 3d 597 (Fla. 2012), *Hickel v. Southeast Conference*, 846 P.2d 38, 45 (Alaska 1992); *In re Reapportionment of Colo. Gen. Assembly*, 647 P.2d 209, 211 (Colo. 1982); *In re Apportionment of State Legislature–1982*, 321 N.W.2d 565, 580 (Mich. 1982).
[36] Compare See, e.g., *Wilson v. Eu,* 823 P.2d 545, 553 (Cal. 1992); Opinion to the Governor, 221 A.2d 799, 802-03 (R.I. 1966); *In re Reapportionment of Towns of Hartland, Windsor & W. Windsor,* 624 A.2d 323, 330 (Vt. 1993).
[37] *Apportionment I,* 83 So. 3d 597, 634 (Fla. 2012)
[38] The Reock method "measures the ratio between the area of the district and the area of the smallest circle that can fit around the district. This measure ranges from 0 to 1, with a score of 1 representing the highest level of compactness as to its scale." *Apportionment I,* 83 So. 3d at 635.
[39] The convex hull method "measures the ratio between the area of the district and the area of the minimum convex bounding polygon that can enclose the district. The measure ranges from 0 to 1, with a score of 1 representing the highest level of compactness. A circle, square, or any other shape with only convex angles has a score of 1." *Apportionment I,* 83 So. 3d at 635.
[40] See, e.g., *Apportionment I,* 83 So. 3d at 635; *Matter of Legislative Districting of State,* 475 A.2d 428, 437, 443-44 (Md. 1984); *Preisler v. Kirkpatrick,* 528 S.W.2d 422, 426 (Mo. 1975).
[41] *Apportionment I,* 83 So. 3d at 635.

insufficient to determine compliance with a compactness standard,[42] and that an evaluation of compactness requires a factual setting.[43]

In addition to compactness, the second tier of standards requires that, where feasible, districts utilize existing political and geographical boundaries.[44] The Florida Supreme Court has defined geographical boundaries as geography that is "easily ascertainable and commonly understood, such as rivers, railways, interstates, and state roads."[45] Likewise, the court has identified political boundaries to include municipalities and counties.[46] The Florida Constitution accords no preference to political over geographical boundaries.[47]

The Constitution recognizes that, in the creation of districts, it will often not be "feasible" to trace political and geographical boundaries.[48] District boundaries might depart from political and geographical boundaries to achieve objectives of superior importance, such as population equality and the protection of minorities, and many political subdivisions are not compact. Some local boundaries may be ill-suited to the achievement of effective and meaningful representation.

III. Effect of Proposed Changes:

Consistent with state and federal law, the bill apportions the state into 27 single-member congressional districts. Maps and statistics for Redistricting Plan H000C9047 and the Benchmark 2002 Redistricting Plan are attached to this analysis.

The districts in the bill have an overall range of one person. Twenty-two districts have populations of 696,344, while five districts have populations of 696,345.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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[42] *See, e.g.*, *Matter of Legislative Districting of State*, 475 A.2d at 439; *Commonwealth ex rel. Specter v. Levin*, 293 A.2d 15, 23-24 (Pa. 1972).
[43] *See, e.g.*, *State ex rel. Davis v. Ramacciotti*, 193 S.W.2d 617, 618 (Mo. 1946); *Opinion to the Governor*, 221 A.2d at 802, 804.
[44] Art. III, § 20(b), Fla. Const.
[45] *Apportionment I*, 83 So. 3d at 637.
[46] *Apportionment I*, 83 So. 3d at 636.
[47] Art. III, § 20(b), (c), Fla. Const.
[48] Art. III, § 20(b), Fla. Const.

D. Other Constitutional Issues:

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.