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 Committee on Reapportionment

BILL:	SJR 2-C
INTRODUCER:	Senator Galvano
SUBJECT:	Apportionment
DATE:	October 22, 2015
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Ferrin	Ferrin	RE	**Pre-meeting**

I. Summary:

SJR 2-C defines terms and sets forth the general standards for establishing state Senate districts. This bill is the vehicle for amendments which will establish a complete Senate redistricting map.

II. Present Situation:

The Florida Constitution requires the Legislature, by joint resolution, to reapportion the state into no fewer than 30 nor more than 40 consecutively-numbered Senate districts.[1] Redistricting must occur in the second year after each decennial census.[2] Florida currently is apportioned into 40 single-member Senate districts.[3]

Additionally, 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.

On February 9, 2012, the Legislature enacted SJR 1176, apportioning the state into state Senate and state representative districts. After a facial review, the Florida Supreme Court concluded on March 9, 2012, that the apportionment plan for Senate districts was unconstitutional under Article III, section 21 of the Florida Constitution. Following the Florida Supreme Court's decision,[4] the Legislature enacted CS/SJR 2-B, which was challenged in *League of Women Voters v. Detzner*, Case No. 2012-CA-2842, in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida.

While that action was ongoing, the Florida Supreme Court ruled on July 9, 2015, that Florida's congressional map—as enacted in a 2014 remedial plan—was unconstitutional.[5] The Court

[1] Art. III, § 16(a), Fla. Const.
[2] *Id*.
[3] Fla. SJR 2-B (2012).
[4] *See In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla. 2012).
[5] *League of Women Voters v. Detzner*, 172 So. 3d 363 (Fla. 2015).

further held that once broader unconstitutional intent is found by a court, any remedial map will be granted no presumption of validity.[6] The Court's finding essentially inverted the standard of review and "shift[ed] the burden to the Legislature to justify its decisions . . . ."[7]

In light of that decision, the Senate elected to enter into a consent judgment with the plaintiffs in the pending Senate case, whereby the Legislature is responsible for enacting a remedial Senate plan for use in the 2016 elections. If the Legislature fails to enact a map, the Judiciary is obligated to impose a remedial plan of its choosing.

The United States Constitution

The Equal Protection Clause of the Fourteenth Amendment requires that legislative districts be as nearly equal in population as practicable.[8] The so-called "one person, one vote" mandate does not require that state legislative districts achieve exact mathematical equality, but, more flexibly, permits disparities in population based on legitimate considerations incident to the effectuation of rational state policies.[9] Specifically, in the case of state legislative districts, an overall range of less than 10 percent is constitutional, absent proof of arbitrariness or discrimination.[10]

The Equal Protection Clause also 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 is subject to strict scrutiny.[11] To satisfy strict scrutiny, the use of race as a predominant factor must be narrowly tailored to achieve a compelling interest.[12] The United States Supreme Court has held that the interest of the state in remedying the effects of identified racial discrimination may be compelling.[13] The Court has also 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.[14]

The United States Supreme Court has construed the Equal Protection Clause to prohibit political gerrymanders,[15] but it has not identified judicially discernible and manageable standards by which such claims are to be resolved.[16] Political gerrymandering cases, therefore, remain sparse.

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[6] *Id.* at 397.
[7] *Id.* at 396-7.
[8] *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).
[9] *Larios v. Cox*, 300 F. Supp. 2d 1320, 1339 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004) (citing *Reynolds*, 377 U.S. at 577-79).
[10] *Id*. at 1338-41. The overall range is determined by subtracting the total population of the least populous district from the total population of the most populous district, and dividing the difference by the ideal population. The overall range has alternatively been referred to as the total or maximum deviation.
[11] *Miller v. Johnson*, 515 U.S. 900, 916 (1995).
[12] *Id*. at 920.
[13] *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).
[14] *Id*. at 915; *Bush v. Vera*, 517 U.S. 952, 982-83 (1996) (plurality opinion).
[15] *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)).
[16] *Davis*, 478 U.S. at 123; *Vieth*, 541 U.S. at 281.

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.[17] If each of these preconditions is established, Section 2 requires the creation 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.[18]

Section 5 of the Voting Rights Act protects the electoral opportunities of minority voters in covered jurisdictions from retrogression, or backsliding.[19] In Florida, Section 5 covers five counties: Collier, Hardee, Hendry, Hillsborough, and Monroe.[20] 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.[21] 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.[22] 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 of the United States Constitution.[23] 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.

The Florida Constitution

Since 1968, the Florida Constitution has required that state legislative districts be contiguous.[24] A district is contiguous if no part of the district is isolated from the rest of the district by another district.[25] In a contiguous district, a person can travel from any point within the district to any other point without departing from the district.[26] A district is not contiguous if its parts touch only at a common corner, such as a right angle.[27] The Florida Supreme Court has also held that

[17] *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *Bartlett v. Strickland*, 556 U.S. 1 (2009) (plurality opinion).
[18] 42 U.S.C. § 1973(b).
[19] 42 U.S.C. § 1973c.
[20] 28 C.F.R. pt. 51 app.
[21] 42 U.S.C. § 1973c(a).
[22] 42 U.S.C. § 1973c(b), (c).
[23] *See Shelby County v. Holder*, 133 S. Ct. 2612 (2013).
[24] Art. III, § 16(a), Fla. Const.
[25] *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)).
[26] *Id*.
[27] *Id*. (citing *In re Apportionment Law, Senate Joint Resolution 1E*, 414 So. 2d at 1051).

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.[28]

Districts must be consecutively numbered, but it is not necessary that adjacent districts receive consecutive numbers.[29] For example, districts in a 40-district redistricting plan may be numbered from one to 40, but District 1 and District 2 need not be adjacent to one another.[30] The numbering of districts also factors into the evaluation of intent to favor or disfavor an incumbent or political party under Article III, section 21 of the Florida Constitution.[31] Numbering systems must also be incumbent neutral.[32]

Ordinarily, senators are elected to four-year terms.[33] The terms are staggered with elections for odd-numbered districts held in years the number of which are multiples of four, and even-numbered districts in years the number of which is an even number not divisible by four.[34] At the general election that follows the decennial reapportionment, terms that are not scheduled naturally to expire will be truncated, and all seats in the Senate will be subject to election in the new districts.[35] The Florida Supreme Court has recognized a narrow exception to the rule that requires the terms of senators to be truncated at the general election following redistricting. If the term of a senator is not scheduled naturally to expire at the general election, and the redistricting plan does not alter the boundaries of the district, the senator would continue to serve the remainder of the term until its natural expiration.[36] To preserve staggered terms in a decennial reapportionment, voters in Senate districts designated by even numbers will elect candidates to two-year terms, while voters in Senate districts designated by odd numbers will elect candidates to four-year terms.[37]

It is an open question of law as to whether, in the context of enacting a remedial redistricting plan, the truncation of terms and special elections are required for districts with numbers that fall outside the constitutional election cycle. There are a confluence of constitutional provisions that create such ambiguity: the requirement of four-year staggered terms,[38] an ambiguity in the applicability of the provision requiring truncation of terms following a reapportionment to a remedial redistricting plan,[39] and the provision establishing the Senate as the sole judge of the qualifications, elections and returns of its members.[40]

In 1996, a United States District Court in Florida approved a settlement that redrew and imposed five new odd-numbered districts and one new even-numbered district whereby the even-

[28] *Id*. at 280.
[29] Art. III, § 16(a), Fla. Const.; *In re Apportionment Law, Senate Joint Resolution 1E*, 414 So. 2d at 1050-51.
[30] *Id*.
[31] *In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 659 (Fla. 2012).
[32] *Id*.
[33] Art. III, § 16(a), Fla. Const.
[34] Art. III, § 15(a), Fla. Const.
[35] *In re Apportionment Law, Senate Joint Resolution 1E*, 414 So. 2d at 1047-48.
[36] *Id*.
[37] Art. III, § 15(a), Fla. Const.
[38] Art. III, § 15(a), Fla. Const.
[39] *See id.*
[40] Art. III, § (2), Fla. Const.

numbered district was not subject to an election until 1998. This permitted the senator holding that district to finish his term in a revised district without standing for a special election.[41]

In a case that is somewhat analogous to the present circumstances, a federal appellate court in the Third Circuit concluded that it was not a violation of the Equal Protection Clause for a senator whose district was renumbered and moved from Eastern Pennsylvania to Western Pennsylvania to serve out the remaining two years of office, despite not having been elected from that district.[42] In the related state court litigation, the Pennsylvania Supreme Court found it appropriate for the senator to continue in office because "[o]nly the Senate has the authority to judge the qualifications of its members."[43] Similar language is contained in the Florida Constitution, which the Florida Supreme Court has found to divest the courts of jurisdiction to determine whether or not a state senator had right to hold that office.[44]

In 2010, voters amended the Florida Constitution to create additional standards for establishing state legislative district boundaries.[45] 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.[46] 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.[47]

The first tier provides that "[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent."[48] 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.[49]

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

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[41] *See Scott v. U.S. Dep't of Justice*, 920 F. Supp. 1248, 1250 (M.D. Fla. 1996), *aff'd*, *Lawyer v. Dep't of Justice*, 521 U.S. 567 (U.S. 1997).
[42] *See Donatelli v. Mitchell*, 2 F.3d 508 (3rd Cir.1993).
[43] *In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, 530 Pa. 335, 352, 609 A.2d 132, 140 (1992), *abrogated on other grounds by Holt v. 2011 Legislative Reapportionment Comm'n*, 614 Pa. 364, 38 A.3d 711 (2012).
[44] *English v. Bryant*, 152 So. 2d 167 (Fla. 1963).
[45] Art. III, § 21, Fla. Const.
[46] Art. III, § 21(c), Fla. Const.
[47] *Id*.
[48] Art. III, § 21(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.
[49] 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.").

choice.[50] The second standard is comparable in its text to Section 5 of the federal Voting Rights Act but is not limited to the five counties protected by Section 5.[51]

The first tier also requires that districts consist of contiguous territory.[52] In this respect, the new standards duplicate a requirement that the Florida Constitution has contained since 1968.[53]

The second tier of standards requires that districts be compact.[54] 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 criteria.[55] 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.[56] In applying the compactness criterion, the Florida Supreme Court has counseled the Legislature 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."[57] 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,[58] and the area/convex hull method.[59] It is unclear whether these are the only compactness measures that may be considered.

Courts recognize that perfect geometric compactness, which consists of circles or regular simple polygons, is impracticable and not required.[60] The criterion of compactness must be measured and balanced against the other tier two criteria of equal population and use of political and geographical 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.[61] Because the considerations that influence compactness are

[50] Art. III, § 21(a), Fla. Const.
[51] *Compare id*. *with* 42 U.S.C. § 1973c(b).
[52] Art. III, § 21(a), Fla. Const.
[53] Similarly, the second tier duplicates the federal requirement that districts be as nearly equal in population as practicable. *Compare* Art. III, § 21(b), Fla. Const., *with Reynolds v. Sims*, 377 U.S. 533, 577 (1964).
[54] Art. III, § 21(b), Fla. Const.
[55] *See, e.g.*, *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).
[56] *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 631 (Fla. 2012); *Compare, 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).
[57] *Apportionment I*, 83 So. 3d 597, 634 (Fla. 2012).
[58] 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.
[59] 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.
[60] *See, e.g.*, *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).
[61] *Apportionment I*, 83 So. 3d at 635.

multi-faceted and fact-intensive, courts tend to agree that mere visual inspection is ordinarily insufficient to determine compliance with a compactness standard,[62] and that an evaluation of compactness requires a factual setting.[63]

In addition to compactness, the second tier of standards requires that, where feasible, districts utilize existing political and geographical boundaries.[64] 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."[65] Likewise, the Court has identified political boundaries to include municipalities and counties.[66] The Florida Constitution accords no preference to political over geographical boundaries.[67]

The Constitution recognizes that, in the creation of districts, it is often not "feasible" to trace political and geographical boundaries.[68] 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 and using 2010 United States Decennial Census data, SJR 2-C apportions the state into 40 contiguous, consecutively-numbered single-member senatorial districts to which members shall be elected in and for as provided by law. If any provision, application, or district of this bill is held invalid, the remaining provisions are severable. It applies to the qualification, nomination, and election of members of the Senate in the primary and general elections held in 2016 and thereafter.

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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[62] *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).
[63] *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.
[64] Art. III, § 21(b), Fla. Const.
[65] *Apportionment I*, 83 So. 3d at 637.
[66] *Id.* at 636.
[67] Art. III, § 21(b), and (c), Fla. Const.
[68] Art. III, § 21(b), Fla. Const.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The 2015 reapportionment will have an undetermined fiscal impact on Florida's election officials, including 67 Supervisor of Elections offices and the Department of State, Division of Elections. Local supervisors will incur the cost of data-processing and labor to change each of Florida's 11 million voter records to reflect new districts. As precincts are aligned to new districts, the costs for postage and printing will be incurred to provide each active voter whose precinct has changed with mail notification. Temporary staff will be hired to assist with mapping, data verification, and voter inquiries.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

None.

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.