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:	CS/SB 2-B
INTRODUCER:	Reapportionment Committee and Senator Galvano
SUBJECT:	Establishing the Congressional Districts of the State
DATE:	August 18, 2015 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Ferrin	Ferrin	RE	**Fav/CS**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 2-B apportions Florida into congressional districts as required by state and federal law.

As amended, this bill contains Redistricting Plan S024C9054, a remedial map of Florida's congressional districts, which was drawn to comply with the Supreme Court's July 9, 2015, opinion in *The League of Women Voters v. Detzner*.

II. Present Situation:

The United States Constitution requires that representation in Congress be periodically reapportioned among the states.[1,2] As a result of the 2010 Census, the Legislature is responsible for apportioning the state into 27 single-member congressional districts.[3] These districts must conform to the requirements of the United States Constitution, federal law, and the Florida Constitution, including the tier one and tier two requirements of Article III, § 20.

In 2012 the Legislature adopted a congressional apportionment plan, H000C9047, which 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.

[1] *See* U.S. Const. Amend. XIV; *Wesberry v. Sanders*, 376 U.S. 1 (1964).
[2] *See also Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S.Ct. 2652, 2668 (U.S. 2015) (holding that "[r]edistricting is a legislative function to be performed in accordance with the State's prescriptions for lawmaking….").
[3] Fla. SB 2-A (2014).

In the circuit court's Final Judgment issued July 10, 2014, Judge Terry Lewis found Congressional Districts (CD) 5 and 10 to be unconstitutional and rejected the Plaintiffs' challenges to CD 13, 14, 15, 21, 22, 25, 26, and 27.

In a subsequent ruling issued August 1, 2014, the judge ordered the Legislature to present a remedial plan to the court no later than August 15, 2014. As a result, the President of the Senate and the Speaker of the House of Representatives convened the Legislature in a Special Session for the sole and exclusive purpose of considering revisions to Congressional Districts 5 and 10 and to make conforming changes to other districts as a result of the changes to Congressional Districts 5 and 10. Those changes were made in a remedial congressional redistricting plan, H000C9057, adopted in SB 2-A, ch. 2014-255, L.O.F.

On July 9, 2015, the Florida Supreme Court affirmed the circuit court's factual findings that the redistricting process leading to the 2012 map was unconstitutional, but reversed the circuit court's order approving the Legislature's 2014 remedial plan. [4] The Court also held, that once broader unconstitutional intent is found by a court, any remedial maps will be granted no presumption of validity.[5] Such a finding essentially inverts the standard of review and "shift[s] the burden to the Legislature to justify its decisions in drawing the congressional district lines."[6]

In its opinion, the Florida Supreme Court also provided guidance on how certain districts must be redrawn, ordering the Legislature to redraw Congressional Districts 5, 13, 14, 21, 22, 25, 26, and 27 in the following ways:

- District 5 must be redrawn in an east-west manner;[7]
- Districts 13 and 14 must be redrawn to avoid crossing Tampa Bay;[8]
- District 21 and 22 must be redrawn to improve tier-two compliance;[9]
- District 25 must be redrawn to avoid splitting Hendry County;[10] and
- Districts 26 and 27 must be redrawn to avoid splitting Homestead.[11]

The Court then relinquished the case back to the circuit court until October 17, 2015.[12] Following the Court's order, the circuit court ordered a new map be enacted by August 25, 2015.

In response to the Supreme Court's opinion of July 9, 2015, the President of the Senate and the Speaker of the House of Representatives convened the Legislature in a Special Session for the sole and exclusive purpose of redrawing Congressional Districts 5, 13, 14, 21, 22, 25, 26, 27, and any other affected districts.

[4] *The League of Women Voters v. Detzner*, No. SC14-1905, 2015 WL 4130852 (Fla. July 9, 2015).
[5] *Id*. at *33-4.
[6] *Id*. at *29.
[7] *Id.* at *39.
[8] *Id.* at *40.
[9] *Id.* at *43.
[10] *Id.* at *42.
[11] *Id.* at *41.
[12] *Id*. at *2.

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.[13] In the creation of congressional districts, the so-called "one person, one vote" requirement mandates the Legislature to make a good-faith effort to achieve precise mathematical equality.[14] The constitution permits population variances only that are either (1) unavoidable despite a good-faith effort to achieve absolute equality; or (2) necessary to achieve a legitimate goal.[15] In the case of congressional districts, however, the Court has allowed no *de minimis* population variances.[16]

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 is subject to strict scrutiny.[17] To satisfy strict scrutiny, the use of race as a predominant factor must be narrowly tailored to achieve a compelling interest.[18] The United States Supreme Court has held that the interest of the state in remedying the effects of identified racial discrimination may be compelling,[19] and it has assumed, but 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.[20]

The United States Supreme Court has construed the Equal Protection Clause to prohibit political gerrymanders,[21] but it has not identified judicially discernible and manageable standards by which such claims are to be resolved.[22] Political gerrymandering cases, therefore, remain sparse.

The Federal Voting Rights Act

In some circumstances, Section 2 of the federal Voting Rights Act (VRA) 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.[23] 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

[13] *Wesberry*, 376 U.S. 1.
[14] *Karcher v. Daggett*, 462 U.S. 725, 730 (1983).
[15] *Id*. at 730-31.
[16] *Id*. at 734.
[17] *Miller v. Johnson*, 515 U.S. 900, 916 (1995).
[18] *Id*. at 920.
[19] *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).
[20] *Id*. at 915; *Bush v. Vera*, 517 U.S. 952, 982-83 (1996) (plurality opinion).
[21] *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)).
[22] *Davis*, 478 U.S. at 123; *Vieth*, 541 U.S. at 281.
[23] *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *Bartlett v. Strickland*, 556 U.S. 1 (2009) (plurality opinion).

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.[24]

Section 5 of the Voting Rights Act protects the electoral opportunities of minority voters in covered jurisdictions from retrogression, or backsliding.[25] In Florida, Section 5 covered five counties: Collier, Hardee, Hendry, Hillsborough, and Monroe.[26] 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.[27] A change in electoral practices is entitled to preclearance if, with respect to minority voters in the covered jurisdictions, the change does not have a discriminatory purpose or diminish the ability of any citizens on account of race or color to elect their preferred candidates.[28] 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.[29] 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

In 2010, voters amended the Florida Constitution to create standards for establishing congressional district boundaries.[30] 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.[31] 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.[32]

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.[33] Redistricting decisions unconnected with an

[24] 42 U.S.C. § 1973(b).
[25] 42 U.S.C. § 1973c.
[26] 28 C.F.R. pt. 51 app.
[27] 42 U.S.C. § 1973c(a).
[28] 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.
[29] *See Shelby County v. Holder*, 133 S. Ct. 2612 (2013).
[30] Art. III, § 20, Fla. Const. Before the adoption of the amendment, the Florida Constitution did not regulate congressional redistricting. Two members of Congress challenged unsuccessfully the constitutionality of the new standards in federal court. They alleged that, because the new standards purported to regulate congressional elections, its method of enactment violated Article I, Section 4 of the United States Constitution. *Brown v. Secretary of State*, 668 F.3d 1271 (11th Cir. 2012).
[31] Art. III, § 20(c), Fla. Const.
[32] *Id*.
[33] 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

intent to favor or disfavor a political party or incumbent do not violate this provision of the Florida Constitution, even if their effect is to favor or disfavor a political party or incumbent.[34]

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.[35] The first standard is comparable to Section 2 of the federal Voting Rights Act. The second standard is comparable to Section 5 of the federal Voting Rights Act, as amended in 2006, but its application is statewide and not limited to the five counties previously protected by Section 5.[36]

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.[37] Without comment, the Department of Justice granted preclearance on May 31, 2011.[38]

The first tier also requires that districts consist of contiguous territory.[39] 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.[40] In a contiguous district, a person can travel from any point within the district to any other point without departing from the district.[41] A district is not contiguous if its parts touch only at a common corner, such as a right angle.[42] 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.[43]

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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.

[34] 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.").

[35] Art. III, § 20(a), Fla. Const.

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

[37] 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).

[38] 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).

[39] Art. III, § 20(a), Fla. Const.

[40] *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)).

[41] *Id*.

[42] *Id*. (citing *In re Apportionment Law, Senate Joint Resolution 1E*, 414 So. 2d at 1051).

[43] *Id*. at 280.

The second tier of standards requires that districts be compact.[44] The various measures of compactness that courts in other states have used include mathematical calculations that compare districts according to their areas, perimeters, and other geometric and geographical criteria.[45] 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.[46] 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."[47] 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,[48] and the area/convex hull method.[49] 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.[50] 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.[51] Because the considerations that influence compactness are multi-faceted and fact-intensive, courts tend to agree that mere visual inspection is ordinarily insufficient to determine compliance with a compactness standard,[52] and that an evaluation of compactness requires a factual setting.[53]

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[44] Art. III, § 20(b), Fla. Const.

[45] *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).

[46] *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).

[47] *Apportionment I,* 83 So. 3d 597, 634 (Fla. 2012).

[48] 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.

[49] 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.

[50] 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).

[51] *Apportionment I*, 83 So. 3d at 635.

[52] *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).

[53] *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.

In addition to compactness, the second tier of standards requires that, where feasible, districts use existing political and geographical boundaries.[54] 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."[55] Likewise, the Court has identified political boundaries to include municipalities and counties.[56] The Florida Constitution accords no preference to political over geographical boundaries.[57]

The Constitution recognizes that, in the creation of districts, it will often not be "feasible" to trace political and geographical boundaries.[58] 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 and conforms to the Florida Supreme Court's order dated July 9, 2015. Specifically, plan S024C9054:

- Redraws District 5 in an east-west manner;
- Redraws Districts 13 and 14 without crossing Tampa Bay;
- Redraws District 21 and 22 in a manner that improves tier-two compliance;
- Redraws District 25 without splitting Hendry County;
- Redraws Districts 26 and 27 without splitting Homestead; and
- Redraws affected districts in accordance with applicable state and federal law.

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[54] Art. III, § 20(b), Fla. Const.
[55] *Apportionment I*, 83 So. 3d at 637.
[56] *Id.* at 636.
[57] Art. III, § 20(b), (c), Fla. Const.
[58] Art. III, § 20(b), Fla. Const.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The enactment of a new map does not appear to have a significant fiscal impact on the Secretary of State. Supervisors of Elections impacted by the changes will incur costs associated with implementation of the new districts. Nothing in the bill requires a special election in the districts affected by the changes. The costs of any special elections are unknown at this time, but a substantial portion of the Supervisors of Elections expenses would be reimbursable by the state.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Although the Florida Supreme Court ruled that CD 5 is not constitutional, federal courts have independent authority to determine whether a congressional district complies with the federal Voting Rights Act. Accordingly, Congresswoman Corrine Brown and others are currently seeking declaratory and injunctive relief in federal court against the use of any redistricting plan that dilutes the voting strength of African Americans in violation of Section 2 of the Voting Rights Act.[59] This lawsuit is essentially a challenge to the Florida Supreme Court's order that the Legislature redraw CD 5 in an east to west configuration.

VIII. Statutes Affected:

This bill substantially amends section 8.0002 of the Florida Statutes.

This bill repeals the following sections of the Florida Statutes: 8.07, 8.08, 8.081, 8.082, 8.083, 8.084, 8.085, 8.086, 8.087, and 8.088.

This bill reenacts the following sections of the Florida Statutes: 8.0001, 8.0111, 8.0112, 8.02, 8.031, 8.05, and 8.0611.

[59] *Warinner v. Detzner*, No. 4:14-cv-00164 (N.D. Fla. August 5, 2015).

IX. Additional Information:

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

CS by Reapportionment on August 17, 2015:
The committee substitute consists of plan S024C9054, which reconfigures Congressional Districts 9, 10, 11, 15, 16, and 17 from how they had been drawn in the bill as filed (plan H00C9065) The changes to these districts result in a reduction of the overall number of cities split into more than one district. As for compactness, the new plan maintains the original bill's statewide Reock and Convex Hull scores, 0.43 and 0.76, respectively, while the statewide Polsby-Popper score is reduced by 0.01 to 0.34.

B. Amendments:

None.