

In my view: the Court's remand to the district court is essentially pointless because the state judiciary is not prepared to adopt a congressional redistricting plan in time to avoid disrupting the 2002 elections, and under the United States Supreme Court's decision in *Grove v. Emison*,¹ the litigation should now shift once and for all to the federal court; and judgment should instead be rendered adopting Plan 1065C, in accordance with the district court's stated intention, because the only objections to that plan, and all of the changes the court made to it, were based on an improper consideration — the protection of incumbents. Therefore I respectfully dissent.

I

Were present efforts to continue unabated, it might be possible to devise a state plan for congressional redistricting in time for the 2006 elections, maybe even with luck for the 2004 elections. But for the 2002 election cycle, which commences six weeks from Monday with the opening of the filing period,² Texas courts, like the Texas Legislature, have now proven incapable of reapportioning the State's congressional districts in time to avoid serious disruptions. To be sure, the 2002 congressional elections could be conducted on the kind of frantic timetable necessitated by the State's failure to produce a lawful reapportionment plan in 1996, with a filing period opening as late as August 30, a special election among all filers in November, and any runoffs in December.³ But a plan devised at the last possible moment is

¹ 507 U.S. 25 (1993).

² TEX. ELEC. CODE §§ 172.001, 172.023.

³ *Vera v. Bush*, 933 F. Supp. 1341 (S.D. Tex. 1996).

hardly one adopted “within ample time . . . to be utilized in the [upcoming] election” within the meaning of *Growe v. Emison*.⁴

Litigation over the same redistricting issues has been pending in the United States District Court for the Eastern District of Texas since the spring,⁵ but in accordance with *Growe*,⁶ that court has deferred to state court proceedings to redraw congressional lines. On July 23, 2001, the federal court announced that its deferral to state efforts to redraw congressional districts would extend only until October 1 and then it would proceed to trial on October 15.⁷ None of the parties to the redistricting litigation suggested that the federal court should defer past October 15.⁸ The federal court’s reasonable deadline has now come and gone, and there is no state plan. Wrangling over which state district court should proceed, well underway on July 23, could not be resolved without this Court’s intervention on September 12.⁹ The trial in state court, commenced on September 17, was not concluded until September 28. At the state court’s request, the federal court extended the deadline for a ruling until October 3.¹⁰ On that day, the state court

⁴ 507 U.S. at 35 (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam); see *id.* at 36-37 (“Of course the District Court would have been justified in adopting its own plan if it had been apparent that the state court, through no fault of the District Court itself, would not develop a redistricting plan in time for the primaries. *Germano* requires deferral, not abstention.”)).

⁵ *Balderas v. Texas*, Civil No. 6:01-CV-158 (E.D. Tex., filed Apr. 12, 2001); *Mayfield v. Texas*, Civil No. 6:01-CV-218 (E.D. Tex., filed May 14, 2001); *Manley v. Texas*, Civil No. 6:01-CV-231 (E.D. Tex., filed May 28, 2001).

⁶ 507 U.S. at 36-37.

⁷ *Balderas v. Texas*, Civil No. 6:01-CV-158 (E.D. Tex., order filed July 23, 2001); *Mayfield v. Texas*, Civil No. 6:01-CV-218 (E.D. Tex., order filed July 23, 2001); *Manley v. Texas*, Civil No. 6:01-CV-231 (E.D. Tex., order filed July 23, 2001).

⁸ *Balderas v. Texas*, Civil No. 6:01-CV-158 (E.D. Tex., order filed Oct. 11, 2001, at 4 n.1).

⁹ *Perry v. Del Rio*, ___ S.W.3d ___ (Tex. 2001).

¹⁰ *Balderas v. Texas*, Civil No. 6:01-CV-158 (E.D. Tex., order filed Oct. 11, 2001, at 1).

issued an order, in its words, “announc[ing] its intention to adopt” Plan 1065C.¹¹ On October 10, however, the state court made what the federal court has fairly characterized as “major changes” in its ruling,¹² issuing an altogether new Plan 1089C.¹³ The federal court immediately postponed its trial until October 22 but indicated that any further delay “would only ensure a delay in the elections.”¹⁴ I agree.

The situation is not like that in *Grove*, where a Minnesota court had given no indication that it “was either unwilling or unable to adopt a congressional plan in time for the elections.”¹⁵ On the contrary, the Minnesota court had adopted a legislative plan before the federal court did and was prepared to adopt a congressional plan, even though the federal court had stayed state court proceedings for a month.¹⁶ The case before us was filed on December 27, 2000, and has been litigated in earnest since the Legislature adjourned *sine die* on May 28, 2001,¹⁷ without enacting any redistricting legislation. Given the flaws in Plan 1089C, which the district court has now adopted, and the infirmities the Court finds in that court’s procedures, the state judicial process is not advancing toward a successful end any time soon. In remanding this case for further proceedings, the Court seems oblivious to the federal court’s reiterated concerns and the exigencies of the circumstances. The district court is to conduct additional hearings.

¹¹ *Del Rio v. Perry*, No. GN003665 (353rd Dist. Ct. of Travis County, Tex., order filed Oct. 3, 2001).

¹² *Balderas v. Texas*, Civil No. 6:01-CV-158 (E.D. Tex., order filed Oct. 11, 2001, at 1).

¹³ *Del Rio v. Perry*, No. GN003665 (353rd Dist. Ct. of Travis County, Tex., order filed Oct. 10, 2001).

¹⁴ *Balderas v. Texas*, Civil No. 6:01-CV-158 (E.D. Tex., order filed Oct. 11, 2001, at 4).

¹⁵ 507 U.S. at 37.

¹⁶ *Id.* at 30-31.

¹⁷ See *Perry v. Del Rio*, ___ S.W.3d ___ (Tex. 2001).

Perhaps it will modify Plan 1089C, adopt another plan already in evidence, or create a new plan altogether, requiring further hearings and appeals on new issues. Perhaps the court will simply readopt Plan 1089C, only to be told on the next appeal to this Court that the plan was legally defective all along. Or perhaps this Court will insist that all further appeals come through the court of appeals. The best that can be said after months of litigation is that development of a state plan remains a remote possibility.

Grove seems to suggest that a federal court may take as a baseline a state court plan that has not been reviewed on appeal.¹⁸ I assume this accounts for the federal court’s statement that “under *Grove*, plan 1089C must be the only candidate for a baseline state plan in this case.”¹⁹ But even if it need not await the state appeals process to run its course, the federal court cannot take as its starting point a plan like 1089C that this Court has already declared invalid, as we do today. Were a valid plan imminent, the federal court might be pressed to defer a bit longer; but a valid plan is not imminent, or even likely at this point. If nothing else, the uncertainties left and the new ones created by today’s decision dispel any lingering hope that a Texas court can produce a valid congressional redistricting plan for 2002. *Grove* seems to counsel federal court deferral only so long as state courts can produce a plan in time for elections. The federal court need not wonder whether that is still possible; it is not.

¹⁸ *Grove*, 507 U.S. at 35 (“The District Court also expressed concern over the lack of time for orderly appeal, prior to the State’s primaries, of any judgment that might issue from the state court We fail to see the relevance of the speed of appellate review. [*Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam)] requires only that the state agencies adopt a constitutional plan ‘within ample time . . . to be utilized in the [upcoming] election’ It does not require appellate review of the plan prior to the election, and such a requirement would ignore the reality that States must often redistrict in the most exigent circumstances — during the brief interval between completion of the decennial federal census and the primary season for the general elections in the next even-numbered year.”).

¹⁹ *Balderas v. Texas*, Civil No. 6:01-CV-158 (E.D. Tex., order filed Oct. 11, 2001, at 2).

Because state procedures should no longer impede the federal litigation, what happens in the state district court is no longer of immediate consequence. The court could attempt to devise a plan for the 2004 elections, in the event that the federal court plan is not preemptive and the Legislature does not revisit the issue in its next session. Or the parties may decide to abandon the state court proceedings altogether. In any event, the effect of today's remand is to terminate the state courts' efforts to develop a congressional redistricting plan for 2002.

II

The United States Supreme Court has instructed federal courts in redistricting cases to “follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution”.²⁰ While the Supreme Court has not given state courts the same direction, this Court has stated that “[w]hen a court sets aside the plan chosen by the Legislature, the beginning point for fashioning a substitute plan must be those aspects of the legislated scheme which are valid.”²¹ The difficulty here is that the last expression of legislative will on the subject of congressional districting was in 1991. Three of the districts drawn by the 1991 Legislature were unconstitutional, resulting in changes to ten others,²² so that the existing districts are now largely an expression of the will of the federal court, not the will of the Legislature. It is inappropriate, of course, to

²⁰ *White v. Weiser*, 412 U.S. 783, 795 (1973).

²¹ *Terrazas v. Ramirez*, 829 S.W.2d 712, 720 (Tex. 1991) (plurality opinion).

²² *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996).

look for direction to an illegal legislative plan. Moreover, Texas has changed dramatically since 1991, so that the legislative experience that year, separating out the legal goals from the illegal, may have limited relevance in 2001. Demographics have changed. The record reflects that the State's population has grown 23%, from 16,986,510 to 20,851,820, of which Hispanics are now nearly one-third versus one-fourth in 1990. And politics have changed. In 1991 the congressional and legislative delegations were seventy and sixty-four percent Democrat, respectively; now they are fifty-seven and fifty-two percent Democrat. In 1991 there were six Republican statewide elected officials; in 2001 all twenty-seven statewide elected officials were Republican. These changes appear to have affected districting considerations. For example, while incumbent protection has been one of the main aims of legislative redistricting in the past,²³ under the plan adopted in July by the Legislative Redistricting Board, thirty-seven incumbents were placed in districts with one or more other incumbents. In sum, the legal deficiencies in the 1991 congressional redistricting plan enacted by the Legislature and the dramatic changes in the ethnic and political makeup of Texas' population render that plan largely irrelevant in determining what principles should guide redistricting now.

The undeniably inherent and intense political nature of redistricting counsels that a state court drawing district lines must start with something besides a blank map, lest the court's job become in all respects the equivalent of the Legislature's. Courts have no business in such a non-adjudicative role. But where to start in this case? The only indication of current state policies is in the legislative redistricting completed by the Legislative Redistricting Board, a constitutional body²⁴ charged by the people with

²³ *Id.* at 1317-1318.

²⁴ TEX. CONST. art. III, § 28.

legislative redistricting when the Legislature defaults. Arguably its work best reflects what factors should now govern redistricting, congressional as well as legislative.

But I need not resolve this question. After a two-week trial, at which many competing factors were argued and as many as twelve plans were presented, the district court on October 3, 2001, “announce[d] its intention to adopt” Plan 1065C, subject to “comments, proposed changes, or requested modifications” lodged by October 9. As I intend to show, almost all of the modifications requested in Plan 1065C, and the only ones not rejected by the district court, were based on protecting incumbents. Because that is not a proper legal basis for judicial redistricting, Plan 1065C should not have been changed. Thus, it stands as a plan adopted by the district court to which no valid objections was raised, and this Court should order it to be the State’s plan for purposes of federal review.

A

The objections filed to Plan 1065C were of three types.

First, there were general objections to changes in historic district lines, all of which amounted to complaints that Plan 1065C did not sufficiently protect incumbents. For example, the Democratic congressional members who intervened in the case and Molly Beth Malcolm, chair of the State Democratic Party, argued that Plan 1065C did not “adhere[] to the Texas Legislature’s longstanding policies of preserving the cores of prior districts and protecting congressional incumbents.” Plan 1065C, they said, moved too far from historical district lines so as to impair the reelection of six Democratic incumbents. The existing and proposed districts of these members were analyzed district by district. Similarly, the plaintiffs objected that the district court was required to adhere as closely as possible to the 1991 legislation even

though it was, they conceded, unconstitutional in significant respects and “partisan-based”. The plaintiffs themselves tell us in their brief that “the only party to propose more than technical changes to Plan 1065C was Speaker Laney.” In his objections, Speaker Laney argued for specific changes out of “respect for traditional communities of interest”, “to restore the core constituencies” of various districts, to “maintain[] the relationships between constituents and incumbents”, to return districts “closer to [their] roots and preserve more of the cores of the current districts”, to “preserve the rural character” of districts, to restore districts “closer to [their] traditional configuration”, and to return a district “to a configuration closer to its current form”.

Plaintiffs concede in their brief that these objections and incumbent-protection are “complementary”. As one court has observed, “the maintenance of the geographic and population cores of existing districts is a criterion designed primarily to protect incumbents.”²⁵ But as argued in objection to Plan 1065C, restoring district lines and incumbent protection are completely congruent. Rhetoric aside, to grant these objections was to help incumbents, and to help incumbents was to grant these objections. Asked at oral argument here whether there were any areas covered by these objections that did not exactly overlap incumbent protection, appellees’ counsel was unable to identify even one. Counsel argued that preserving a “core constituency” or a “traditional configuration” might be desirable even if an incumbent were retiring, but the record does not reflect that any of the incumbents is retiring.

²⁵ *Good v. Austin*, 800 F. Supp. 557, 564 (E.&W.D. Mich. 1992).

Second, there were objections to three districts based on the Voting Rights Act, but in each instance, the requested changes were, in context, tantamount to incumbent protection. Third, there were a few technical objections to insignificant flaws in the plan.

The district court made the exact changes urged by Speaker Laney. The court expressly said so in a letter to the parties — “The Court . . . is seriously considering [changes] . . . using Speaker Laney’s proposed plan 1081C; . . . based on Speaker Laney’s plan 1080C; . . . based on Speaker Laney’s plan 1083C; . . . based on Speaker Laney’s plan 1083C.” Furthermore, Plan 1089C reflects the changes urged by Speaker Laney and essentially no others. It is not clear whether the district court made any of the proposed technical changes or whether the extensive changes the court did make simply mooted the technical objections. Thus, the only objections to Plan 1065C, which the district court stated that it intended to adopt, and the only changes made in that plan to produce Plan 1089C, were to protect incumbents.

The appellees argue that Plan 1065C cannot be adopted as the state plan because the district court made no findings to support it, but the findings the court made in support of Plan 1089C were based largely on statistical materials that were never offered or admitted in evidence. The plan can be reviewed on the evidence viewed in a supporting light. The appellees also argue that the district court considered incumbent protection in developing Plan 1065C, and if it did it erred, but appellants did not object to that plan on that basis. Assuming they are correct, that does not justify changes to the plan based on the protection of incumbents to which there was and is vigorous objection.

B

The protection of incumbents is a legitimate redistricting goal — for the Legislature.²⁶ The Legislature may decide to give priority to protecting relationships between representatives and constituents and benefitting from the experience and seniority incumbents have acquired. The Legislature may also decide to protect incumbents to achieve a desired partisan composition of the delegation. But all of these factors are almost purely political and for this reason are not appropriate for *judicial* consideration in drawing lines when the Legislature has failed to do so. A court simply has no business making the partisan political decision that particular representatives should or should not be re-elected. Thus, the Fifth Circuit stated in *Wyche v. Madison Parish Police Jury*: “Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts.”²⁷ The three-judge federal court that drew Texas’ existing congressional district echoed this statement.²⁸ Likewise, in *Good v. Austin*, a three-judge federal court devising a redistricting plan refused to consider “the maintenance of the geographic and population cores of existing districts” because it was a criteria “designed primarily to protect incumbents” and was thus “so laden with political considerations” as to be “inappropriate . . . in the formulation of a judicial redistricting plan.”²⁹

Accordingly, I would hold that it was improper for the district court to consider the protection of incumbents in adopting a redistricting plan.

²⁶ *E.g., White v. Weiser*, 412 U.S. 783, 791 (1973).

²⁷ 769 F.2d 265, 268 (5th Cir. 1985) (per curiam).

²⁸ *Vera v. Bush*, 933 F. Supp. 1341, 1351 (S.D. Tex. 1996).

²⁹ 800 F. Supp. 557, 564 (E.&W.D. Mich. 1992).

C

Because the district court expressly adopted Speaker Laney's changes in Plan 1065C, and because all of those changes were plainly for the protection of incumbents, I would hold that Plan 1089C was not properly adopted. Determining the purpose of the changes might well present fact questions but for their characterization in the objections that were filed. The district court appears to have overruled the other objections to Plan 1065C, and therefore it was left without any valid objection to it. For this reason, I would render judgment adopting Plan 1065C as the state congressional redistricting plan for consideration by the federal court in the pending cases.

III

I agree with the Court on three other issues:

I agree that a redistricting plan cannot be presumed to be the State's plan merely because it has been proposed by the Attorney General. Without belaboring the matter, the Attorney General's argument is simply inconsistent with the Court's opinion in *Terrazas v. Ramirez*.³⁰

I am also persuaded that the district court adopted Plan 1089C in violation of the procedures we prescribed in *Terrazas*. True, the district court in *Terrazas* ordered a redistricting plan without hearing any evidence or argument on how district lines should be drawn, and here there was a two-week trial on that issue. Appellees argue that Plan 1089C was based on evidence and arguments at trial, but they concede that the exact lines in the plan cannot be found in the evidence. Appellants were entitled to an opportunity

³⁰ 829 S.W.2d 712 (Tex. 1991).

to challenge Plan 1089C, which they had never seen, and the district court denied them this opportunity. I presume that the district court's rush was attributable to the fact that the federal deadline had already passed, but whatever the reason, appellants were not given any reasonable opportunity to challenge Plan 1089C before it became, by virtue of the district court's order, the baseline for the federal court litigation. In most other cases, parties may challenge a trial court's judgment through motions to reconsider, to reopen the evidence, and for a new trial. But redistricting cases must often be litigated in exigent circumstances, and here ordinary post-judgment remedies would not afford appellants relief before their rights were severely impacted.

Finally, I agree that the Court has jurisdiction over this direct appeal. CHIEF JUSTICE PHILLIPS's explanation why the Court lacks jurisdiction over this direct appeal seems little more than a contrivance to avoid a relatively plain statute. Section 22.001(c) of the Government Code states: "An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state."³¹ Here we have an appeal of an order of a trial court granting a permanent injunction on the ground that a statute — article 197h of the Texas Revised Civil Statutes, as later modified by the federal court — is unconstitutional. That would seem to satisfy section 22.001(c) exactly. But the CHIEF JUSTICE argues that the Court does not have jurisdiction over *all* appeals from such orders; it has jurisdiction only over *some* appeals, namely where one party complains of the ruling on the constitutionality of the statute. This argument adds to the

³¹ TEX. GOV'T CODE § 22.001(c); *see also* TEX. CONST. art. V, § 3-b.

statute an additional requirement that cannot be found in its language or history. In the sixty-eight years since the predecessor to section 22.001(c) was enacted, the situation has never arisen. The CHIEF JUSTICE's argument is based on a line of dicta in *Bryson v. High Plains Underground Water Conservation District*.³² The Court has never denied jurisdiction over a direct appeal, not in *Bryson* or in any other case, because the parties agreed that a statute was unconstitutional but disagreed on the relief ordered. Given the clarity of the statute, this is hardly surprising.

In most direct appeals, time is important but it is not of the essence, as it is in this case. If ever a direct appeal to this Court were appropriate, this is the kind of case for it. Few like it will ever arise, where the parties agree that a statute is unconstitutional and that injunctive relief should issue but disagree over the terms of that relief. To misapply the plain language of section 22.001(c), without a word of authority in support, in a case where haste is crucial cannot be justified.

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For these reasons I respectfully dissent.

Nathan L. Hecht
Justice

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³² 297 S.W.2d 117, 119 (Tex. 1956).