IN THE SUPREME COURT OF TEXAS

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NO. 01-0988
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RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS, AND HENRY CUELLAR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF TEXAS, APPELLANTS

v.

ALICIA DEL RIO, ET AL., APPELLEES

- consolidated with -

444444444444
NO. 01-1002
444444444444

ALICIA DEL RIO, ET AL., APPELLANTS

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS, AND HENRY CUELLAR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF TEXAS, APPELLEES

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ON DIRECT APPEALS FOR THE 353RD DISTRICT COURT, TRAVIS COUNTY, TEXAS
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Argued on October 18, 2001

JUSTICE OWEN, concurring.

I join in the Court's decision to remand this case and its analysis of the due process issue and the scope of the Attorney General's authority. But this Court should give guidance and instructions to the trial court on the substantive law that should govern the selection of a plan on remand if the case is to proceed. The modifications to Plan 1065C that led to Plan 1089C were based in part, if not in whole, on political considerations, including incumbent protection. I would remand this case with directions to the trial court that it cannot consider political factors.

I share JUSTICE HECHT'S frustration that these proceedings have not been more expeditious. However, I cannot assume with certainty that the three-judge federal court will conclude that the State of Texas has failed to devise a districting plan, although the federal court would be justified in coming to that conclusion. My greatest concern is that on remand of this case, the trial court will adopt a plan plagued by the same infirmities that obtained in Plan 1089C. Accordingly, I would give guidance to the trial court to preclude that possibility.

I

When courts must make redistricting decisions after a state legislature has failed to adopt a constitutional plan, those courts generally are "faced with hard remedial problems in minimizing friction between their remedies and legitimate state policies."[1] I submit that there are few, if any, state policies that

[1] *Connor v. Finch*, 431 U.S. 407, 414 (1977).

are of concern in fashioning a plan in this case. No congressional district in Texas can pass constitutional muster in the wake of the population growth and shifts that have occurred since the statute governing congressional districts was enacted in 1991. The plan, statewide, is unconstitutional. And, as detailed in JUSTICE HECHT'S dissent, other significant changes have occurred in the political make-up of this State since its now unconstitutional districting plan was adopted in 1991. The failure of the Legislature to make any serious attempt in the 2001 session to adopt a new plan based on the 2000 decennial census, and its repeated failure to adopt a new plan from and after significant parts of the existing plan were declared unconstitutional in 1996, indicate the absence of any political will and the absence of any consensus on political policy on the part of the Texas Legislature in the districting context.

Even if there were discernible state apportionment policies, the United States Supreme Court has held that while it is well within the province of legislatures to formulate state policies that take political considerations into account in devising a districting plan,[2] "courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name."[3] In this same vein, a three-judge federal court has held that "'[m]any 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

[2] *Hunt v. Crowmartie*, 526 U.S. 541, 551 (1999) ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." (emphasis in original)).

[3] *Connor*, 431 U.S. at 415 (citations omitted).

by the courts.'"[4] The United States Court of Appeals for the Fifth Circuit has likewise held that protection of incumbents has "no place in a plan formulated by the courts."[5]

As JUSTICE HECHT's dissent explains, most of the reasons offered by the proponent of what came to be Plan 1089C for changes to Plan 1065C were for incumbency protection. I agree with JUSTICE HECHT's dissent that the euphemisms used were simply another way of articulating "incumbent protection." The proponent of Plan 1089C offered only political considerations in urging the trial court to adopt that plan. No record was developed on Plan 1089C, and we cannot, therefore, determine if there was any legitimate basis for the trial court to fashion a plan that otherwise appears to place improper factors ahead of one-man-one vote considerations, compactness, respecting political subdivision boundaries, and compliance with the Voting Rights Act.

The only other reason for modifications to Plan 1065C identified by the proponent of what came to be Plan 1089C was that particular areas should retain their rural or suburban "character" or similarly, to "restore communities of interest." These, too, are political considerations that have no bearing on compactness, the boundaries of political subdivisions, or compliance with the Voting Rights Act.

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[4] *Vera v. Bush*, 933 F. Supp. 1341, 1351 (S.D. Tex. 1996) (quoting *Wyche v. Madison Parish Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985)).

[5] *Wyche v. Madison Parish Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985); *see also Vera*, 933 F. Supp. at 1351.

When courts must step in and fashion a redistricting plan, their task is a "sensitive one that must be . . . free from any taint of arbitrariness or discrimination."[6] A plan that draws on political factors such as "communities of interest" is tainted.

II

Assuming that the federal court concludes that it will consider the new plan from the state trial court following remand, which the federal court is certainly not obliged to do,[7] then there may be a window within which the state court system can devise a legitimate redistricting plan. There is a plan in existence that will not require additional evidence or an extensive hearing on remand, and there were no objections to that plan on the basis that it protected incumbents. That plan is the one the trial court originally announced that it intended to adopt. If there is indeed an opportunity for the state court system to avoid default, it would seem that this plan, with little or no modification, is the State's best hope for arriving upon a plan that meets the criteria that courts should consider, which are adherence to the one-man-one-vote requirement, compactness, respect for political subdivisions, and compliance with the Voting Rights Act.

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For the foregoing reasons, I concur in the Court's judgment.

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[6] *Connor*, 431 U.S. at 415 (citation omitted).

[7] *Growe v. Emison*, 507 U.S. 25, 35 (1993).

Priscilla R. Owen
Justice

Opinion delivered: October 19, 2001