

pursuant to section 5 of the Voting Rights Act. This three-judge court then heard evidence on November 5 and 6, 2001, supplementing the evidence taken at the congressional redistricting trial and challenging the legality of the LRB Senate plan, 1188S, under the Equal Protection Clause and the Voting Rights Act. We will first describe the course of this litigation and then address the parties' challenges to the LRB Senate plan. We repeat in part our description in our opinion adopting a congressional redistricting plan.³

I

Voters and various officeholders filed multiple lawsuits in state and federal court challenging the districting of Texas' congressional seats and both houses of the state legislature based on the 2000 census.⁴ The federal cases were consolidated into the earliest-filed federal action, *Balderas v. Texas*, No. 6:01-CV-158,

³ We filed a plan for congressional districts with an opinion on November 14, 2001. We directed entry of a final judgment on those claims at that time.

⁴ *Balderas v. Texas*, Civil No. 6:01-CV-158 (E.D. Tex.); *Mayfield v. Texas*, Civil No. 6:01-CV-218 (E.D. Tex.); *Manley v. Texas*, Civil No. 6:01-CV-231 (E.D. Tex.); *Del Rio v. Perry*, No. GN-003665 (353rd Dist. Ct., Travis County, Tex.); *Cotera v. Perry*, No. GN-101660 (353rd Dist. Ct., Travis County, Tex.); *Connolly v. Perry*, No. GN-102250 (98th Dist. Ct., Travis County, Tex.); *Associated Republicans of Texas v. Cuellar*, No.2001-26894 (281st Dist. Ct., Harris County, Tex.); *Rivas v. Cuellar*, No.2001-33760 (152nd Dist. Ct., Harris County, Tex.).

before this three-judge court.⁵

The Texas Constitution requires that the Texas legislature, "at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts."⁶ The Constitution also provides that, "[i]n the event the Legislature shall at any such first regular session following the publication of a United States decennial census, fail to make such apportionment, same shall be done by the Legislative Redistricting Board of Texas," which is "composed of five (5) members, as follows: The Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office."⁷ In May 2001, the 77th Legislature adjourned *sine die* without enacting Senate and House redistricting plans and so the LRB convened and adopted Senate and House redistricting plans on July 24, 2001. Under state law, these plans, "executed and filed with the Secretary of State, shall have force and effect of law."⁸

⁵ Other three-judge courts had dismissed prior suits filed prematurely.

⁶ Tex. Const. art. III, § 28.

⁷ *Id.*

⁸ *Id.*

Pursuant to the Supreme Court's direction in *Grove v. Emison*,⁹ on July 23, 2001 we deferred proceedings in federal court until October 1, 2001. Proceedings on the congressional redistricting concluded on November 2, 2001 and our order issued on November 14, 2001.

After a pre-trial conference on November 2, 2001, trial on the Senate plan commenced on November 5, concluding with arguments on November 6. Post-trial briefs were submitted on November 9, 2001. After reviewing the evidence and the parties' submissions, we now turn to our decision on the challenges presented to the state Senate redistricting plan adopted by the LRB and precleared by the Justice Department.

II

Federal courts have a limited role in considering challenges to precleared legislatively-adopted redistricting plans.¹⁰ The Supreme Court has made clear that "[a] State should be given the opportunity to make its own redistricting decisions so long as that is practically possible and the State chooses to take the opportunity," and, "[w]hen it does take the opportunity, the discretion of the federal court is limited except to the extent

⁹ 507 U.S. 25 (1993).

¹⁰ See, e.g., *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993).

that the plan itself runs afoul of federal law."¹¹ We may reject the State's apportionment plan only insofar as it is deficient as a matter of federal law and may only act remedially to correct any such deficiency.¹²

III

The parties presented competing plans for redistricting the Senate seats, but, as we have explained, our task is simply to evaluate whether the precleared LRB Senate plan runs afoul of the statutory and constitutional law, specifically the Equal Protection Clause of the Fourteenth Amendment and sections 2¹³ and 5¹⁴ of the Voting Rights Act.

¹¹ *Lawyer v. Dep't of Justice*, 521 U.S. 567, 576-77 (1997); see also *Upham v. Seamon*, 456 U.S. 37, 40 (1982) (per curiam) (holding that a three-judge court cannot "simply substitute[] its own reapportionment preferences for those of the state legislature").

¹² *Cook v. Lockett*, 735 F.2d 912, 919 (5th Cir. 1984); see also *Voinovich*, 507 U.S. at 156 ("[T]he federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law.").

To the extent the plaintiffs raise claims that ask that this court enforce state law against the State, they are barred by the Eleventh Amendment, and this court has no jurisdiction to hear them, whether for injunctive or for declaratory relief. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 121 (1984); *Watson v. Texas*, 261 F.3d 436, 440-41 (5th Cir. 2001); *Earles v. State Bd. of Certified Public Accountants of La.*, 139 F.3d 1033, 1039-40 (5th Cir. 1998); *Hays County Guardian v. Supple*, 969 F.2d 111, 125 (5th Cir. 1992).

¹³ 42 U.S.C. § 1973.

¹⁴ 42 U.S.C. § 1973c.

A

Several plaintiffs urge that the LRB plan violates the Voting Rights Act. The Balderas plaintiffs argue that section 2 of the Voting Rights Act requires that we draw in a seventh Latino citizenship majority district in South Texas. The Valdez-Cox plaintiffs argue that a Latino majority district should be created in Dallas and Tarrant Counties. The Mayfield plaintiffs challenge the LRB plan's Senate districts in Dallas, Harris, Tarrant, and Jefferson Counties, seemingly arguing for the creation of minority "influence" districts under section 2 of the Voting Rights Act. The Mayfield plaintiffs also argue that the LRB plan impermissibly "packs" existing majority-minority districts at the expense of neighboring minority districts with less than a majority-minority population. Amicus curiae Texas NAACP argues for a third African-American opportunity district in Harris County and argues that the LRB Senate plan dilutes minorities in certain "influence districts," 4, 12, and 15.

Looking first to the Balderas and Valdez-Cox plaintiffs' claims, we must reject these claims for reasons substantially similar to those given in our decision in the congressional redistricting case. The record before us demonstrates that the Latino population is not sufficiently compact or numerous to support another, effective majority Latino citizenship district in

Dallas and Tarrant Counties or in South Texas.¹⁵ We further find that, under the totality of the circumstances, the failure to create a seventh Latino majority district will not prevent full and equal Latino participation in the political process. Rather, creating such a district would risk giving rise to retrogression in the existing Latino majority districts. We conclude that the these plaintiffs have failed to prove that section 2 of the Voting Rights Act requires any correction to the LRB Senate plan based on allegations of Latino vote dilution.

To the extent the Mayfield plaintiffs and amicus curiae Texas NAACP invite us to recognize and sustain a challenge to the LRB plan based on minority "influence districts," we have no warrant to do so.¹⁶

Texas NAACP has similarly failed to identify in the record a violation of Section 2 of the Voting Rights Act so as to compel the creation by this court of an African-American opportunity district in Harris County. The new minority opportunity districts in the Texas NAACP's proposed Plan 1219S, District 12 in Dallas and Tarrant Counties and District 15 in Fort Bend and Harris Counties,

¹⁵ See *Grove*, 507 U.S. at 39-40; *Thornburgh v. Gingles*, 478 U.S. 30, 50-51 (1986); *NAACP v. Fordice*, 252 F.3d 361, 365-67 (5th Cir. 2001).

¹⁶ See *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-53 (5th Cir. 1999); see also *Johnson v. De Grandy*, 512 U.S. 997, 1008-09 (1994) (declining to decide whether "influence district" claims are cognizable under section 2 and citing three prior cases in which the Court similarly declined to so decide).

rely on supposed coalitions of Latino and African-American populations to achieve majority-minority populations. Amicus points to suggestions that Latinos and African-Americans have voted cohesively in certain Democratic primaries. The evidence before us, however, does not persuade us that Latinos and African-Americans vote cohesively as required by *Thornburg v. Gingles*¹⁷ so as to constitute a majority in a single-member district.¹⁸

We are also not persuaded by the Mayfield plaintiffs' packing claims. The addition of minority, particularly Latino, populations to several districts was necessitated by the one-man, one-vote requirement and non-retrogression concerns pursuant to section 5 of the Voting Rights Act. To the extent minority populations were added to majority-minority districts under the LRB plan, such as the movement of Latinos from El Paso County between former District 29 and new District 19, the evidence demonstrates that these shifts in population were in keeping with the demands of the Equal Protection Clause and the Voting Rights Act.

To the extent that we have jurisdiction to do so we find that there is no retrogression in violation of section 5 of the Voting Rights Act in the LRB Senate plan. As we have noted, the Justice Department has precleared the LRB plan.

¹⁷ 478 U.S. 30, 50-51 (1986).

¹⁸ See *Grove*, 507 U.S. at 41; *Valdespino*, 168 F.3d at 852-53.

B

The Mayfield plaintiffs argue that the LRB plan is unconstitutional because its population deviation violates the Equal Protection Clause. We note first that the LRB plan presents a total deviation under ten percent. As such, the plaintiffs cannot establish a *prima facie* case of vote dilution in violation of Equal Protection Clause, and the State is not required to justify minor variations in various districts from the ideal Senate district population.¹⁹

The Mayfield plaintiffs, in attempting to meet their burden of proof, contend that the LRB plan is unconstitutional under *Roman v. Sincock*²⁰ because it is not "free from any taint of arbitrariness or discrimination."²¹

Showing only that smaller population deviations were possible is insufficient to prove a violation of the Equal Protection Clause.²² We cannot say that this plan, which satisfies the Voting Rights Act and contains less than 10% total deviation is so without reason as to violate the Equal Protection Clause. It is plainly the product of partisan line-drawing.

¹⁹ *Chen v. City of Houston*, 206 F.3d 502, 522 (5th Cir. 2000).

²⁰ 377 U.S. 695 (1964).

²¹ *Id.* at 710.

²² *See id.* at 1221 (citing authorities).

C

The Valdez-Cox plaintiffs also urge that Hidalgo County and particularly the City of McAllen be left whole in contrast to the LRB Senate plan, which splits Hidalgo and McAllen between Districts 20 and 27. They argue that splitting these political subdivisions violates the narrowly-tailored approach mandated by Supreme Court case law dealing with court-ordered plans or modifications targeted at correcting Voting Rights Act or constitutional violations.²³ The LRB plan, however, is not a court-ordered remedial plan, so these arguments are inapposite. On the evidence presented, the splitting of Hidalgo County in the LRB plan does not violate the Voting Rights Act. Whether the decision to split Hidalgo County is wise or unwise as a matter of legislative policy is not for us to say.

D

The Mayfield plaintiffs also urge a federal due process challenge to the LRB plan. They have not briefed this matter in their post-trial briefs, but argued at trial that the violation arises from the LRB's failure to follow its own guidelines in adopting its plan. This issue has not been preserved and, in any event, our reading of the guidelines and the proceedings before the LRB disclose no due process violation.

²³ See *Upham*, 456 U.S. at 43; *Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1973).

E

Various parties argue that certain districts, in particular Senate District 17, are unconstitutional as purposeful racial discrimination in violation of the Equal Protection Clause. We find no such violation. As one of the political scientists testified, "it isn't pretty," it's just political gerrymandering.

IV

We conclude that there is no meritorious challenge, based on federal constitutional or statutory law to the LRB Senate plan, 1188S, nor any state law challenge over which this three-judge court has jurisdiction. As such, we hold that 1188S, as enacted into law by the LRB, governs state Senate apportionment for the State of Texas following the 2000 census. There being no reason for delay, we direct entry of final judgment in this case pursuant to Federal Rule of Civil Procedure 54(b).

Each member of this panel joins in this ruling but reserves the right to express more fully their separate views in a later opinion.

So **ordered** and **signed** this ___th day of November, 2001.

PATRICK E. HIGGINBOTHAM

UNITED STATES CIRCUIT JUDGE

JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

T. JOHN WARD
UNITED STATES DISTRICT JUDGE