

to the jurisdiction, which alleged that the *Del Rio* plaintiffs' claims were not ripe for review. The court of appeals affirmed the trial court's order, and there was no dissent. __ S.W.3d __ (Tex. App.—Austin 2001). Accordingly, this Court has jurisdiction to review the appeal only if it determines that the court of appeals held differently from another court of appeals', or this Court's, prior decision on a question of law material to the decision of the case. *See* TEX. GOV'T CODE §§ 22.001(a)(2), 22.225(c); *Coastal Corp. v. Garza*, 979 S.W.2d 318, 319 (Tex. 1998).

Here, the Court has conflicts jurisdiction to review the court of appeals' decision. By granting Bentsen mandamus and avoiding a conflicts-jurisdiction analysis, the Court turns Texas' ripeness-doctrine jurisprudence on its head.

A. APPLICABLE LAW

1. Texas' Ripeness Doctrine

Ripeness is a threshold issue that implicates subject-matter jurisdiction. *Patterson v. Planned Parenthood*, 971 S.W.2d 439, 442 (Tex. 1998). The ripeness doctrine examines when claims may be brought and asks, "whether, at the time a lawsuit is filed, the facts are sufficiently developed 'so that an injury has occurred or is likely to occur, rather than being contingent or remote.'" *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851-52 (Tex. 2000); *see also Patterson*, 971 S.W.2d at 442.

The ripeness doctrine allows courts to avoid premature adjudication and serves constitutional interests in prohibiting advisory opinions. *Gibson*, 22 S.W.3d at 852. If the plaintiff's injury is not concrete and depends on contingent or hypothetical facts, the trial court does not have jurisdiction to hear the dispute. *Gibson*, 22 S.W.3d at 852. To determine if the plaintiff's claims were ripe or if the trial court

should have dismissed the suit for want of jurisdiction, the appellate court must look to the facts and evidence existing when the suit was filed. *Gibson*, 22 S.W.3d at 851-52. If a plaintiff amends her petition while the case is pending to demonstrate the claims' ripeness, the facts and evidence asserted in the amended petition must have existed when the plaintiff sued. *See Gibson*, 22 S.W.3d at 853.

2. Appellate Review

Our appellate rules provide that while an appeal from an interlocutory order is pending, a trial court “must not make an order that . . . interferes with or impairs the jurisdiction of the appellate court *or effectiveness of any relief sought* or that may be granted on appeal.” TEX. R. APP. P. 29.5(b) (emphasis added). This rule is designed to prevent an “end run” around an interlocutory appeal. *See In re M.M.O.*, 981 S.W.2d 72, 79 (Tex. App.—San Antonio 1998, no pet.); *St. Louis S.W. Ry. Co. v. Voluntary Purchasing Groups, Inc.*, 929 S.W.2d 25, 33 (Tex. App.—Texarkana 1996, no writ); *Cobb v. Thurmond*, 899 S.W.2d 18, 19 (Tex. App.—San Antonio 1995, writ denied).

Additionally, it is well-settled in Texas that an appellate court's review is confined to the record in the trial court when the trial court acted. *See, e.g., Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 52 n.7 (Tex. 1998); *University of Tex. v. Morris*, 344 S.W.2d 426, 429 (Tex. 1961); *Monsanto v. Davis*, 25 S.W.3d 773, 781 (Tex. App.—Waco 2000, pet. disp'd w.o.j.).

B. ANALYSIS

After discussing the ripeness-doctrine principles this Court announced in *Gibson* and *Patterson*, the court of appeals concluded that reviewing the trial court's order denying the jurisdictional plea was

“made easier by the fact that the *Del Rio* case has been consolidated and merged with the *Cotera* case which when filed on May 31 was ripe on its face.” ___ S.W.3d at ___. The court of appeals further stated that it did not have to examine the trial court’s decision in detail because *Del Rio* was consolidated with *Cotera*, a suit that the court of appeals determined asserted claims that were “clearly ripe.” ___ S.W.3d at ___. But the court of appeals’ reliance on facts that occurred after *Del Rio* was filed, and were not before the trial court when it denied the plea, conflicts with *Gibson*.

In *Gibson*, the court of appeals concluded that it could not decide the school district’s ripeness challenge because it was raised for the first time on appeal. *Gibson*, 22 S.W.3d at 850. After recognizing that subject-matter jurisdiction cannot be waived and may be raised for the first time on appeal, we analyzed the ripeness issue. We specifically reiterated that in determining if a case is ripe, we consider “whether, *at the time a lawsuit is filed*, the facts are sufficiently developed.” *Gibson*, 22 S.W.3d at 851-52 (emphasis in original). Additionally, we noted that the Court may review the entire record to ascertain if any evidence supports the trial court’s subject-matter jurisdiction. *Gibson*, 22 S.W.3d at 853. But we further determined that our decision still turns on the facts and evidence existing “*when the plaintiffs sued*.” *Gibson*, 22 S.W.3d at 853 (emphasis in original). For example, the Court considered the plaintiffs’ argument that an “‘impact’s coming’” in response to the school district’s assertion that its policy had not impacted any students “*when the [plaintiffs] filed suit*.” *Gibson*, 22 S.W.3d at 852-53 (emphasis added). After reviewing the evidence and testimony before the trial court, we held that the trial court did not have jurisdiction because the plaintiffs’ claims were not ripe. *Gibson*, 22 S.W.3d at 853.

Notably, the *Gibson* dissent argued that the Court should have given the plaintiffs an opportunity to amend their pleadings rather than relying solely on the original petition. *Gibson*, 22 S.W.3d at 856

(Hecht, J. dissenting). The dissent also urged that the Court should have considered whether the plaintiffs could have adduced evidence to demonstrate their claims' ripeness when their case was developed further in the trial court. *Gibson*, 22 S.W.3d at 856. But the majority rejected the dissent's position when it emphatically held that the facts existing "when the plaintiffs sued" must show the claims are ripe. *Gibson*, 22 S.W.3d at 853 (emphasis in original).

Here, the court of appeals' analysis and the legal principles it applied to conclude that the *Del Rio* plaintiffs' claims were ripe would operate to overrule *Gibson* had we issued the same decision. See *Coastal Corp.*, 979 S.W.2d at 321. Had the court of appeals properly applied *Gibson*, it would have confined reviewing the trial court's order to the facts and evidence existing when the *Del Rio* plaintiffs filed suit. See *Gibson*, 22 S.W.3d at 851. And, if it had done so, the court of appeals could have reached only one conclusion—that the *Del Rio* plaintiffs' claims were not ripe.

The *Del Rio* plaintiffs sued on December 27, 2000, before the census data was released and before the Legislature adjourned *sine die*. A case involving congressional redistricting could not have been ripe at least until these events occurred. ___ S.W.3d at ___. Thus, on December 27, 2000, the alleged harm was not direct and immediate; it was merely conjectural, hypothetical, and remote. See *Gibson*, 22 S.W.3d at 852.

In addition to its obvious conflict with *Gibson*, the court of appeals' conclusion that *Del Rio* is ripe is based on its improperly considering the order consolidating *Del Rio* and *Cotera*. Here, the trial court's consolidation order clearly interfered with and impaired the effectiveness of the relief the *Del Rio* State defendants sought. See TEX. R. APP. P. 29.5(b); *In re M.M.O.*, 981 S.W.2d at 79; *St. Louis S.W. Ry. Co.*, 929 S.W.2d at 33; *Cobb*, 899 S.W.2d at 19. But for the consolidation order, the court of appeals

would have had to apply Texas' ripeness doctrine to conclude that *Del Rio* was not ripe.

Finally, the court of appeals' opinion disregards Texas' rule that an appellate court's review is confined to the record before the trial court when the trial court acted. *See, e.g., Owens-Corning Fiberglas Corp.*, 972 S.W.2d at 52 n.7; *Morris*, 344 S.W.2d at 429; *Monsanto*, 25 S.W.3d at 781. Here, the court of appeals concluded that *Del Rio* was ripe, relying on *Del Rio's* and *Cotera's* consolidation. This event not only occurred after *Del Rio* filed her petition, but it also occurred after the trial court denied the plea to the jurisdiction and after the State defendants perfected their interlocutory appeal. Thus, the court of appeals erroneously looked outside the record that was before the trial court when it denied the plea to the jurisdiction.

C. CONCLUSION

The court of appeals' decision conflicts with Texas' ripeness-doctrine jurisprudence and, in particular, the analysis and legal principles we applied in *Gibson*. Under *Gibson*, the court of appeals should have reversed the trial court's order denying the jurisdictional plea and dismissed the suit for want of jurisdiction.

II. THE COTERA CASE

After the *Cotera* plaintiffs sued on May 31, 2001, the State defendants filed their plea to the jurisdiction, contending that the claims were not ripe because the Governor could still call a special session. After the trial court consolidated *Del Rio* and *Cotera*, it denied this plea to the jurisdiction on August 2, 2001. The State defendants appealed this order. Then, once the court of appeals issued its *Del Rio*

decision, the *Cotera* plaintiffs filed a “motion to expedite and motion for summary affirmance” in the court of appeals. The *Cotera* plaintiffs argued that the court’s *Del Rio* decision specifically answered *Cotera*’s jurisdictional issue. On August 31, 2001, the court of appeals, without explanation, dismissed the *Cotera* appeal for want of jurisdiction.

This Court has jurisdiction to determine whether a court of appeals correctly decided its jurisdiction over an interlocutory appeal. *Qwest Communications Corp. v. AT & T Corp.*, 24 S.W.3d 334, 335-36 (Tex. 2000). Here, the *Cotera* State defendants appealed the trial court’s interlocutory order denying their pleas to the jurisdiction. The court of appeals had jurisdiction to consider these appeals under Texas Civil Practice & Remedies Code section 51.014(a)(8). Because the court of appeals had jurisdiction, it should have decided *Cotera* on the merits.

III. THE BENTSEN MANDAMUS

The Court’s decision to grant mandamus here is a radical departure from our dominant-jurisdiction and mandamus jurisprudence. Mandamus should not issue because this case is not unique or significantly different than those expressing our well-established legal principles in these areas.

A. APPLICABLE LAW

Mandamus is an extraordinary remedy, available only when a trial court clearly abuses its discretion and when there is no adequate remedy on appeal. *See Walker v. Packer*, 827 S.W.2d 833, 840-44 (Tex. 1992). Reviewing courts must not issue mandamus to control or correct a trial court’s incidental ruling when the harm, if any, can be remedied on appeal. *See, e.g., Canadian Helicopters Ltd. v. Wittig*,

876 S.W.2d 304, 306 (Tex. 1994); *Walker*, 827 S.W.2d at 840.

The general common-law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts. *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974). For sixteen years, this Court has recognized that appeal is an adequate means for reviewing dominant-jurisdiction questions. *Abor v. Black*, 695 S.W.2d 564, 566 (Tex. 1985). In *Abor*, the Court distinguished *Curtis*, a dominant-jurisdiction case in which this Court granted mandamus relief, by pointing out that in *Curtis* there was an injunction from one court precluding the other court from proceeding. *Abor*, 695 S.W.2d at 567. We held that because no injunction had been granted in *Abor* and no order actively interfered with the other court's jurisdiction, mandamus relief should be denied. *Abor*, 695 S.W.2d at 567.

Accordingly, the *Abor* rule applies, and mandamus is unavailable to review a denial of a plea in abatement based on the pendency of a first-filed action, "unless the courts were directly interfering with each other by issuing conflicting orders or injunctions." *Hall v. Lawliss*, 907 S.W.2d 493, 494 (Tex. 1995) (relying on *Abor*, 695 S.W.2d at 567). The interference may not be incidental, but must rise to the level that it interferes with the other court's exercise of its jurisdiction. *Abor*, 695 S.W.2d at 567.

Texas courts of appeals have steadfastly applied the *Abor* rule, recognizing that a court cannot grant mandamus relief when both courts can proceed with their separate actions and one court has not attempted to divest the other of jurisdiction. *See, e.g., In re Ramsey*, 28 S.W.3d 58, 63 (Tex. App.—Texarkana 2000, orig. proceeding); *In re Rio Grande Valley Gas Co.*, 987 S.W.2d 167, 172-73 (Tex. App.—Corpus Christi 1999, orig. proceeding); *Texas Commerce Bank, N.A. v. Prohl*, 824 S.W.2d 228, 230 (Tex. App.—San Antonio 1992, orig. proceeding). As a result, courts have granted mandamus relief only when "there is a conflict in jurisdiction between courts of coordinate jurisdiction and

the proceedings in the trial court first taking jurisdiction have been improperly enjoined by the second court, or the first court has refused to proceed to trial.” *Dallas Fire Ins. Co. v. Davis*, 893 S.W.2d 288, 294 (Tex. App.—Fort Worth 1995, orig. proceeding); *see also Allstate Ins. Co. v. Garcia*, 822 S.W.2d 348, 349 (Tex. App.—San Antonio 1992, orig. proceeding); *Trapnell v. Hunter*, 785 S.W.2d 426, 429 (Tex. App.—Corpus Christi 1990, orig. proceeding).

B. ANALYSIS

The Court concludes that the Travis County court has dominant jurisdiction because the *Cotera* plaintiffs’ claims were ripe when *Cotera* filed suit and because the *Del Rio* plaintiffs amended their petition on the same day *Cotera* filed suit. However, even assuming this is correct and the Harris County trial court abused its discretion in denying the plea in abatement, Bentsen has an adequate appellate remedy. *See Hall*, 907 S.W.2d at 494; *Abor*, 695 S.W.2d at 567.

In determining that Bentsen’s appellate remedy is inadequate, the Court concludes that under the circumstances, “further confusion or delay in the trial of a pending challenge to congressional districting poses the very real threat that the parties will not be able to obtain a decision in the state courts that is final on appeal before the October 1 deadline set by the federal courts.” __ S.W.3d at __. But this analysis is inconsistent with our jurisprudence. *See Abor*, 695 S.W.2d at 567. If the Harris County case and Travis County case proceed to trial at the same time, neither courts’ jurisdiction is affected. The cases, which involve some but not all the same parties, witnesses, and attorneys, can go forward at the same time and proceed to final judgment. Then, the dominant- jurisdiction and abatement issues—the very issues the Court improperly decides by mandamus today—can be properly determined upon appeal.

Indeed, the very same situation confronted this Court in *Hall v. Lawliss*. In *Hall*, the same parties in a dispute arising from the same facts sued each other in different counties. 907 S.W.2d at 494. The court in which the second suit was filed refused to abate or dismiss its proceedings even though the other case was pending. We recognized that the first-filed suit acquired dominant jurisdiction, but, adhering to *Abor*, we denied mandamus relief because the two courts had not directly interfered with each other “by issuing conflicting orders or injunctions.” *Hall*, 907 S.W.2d at 494. If we would not grant mandamus relief then, when the cases before it involved the exact same parties and issues, how can the Court do so now? Simply because there are two orders indicating that the trials will proceed at the same time, does not make this case any different than *Hall*. In *Hall*, this Court knew that in denying mandamus relief, both cases would proceed to trial. But it correctly chose to adhere to our caselaw. *See Hall*, 907 S.W.2d at 907. The Court should reach the same conclusion here.

Additionally, Bentsen offered no evidence at the hearing on the plea in abatement to demonstrate that the Harris County court had directly interfered with the Travis County court’s jurisdiction. *See TEX. R. APP. P. 52.7; Walker*, 827 S.W.2d at 833. Indeed, both counsel for Bentsen and real parties in interest agreed at oral argument that the two trials could proceed at the same time. Moreover, the parties noted that the Travis County court had stated that the Harris County court was not interfering with the Travis County court’s jurisdiction. There is absolutely nothing in these cases that preclude our applying *Abor* and denying mandamus relief.

Finally, mandamus should not issue in this case, because Bentsen did not first seek relief in the court of appeals as Texas Rule of Appellate Procedure 52.3(e) requires. And, this case does not present “compelling circumstances” for the Court to allow Bentsen to bypass the court of appeals’ review. Indeed,

this Court denied Weddington's mandamus, which arose from the *Del Rio* trial court's denying her plea to the jurisdiction, because she did not first seek relief from the court of appeals. See ___ S.W.3d at ___ n.90. Not surprisingly, Bentsen opposed Weddington's mandamus petition in that case and argued that no compelling circumstances existed to allow her to bypass the court of appeals and that the Austin court of appeals was in any event better prepared to consider her mandamus because the State defendants' interlocutory appeals were pending there.

Here, the Harris County trial court denied Bentsen's plea in abatement on August 31, 2001, giving him ample time to first seek mandamus relief in the court of appeals. Also, an interlocutory appeal from the Harris County trial court's order denying Speaker Laney's plea to the jurisdiction, raising the same issues as Bentsen urges here, is pending in the Houston court of appeals. This Court's integrity turns upon its consistent application of our procedural rules, and therefore, Bentsen should be required to first seek mandamus relief from the court of appeals.

C. CONCLUSION

Abor and its progeny recognize that the same parties and the same issues can proceed to trial in different trial courts. Bentsen has an adequate appellate remedy, and therefore, this Court must deny mandamus relief.

IV. THE COURT'S OPINION

Today, the Court grants mandamus relief as an end-run around the conflicts-jurisdiction issue in *Del Rio* and to avoid deciding that the court of appeals erred in dismissing *Cotera* for lack of jurisdiction.

The inconsistencies in the Court's opinion support my conclusion:

- The Court acknowledges that state law should determine jurisdictional issues, but then applies federal law contrary to Texas' ripeness doctrine to conclude that *Del Rio* is ripe.
- After discussing the more liberal federal ripeness standards that Texas law supposedly reflects, the Court boldly states, with no Texas authority cited whatsoever, that "the ripeness doctrine is no less functional under Texas law." __S.W.3d at __ .
- The Court's writing completely ignores the reasoning the court of appeals applied in *Del Rio* to conclude the case was ripe. Instead, the Court applies federal ripeness analysis to avoid discussing the court of appeals' faulty reasoning.
- The Court summarily dismisses *Cotera* as moot without acknowledging that the Court's jurisdiction is limited to determining whether the court of appeals had jurisdiction to hear the appeal—which it did.
- Relying on *Leach v. Brown*, 292 S.W.2d 329, 311 (Tex. 1956), the Court states that an amended pleading should be treated as a new suit for purposes of determining dominant jurisdiction. But in *Leach*, the trial court dismissed the original petition and the parties unsuccessfully appealed that final order. The amended petition was filed in the same trial court after the appeal was final, and thus, the petition was treated as a new suit.
- To circumvent *Abor*, the Court casually remarks that "[i]t is unimportant to the issue of dominant jurisdiction which court first set an earlier trial date." There is no Texas authority for this statement, and it appears to exist only as a figment of the Court's mind. Indeed, this statement flies in the face of our jurisprudence holding that courts grant mandamus relief in dominant-jurisdiction cases only when the offending court's order directly interferes with the other court's *jurisdiction*. Here, the Harris County court did not enter an order that interfered with any action of the Travis County trial court, much less its jurisdiction.
- Bentsen offered no evidence at the hearing on the plea in abatement to demonstrate that the Harris County court had directly interfered with the Travis County court's *jurisdiction*.
- All the parties agreed at oral argument that the two trials could proceed at the same time.
- The Travis County court has stated that the Harris County court was not interfering with the Travis County court's *jurisdiction*.
- The Court grants mandamus relief of the trial court's order denying the plea in abatement, which this Court and courts of appeals have concluded for decades is an incidental trial court ruling not

subject to mandamus review.

- In granting mandamus, the Court argues that this case presents exceptional circumstances based on its mere speculation that the state courts cannot reach a final decision by the October 1 deadline.
- To achieve the result the Court wants to reach, it has to overrule *Gibson* and *Abor*, and its refusal to acknowledge that it has done so is disingenuous.

The Court's writing is nothing more than cleverly crafted linguistic legerdemain designed to obscure the fact that the Court applies federal law contrary to clear Texas precedent in the first instance and grants mandamus contrary to equally clear Texas precedent in the second.

V. CONCLUSION

For the reasons discussed above, I cannot agree with the Court's disposition of these redistricting petitions. The Court has conflicts jurisdiction to determine that the court of appeals erred in affirming the trial court's order denying the jurisdictional plea in *Del Rio*. The Court should reverse *Del Rio* and the trial court should dismiss that case for want of jurisdiction. Next, because the court of appeals erred in dismissing *Cotera* for want of jurisdiction, we should remand that case to the court of appeals so that the court can decide the appeal on its merits. Finally, we should deny Bentsen's mandamus petition. Because the Court concludes otherwise, I dissent.

James A. Baker
Justice

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