No. 17-680

In the Supreme Court of the United States

TEXAS DEMOCRATIC PARTY, *et al.*,
Appellants,

v.

GREG ABBOTT, in his official capacity as Governor of Texas, *et al.*,
Appellees.

On Appeal from the United States District for the Western District of Texas

REPLY SUPPORTING JURISDICTIONAL STATEMENT

J. Gerald Hebert
J. GERALD HEBERT, P.C.
191 Somervelle St., #405
Alexandria, VA 22304

Jessica Ring Amunson
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001

Mark P. Gaber
439 Elm St. NW
Washington, DC 20001

Counsel for Appellants Margarita Quesada, et al.

Chad W. Dunn
Counsel of Record
K. Scott Brazil
BRAZIL & DUNN
4201 Cypress Creek Pkwy.
Suite 530
Houston, TX 77068
(281) 580-6310
chad@brazilanddunn.com

Counsel for Appellants Texas Democratic Party and Gilberto Hinojosa

December 19, 2017

Additional Counsel Listed on Inside Cover

Gerald H. Goldstein
GOLDSTEIN, GOLDSTEIN, & HILLEY
310 S. St. Mary's St.
San Antonio, TX 78205

Donald H. Flanary, III
FLANARY LAW FIRM
1005 South Alamo
San Antonio, TX 78210

Jesse Gaines
P.O. Box 50093
Fort Worth, TX 76105

Counsel for Appellants
Margarita Quesada, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

This appeal was necessitated by Texas's premature invocation of this Court's jurisdiction in *Abbott v. Perez*, Nos. 17-586 and 17-626. While the Texas Democratic Party and the Quesada Appellants maintain this Court lacks jurisdiction over *any* appeal at this stage, they have filed a Jurisdictional Statement to protect their rights in the event this Court announces a new rule permitting it to review the district court's decisions in this case now. If such a rule is announced, this Court should exercise its power to simultaneously review the district court's dismissal of Appellants' partisan gerrymandering claims.

ARGUMENT

I. The Court Must Consistently Apply Its Jurisdictional Rules in this Case.

A. This Court Lacks Jurisdiction Over Any Appeal at this Stage.

This Court has no jurisdiction over *any* appeal at this stage: the district court has not granted or denied any interlocutory or permanent injunctive relief on any claim. As appellees have explained in briefing Texas's appeals (Nos. 17-586 & 17-626), *see, e.g.*, Mot. to Dismiss or Affirm at 15-19, *Abbott v. Perez*, No. 17-586, the plain text of 28 U.S.C. § 1253 has always been strictly interpreted by this Court in order to enforce Congress's intent that its appellate docket be narrowly confined. *See, e.g.*, *Gunn v. Univ. Comm. to End the War in Viet Nam*, 399 U.S. 383, 390 (1970) (holding Court lacks jurisdiction over three-judge district court order that does not expressly grant or deny injunction); *Goldstein v. Cox*,

396 U.S. 471, 478 (1970) (noting that § 1253 must be "narrowly construed" so as not to "defeat the purposes of Congress . . . to keep within narrow confines our appellate docket" (quotation marks omitted)); *id.* (stating that "redoubled vigor" is necessary for strict construction of § 1253 where, as here, *interlocutory* trial orders are at issue).

Moreover, Texas's attempt to pluck the "practical effects" rule of *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), out of its context (*i.e.*, appeals to circuit courts pursuant to 28 U.S.C. § 1292(a)(1)) plainly fails. The textual differences between the statutes,[1] their different purposes, and the differing roles of circuits courts of appeals and this Court foreclose the extension of *Carson* to § 1253.[2] And even if *Carson* did

---

[1] Texas contends there is no difference between § 1253 and § 1292(a)(1) because, in its view, the two statutes "use materially identical language to vest jurisdiction over 'orders' 'granting' an 'injunction.'" Reply Supporting Jurisdictional Statement at 2, *Abbott v. Perez*, No. 17-586 (U.S. 2017). Not so. Section 1253 is far more limited, only authorizing this Court's jurisdiction over "an order granting or denying, after notice and hearing, an interlocutory or permanent injunction." 28 U.S.C. § 1253. Section 1292(a)(1), to the contrary, is much broader, granting the circuit courts of appeals jurisdiction over "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C § 1292(a)(1).

[2] Unlike the circuit courts of appeals, this Court's primary purpose is not to entertain direct appeals. Moreover, as this Court has explained, the purpose behind § 1292(a)(1)'s exception to the finality rule is to "permit[] litigants to

apply to direct appeals under § 1253, Texas's appeal of the race-based redistricting claims meets *none* of *Carson*'s requirements. *See* Mot. to Dismiss or Affirm at 17-19, *Abbott v. Perez*, No. 17-586.

Nothing in the text of the statute or this Court's precedent supports finding jurisdiction over Texas's appeals (Nos. 17-586 & 17-626). Indeed, if Texas were correct, *every* redistricting case would, as a matter of right, trigger mandatory piecemeal appeals to this Court, thus eliminating the district court's discretion to structure its liability and remedial proceedings. *Cf. Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1691-92 (2015) (noting that "[p]ermitting piecemeal, prejudgment appeals . . . undermines efficient judicial administration and encroaches upon the prerogatives

---

effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Carson*, 450 U.S. at 84 (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955)). Section 1292(a)(1)'s broader text accommodates *Carson*'s "practical effect" rule. Section 1253, on the other hand, applies only to matters required to be heard by three-judge district courts, a mechanism that *itself* guards against serious, perhaps irreparable, consequences. *See MTM, Inc. v. Baxley*, 420 U.S. 799 (1975) ("It is certain that the congressional policy behind the three-judge court and direct-review apparatus—the saving of state and federal statutes from improvident doom at the hands of a single judge—will not be impaired by a narrow construction of [§] 1253. A broad construction of the statute, on the other hand, would be at odds with the historic congressional policy of minimizing the mandatory docket of this Court in the interest of sound judicial administration.").

of district court judges, who play a special role in managing ongoing litigation" (quotations marks omitted; alterations in original)). The Court should dismiss all pending appeals for lack of jurisdiction and remand the cases to the district court to permit it to complete its work and grant or deny any requested injunctive relief, an order from which an appeal to this Court would properly lie.

B. If the Court Exercises Jurisdiction Over Texas's Appeals, It Should Exercise Jurisdiction Over this Appeal.

To the extent this Court announces a new rule that would grant it jurisdiction to entertain Texas's appeals (Nos. 17-586 & 17-626), such a rule should also extend to reach this appeal regarding the dismissed partisan gerrymandering claims. That would be consistent with the principle of pendent appellate jurisdiction as well as the congressional policy disfavoring piecemeal appeals.

As the D.C. Circuit has explained, an appellate court may exercise pendent appellate jurisdiction to "consider the whole case at once," including aspects that are not otherwise "immediately appealable," when "substantial considerations of fairness and efficiency demand it." *Rendall-Speranza v. Nassim*, 107 F.3d 913, 917 (D.C. Cir. 1997); *see also Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 44 n.2 (1995) (collecting cases regarding pendent appellate jurisdiction). Such is the case here.

The only reason the district court has not yet entered a final order denying injunctive relief on the partisan gerrymandering claims is because of Texas's

premature appeal. Had Texas waited mere weeks to properly invoke this Court's appellate jurisdiction following remedial proceedings on the race-based claims below, the case would have reached finality and an order denying injunctive relief on the partisan gerrymandering claims would have been entered. It would be manifestly unjust to permit Texas to succeed in delaying review of the district court's dismissal of the partisan gerrymandering claims in this manner.

Moreover, considerations of efficiency demand that the appeal of the partisan gerrymandering claims be simultaneously heard with Texas's appeals (Nos. 17-586 & 17-626). The partisan gerrymandering claims are the only other claims over which this Court's review is sought. They were dismissed by the district court. Nothing more will happen with them until this Court's review. Delaying appellate review of those dismissed claims, while exercising appellate review of the race-based claims, would serve no purpose whatsoever. But exercising appellate review will permit this Court to resolve all issues this Term, and ensure that trial regarding the partisan gerrymandering claims proceeds on remand without further unnecessary delay.[3]

---

[3] If this Court instead agrees with Texas that the appeal over the partisan gerrymandering issues is premature and this Court does not yet have jurisdiction over those claims, Appellants request the Court promptly enter an order to that effect. Doing so would permit the district court to entertain a motion for reconsideration regarding the partisan gerrymandering claims upon release of this Court's pending decisions in *Gill v. Whitford*, No. 16-1161,

This is consistent with the "congressional policy against piecemeal appeals." *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966). Because the dismissal of the partisan gerrymandering claims is the only other issue in this case over which this Court's review is sought, delaying resolution of this appeal would create piecemeal appeals for no reason whatsoever. Indeed, it would be ironic to conclude this Court *has* jurisdiction over the race-based claims—claims the district court expressly said it was continuing to consider—but has *no* jurisdiction over the partisan gerrymandering claims—claims the district court was expressly done considering. If this Court exercises jurisdiction over Texas's appeals (Nos. 17-586 & 17-626), it should consider all the claims at once.

Texas's argument otherwise is remarkably inconsistent. Texas simultaneously contends that this appeal (1) is "manifestly untimely" and the time for appeal has "long passed," Mot. at 1, (2) is "years late or still premature," *id.* at 7, (3) has "missed the statutory deadline to [be] filed . . . by a combined nine years," *id.* at 8, (4) is "actually too early," *id.* at 10, and/or (5) is "years too late," *id.*[4] This makes no sense.

---

and *Benisek v. Lamone*, No. 17-333. Discovery and trial on those claims could thus proceed concurrent with this Court's consideration of Texas's appeal of the race-based claims.

[4] The contradictory assertions in Texas's brief illustrate how ill-advised it would be for this Court to bend the statutory text of 28 U.S.C. § 1253, and its precedent strictly construing it, in order to permit Texas's premature appeals

First, the Court should reject outright the contention that this appeal is too late. The district court never entered an order denying an injunction with respect to the partisan gerrymandering claims, and thus there was no order from which to properly appeal pursuant to § 1253 at the time the claims were dismissed. Because other claims remained pending, appellate jurisdiction did not exist at the time the dismissal orders were entered. *See, e.g.*, *Citizens Accord, Inc. v. Town of Rochester*, 235 F.3d 126, 128 (2d Cir. 2000) (holding that "an order that adjudicates fewer that all of the claims remaining in the action . . . is not a final order unless the court directs the entry of a final judgment as to the dismissed claims or parties 'upon an express determination that there is no just reason for delay.'" (quoting Fed. R. Civ. P. 54(b))). The three-judge court never entered final judgment on the partisan gerrymandering claims. In addition, even if Appellants had attempted to shoehorn *Carson* into § 1253, as Texas does now,

---

(Nos. 17-586 & 17-626) now. Jurisdictional rules—particularly those governing this Court's appellate docket—must be clear and understandable because their enforcement has serious consequences for litigants. *Cf. United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1631-32 (2015) (noting "harsh consequences" of jurisdictional rules and thus the requirement that Congress "clearly state" its intent to limit courts' jurisdiction (quotation marks omitted)). Adopting Texas's proposed distortion of the heretofore clear rules would create confusion and chaos in future cases—a result Texas has regrettably already achieved in this matter.

nothing in *Carson* or its progeny *obligates* a party to seek an immediate interlocutory appeal. And, no doubt, had such an appeal been filed, Texas would have contended this Court had no jurisdiction to entertain it. Even Texas does not buy its own argument, eventually asserting that this appeal is "actually too early." Mot. at 10. To hold that Appellants were obligated to file an appeal immediately following the entry of an interlocutory order dismissing only some of the claims in this case would seriously upend every principle and precedent governing appellate jurisdiction.

Second, *all* the appeals in this case are premature. But to the extent the Court concludes otherwise with respect to Texas's appeals (Nos. 17-586 & 17-626), it should also exercise its pendent appellate jurisdiction to decide this appeal. Texas's focus on the supposed difference between the basis for *its* appeal (the "practical effect" of an injunction) and its suggested basis for *this* appeal (entry of final judgment), *see* Mot. at 9-10, is misplaced. The entire point of pendent appellate jurisdiction is that issues not otherwise currently appealable may be reviewed once the Court determines its appellate jurisdiction on some issue has been properly invoked.

This Court should uphold its longstanding, narrow interpretation of its appellate jurisdiction, consistent with the plain text of 28 U.S.C. § 1253, and dismiss all pending appeals in this case for want of jurisdiction. But if this Court announces a new rule in this case expanding its appellate jurisdiction and permitting consideration of Texas's appeals (Nos. 17-

586 & 17-626), then it should also consider this appeal.

II. Remand is Required to Permit Trial on Appellants' Partisan Gerrymandering Claims.

The Court should summarily reverse, or vacate and remand in light of its pending decisions in *Gill v. Whitford*, No. 16-1161, and *Benisek v. Lamone*, No. 17-333. Texas's contrary contentions are misplaced.

First, Texas's contention that partisan gerrymandering claims are non-justiciable, *see* Mot. at 11-12, has already been rejected by a majority of this Court, *see Vieth v. Jubilirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring); *id.* at 317 (Stevens, J., dissenting). Texas offers no serious reason this Court should change course now.

Second, Texas objects to the arguments Appellants advanced in their district court briefing opposing dismissal and contends that, because those arguments differed from the standard adopted by the *Whitford* district court, Appellants cannot avail themselves of the standard this Court may adopt in *Whitford*. *See* Mot. at 12-15. That simply is not the law. As this Court has explained,

> [w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the

rule.

Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1992). Because this case is "still open on direct review," *id.*, whatever standard this Court announces in the pending *Whitford* or *Benisek* cases must be applied retroactively to this case, and Appellants were not required to be clairvoyant and predict, in their complaints and dismissal motion briefing, what this Court's subsequent cases might decide. It suffices that this case remains open on direct review, and the rules announced in *Whitford* and *Benisek* apply retroactively.

Third, Texas's contention that the *Whitford* standard is not satisfied is misplaced. Because the district court dismissed the partisan gerrymandering claims, Appellants have not had the opportunity to make an evidentiary showing supporting their claims, and the district court has made no fact-findings.[5]

---

[5] Texas's contention that the repealed 2011 plans cannot be challenged is beside the point. The law does not require, in order to preserve appellate review, the parties to replead a dismissed claim when that claim was dismissed on the merits—a contrary rule would require a futile act. *See, e.g.*, *Palakovic v. Wetzel*, 854 F.3d 209, 220 (3d Cir. 2017). In any event, partisan gerrymandering claims were raised against the 2013 plans, and Appellants do not intend to challenge the 2011 plans on remand. Moreover, Texas's challenge to the Texas Democratic Party's standing, on the basis that its members have not alleged district-specific harms, *see* Mot. at 10 n.4, makes no sense. Even if partisan gerrymandering claims required a district specific standing analysis (they do not, as the claim is analytically distinct from a racial gerrymandering claim), the Texas

"[F]actfinding is the basic responsibility of district courts, rather than appellate courts. . . . [W]here findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982) (internal quotation marks omitted) (first bracket in original). As Appellants explained in their Jurisdictional Statement, the record evidence to date strongly supports the conclusion that Texas's redistricting plans were the product of an unconstitutional partisan gerrymander.

Texas cannot overcome that evidence, or eliminate Appellants' right to present its case at trial, by cherry-picking a single statewide election result it says contradicts Appellants' claims. *See* Mot. at 16-18. Texas contends that because a party should expect to see a 2% increase in seat share for every 1% increase in vote share over 50%, and because a single Republican candidate for statewide office in a single year received 61.56% of the vote, Appellants' claims must fail. Mot. at 17. Not so. The election data Texas cites does not even support its argument. *See* Mot. at 17 n.5. As Texas notes, in 2014 and 2016, "Republicans made up roughly 63% and 65% of the Texas House of Representatives and 69% of the Texas congressional delegation." *Id.* at 17. But statewide Republicans' vote shares ranged from only 52.23% to

---

Democratic Party has members in every district of the State. Finally, Texas's contention that the intent prong cannot be met here, Mot. at 16, is a question of fact for the district court.

55.8% in the 2016 elections. *Id.* at 17 n.5. Texas cannot cherry-pick the results of a single statewide race, ignore all others, and assert that it alone precludes a finding of partisan gerrymandering. That hardly indicates "only one resolution," *Pullman-Standard*, 456 U.S. at 292, of this case. Appellants are entitled to develop an evidentiary record before the trial court in the first instance; two pages of Supreme Court briefing and a single citation footnote does not equate with a trial of the partisan gerrymandering claims.

* * *

This Court should not upend decades of precedent in order to hear Texas's appeals (Nos. 17-586 & 17-626) now. But if it does so, it should also exercise jurisdiction over this appeal in order to address all claims at once, consistent with settled precedent and the policy against piecemeal appeals.

CONCLUSION

The Court should summarily reverse, or vacate and remand in light of *Whitford* or *Benisek*, or alternatively note probable jurisdiction.

Respectfully submitted,

Chad W. Dunn
Counsel of Record
K. Scott Brazil
BRAZIL & DUNN
4201 Cypress Creek Pkwy., Suite 530
Houston, TX 77068
(281) 580-6310
chad@brazilanddunn.com

Counsel for Texas Democratic Party and Gilberto Hinojosa

J. Gerald Hebert
J. GERALD HEBERT, P.C.
191 Somervelle, No. 405
Alexandria, VA 22304

Jessica Ring Amunson
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001

Mark P. Gaber
439 Elm St. NW
Washington, DC 20001

Gerald H. Goldstein
GOLDSTEIN, GOLDSTEIN, & HILLEY
310 S. St. Mary's St.
San Antonio, TX 78205

Donald H. Flanary, III
FLANARY LAW FIRM
1005 South Alamo
San Antonio, TX 78210

Jesse Gaines
P.O. Box 50093
Fort Worth, TX 76105

Counsel for Appellants Margarita Quesada, et al.