5th Circuit, Supreme Court are out of sync

Citizens deserve consistency on the issue of standing

By DAVID COALE

American judicial bodies are independent by design. But when two of the most powerful courts in the land consistently disagree on a basic issue about judicial power, it creates confusion and deserves a second look.

The U.S. Court of Appeals for the 5th Circuit hears appeals from federal courts in Texas, Louisiana and Mississippi. As a practical matter, it is the "last word" about the meaning of federal law in Texas. The 5th Circuit resolves thousands of cases every year, and the Supreme Court can review only a handful of them.

By any measure, the 5th Circuit is a hardworking, intelligent and principled court. But the relationship between the 5th Circuit and Supreme Court has frayed on a fundamental issue. In a series of high-profile constitutional cases, the Supreme Court has reversed the 5th Circuit's judgment on the critical threshold issue of whether the plaintiffs had "standing" to bring those cases in the first place.

Texas deserves a reliable and consistent voice about what the Constitution means. The 5th Circuit's persistent difference of opinion with the Supreme Court about standing makes the 5th Circuit's rulings less reliable than they should be — on the very high-profile issues where Texas most needs the consistency and predictability.

The most recent example was Aug. 16. By a 2-1 vote, a 5th Circuit panel partially stayed Judge Matthew J. Kacsmaryk's sweeping order that banned the medication-abortion drug mifepristone. But the 5th Circuit's opinion had no immediate legal effect because the Supreme Court had already intervened in the case to grant a complete stay of Kacsmaryk's order, pending the Supreme Court's own review.

It's no secret why. There is serious doubt whether the plaintiffs have standing to bring the medication-abortion case because their claim to standing is based on a series of probabilistic events linked to the FDA's approval of mifepristone. And in three recent cases, the Supreme Court has reversed the 5th Circuit for finding standing when the high court saw only speculative harm.

In 2021, in California vs. Texas — a constitutional challenge to the remaining parts of the Affordable Care Act after Congress removed the penalties for not obtaining insurance — the Supreme Court reversed the 5th Circuit on standing. By a 7-2 vote, it held that an unenforceable law could not injure the plaintiffs.

In U.S. vs. Texas this past term, the Supreme Court held 8-1 that Texas lacked standing to challenge the federal government's discretionary enforcement policy about the arrest of unauthorized entrants into the country.

And on the last day of the term — the same day that the Supreme Court invalidated the Biden administration's loan-forgiveness program — it unanimously found that the plaintiffs lacked standing in the companion case, from Texas, of Department of Education vs. Brown. It held that those plaintiffs' hopes of qualifying for hypothetical future debt relief were too speculative to let it challenge the Biden administration's program. (The 5th Circuit did not write an opinion in this case, but it declined to stay the ruling made by the federal district court.)

In each case, the Supreme Court held that speculative or hypothetical harm does not confer standing. These holdings vividly demonstrate that the John Roberts Court is "conservative" not only about end results, but about judicial process and the proper roles of the courts. Conversely, they signal that the 5th Circuit is willing to engage hot-button cases despite a shaky procedural foundation.

Regardless of how the abortion-medication case may end, the underlying — and long-running — jurisdictional friction between the 5th Circuit and Supreme Court does Texas a disservice. Careful attention to standing doctrine, as precisely defined by the Roberts Court, will help align these two powerful courts and help Texans understand the constitutional framework of their society.

David Coale is a Dallas lawyer. He wrote this column for The Dallas Morning News.