No. 19-1441

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF AUSTIN, TEXAS,

Petitioner,

vs.

KEN PAXTON, ATTORNEY GENERAL OF THE STATE OF TEXAS,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

As authorized by Supreme Court Rule 15.8, the City of Austin, Texas, petitioner herein, supplements the Petition for a Writ of Certiorari filed on June 25, 2020. In this supplement, Austin brings to the Court's attention only matters post-dating the filing of its petition for a writ of certiorari on June 25, 2020.

I. The Fifth Circuit Still Has No Governing Legal Principle For Application Of *Young*'s Connection Requirement.

The absence of a guiding principle for applying a key feature of the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), continues unabated. Part II.A of the petition highlights the muddled state of Fifth Circuit jurisprudence on application of *Young*'s "connection" element. Pet. 17-19. It points in particular to the fact that the Fifth Circuit itself acknowledges that the decision below did nothing to clarify or settle the applicable test. *Id*. 19.

In *Texas Democratic Party v. Hughs*, 974 F.3d 570 (5th Cir. 2020), involving Texas voter registration rules, a motions panel of the court acknowledged that the scope of *Young*'s connection requirement is still unsettled and lacking "clarity" on how much of a connection suffices to trigger the exception. *Id*. at 571.

In a case involving Texas absentee ballot requirements, *Texas Democratic Party v. Abbott*, 2020 WL 6127049 (5th Cir. Oct. 14, 2020), the Court acknowledged that it "has not spoken with conviction about all relevant details of the 'connection' requirement." *Id*. *5. Despite the absence of any

clear articulation of the principle, the court nonetheless applied the "connection" rule to hold that the Texas Secretary of State's duties fell on one side of it—that is, a sufficient connection was present—while the Texas Attorney General's duties, presenting a "closer question," fell on the other. *Id.* **5-7. In short, the court sorted out a close, and important, legal question without an articulable legal principle used to do the sorting.

That same day, the Fifth Circuit applied the still-unsettled doctrine to hold that neither Texas's Governor nor its Secretary of State had sufficient connection to enforcement of a pandemic-related proclamation issued by the Governor concerning election procedures to bring them within *Young*'s exception. *Mi Familia Vota v. Abbott*, 2020 WL 6058290 (5th Cir. Oct. 14, 2020).

District courts have taken note of the Fifth Circuit's continuing confusion about this aspect of the *Young* doctrine. *See SkyRunner, LLC v. Louisiana Motor Vehicle Comm'n*, 2020 WL 6092350 (W.D. La. Oct. 15, 2020), at *3 ("Different panels of the Fifth Circuit have used different definitions of 'connection.'"); *Hernandez v. Abbott*, 2020 WL 5539093 (E.D. Tex. Aug. 24, 2020), at *10 n.11 (reciting string of appellate case authority reflecting confusion and absence of clarity). One district court simply disregarded the confusion in the authority and applied the plurality *en banc* opinion—to which the Fifth Circuit itself has not ascribed governing weight—to decide the Eleventh Amendment issue before it. *McWherter v. Davis*, 2020 WL

5632675 (E.D. Tex. Sept. 21, 2020), *adopting* 2020 WL 5638714 (Aug. 5, 2020), at *8 (citing only plurality opinion in *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (*en banc*)).[1]

The merits issues in these recent cases involve significant legal disputes involving public policies. Yet, the merits of the disputes are often overshadowed, and their resolution pretermitted, by the Fifth Circuit's application of an *Ex parte Young* doctrine that the appeals court itself is unable to articulate.

II. The Conflicts And Confusion In Application Of *Young*'s Connection Requirement Are Increasingly Fogging Article III Standing Analysis.

There have not been any intervening decisions from other circuits that lessen or eliminate the conflicts with the Fifth Circuit on the *Young* connection requirement discussed in the petition's Part II.B.1, Pet. 20-22. Nor are there any intervening decisions from those other circuits that clarify or

[1] One recent case illustrates how the confused state of this part of the *Young* doctrine delays timely adjudicating the merits of important legal disputes. In 2019, in *Gilby v. Hughs*, No. 1:19cv1063-LY (W.D. Tex.), the plaintiffs filed a challenge to the validity of a Texas statute restricting use of mobile polling stations, naming the Texas Secretary of State in her official capacity as defendant. In July 2020, when the coronavirus pandemic interfered with obtaining a trial date, the plaintiffs instead applied for a preliminary injunction in advance of the November general election. The district court first decided the defendant's motion to dismiss, which included an argument that the Eleventh Amendment protected the Secretary of State from suit on the ground that the *Young* exception was inapplicable. The court denied the motion to dismiss, rejecting the Secretary's Eleventh Amendment immunity argument on the ground that "the circuit has already determined that she is the proper defendant in this case." *Gilby v. Hughs*, 2020 WL 5745915 (W.D. Tex. Aug. 11, 2020), at *3. The Secretary immediately filed a notice of appeal, staying further trial court proceedings, and when the plaintiffs argued that the trial court should nonetheless proceed on the preliminary injunction on a finding that the appeal was frivolous, the district court declined. Citing the Fifth Circuit's own confession that its jurisprudence on the point is "not a model of clarity," the district court found that the Secretary's role in enforcing Texas election laws, "while seemingly obvious," is "not as clear as it seems." Order of Sept. 2, 2020, No. 1:19cv1063-LY, (Doc. 114). District court proceedings remain stayed while the appeal is pending in the Fifth Circuit as *Texas Democratic Party v. Hughs*, No. 20-50683.

alleviate the muddled and apparent conflicts discussed in the petition's Part II.B.2, Pet. 22-23. But the infiltration of the *Young* "connection" principle into Article III standing analysis noted in the petition, Pet. 23 n.18, has increasingly sown uncertainty in the Fifth Circuit and conflict and uncertainty among the circuits.

The Fifth Circuit still has not directly addressed this issue, but the impact of its confused *Ex parte Young* jurisprudence has been specifically noted. In *Fusilier v. Landry*, 963 F.3d 447 (5th Cir. 2020), a concurring and dissenting member of the panel puzzles over the fact that the circuit's case authority has not provided clear guidance on how to mesh *Young*'s connection rule with Article III standing analysis. *Id.* at 469 ("our precedent does not speak with one voice").

The Eleventh Circuit has relaxed the link between *Young*'s connection rule and Article III standing analysis, treating the former (the connection rule) as establishing a more stringent a test than the latter (standing). *Jacobson v. Florida Sec. of State*, 974 F.3d 1236, 1256 (11th Cir. 2020). In distinct contrast, a district court in the Eighth Circuit understands *its* circuit to have established precisely the opposite principle, setting a higher standard to meet the *Young* exception than to establish Article III standing. *Minnesota RFL Republican Farm Labor Caucus v. Freeman*, 2020 WL 5512509 (D. Minn. Sept. 14, 2020), at *5.

Granting Austin's petition therefore provides the Court not only an opportunity to clarify its long-unexplained "connection" requirement in *Young*, but also an opportunity to lessen the increasing uncertainty the "connection" part of the *Young* doctrine has injected into Article III analysis.

III. The Austin City Council Will Continue With This Litigation If Its Petition Is Successful.

By unanimous consent on October 29, 2020, the Austin City Council reaffirmed the city's continued pursuit of this federal litigation effort to invalidate Tex. Loc. Gov't Code § 250.007(a) under the federal Supremacy Clause and to implement and enforce its Source of Income ordinance (Ord. No. 20141211-050) if it is successful in reversing the Fifth Circuit opinion and judgment that is the subject of this petition. Its resolution doing so is submitted as a Supplemental Appendix.[2]

CONCLUSION

These recent developments provide additional support for the grant of Austin's petition for a writ of certiorari.

Respectfully submitted,

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[2] Pandemic-related restrictions on in-person activity at Austin City Hall have slowed final processing of such council-passed items as the resolution. Rather than delay submission of this supplement to the petition, Austin is submitting the resolution as adopted but without the official signatures and attestations that are expected to follow soon.

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November 2, 2020