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TO: Farmers Branch City Council; Charles Cox
FROM: Nicole A. Corr
DATE: April 15, 2019
SUBJECT: *Zimmerman v. City of Austin*, 881 F.3d 378 (Tex.App.--5th Cir. 2018); rehearing denied (888 F.3d 168, Apr 18, 2018); cert denied (139 S.Ct. 639, Dec. 10, 2018)

CASE SUMMARY:

Donald Zimmerman, a former Austin City Councilmember, challenged four provisions of an amendment to the Austin City Charter passed in 1997 that restricted campaign contributions. The four challenged restrictions were as follows:

- (1) Article III, § 8(A)(1) – the base contribution limit – prohibits candidates for mayor or city council from accepting campaign contributions of more than “\$300 per contributor per election from any person,” with that amount to be adjusted annually for inflation. Austin, Tex. Code, Art. III, § 8(A)(1).
- (2) Article III, § 8(A)(3) – the aggregate contribution limit – prohibits candidates from accepting “an aggregate contribution total of more than \$30,000 per election, and \$20,000 in the case of a runoff election, from sources other than natural persons eligible to vote in a postal zip code completely or partially within the Austin city limits.” Austin, Tex. Code, Art. III, § 8(A)(3).
- (3) Article III, § 8(F)(2) – the temporal restriction – prohibits candidates or officeholders from soliciting or accepting political contributions except for during the 180 days before an election. Austin, Tex. Code, Art. III, § 8(F)(2).
- (4) Article III, § 8(F)(3) – the disgorgement provision – requires candidates to “distribute the balance of funds received from political contributions in excess of any remaining expenses” to the candidate’s contributors, a charitable organization, or the Austin Fair Campaign Fund. Austin, Tex. Code, Art. III, § 8(F)(3).

After a bench trial, the lower court (1) upheld the base contribution limit in light of the City’s interest in preventing *quid pro quo* corruption, (2) concluded Zimmerman lacked standing to challenge the aggregate limit because he did not come close to reaching the relevant limits, (3) found the temporal restriction was an unconstitutional limit on contributions because the City had failed to show it was sufficiently tailored to serve an interest in preventing the *quid pro quo* corruption, and (4) found the disgorgement provision was an unconstitutional restriction on expenditures because the City had failed to show it was the least restrictive means of preventing *quid pro quo* corruption.

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Both Zimmerman and the City of Austin appealed, and the Fifth Circuit Court of Appeals affirmed the lower court's findings.¹ Zimmerman filed a request for rehearing that was denied and a writ of certiorari to the United States Supreme Court that was also denied. The appeals process is now concluded and the decision by the Fifth Circuit Court of Appeals is the final judgment.

CASE ANALYSIS:

In upholding the trial court's findings, the appellate court first clarified that Texas law distinguishes between "campaign contributions" and "officeholder contributions," and noted the catchall phrase "political contribution" includes both campaign and officeholder contributions. 881 F.3d at 382-383. Austin's Charter section 8(A)(1) refers to "campaign contributions" and section 8(A)(3) refers to "contributions" generally, while section 8(F) specifically refers to "political contributions." *Id.* at 383. The court found this language important when deciding this case.

1. The Base Contribution Limit

Zimmerman argued the base limit on campaign contributions required strict scrutiny as content-based restriction on speech or indirect burden on campaign expenditures, or in the alternative, the limit is not justified by a sufficiently important governmental interest and even if it were, it is not sufficiently tailored to that interest. *Id.* at 383-384. The court disagreed on all points, finding the limit is not content-based restriction on speech because the City intended for section 8(A) to reach any contribution to a candidate or incumbent officeholder even though it refers to "campaign contributions" and "contributions" generally. *Id.* at 384. Zimmerman had argued the base limit only applied to "campaign contributions," thereby limiting contributions to fund campaign speech but providing no limits on contributions to fund officeholder expenses such as a newsletter describing an incumbent's achievements. *Id.*

As for his argument that the limit is an indirect burden on campaign expenditures and therefore subject to strict scrutiny, the appellate court relied on the US Supreme Court's distinction between contribution limits and expenditure limits. *Id.* at 385; *see also FEC v. Colo. Republican Fed. Campaign Comm'n*, 533 U.S. 431, 437 (2001); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986). The US Supreme Court has held contribution limits create a far lesser burden on speech, and, for that reason, are subject to less searching scrutiny. *Id.*

The court then applied the closely-drawn test set forth in *Buckley v. Valeo* to the base limit on political contributions, which is something akin to intermediate scrutiny and "may be sustained if the governmental entity demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id.*; *see Buckley v. Valeo*, 424 U.S. 1, 25 (1976). The *Buckley* test consists of two parts: (1) the need for a contribution limit must be justified by a sufficiently important interest, and (2) the amount of the limit must be sufficiently tailored such that the limit does not unnecessarily impinge First Amendment rights. *Id.* at 386.

The court recognized the only governmental interests sufficient to justify limits on campaign contributions are the prevention of actual corruption and its appearance. *Id.* at 385. While the evidentiary bar is not high in establishing such justification, "the existence or perception of corruption must still be more than mere conjecture." *Id.* The court found Austin was able to meet this bar with evidence of a perception of corruption among the City's

¹ It is important to note the appellate court gave great deference to the trial court's findings under the applicable standard of review which was clear error for findings of fact and de novo for legal issues.

population including testimony that large contributions created a perception that economic interests were “corrupting the system,” as well as the fact that the initiative passed with 72% of the vote. *Id.*

As for the dollar limit on the contribution, the court relied on *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 397 (2000), which held there are no constitutional minimum contribution amount below which legislatures cannot regulate. *Id.* at 387. Instead, a contribution limit is unconstitutional “if it is so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contribution pointless.” *Id.* (internal quotes omitted). Courts must therefore review the record carefully toward the statute’s tailoring or proportionality of the restrictions where there are danger signs that a limit may be so low that it risks preventing challengers from mounting effective campaigns. *Id.*

The court found no danger signs associated with the \$350 limit because the contribution limit was per election not election cycle, and therefore reset between general and runoff elections, and the limit was on par with limits imposed in other states and localities and upheld by other courts, as well as indexed for inflation. *Id.* at 387. Additionally, the City presented evidence that the limit did not prevent candidates from running “full-fledged” campaigns, including testimony from a former councilmember that the limit did not at all impede her ability to run an effective campaign and that the limit was good for democracy because it meant that she was out there “talking to a heck of a lot more people.” *Id.* at 388.

2. The Aggregate Contribution Limit

The court agreed with the trial court that Zimmerman lacked standing to challenge the aggregate contribution limit because he did not suffer an actual injury as a result of the ordinance. *Id.* at 388-389. The court rejected all of Zimmerman’s injury arguments, which included that the law caused him to change his campaign strategy and withhold solicitations he otherwise would have sent to individuals outside the Austin area. *Id.* The court found Zimmerman’s decision to forego solicitations because the \$5,000 investment would not have been worth the maximum \$36,000 return could not be excused on the ground that soliciting funds from outside of the Austin area would have been futile. *Id.* at 389. “While changing one’s campaign plans or strategies in response to an allegedly injurious law can itself be a sufficient injury to confer standing, the change in plans must still be in response to a reasonably certain injury imposed by the challenged law.” *Id.* at 390.

Zimmerman next argued that his speech had been chilled due to the threat of an ethics complaint. *Id.* The court rejected this argument as well, holding in order to bring a preenforcement challenge, a plaintiff must produce evidence of an “intention to engage in a course of conduct arguably affected with a constitutional interest, but not proscribed by statute, as well as a credible threat of prosecution.” *Id.* at 391. But Zimmerman failed to establish such an intention. *Id.*

Zimmerman’s third and final argument for standing was that he suffered an injury-in-fact due to the diversion of resources required to comply with the aggregate limit. *Id.* at 391. The court rejected this argument as well based on Zimmerman’s failure to provide evidence that anyone in his campaign actually expended any additional time or money as a result of the aggregate limit. *Id.*

3. The Temporal Restriction

The court affirmed the trial court’s finding that the six-month temporal limit on fundraising is unconstitutional. *Id.* at 391. The court again applied the *Buckley* two-part test, which required Austin to show (1) that the six-month limit serves the sufficiently important interest of preventing actual corruption or its appearance and (2) that it employs means that



are closely drawn. *Id.* Austin had to justify the limit with some evidence of actual corruption or its appearance. *Id.* The court also held that in light of *McCutcheon v. FEC*, 134 S.Ct. 1434, 1450 (2014), Austin needed to establish that even if the \$350 contribution near the time of an election is not likely to lead to actual corruption or its appearance, the same contribution made at another time is. *Id.* at 392. And what is needed to justify a temporal limit is additional to and distinct from what is needed to justify a dollar limit on contributions. *Id.*

Based on evidence presented by Austin at trial, the court found Austin had failed to produce sufficient evidence to justify the temporal limit. *Id.* at 392. Specifically, there was testimony that the City Council is in session and voting year-round such that the risk of money coming in before votes is no less of a concern in the six-month window before an election than at any other time. *Id.*

4. The Disgorgement Provision

As for the disgorgement provision, the court held Zimmerman did have standing to challenge this provision and that the provision was unconstitutional, thereby again affirming the trial court. *Id.* at 393. The disgorgement provision required candidates to distribute the balance of funds received from political contributions in excess of any remaining expenses for the election to the candidate's contributors, a charitable organization, or the Austin Fair Campaign Fund. *Id.* Candidates could retain up to \$20,000 for officeholder expenditures. *Id.* Austin had argued Zimmerman did not have standing because he only had \$1,200 left and could have retained it all for officeholder expenditures. *Id.* The court, however, found this argument missed the nature of the First Amendment right – Zimmerman has the right to use campaign funds to advocate for his own election; that right was impaired by his inability to retain excess funds from the 2014 election for use in future campaigns. *Id.*

Austin then argued there is no First Amendment right to use funds remaining after one campaign in a new and different campaign because the new campaign “re-set” the First Amendment clock. *Id.* at 395. The court rejected this argument as well, because it again overlooked the nature of the right at issue. *Id.* Specifically, once a contribution is made and in the hands of a candidate, it “helps the candidate communicate a political message,” and the candidate's expenditure of that money to engage in political speech is then afforded its own constitutional protection. *Id.* “By prohibiting candidates from spending money raised in one election cycle on speech in the next, the disgorgement provision acts as an indirect burden on expenditures and thus implicates First Amendment rights.” *Id.* As a burden on expenditures, the provision is subject to heightened scrutiny and Austin, on appeal, did not attempt to justify the provision as sufficiently tailored to serve its interest in preventing corruption. *Id.* The court therefore affirmed the trial court and found the disgorgement provision to be an unconstitutional abridgement of First Amendment rights. *Id.*

CONCLUSION:

Based on the court's decision set forth above, we conclude that the City of Farmers Branch may adopt an ordinance that limits the amount of campaign contributions but with some restrictions. Similar to the City of Austin's base contribution limit of \$350, the City may adopt an ordinance that caps the total amount a contributor can make so long as that limit is adjusted for inflation and takes into consideration the following. When deciding on the amount of the cap, the City must be cognizant that the amount is not so low that it risks preventing challengers from mounting effective campaigns. For example, the City should consider applying the cap per election, not election cycle, so that it resets between general and runoff elections. The City should also research limits imposed in other states and localities and upheld by other courts. The City must be able to show a legitimate reason for passing this limit which includes preventing corruption, or at least the perception of



corruption, just as the City of Austin was able to show. And the City should make it clear the limit applies to both campaign and officeholder contributions.

Because the court did not substantively address the aggregate contribution limits, it is unclear how a court would rule on such limits. The City could adopt a nearly identical ordinance as the City of Austin and risk having to defend the ordinance should someone who does have standing challenge it in court. Based on the court's analysis of the standing issue and Zimmerman's inability to establish standing for this particular ordinance even as a councilmember, it may be difficult for someone to challenge an aggregate contribution ordinance which would, in turn, reduce the City's risk that it would have to defend its ordinance in court. However, it is difficult to predict who may try to challenge the ordinance and therefore difficult to adequately analyze the City's legal exposure should the City choose to adopt a similar ordinance.

The City cannot, however, pass an ordinance that prohibits candidates or officeholders from soliciting or accepting political contributions except for a specific period of time before an election based on the court's decision in *Zimmerman*. The court found such a temporal restriction on campaigning unconstitutional because the City of Austin could not show how a \$350 contribution near the time of an election is less likely to lead to actual corruption or its appearance than the same contribution made at another time. The court took into consideration the fact that City Council meets and votes year-round, thus the risk of corruption is the same should a contribution be made just before a vote or during the six months before an election. We believe the City of Farmers Branch would have similar difficulty proving a temporal restriction on a campaign contribution serves the sufficiently important interest of preventing actual corruption or its appearance. Especially considering the City of Farmers Branch City Council also meets year-round and votes on issues throughout the year; therefore, the risk of corruption exists throughout the year and not just prior to an election.

The City is also prohibited from requiring candidates to disgorge the balance of funds received from political contributions in excess of any remaining expenses for a specific election. The court in *Zimmerman* held a candidate has the right to use campaign funds to advocate for his own election and the City cannot impair that by preventing the candidate from retaining and/or using excess funds from the current election for use in future campaigns. Once a contribution is made and in the hands of a candidate, it "helps the candidate communicate a political message," and the candidate's expenditure of that money to engage in political speech is then afforded its own constitutional protection. "By prohibiting candidates from spending money raised in one election cycle on speech in the next, the disgorgement provision acts as an indirect burden on expenditures and thus implicates First Amendment rights."

As a burden on expenditures, the provision is subject to heightened scrutiny. Although Austin did not attempt to justify the provision as sufficiently tailored to serve its interest in preventing corruption and therefore the court did not analyze whether the interest of preventing corruption would justify such an ordinance, we believe the City would have a difficult time meeting heightened scrutiny and would probably lose any legal challenge.

