UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DONALD ZIMMERMAN, Plaintiff, v. CITY OF AUSTIN, TEXAS Defendant.	Civil Case No. 15-628 DECLARATORY AND INJUNCTIVE RELIEF SOUGHT

PLAINTIFF'S VERIFIED COMPLAINT[1]

Plaintiff DONALD ZIMMERMAN complains as follows:

Preliminary Statement

1. This is a civil action for declaratory and injunctive relief arising under the First and Fourteenth Amendments to the Constitution of the United States. This suit concerns the constitutionality of several provisions of Austin's campaign finance laws, set forth in Article III, § 8 of the City Charter and Title II, Chapter 2 of the City's Code of Ordinances, specifically:

2. The City of Austin ("Austin" or "City") categorically bans fundraising by City candidates for 42 months of each four-year election cycle.[2] Article III, § 8(F)(2) of the Charter prohibits candidates for City office at the November 2016 general elections from soliciting or receiving contributions until May 12, 2016, a mere six months before Election Day. AUSTIN, TEX. charter art. III, § 8(F)(2). This restriction is also reflected in the Code. *See* AUSTIN, TEX. code § 2-2-7(D) ("A candidate may only raise funds for an election during an authorized

[1] The verification for Plaintiff is attached to this Complaint.

[2] As a result of a recent amendment to the Charter, members of the City Council are elected to a four-year term. Charter art. III § 2 (A).

campaign period.").[3] Charter art. III, § 8(F)(2) and Code § 2-2-7(D) shall be collectively referred to as the "Blackout Period."

3. Charter art. III, § 8(A)(1) imposes a "Base Limit" on the size of contributions that a candidate may accept from any given person per election, currently $350, with an exception for funds from the candidate himself and small-donor political committees that satisfy rigid requirements.[4]

4. Charter, art. III § 8(A)(3) imposes an aggregate limit of $36,000 per election (and $24,000 in the case of a runoff election) on the *total* contributions a candidate can accept from sources other than natural persons eligible to vote in a postal zip code completely or partially within the Austin city limits.

5. Charter art. III, § 8(F)(3) requires candidates to distribute the balance of funds received from political contributions in excess of any remaining expenses for the election no later than the 90th day after an election: (a) to the candidate's or officeholder's contributors on a reasonable basis, (b) to a charitable organization, or (c) to the Austin Fair Campaign Fund. (hereinafter sometimes referred to as the "Dissolution Requirement").

6. These laws stifle core political activity and prevent candidates from raising the funds required to run effective campaigns, yet they fail to advance the only legitimate governmental interest relevant in this area – the prevention of *quid pro quo* corruption or its appearance. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1441-42 (2014). These laws are also not appropriately tailored to avoid the unnecessary abridgment of associational freedom. As a result, these laws are unconstitutional under the First and Fourteenth Amendments and relief is required to correct these abridgements.

[3] Plaintiff refers herein to the Austin Charter as the "Charter," and the Austin Code of Ordinances as the "Code."

[4] Adjusting for inflation as directed in this provision, the individual contribution limit is currently $350.

Jurisdiction and Venue

7. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343. This civil action arises under the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. Plaintiff seeks a declaration of his rights in this case of actual controversy within this court's jurisdiction pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

8. Venue is proper in this Court under 28 U.S.C. § 1391(b) because Defendant City of Austin is located in this district, and the Defendant's official duties are performed in this district. Additionally, a substantial part of the events giving rise to this claim occurred in this district.

Parties

9. Plaintiff Donald "Don" Zimmerman was elected to the Austin City Council as the District 6 representative in a runoff election held in December 2014. Zimmerman is a candidate for District 6 at the City general election to be held in November 2016. Zimmerman resides at 10901 Enchanted Rock Cove, Austin, Texas 78726.

10. Defendant City of Austin, Texas is a home-rule municipality in Travis County, Texas with the capacity to sue and be sued. Its main address is 301 West Second Street, Austin, Texas 78701. The City of Austin, Texas is a subdivision of the State of Texas. The City of Austin, Texas and its officials are responsible for creating, adopting, and enforcing the rules, regulations, ordinances, laws, policies, practices, procedures, and/or customs for the City of Austin, Texas.

Statement of Facts

Zimmerman expressed his concern regarding the constitutionality of the challenged laws to the City prior to filing this lawsuit

11. In an email memorandum sent to City Attorney Anne L. Morgan and Mayor Steve Adler on April 7, 2015, Plaintiff Don Zimmerman expressed his concern that the enforcement of the laws challenged in this lawsuit violates fundamental rights of speech and association.

12. Subsequently, on April 27, 2015, Zimmerman and City Attorney Morgan conducted a conference call with Zimmerman's Counsel Jerad Najvar. City Attorney Morgan confirmed that even if the City agreed certain provisions were invalid under the First Amendment, there is no means of amending the Charter outside of the home rule charter amendment process set out in the Local Government Code. *See* Tex. Loc. Gov't Code § 9.004. Such process would (1) require Plaintiff to convince the City that certain specific provisions challenged here should be repealed, (2) rely on the City Council to draft the requisite charter amendments, and then (3) hold an election several months later, which still would not guarantee the repeal of the offending laws.

13. In light of the categorical and unambiguous language of the challenged provisions, Zimmerman's desired activity is chilled due to fear of enforcement of the challenged laws.

14. Even if the Defendants agreed that the challenged laws were invalid, and even if they were willing to correct the infirmities, they are unable to vindicate Plaintiff's rights in a timely or effective manner.

Zimmerman will run for City office, but is barred from soliciting or accepting contributions until May 2016

15. Plaintiff Donald Zimmerman will run for re-election to Austin City Council, District 6 in the November 2016 general election.

16. Zimmerman's campaign ended the 2014 campaign cycle approximately $18,000 in debt.

17. Zimmerman does not have vast personal financial resources with which to self-fund his campaign.

18. Zimmerman believes that he must begin raising funds for his campaign immediately in order to raise sufficient funds.

19. Limitations on his ability to fundraise necessarily prevent him from spending money, because he cannot spend money that he has not yet raised.

20. Without the ability to raise contributions, Zimmerman cannot pay for activities that he would otherwise immediately undertake to further his campaign for re-election in 2016, such as:

a. Contracting for professional development of a custom campaign website to disseminate his campaign message and facilitate the collection of campaign contributions via the internet;

b. Contracting for professional development of custom digital campaign ads;

c. Purchasing ad space for digital ads on targeted social media and Internet sites;

d. Deploying digital fundraising platforms, such as fundraising via Facebook and Twitter advertisements, from potential supporters regardless of where such supporters are physically located or domiciled;

e. Neighborhood meet-and-greets (which require funds for advertising, renting a venue, and catering);

f. Hiring campaign staff;

g. printing and distributing campaign materials, such as mailers;

h. and paying down debt from his 2014 campaign, which will free up campaign funds for 2016.

i. Zimmerman would begin expending funds on these activities immediately, but he cannot do so without raising money from those who support his campaign.

21. If not for the absolute temporal ban on fundraising under the Blackout period, Zimmerman would immediately solicit and accept contributions to fund his re-election campaign for City Council.

22. If not for the absolute ban on fundraising under the Blackout period, many individuals, including but not limited to Roger Borgelt, Michael Lee, Nathalene Pena, James Skaggs and Josh Spain, would immediately contribute funds to support Zimmerman in his campaign for City Council.[5]

23. Regardless of whether Zimmerman is successful in his campaign for City office in November 2016, he intends to be a candidate for City office again in future elections.

Zimmerman desires to accept contributions larger than the current Base Limit of $350 per contributor per election

24. Zimmerman would accept contributions greater than $350 per contributor if permitted.

25. The Base Limit is so low that it reduces the amount of money that Zimmerman has to communicate his message and platform to constituents and prospective voters.

26. Specifically, the Base Limit makes it difficult for Zimmerman to amass sufficient funds to engage in communications such as direct mail advertisements to constituents/district

[5] Plaintiff Zimmerman has standing to assert not only his right as candidate to receive contributions, but also the rights of persons who would contribute to him but for the prohibition challenged here. *See Wisc. Right to Life, Inc. v. Barland*, 664 F.3d 139, 146-48 (7th Cir. 2011).

voters, and television and radio advertisements, which are necessary to mount an effective campaign, as well as other campaign activities.

27. Such mass media communications are expensive in the sophisticated media market of Austin.

28. Because municipal races in Texas are officially nonpartisan, the ballot does not include designation of party affiliation. The lack of such designation makes it even more important for each City candidate individually to communicate effectively with voters to explain his or her positions on issues, because voters lack the shorthand reference that a party affiliation provides.

29. If not for the Base Limit, many individuals would contribute funds to support Zimmerman's 2016 campaign for City Council in excess of $350, and Zimmerman would accept such contributions. For example, James Skaggs would immediately contribute $2,500.

Zimmerman would like to accept funds in excess of the article III, section 8(A)(3) aggregate limit of $36,000.

30. Zimmerman enjoys support from like-minded individuals and groups that reside, or are registered or domiciled, both inside and outside the territorial limits of the City of Austin.

31. Zimmerman will solicit and accept contributions from supporters regardless of whether the supporter is a "natural person[] eligible to vote in a postal zip code completely or partially within the Austin city limits." Charter art. III, § 8(A)(3). Article III, § 8(A)(3) arbitrarily discriminates against contributions from persons who are (1) natural persons residing in the territory but who are not "eligible to vote"; (2) any association or entity; and (3) natural persons residing in a zip code that is not at least partially within Austin.

32. In furtherance of this effort, Zimmerman desires to place digital ads on social media sites such as Facebook, and Internet sites frequented by libertarian and conservative

audiences to share his message of fiscal conservatism and to solicit financial support for his campaign.

33. Zimmerman also desires to purchase donor lists from libertarian and conservative groups with many donors from across Texas and the United States to promote his message of fiscal conservatism and solicit financial support for his campaign. Such lists are expensive, but Zimmerman believes the purchase price would be a wise investment if he were able to aggressively solicit such lists with targeted and compelling fundraising appeals. However, Zimmerman will not purchase such a list unless the article III, § 8(A)(3) aggregate limit is enjoined or invalidated, because the limited return ($36,000) would not justify the resources (time and money) necessary to effectively use such lists.

34. If the Blackout Period and art. III, § 8(A)(3) were both enjoined, Zimmerman would immediately purchase such list(s) and solicit campaign funds. If the Base Limit were enjoined, Zimmerman would solicit contributions in excess of $350 using such list(s).

35. So long as the aggregate limit under article III, § 8(A)(3) remains in place, Zimmerman will not accept funds in excess of the $36,000 ceiling.

36. If not for the specific prohibition, he would accept contributions from "sources other than natural persons eligible to vote in a postal zip code completely or partially within the Austin city limits" without respect to any aggregate limit on contributions from such persons.

37. In the context of a modern campaign, and specifically in the context of the latest internet-based fundraising technology which Zimmerman plans to aggressively deploy, monitoring contributions to abide by the article III, § 8(A)(3) aggregate limit would be unduly expensive, time-consuming, and difficult.

38. Abiding by this limit would, at the most basic level, require careful monitoring of contribution data so as to immediately stop accepting contributions once the aggregate limit is reached. Candidates first must ensure they are keeping a real-time tally of all contributions, grouped by zip code. Then, for contributors who provide a zip code "completely or partially within the Austin city limits," the candidate must request information sufficient to determine whether the person is not only registered, but also not subject to a legal disability from voting. Only then may the candidate feel safe in tallying that person's contribution in the non-aggregate-limit category. All of this imposes an unnecessary and severe burden, and reduces the availability of new technology, such as social media, as effective fundraising platforms. .

39. This monitoring alone would divert campaign time and resources from essential campaign functions.

40. Moreover, requesting information on whether a contributor is "eligible to vote" would unduly encumber the fundraising process, waste campaign time, and in some cases dissuade a person from contributing even if he or she is not prohibited by the aggregate limit.

The Dissolution Requirement

41. At the end of the 2014 campaign, Zimmerman had $1,200 remaining in his campaign account.

42. Zimmerman would have retained these funds in his campaign account, but the Dissolution Requirement prohibited him from retaining these funds in an account for campaign purposes.

43. Zimmerman did not want to dispose of the $1,200 in one of the three ways preferred by the government (*see* Charter art. III, § 8(F)(3)); thus, in order to retain the funds in

some usable manner, he was forced to retain them "for the purposes of officeholder expenditures" only. Charter art. III, § 8(F)(6).

44. If not for the Dissolution Requirement, Zimmerman would have retained the unexpended funds from his 2014 election in his campaign account beyond the 90-day post-election period.

45. Regardless of the outcome of the November 2016 election, Zimmerman intends to run for City office again in the future.

46. If not for the Dissolution Requirement at article III, § 8(F)(3), Zimmerman would retain any unexpended campaign funds and from time to time use them for campaign purposes in his own discretion, including such purposes as campaign mailings and similar communications with voters and debt retirement activities.

47. If the Dissolution Requirement remains in effect, Zimmerman will be forced to refrain from using unexpended funds for campaign purposes and instead will comply with the provision by either returning contributions to donors, exhausting the funds for other permissible purposes prior to the end of the 90-day post-election period, or if he is re-elected, transferring any remaining amounts equivalent to or less than $20,000 to an officeholder account.

Relevant Law

Austin's Campaign Finance Regime

48. The City of Austin has enacted a comprehensive campaign finance regime, occupying parts of article III of the City Charter as well as an entire chapter of the Code of Ordinances entitled "Austin Fair Campaign Chapter." Code § 2-2-1 et seq.

49. Given Zimmerman's public statement of definite intent to run for re-election to his seat as city council member for District 6 at the November 2016 election, Zimmerman is a

"candidate" for "city council." Code § 2-2-2(5)(a) (defining "candidate" to include "a candidate for mayor or city council" and "a candidate's campaign committee"); Tex. Elec. Code § 251.001(1)(E) (defining "candidate"); *see also* Code § 2-2-3(A) ("Terms not defined in this chapter but defined in the Texas Election Code shall have the meanings assigned to them in the Texas Election Code.").

50. Article III of the Charter and Chapter 2-2 of the Code impose several detailed restrictions on solicitations and contributions applicable to all City candidates and persons making contributions to candidates.

The Challenged Laws

51. **Blackout Period.** The Blackout Period provides:

> An officeholder, a candidate for mayor or city council, or an officeholder's or candidate's committee may not solicit or accept a political contribution except during the last 180 days before an election for mayor or council member or in which an officeholder faces recall.

Charter art. III, § 8(F)(2); *see also* Code § 2-2-7(D).

52. The Blackout Period thus imposes a categorical ban on solicitation or acceptance of "political contributions" in any amount until the last six months before an election. The term "political contribution" is not defined in City law, but the Texas Election Code provides that "'[p]olitical contribution' means a campaign contribution or an officeholder contribution." Tex. Elec. Code § 251.001(5). "Campaign contribution," in turn, "means a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure. Whether a contribution is made before, during, or after an election does not affect its status as a campaign contribution." *Id.* § 251.001(3).[6]

[6] The Election Code defines "officeholder contribution" as follows:

> "Officeholder contribution" means a contribution to an officeholder or political committee that is offered or given with the intent that it be used to defray expenses that:

53. The next City general election will be held in November 2016. *See* Charter art. III, § 2(A). The Blackout Period prohibits Zimmerman—and all other candidates for City office—from soliciting or accepting contributions for their City campaigns except during the very narrow window beginning May 12, 2016 and ending November 8, 2016 (with an allowance for participation in a run-off election).

54. The Blackout Period even applies to prevent debt retirement fundraising by successful candidates during the period of the blackout. Charter art. III, § 8(F)(5).[7]

55. The Blackout Period is not related to Austin's business calendar. The Council meets on Thursdays year-round to conduct city business. Code § 2-5-24(A). Many additional meetings of committees of the Council meet monthly throughout the year.

56. **Base Limit.** For persons eligible to contribute to City campaigns, even during the six-month window when contributions are not altogether banned, Austin imposes a Base Limit, limiting the amount of contributions that a candidate may accept to $350[8] per person[9] per election, with an exception for the candidate and small-donor political committees that satisfy rigid requirements. Charter art. III, § 8(A)(1).

57. Although such a base limit already severely restricts the *amount* that any person is eligible to contribute to a City candidate per election, the City of Austin imposes additional

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(A) are incurred by the officeholder in performing a duty or engaging in an activity in connection with the office; and

(B) are not reimbursable with public money.

Tex. Elec. Code § 251.001(4).

[7] However, candidates who are unsuccessful are permitted to fundraise without restriction by the Blackout Period for the purpose of repaying expenses incurred in the campaign and reimbursing personal expenditures incurred in the campaign. *Id.* § 8(F)(4)

[8] The provision limits contributions to $300 with an annual adjustment for inflation. The most recent update, released in September 2014, set the limit at $350.

[9] "PERSON means an individual, corporation, partnership, labor union, or labor organization, or any unincorporated association, firm, committee, club, or other organization or group of persons, including a political committee organized under the Texas Election Code[.]" Code § 2-2-2(17).

restrictions on contributions, and subjects certain categories of persons to a near-total ban on contributions. *See infra* ¶ 67.

58. **Art. III, section 8(A)(3) Aggregate Limit.** The Charter limits the total amount that a City candidate may accept *in the aggregate* from all sources that are not (i) "natural persons" (ii) eligible to vote in a zip code completely or partially within Austin city limits. Charter art. III, § 8(A)(3). The current ceiling is $36,000 per election, and $24,000 in the case of a runoff election.

59. The Charter also includes a **Dissolution Requirement**, generally mandating that candidates dissolve their campaign accounts within 90 days after an election. It reads as follows:

> Except as provided by subsection (F)(6), no later than the 90th day after an election, or if a candidate is in a runoff election no later than the 90th day after the runoff, a candidate or officeholder shall distribute the balance of funds received from political contributions in excess of any remaining expenses for the election: (a) to the candidate's or officeholder's contributors on a reasonable basis, (b) to a charitable organization, or (c) to the Austin Fair Campaign Fund.

Charter art. III, § 8(F)(3).

60. The Dissolution Requirement offers an exception for incumbents: "An *officeholder* may retain up to $20,000 of funds received from political contributions for the purposes of officeholder expenditures." Charter art. III, § 8(F)(6) (emphasis added).

61. The Charter mandates that funds retained under subsection (F)(6) (the incumbent exception) "may be used only for officeholder expenditures," and "may not be used for campaign expenditures." *Id.* § 8(F)(7). Elsewhere, the code of ordinances "limit[s]" the use of officeholder account funds "to the following purposes":

> [C]ompensation of the officeholder's staff; office supplies; travel expenses related to City matters; meals; purchase and lease of office equipment; staff training, development and recruiting; *newsletters*; *contributions to charitable organizations*; *membership dues*; *nonpolitical advertising*; *contributions to not-for-profit organizations*; and expenditures for telephones and telephone services incurred by the officeholder in performing a duty or engaging in an activity in

> connection with the office. *Nothing in this section shall be interpreted to restrict an officeholder's ability to make campaign contributions, as defined by the Texas Election Code, from an officeholder account*.

Code § 2-2-41 (emphasis added).

62. The restrictions in article III of the Charter (the Blackout Period, Base Limit, Dissolution Requirement, and art. III, § 8(A)(3) Aggregate Limit) do not apply to "the solicitation, acceptance, or use of contributions for" a "Criminal or Civil Litigation Fund" for actions brought or defended in the person's capacity as a candidate or officeholder. Charter art. III, § 8(H).

Other restrictions and requirements under Austin's Campaign Finance Law

63. The Austin Code limits contributions to "a specific-purpose committee supporting or opposing a candidate in a City election" to the same limits applicable to contributions made directly to the candidate or the candidate's authorized committee (that is, the Base Limit of $350 from a single source and aggregate limit of $36,000 in total from all sources other than natural persons eligible to vote in a zip code wholly or partially within Austin city limits). Code § 2-2-54. These limits apply without regard to whether the "specific purpose committee" coordinates any of its activity with the candidate supported by its activity.

64. To understand the impact of § 2-2-54, one must understand the manner in which the Election Code definitions of "political committee," "specific purpose committee," and "general purpose committee" apply to conduct undertaken by associations of individuals. Under Texas law, once a group of persons decides to undertake certain political activity in concert, they are required to register as a political committee of one type or another. See Tex. Elec. Code § 251.001(12); *Catholic Leadership*, 764 F.3d 409, 430 n.28. Whether they constitute a specific or general purpose committee depends entirely on their purpose for associating. *See Catholic Leadership*, *supra*, at 414-15 (discussing generally the two types of political committees

recognized by Texas law). As the Fifth Circuit has summarized, a group that is "dedicated to supporting candidates of a particular point of view (e.g., pro-life or pro-choice candidates) is a general-purpose committee because the committee's fidelity lies with the committee's particular *perspective* rather than any specific *candidates*." *Id.* at 414 (emphasis in original). Even when a general purpose committee identifies candidates to support in a particular election, it does not become a specific purpose committee, because those candidates may still lose the committee's support if they change their position on issues relevant to the committee. *Id.* at 414-15, 415 n.5. By contrast, a "political committee" that "does not have among its principal purposes those of a general-purpose committee but does have among its principal purposes" supporting or opposing one or more specific candidates—and where the committee's fidelity lies with the identified candidates rather than a particular policy perspective—the group is a "specific-purpose committee." *Id.* at 415. These Election Code definitions apply regardless of whether the "political committee" is coordinating with a candidate, and regardless of whether the committee funds its own communications exclusively, or also makes contributions to candidates.

65. Austin Code § 2-2-54 limits contributions to *all* specific-purpose committees "supporting or opposing a candidate in a city election." In other words, the section makes no distinction between specific-purpose committees that collect funds to make contributions to candidates and specific-purpose committees that collect funds solely to make their own independent expenditures.

66. The Code generally prohibits contributions from being made, solicited or accepted at a City-owned building. Code § 2-2-52.

67. The Code restricts City lobbyists and their spouses from contributing more than $25 to a City candidate, officeholder or specific-purpose political committee. Code § 2-2-53.

Reporting requirements for candidates for City office

68. Candidates for City office in Austin are subject to robust reporting requirements. Chapter 254, Texas Election Code, sets out the substantive requirements for reports and the filing schedule applicable to City of Austin candidates. *See* Tex. Elec. Code. § 251.001(1) (defining "candidate" as used in title 15, Texas Election Code, to include all persons taking affirmative action to gain nomination or election to "public office"); *id.* § 252.005 (setting out the authority with whom a candidate's campaign treasurer appointment is to be filed, including for candidates for municipal office); *id.* § 254.066 (requiring that reports filed under this chapter be filed with the authority with whom the candidate's campaign treasurer appointment is filed); *see also* Code § 2-2-2(7) ("CONTRIBUTION AND EXPENDITURE REPORT means a periodic report of contributions and expenditures by a candidate…required to be filed under the Texas Election Code, including any other matters required to be disclosed under this chapter.").

69. In all years, including non-election years, candidates must file two "semiannual" reports, due on January 15 and July 15. Tex. Elec. Code § 254.063.

70. Candidates must file additional reports in election years. Specifically, any candidate who is running opposed for a City office must file reports due thirty days and eight days before Election Day. *Id.* § 254.064(b), (c). Additionally, if the candidate participates in a runoff election, the candidate must file a report no later than the eighth day before the runoff election date. *Id.* § 254.064(e).

71. Each report is required to contain voluminous information, as set out in § 254.031(a), Texas Election Code, including detailed information for each source contributing in excess of $50 in a reporting period, loans, political expenditures, payments not qualifying as political expenditures, any interest or other gains accruing from political contributions, etc.

72. Knowingly failing to file complete and timely reports is a criminal offense punishable as a Class C misdemeanor. Tex. Elec. Code § 254.041.

73. Even if law enforcement does not pursue a candidate for reporting failures, the Texas Election Code vests any resident of Austin with standing to seek injunctive relief requiring a candidate or officeholder, or a specific purpose committee related to such candidate or officeholder, to file a report that was not timely filed. *Id*. § 254.043.

74. In addition to the information required under the Election Code, the City adds another level of information required, including "disclosure of the occupation of the contributor and the name of the contributor's employer" for any individual contributing in excess of $200 in a reporting period. Code § 2- 2- 21(A).

75. The City also requires special reports capturing last-minute contribution activity within the last nine days before an election (that is, the activity that otherwise falls outside of the reporting period for the state-required eight-day pre-election report). Specifically, "Special Pre-Election Reports" must be filed by any candidate "who accepts contributions that total more than $10,000 during the period beginning the 9th day before the date of the election and ending at 5 p.m. on the day before the date of an election." Code § 2-2-29(A)(1). The report(s) must be filed essentially within 24 hours of triggering contributions and must disclose information about the contributions and contributors.

76. The City further requires candidates to make extensive disclosures regarding individuals who "bundle" contributions from other individuals in support of the campaign. The City even imposes an aggregate limit on bundling activity of individuals associated with a "business association" that is itself a registered lobbyist, owned in whole or in part by a

registered lobbyist, employs a registered lobbyist, or compensates another person to lobby on its behalf. Code § 2-2-22.

Public availability of campaign finance reports

77. The City requires electronic filing of campaign finance reports. The only exception to the electronic filing requirement is for a filer who submits a signed statement that the candidate does not intend to raise more than $30,000 in a campaign period. The Code further requires the city clerk to post the report on the city clerk's campaign finance report website within one business day of receipt of the report. Code § 2-2-26.

Penalties

78. Pursuant to Code § 2-2-5(A), violations of any provision of the campaign finance chapter of the code of ordinances, or Charter article III, § 8 are defined as Class C misdemeanors punishable "in accordance with [Code] section 1-1-99 by a fine not to exceed $500." "Each contribution, expenditure or other action in violation of chapter 2 constitutes a separate offense." *Id.*

79. This City-authorized punishment is cumulative of penalties under state and federal law. *Id.* § 2-2-5(C).

First Amendment Principles

80. "Contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities," *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam), implicating freedom of political speech and association. *Randall v. Sorrell*, 548 U.S. 230, 246 (2006) (plurality op.).

81. Laws that burden political speech are subject to strict scrutiny. *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011); *see also McCutcheon v. FEC*, 134 S. Ct. 1434, 1445-46 (2014) (plurality op.).

82. Even limits on contributions should be subject to strict scrutiny. Both *McCutcheon* and *Catholic Leadership* declined to announce whether the limits at issue were still subject to the lesser "closely drawn" standard, finding that they failed scrutiny even under the "closely drawn" test. *McCutcheon*, 134 S. Ct. at 1446; *Catholic Leadership*, 764 F.3d at 424.[10]

83. Even if this court declines to apply strict scrutiny to a given provision, contribution restrictions may only be sustained "if the [Government] demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *McCutcheon*, 134 S. Ct. at 1441 (quoting *Buckley*, 424 U.S. at 25); *Catholic Leadership*, 764 F.3d at 424.

84. Prevention of actual or apparent *quid pro quo* corruption is the only government interest sufficient to justify campaign finance restrictions, whether limits on contributions or expenditures. *McCutcheon*, 134 S. Ct. at 1450. The Supreme Court has recently clarified how narrowly this interest is defined. *Quid pro quo* corruption "captures the notion of a direct exchange of an official act for money." *Id*. at 1441. In reaffirming this narrow definition, the Court directly rejected the broader "influence" standard. "Reliance on a generic favoritism or influence theory…is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle." *Citizens United*, 558 U.S. at 359 (internal quotation omitted)

[10] Plaintiff acknowledges that the Court may conclude it is still bound to apply closely drawn scrutiny to a contribution limit. Plaintiff preserves this request for potential review by the Supreme Court.

85. Some contribution restrictions are invalid as a matter of law because they fail to address any threat of *quid pro quo* corruption. The Supreme Court draws a material distinction between base and aggregate limits. Base limits—that is, limits "restricting how much money a donor may contribute to *a particular* candidate or committee," *McCutcheon*, 134 S. Ct. at 1442, can be appropriately directed at the *quid pro quo* threat. *See McCutcheon*, *supra* at 1442; *Buckley*, 424 U.S. at 28 (noting that a base limit "focuses precisely on the problem of large campaign contributions[,] the narrow aspect of political association where the actuality and potential for corruption have been identified") (punctuation added). However, unlike base limits on the size of a contribution from a single contributor to a single recipient, aggregate limits do not address *quid pro quo* corruption. *McCutcheon*, *supra* at 1442; *Catholic Leadership*, 764 F.3d at 432-33.

86. Even if a particular contribution limit is supported by the requisite governmental interest, and regardless of whether the Court applies strict or "closely drawn" review, the court "must assess the fit between the stated governmental objective and the means selected to achieve that objective. Or to put it another way, if a law that restricts political speech does not 'avoid unnecessary abridgment' of First Amendment rights, it cannot survive 'rigorous' review." *McCutcheon*, 134 S. Ct. at 1445 (internal citations omitted).

87. The Government always bears the burden of justifying speech-restrictive laws, including in the campaign finance context. *Id.* at 1452; *Catholic Leadership*, 764 F.3d at 425.

Preliminary and Permanent Injunctive Relief

88. Plaintiff re-alleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

89. The Blackout Period (Charter art. III, § 8(F)(2) and Code § 2-2-7(D)), the Base Limit (Charter art. III, § 8(A)(1)), the Dissolution Requirement (Charter art. III, § 8(F)(3)), and the aggregate limit under Charter art. III, § 8(A)(3) have deprived, and will continue to deprive, Plaintiff of his fundamental rights protected by the First and Fourteenth Amendments. Money damages cannot adequately compensate these constitutional injuries and, absent injunctive relief, the injuries will be irreparable. Accordingly, appropriate injunctive relief and a declaration of the unconstitutionality of the statutes are necessary.

90. Plaintiff faces a credible threat of prosecution if he solicits or accepts a political contribution before the narrow window for fundraising permitted under the Blackout Period opens.

91. Plaintiff faces a credible threat of prosecution if he accepts a campaign contribution in excess of the Base Limit.

92. Plaintiff faced a credible threat of prosecution if he were to retain any unexpended campaign funds later than 90 days after the 2014 election, and he faces a credible threat of prosecution if he retains unexpended campaign funds later than 90 days after any future election or otherwise fails to distribute the balance of such funds to a government-approved recipient within the required time frame.

93. Plaintiff faces a credible threat of prosecution if he accepts contributions exceeding the aggregate limit permitted from the disfavored categories of contributors under charter art. III, § 8(A)(3).

94. Plaintiff is not willing to expose himself and his supporters to criminal and civil penalties and thus he has been forced to refrain from engaging in core political activity pending vindication of his constitutional rights.

95. Plaintiff intends to run for Austin elective office again in the future, regardless of the outcome of the November 2016 election, and unless the unconstitutionality of the challenged restrictions is recognized, Plaintiff's First Amendment rights will be restricted in the future election or elections.

96. The free speech and associational rights of others not before the Court will be similarly infringed as the challenged provisions are applied to other candidates in the November 2016 general election in the City of Austin, as well as against candidates in future elections, and enforced by these Defendants. *See Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Catholic Leadership*, 764 F.3d at 423-24.

COUNT 1

The Blackout Period imposes a temporal aggregate limit of zero dollars on political contributions that is facially unconstitutional because it is unsupported by any cognizable government interest and because it is not appropriately tailored.

97. Plaintiff re-alleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

98. The Blackout Period under Charter article III, § 8(F)(2) and Code § 2-2-7(d) imposes a zero-dollar aggregate limit on solicitations by, and contributions to, City candidates for a significant period of every election cycle. The Blackout Period functions effectively as a limit on campaign expenditures and should be subject to the scrutiny applied to expenditure limits. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. at 2806 (2011); *Buckley*, 424 U.S. at 54-59 (striking down limit on total expenditures by federal candidates during an election cycle).

99. Even if this Court views the Blackout Period's unique and severe burden as a contribution limit, it should be subject to strict scrutiny.

100. However, whether under strict or closely drawn scrutiny, the Blackout Period cannot pass constitutional muster.

101. The Blackout Period does not further the government's interest in preventing the actuality or appearance of *quid pro quo* corruption.

102. Because the Blackout Period imposes an aggregate limit on contributions to Zimmerman and similarly-situated City candidates, and because aggregate limits do not address corruption as a matter of law, Charter article III, § 8(F)(2) and Code § 2-2-7(D) are facially unconstitutional for lack of any cognizable government purpose.

103. In addition, the Blackout Period is not appropriately tailored for numerous reasons. These reasons include, but are not limited to, the following: (A) the aggregate zero dollar limit necessarily also limits contributions from *any single contributor* to zero dollars, despite the fact that at other times of the year persons may contribute $350 and small-donor political committees may contribute $1,000, amounts which the City judges to be non-corrupting; (B) the period subject to the fundraising blackout is exceedingly long and bears no relation to the City's business calendar; and (C) the City has already addressed its legitimate anticorruption interest with other measures, including stringent base limits, near-absolute bans on contributions from professional lobbyists, and robust reporting requirements making available detailed information about contributions to the public. The absolute temporal ban on non-legal-fee fundraising is an unnecessary abridgment of Plaintiff Zimmerman's First Amendment rights resulting from the City's failure to tailor the provision to any threat of corruption

104. The Blackout Period violates the First Amendment rights of speech and association of Plaintiff and of any and all persons who desire to or would contribute to Plaintiff's campaign for City Council.

105. The Blackout Period also violates the First Amendment rights of members of the public, as it prevents them from hearing the views of candidates for City office who cannot raise money with which to disseminate their views.

106. The Blackout Period has deprived, and will continue to deprive, Plaintiff and others similarly situated of their fundamental rights protected by the First and Fourteenth Amendments. Money damages cannot adequately compensate these constitutional injuries and, absent injunctive relief, the injuries will be irreparable. There is no adequate remedy at law.

COUNT 2

The Aggregate Limit in Charter article III, section 8(A)(3) is facially unconstitutional because it does not advance any cognizable government interest and is not appropriately tailored.

107. Plaintiff re-alleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

108. The aggregate limit in Charter article III, § 8(A)(3) imposes significant burdens on associational freedom. This aggregate limit reduces the pool of potential contributions to City campaigns, reducing the funds available to support communications and other campaign activities. It also imposes significant administrative burdens if one is to monitor contributions and comply with it. These unique compliance burdens significantly increase compliance costs, and significantly reduce the ability of City candidates to utilize convenient and inexpensive online fundraising tools and digital campaign methods.

109. While the aggregate limit in article III, § 8(A)(3) imposes these substantial burdens on fundamental activity, it does not further the Government's interest in combatting the actuality or appearance of *quid pro quo* corruption.

110. The limit prevents City candidates from associating with some contributors by prohibiting contributions of *any* amount once the limit has been reached, even though other contributors (those who contribute before the limit is reached) are permitted to associate with the campaign, at least at levels up to the (still unconstitutionally low) base limit.

111. As such, article III, § 8(A)(3) does not address corruption as a matter of law under *McCutcheon* and *Catholic Leadership*, and thus is facially unconstitutional for lack of any legitimate governmental purpose.

112. The limit is also facially invalid because it is discriminatory; it disfavors certain categories of contributors without reference to any increased *quid pro quo* threat from any such category.

113. Article III, § 8(A)(3) is invalid to the extent it discriminates against persons residing in a zip code partially or wholly within Austin but who are not "eligible to vote," because the City cannot justify discrimination against such persons with respect to any threat of *quid pro quo* corruption. In order to be "eligible to vote" in a given zip code, one must be eighteen years of age and a registered voter, among other criteria. *See* Tex. Elec. Code §§ 11.001-.002. However, one is not accorded greater or lesser protection under the First Amendment based on residency or voting status or age.

114. Article III, § 8(A)(3) is invalid to the extent it discriminates against political committees and other associations (whether domiciled in Austin or out), because the City cannot justify discrimination against associations with respect to any threat of *quid pro quo* corruption.

115. Article III, § 8(A)(3) is invalid to the extent it discriminates against natural persons residing in zip codes that are *not* completely or partially within Austin, because the City cannot justify discrimination against political contributions from non-residents with respect to

any *quid pro quo* corruption threat. *E.g.*, *Landell v. Sorrell*, 382 F.3d 91, 148 (2nd Cir. 2004), *rev'd on other grounds and remanded sub. nom. Randall v. Sorrell*, 548 U.S. 230 (2006).

116. Article III, § 8(A)(3) appears to be intended specifically to enhance the relative influence of certain preferred contributors by restricting the political participation of those in the disfavored groups. This renders article III, § 8(A)(3) invalid because it is based on an impermissible purpose. *See McCutcheon*, 134 S. Ct. at 1441.

117. Even aside from this impermissible purpose, article III, § 8(A)(3) is unconstitutional for lack of appropriate tailoring under any level of review. First, it is over-inclusive because it imposes an absolute ban on contributions of *any* amount from contributors who would have been permitted to contribute if not for previous contributions from similarly-situated persons. Second, as described above, to the extent the City can assert an interest in protecting against *quid pro quo* corruption, appropriately-drawn base limits are a less restrictive alternative. *Catholic Leadership*, 764 F.3d at 436. Third, the City's robust disclosure requirements provide vast quantities of information regarding the flow of money to and from candidates and provide a less burdensome means of addressing corruption.

118. Even if the Blackout Period is rendered unenforceable, unless this aggregate limit is also rendered unenforceable, Plaintiff will not invest in the fundraising list(s) he desires to purchase because the permissible return under the aggregate limit will not justify the expense. Thus, Plaintiff is forced to forego desired political association with contributors merely because of the fact that the aggregate limit exists on the books.

119. The aggregate limit at charter article III, § 8(A)(3) has deprived, and will continue to deprive, Plaintiff and others similarly situated of their fundamental rights protected by the First and Fourteenth Amendments. Money damages cannot adequately compensate these

constitutional injuries and, absent injunctive relief, the injuries will be irreparable. There is no adequate remedy at law.

COUNT 3

The Dissolution Requirement in Charter article III, section 8(F)(3) is facially unconstitutional because it does not advance any cognizable government interest and because it is not appropriately tailored.

120. Plaintiff re-alleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

121. The Dissolution Requirement demands that within 90 days after an election, a candidate or officeholder "shall distribute the balance of funds received from political contributions in excess of any remaining expenses from the election: (a) to the candidate's or officeholder's contributors on a reasonable basis; (b) to a charitable organization; or (c) to the Austin Fair Campaign Fund." Charter art. III, § 8(F)(3). The only exception to the requirement to entirely dissolve one's campaign account is extended to "officeholder[s]"—*i.e.*, incumbents—who "may retain up to $20,000 of funds received from political contributions for the purposes of officeholder expenditures." Charter art. III, § 8(F)(3), (6).

122. If not for the Dissolution Requirement, Zimmerman would have retained unexpended funds from his 2014 campaign for use in his discretion, and he will retain any unexpended funds from the 2016 election, and/or from another future election, to use in a subsequent election. If the Dissolution Requirement is enjoined, Zimmerman will use the leftover $1,200 (or whatever remains) immediately for campaign purposes.

123. The Dissolution Requirement simultaneously (A) prohibits expenditures of remaining campaign funds *for campaign speech* and (B) compels the candidate instead to dedicate unexpended funds to certain government-preferred purposes (one of which is to relinquish them to the government itself). Accordingly, the Dissolution Requirement is a

"law[]…burden[ing] political speech" and subject to strict scrutiny. *Ariz. Free Enter.*, 131 S. Ct. at 2817.

124. The Dissolution Requirement does not address *quid pro quo* corruption because it does not target the transfer of large financial contributions from a single contributor to a single recipient. Instead, it prohibits the expenditure of funds already received, regardless of the size of the contribution(s) that generated the funds. Therefore, the Dissolution Requirement is facially invalid for lack of any legitimate government purpose.

125. The Dissolution Requirement also fails constitutional scrutiny because it is not appropriately tailored. Among other reasons, the City cannot claim that it is necessary for anticorruption purposes to extinguish every candidate's campaign account between elections but then grant an exception to incumbent "officeholders" who may maintain $20,000 for use in many ways to benefit such officeholders' campaign prospects, including by funding constituent newsletters and making contributions to other campaigns. *See supra* ¶ 61.

126. The Dissolution Requirement has deprived, and will continue to deprive, Plaintiff and others similarly situated of fundamental rights protected by the First and Fourteenth Amendments. Money damages cannot adequately compensate these constitutional injuries and, absent injunctive relief, the injuries will be irreparable. There is no adequate remedy at law.

COUNT 4

The Base Limit in Charter article III, section 8(A)(1) is facially unconstitutional because it is too low.

127. Plaintiff re-alleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

128. Charter art. III, § 8(A)(1) (the "Base Limit") prohibits any candidate for City office from accepting campaign contributions in excess of a certain limit per election from any "person." Currently, the limit is $350.

129. "Person" encompasses not only individuals but also entity-persons eligible to contribute, including political committees. Code § 2-2-2(17).

130. The Base Limit burdens and chills the speech and association of Plaintiff and his would-be contributors. It is unconstitutional because it fails the required strict scrutiny review in that it is too low.

131. Even if the Base Limit is subject to "closely drawn" scrutiny, it is too low and too strict to survive and so is unconstitutional.

132. The Base Limit has deprived, and will continue to deprive, Plaintiff and others similarly situated of fundamental rights protected by the First and Fourteenth Amendments. Money damages cannot adequately compensate these constitutional injuries and, absent injunctive relief, the injuries will be irreparable. There is no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

1. A declaratory judgment that Charter art. III, §§ 8(A)(1), 8(A)(3), 8(F)(2) (along with Code § 2-2-7(D)) and 8(F)(3) are facially unconstitutional under the First Amendment to the United States Constitution;

2. A declaratory judgment that Charter art. III, §§ 8(A)(1), 8(A)(3), 8(F)(2) (along with Code § 2-2-7(D)) and 8(F)(3) are unconstitutional under the First Amendment to the United States Constitution as applied to Plaintiff;

3. A preliminary and permanent injunction enjoining Defendant from enforcing Charter art. III, §§ 8(A)(1), 8(A)(3), 8(F)(2) (along with Code § 2-2-7(D)) and 8(F)(3) against Plaintiff or against any other candidate for City of Austin office;

4. An award of nominal damages for the violation of Plaintiff's constitutional rights;

5. Reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988 or any other applicable statute or authority; and

6. Any other relief that the Court deems just and appropriate.

Dated July 27, 2015.

Respectfully submitted,

/s/ Jerad Najvar

Jerad Wayne Najvar
Texas Bar No. 24068079
NAJVAR LAW FIRM
4151 Southwest Freeway, Suite 625
Houston, TX 77027
281.404.4696 phone
281.582.4138 fax
jerad@najvarlaw.com
Lead Counsel for Plaintiff

Danielle Frisa*
SHAHLA PC
708 Main Street, Suite 430
Houston, TX 77002
713.497.5133 phone
713.904.2496 fax
danielle@shahlapc.com
Of Counsel for Plaintiff
*Motion for admission *pro hac vice* forthcoming