No. 18-93

In The
Supreme Court of the United States

DONALD ZIMMERMAN,

Petitioner,

v.

CITY OF AUSTIN, TEXAS,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does Austin's inflation-adjusted, per-election limit on individual contributions infringe on a right under the First Amendment of an incumbent city council member to solicit and accept contributions for his reelection campaign?

2. Does a former city councilmember who never "c[a]me close" to the limit have Article III standing to raise a First Amendment challenge to an inflation-adjusted, per-election limit on the total amount of contributions from outside the greater Austin area that may be accepted by a council candidate?

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INTRODUCTION

Over twenty years ago, a group called "Austinites for a Little Less Corruption! a/k/a No More Corruption!" succeeded in placing before Austin voters an initiative to amend the city charter by adding a new set of rules for financing city campaigns. The anti-corruption measure passed overwhelmingly, garnering 72% of the vote. One of the new rules set a cap on the amount an individual may contribute to a city council candidate in an election.

Nearly a decade later, in 2006, 68% of Austin voters approved a set of charter amendments loosening the 1997 campaign finance restrictions. Among these amendments was a trebling of the capped level for individual contributions to any one candidate in an election, coupled with inflation-indexing of the new limit. These inflation-indexed limits apply per election rather than per election cycle, and they remain in place today.

First elected to the Austin city council in 2014, Mr. Zimmerman planned to seek reelection in 2016. As an incumbent candidate, he sued the city, claiming that four campaign finance provisions of its charter violated his First Amendment rights. No contributors, actual or prospective, joined him in the suit. Zimmerman lost his 2016 reelection bid and is not currently a candidate for city office.

Zimmerman succeeded below in two of the challenges. The district court struck down a temporal restriction on campaign fundraising and a post-election campaign funds disgorgement provision. The Fifth

Circuit affirmed, and neither of these rulings has been brought forward by cross-petition for writ of certiorari.

But Zimmerman's challenge fell short on two other claims. He failed to establish Article III standing for his challenge to the non-individualized limit on total contributions from outside the Austin area. And he lost on the merits in his challenge to the individual contribution limits. While he seeks this Court's review of both of these losses, his only extended argument is devoted to the individual contribution limit issue.

Zimmerman's arguments supporting his request for review of the Fifth Circuit's ruling upholding Austin's individual contribution limits provide the Court no meaningful toehold for review. He rests his challenge on two basic arguments. In neither case does he offer a persuasive reason in terms of circuit conflict or jurisprudential importance for review to be granted.

His first argument, that Austin's individual contribution limit is an invalid content-based restriction, rests on a mistaken reading of Austin's city charter that has no basis in the charter's text or in actual practice. The Fifth Circuit rejected it, finding no reason to reach out and manufacture a constitutional issue when Austin's reading of its own charter was reasonable and textually grounded. In any event, this argument by Zimmerman is inextricably bound to an interpretation—albeit an erroneous one—of Austin's city charter that carries no implications outside Austin's own backyard.

His second argument, that Austin's individual contribution limit is too low, fails to identify any circuit conflicts with the Fifth Circuit's ruling upholding the limits. On the contrary, Zimmerman concedes that the Fifth Circuit ruling is consistent with "the prevailing, potentially universal, view of the lower courts" in the nearly two decades since this Court's opinion in *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000). Pet. 26. His argument on this point is oddly fact-bound, positing that the current Austin limit is too far below the level it should be to actually address the permissible governmental objective of alleviating *quid pro quo* corruption or the appearance of it. Overlooked in his argument is the fact that the "danger signs" the Court has identified as triggers for a closer look at the facts on the ground in the contribution limit context are, as the appeals court found in this record, simply not present in Austin city council elections. Pet. App. 12 ("there are no such 'danger signs'" in Austin elections). Here again, Zimmerman's argument fails to identify any broader reason for this Court to take the case than to evaluate whether the Fifth Circuit and district court correctly applied the law to the facts in this particular instance. That the courts below actually *did* correctly apply the law to the facts of Zimmerman's case is beside the point of this discussion. There simply is no reason for the Court to grant review in this case, where the lone complainant is a candidate who is no longer on the scene and raises only narrow issues, with the main one not even a question of federal law.

STATEMENT OF THE CASE

1. The roots of the 1997 anti-corruption citizen initiative on campaign finance are found in Austin economic and environmental developments in the late 1980s and early 1990s. Austin had been in an economic depression in the late 1980s, but began to emerge from it in the early 1990s when the construction and housing sectors boomed. ROA.840. This boom, in turn, created major environmental pressures, especially on the area's water resources, and gave birth to a politically-engaged local environmental movement. ROA.841. This movement quickly became a dominant force in Austin politics, where clashes between development and environmental interests frequently played out before the Austin city council, which determined land use policy inside city limits and regulated water quality in its extraterritorial jurisdiction. During this period of the 1990s, Austin's campaign finance system was "wide open," with no limits on contributions. ROA.1000. Council campaigns were "dominated by large contributions" and developers, joined by associated interests such as engineering and law firms, threw a "lot of money" into campaigns. ROA.872-873.

2. To many close observers in the community, a "pay-to-play" system was at work in council races, where a contributor "paid in contributions and, in exchange, . . . got development rights." ROA.842. Often, these developer contributions would flow at high levels in close proximity to important council votes on land development projects. Councilmembers were sometimes labeled by the name of their financial

supporters' development interests, as in "the councilmember from Nash Phillips Copus." ROA.842.[1] "There was one council member . . . backed by the environmental and neighborhood associations except when he got contributions from this one particular developer and then he would vote with him." ROA.842. In short, much of the community had come to see the council election system as corrupt. Citizens spurred to action formed "Austinites for a Little Less Corruption! a/k/a No More Corruption!" and, over council resistance and with the aid of a federal court order, were able to place a citizen initiative on campaign finance before Austin's voters. In 1997, it passed overwhelmingly, 72% to 28%, adding Article III, § 8, to the city charter. Citizen concern about city council campaign corruption subsided after the initiative's passage. ROA.895.

3. In 2006, those who had been prominent activists supporting the original campaign finance initiative worked with the Austin city council to update and loosen the restrictions somewhat. ROA.851. A set of proposals to amend Article III, § 8, of the city charter went before Austin voters, who approved the amendments by a 68%-32% margin. Exh. D-19. The amendments raised the individual contribution limits to three times their 1997 level and indexed them to inflation. They also raised the capped levels for non-individualized, out-of-area aggregate contribution levels, indexing them for inflation, too. The 2006-enacted set

[1] Nash Phillips Copus was a prominent Austin-area real estate development company in the 1980s and 1990s.

of Austin campaign finance rules are the ones challenged by Zimmerman. They remain in place and govern current Austin council elections.

4. Zimmerman ran his first campaign for city office in 2014 when he sought the city council seat for District 6. Pet. App. 4. The district had a population of just over 92,000 and about 70,000 eligible voters. *Id*. He won in a run-off. *Id*. Then, having drawn a 2-year term (Austin had just moved to single-member district elections), he ran again in 2016 for re-election and lost. *Id*. He is not currently a candidate for any city office.

5. In 2015, Zimmerman sued Austin, challenging four components of the city charter rules in Article III, § 8, that govern campaign finance for Austin city council races. This discussion will focus on the two components that Zimmerman seeks to have this Court review.[2] At the time of suit and trial, these two

[2] The other two components challenged by Zimmerman were invalidated by the courts below, and Austin has chosen not to seek review from this Court of the rulings below on them. In brief, the charter provisions involved were Article III, §§ 8(F)(2) and 8(F)(3). Subsection (F)(2) barred a city council candidate from soliciting or accepting a "political contribution" except during the 180 days immediately preceding an election. Subsection (F)(3) dealt with post-election disposition of leftover campaign contributions. Summarizing, it allowed three months for payment of campaign expenses from leftover funds, after which remaining balances (except for up to $20,000 which a winning candidate could transfer to an officeholder account) had to be disbursed to either the original contributors, a charity, or an Austin fund for fair campaigns. These provisions will not be discussed in any detail in the remainder of this brief.

components established the following basic rules under Article III of the charter:

> a. No limits were set on the total amount of contributions or expenditures allowed a candidate in an election. Nor were any limits set on self-financed expenditures. In § 8(A)(1), however, a cap was established for how much any one individual may contribute to a candidate for any single election.[3] The individual cap is $350 per candidate per election, subject to annual adjustment for inflation (in $50 increments) measured by the Consumer Price Index.
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> b. Under § 8(A)(3), for those outside the envelope of ZIP code areas either wholly or partially inside Austin city limits,[4] there is a non-individualized aggregate cap on total contributions, subject to annual CPI-based-adjustments for inflation (in $1,000

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[3] For these purposes, general elections and runoff elections are separate elections. Austin city council elections are nonpartisan. To be elected, a candidate must receive a majority of the votes cast at the general election. If no candidate receives a majority, the top two proceed to a run-off. In § 2-2-7(A), the Austin city code establishes the general and runoff elections as separate campaign periods—that is, different elections—for purposes of the city charter's campaign contribution limits.

[4] Theoretically, § 8(A)(3)'s aggregate contribution cap also encompasses a category of entities inside the ZIP code envelope that are not eligible to vote; however, as Austin's expert explained, those in this category are "so negligible . . . there's no reason to believe that it should be factored in." ROA.895.

increments). The amount was $36,000 for the general election and $24,000 for a runoff.[5]

6. In-kind labor is not a contribution and does not count against the §§ 8(A)(1) and 8(A)(3) limits. Austin City Code § 2-2-2(7), last sentence. Also, contributions from small-donor political committees are not subject to the individual contribution limit, and these committees may contribute up to $1,000 per candidate per election. Pet. App. 76 (City Charter Art. III, § 8(B)(2)).

7. Zimmerman sued but did not seek preliminary injunctive relief on his individual contribution limit challenge. ROA.638.[6] The court proceeded to a two-day bench trial on the merits of Zimmerman's claims and whether he was entitled to final injunctive relief.[7]

8. The district court ruled for Zimmerman on his challenges to the §§ 8(F)(2) and 8(F)(3) temporal

[5] Post-trial inflation adjustments have since raised the caps to $37,000 and $25,000 for the 2018 general and runoff elections, respectively. Austin City Clerk (Aug. 7, 2018) (available at http://www.austintexas.gov/edims/document.cfm?id=296172).

[6] Zimmerman's assertion that the district court "effectively denied" preliminary injunctive relief, Pet. 8, is misleading. He requested no such relief for his principal claim, and a review of the transcript of a pre-trial status hearing shows that Zimmerman acquiesced in going straight to a merits trial rather than first having a preliminary injunction hearing. ROA.635-654.

[7] Zimmerman's assertion that, in addition to injunctive relief, he also sought nominal damages is correct, Pet. 8, but only technically so. He made the claim but never pursued it at trial, and he abandoned damages relief entirely when he failed to raise it as an issue on appeal after the district court's final judgment awarded him no such relief.

fundraising and the post-election funds disgorgement provisions and enjoined their use. Pet. App. 54. It upheld the city's § 8(A)(1) base limit rule, *id*. 38-43, and did not reach the § 8(A)(3) non-individualized aggregate cap rule because Zimmerman failed to show he had standing to make the challenge, *id*. 47-49. It subsequently denied Zimmerman's motion to alter or amend the judgment as to these two holdings. *Id*. 56-58. The Fifth Circuit unanimously affirmed the district court on all grounds, *id*. 1-31, and denied rehearing en banc by a 12-2 vote, *id*. 59-60.

9. The Fifth Circuit reached the merits of the base limits issue. It first rejected Zimmerman's argument that the limit is content-based, which had it been correct would have triggered strict scrutiny. *Id*. 6-7.[8] Zimmerman had concocted an argument first articulated at trial that Austin's charter provisions had left contributions to city officeholders unaddressed and, hence, uncapped. There was no basis in fact or law for Zimmerman's position. As one of Austin's trial witnesses—a longtime participant in Austin city politics and political campaigns—testified, Zimmerman's novel reading of the charter on this point had never been adopted or proposed during the revised charter rules' 20-year lifetime. ROA.882-883 (never heard of "anyone ever interpreting it that way").[9] Article III of

[8] The appeals court also rejected a Zimmerman argument that the individual contribution limits were really an expenditure restriction. Pet. App. 7-8. Zimmerman's petition does not pursue that argument.

[9] This witness was a fact witness, not an expert witness. Zimmerman's statement that Austin called three "expert witnesses"

the charter in fact directly contradicts Zimmerman's position. In § 8(G), it is required that "any incumbent councilmember" is subject to the very regulations applied to "candidates" for the office held by the incumbent. In other words, the individual contribution cap of $350 applies as much to officeholders seeking contributions for their officeholder accounts as to candidates seeking contributions for their campaign accounts. As to Zimmerman's argument that the Texas Election Code supports his argument on this point, Pet. 5, the words of Article III of the charter refute it; they restrict application of Texas Election Code definitions to only subsection (F) of § 8.[10] The individual contribution cap is in subsection (A), which applies to contributions to both candidates and incumbent officeholders, as § 8(G) requires.

The Fifth Circuit adopted the foregoing rationale and rejected Zimmerman's city charter-based argument. It found the city's construction of its own charter reasonable and consistent with the text. Pet. App. 7. With its city-law underpinnings removed, Zimmerman's argument about a content-based restriction collapsed of its own weight.

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at trial, Pet. 11, is wrong. Austin called one expert witness, Dr. Krasno. Its other three live witnesses were fact witnesses, all intimately involved for a long time in political campaigns for city office.

[10] Home rule cities such as Austin have the power to adopt city charter provisions that differ from state Election Code provisions as long as there is no unavoidable conflict in the two. *In re Sanchez*, 81 S.W.3d 794, 798 (Tex. 2002).

10. The Fifth Circuit also rejected Zimmerman's argument that Austin's individual contribution limit failed the "closely drawn" test of *Buckley v. Valeo*, 424 U.S. 1 (1976). Pet. App. 8-14. First, it held that Austin had met its evidentiary burden of demonstrating that it had a sufficiently important interest in preventing either "actual corruption or its appearance." *Id*. 10. Austin had shown the trial court creditable evidence that, leading up to the 1997 passage of the campaign finance initiative, there was a "perception of corruption among Austinites." *Id*.[11] Evidence included trial testimony that economic interests were "corrupting the system" and turning the council into a "pay-to-play" system. *Id*. Further buttressing this evidence was the fact that an overwhelming number of Austin voters—72% of them—voted to adopt the challenged limits urged by the "No More Corruption!" citizens' group. *Id*. This, the appeals court held, was "exactly the kind of evidence" that this Court found in *Shrink Missouri* to be clearly sufficient to satisfy the first prong of the *Buckley* test. *Id*.

Turning to Zimmerman's argument that Austin's limit was too low to meet the first part of the *Buckley*

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[11] "Perception of corruption" is the formulation used in *Davis v. FEC*, 554 U.S. 724 (2008), to describe an appearance of corruption. *Id*. at 740. Judge Ho's dissent from the denial of en banc rehearing criticized the term "perception," implying it was somehow different from the test for appearance of corruption. Pet. App. 63. But, as *Davis* shows, this Court itself has used "perception" and "appearance" interchangeably. *See also FEC v. Colo. Rep. Fed'l Campaign Comm*., 533 U.S. 431, 475 (2001) (J. Thomas, dissenting) (using same formulation).

test, the appeals court found that it rested on a mistaken conflation of the government-interest aspect of the test with the tailoring aspect. *Id*. 11. Then, applying the tailoring part of the test, the Fifth Circuit noted that, while quibbling about precise levels of limits is generally eschewed, a more detailed inquiry may be appropriate if there are "danger signs" that the level of the limit is such that challengers cannot mount effective campaigns. *Id*. 12, citing *Randall v. Sorrell*, 548 U.S. 230, 249 (2006) (plurality opinion). But the appeals court found no such danger signs in Austin city campaigns. Pet. App. 14-15. Evidence established that the contribution limit did not prevent council candidates from running "full-fledged" campaigns.[12] It even noted that Zimmerman himself exemplified the absence of one of the possible danger signs—over-protection of incumbents—since he ran as an incumbent but lost. *Id*. 14. In contrast to the Vermont legislature's limit invalidated in *Sorrell*, Austin's initiative-based limit was per election (not per election cycle) and inflation-indexed. *Id*. 13. Its limit was "on par" with limits imposed elsewhere and upheld. *Id*.

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[12] Austin's evidence showed that the 2014 round of city council campaigns were "vibrant" and "remarkable" for their vigorous public debate, with more money raised than in the past. ROA.858, 861, 982. The city's expert concluded that Austin stood out for the large number of candidates competing and that it has more competitive city council elections than most other large Texas cities. ROA.906. The district court found that Zimmerman had not provided any evidence suggesting that the base limit "renders political association ineffective or drives candidates' voices below the level of notice." Pet. App. 42.

11. As to the non-individualized aggregate limit on out-of-area contributions, the appeals court agreed with the district court that Zimmerman had failed to establish his standing to make the challenge. Pet. App. 14-21. His 2014 general election campaign had raised only 6% of the limit for out-of-area contributors. Exh. D-2C. His choice to forego spending $5,000 to raise up to $36,000 was not an injury-in-fact traceable to the limit itself. Instead, it was a self-inflicted injury which could not confer standing. Pet. App. 17-18. And finally, the fact that it would take a modicum of campaign work to track compliance with the aggregate limit was no injury at all but rather just part of the typical business of running a campaign and complying with election laws. *Id*. 20-21.

12. The Fifth Circuit denied rehearing en banc by a 12-2 vote. Judge Ho authored a dissent, joined only in part by one other judge, limited to the individual contribution limit issue. He disagreed with the conclusion that the $350 individual cap was not too low. Pet. App. 63-66.[13]

[13] Judge Ho did note that Zimmerman failed to marshal further evidence to support his contribution limit argument, suggesting that "another Austin citizen" could come along and raise issues and present evidence that Judge Ho would have found more persuasive. Pet. App. 66-68.

REASONS FOR DENYING THE PETITION

I. THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS OR ANY DECISION OF THIS COURT.

Zimmerman fails to meet a prime condition for the Court to exercise its discretionary power of certiorari: "to secure uniformity of decision" among the circuit courts of appeals. *Magnum Imp. Co. v. Coty*, 262 U.S. 159, 163 (1923); *see* Sup. Ct. Rule 10(a).

Zimmerman fails to identify any circuit court decision in conflict with the Fifth Circuit's decision in this case. He does not even try. Rather, he concedes that the ruling below on the individual limits issue is consistent with "the prevailing, potentially universal, view of the lower courts" in their reading of the most pertinent precedent for this case, *Shrink Missouri*. Pet. 26.

He does argue that the ruling below gives *Shrink Missouri* more precedential heft than it should be given, Pet. 26, but fails to explain how the ruling conflicts in any way with that decision. Instead, he argues that the Fifth Circuit ruling *expands* the *Shrink Missouri* holding and fails to account for the view of a majority of justices in *Randall v. Sorrell*. *Id*. 26-27. But this is not argument that there is a conflict. It is an argument that the Court should take the case on review for other reasons (a matter addressed in the next part—Part II—of this brief).

Unlike Zimmerman, *amici* filing in his support[14] do argue that there is a circuit conflict that needs to be resolved. *See* PPLI Br. 12-20. The appeals court decisions that they cite on this point do not establish a conflict with the Fifth Circuit ruling in this case. Those other appeals court decisions addressed questions of *bans* on contributions from certain narrow categories of potential contributors, not *limits* on contributions from the public more generally.

Three cases are cited to support the assertion of conflict: *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010); *Lavin v. Husted*, 689 F.3d 543 (6th Cir. 2012); and *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015) (en banc), *cert. denied sub nom. Miller v. FEC*, 136 S.Ct. 895 (2016). None is apposite.

Green Party considered a state "ban" on campaign contributions and solicitation of contributions by "state contractors, lobbyists, and their families." 616 F.3d at 192. The Second Circuit was careful to distinguish a ban from what it described as "*general* contribution limits . . . applied to *all* citizens." *Id*. at 201 (emphasis in original) (citing *Randall* as example of the latter kind of case). Describing a ban as a "drastic measure," the court found that it imposes more potential constitutional damage than a general contribution limit, which leaves intact the symbolic expression of support embodied in a contribution. *Id*. at 204.

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[14] These *amici* are the Public Policy Legal Institute and the Institute for Free Speech (collectively, "PPLI").

Lavin, too, involved a contribution ban, not a limitation. And this ban, too, involved a special, limited class of potential contributors: Medicaid providers or those with an ownership interest in them. The court struck down the ban but, in doing so, specifically noted that the state had foregone the less intrusive option of "limiting campaign contributions" by those that were the target of the ban. 689 F.3d at 548.

The third case, *Wagner*, is no different than the other two in the respects pertinent to the alleged conflict. It concerned a federal ban on contributions by those directly involved in federal contracting. The court upheld the ban as appropriately in furtherance of the governmental interest in "merit-based administration," as well as in avoiding *quid pro quo* corruption or its appearance. 793 F.3d at 21, 26.

The Fifth Circuit decision, upholding a limitation not a ban and involving the general citizenry not a special sub-category of actors, conflicts with none of these appeals court rulings.

Also, none of these rulings dealt with a nonpartisan elective body equivalent to the Austin city council. City councils are not simply legislative and executive bodies; they also perform judicial functions. *See, e.g., Diva's Inc. v. City of Bangor*, 411 F.3d 30, 41 (1st Cir. 2005). Austin's does. ROA.1036-1039; Exh. D-15 (citing more than two dozen times during a 17-month period roughly coinciding with the lawsuit when council performed judicially). This function implicates different government interests. *See Williams-Yulee v. Fla. Bar*, 135 S.Ct. 1656 (2015).

Nor—to briefly address Zimmerman's subsidiary issue about standing to challenge the individualized aggregate contribution limit from areas beyond Austin's environs—is there a conflict between the appeals court finding that Zimmerman lacked standing to raise the issue and any ruling by an appeals court or this Court.[15] Zimmerman only implies one conflict and that is with this Court's decision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011). Pet. 40. *Bennett*, though, was not a standing case at all and, in addition, it was not a contributions case, but instead an expenditures case. There is no inconsistency between Zimmerman's being held to lack standing for the aggregate contribution cap and *Bennett*.

There are no conflicts identified by Zimmerman or his supporters justifying review in this case.

II. ZIMMERMAN HAS NOT IDENTIFIED ANY ISSUE OF NATIONAL IMPORTANCE SUPPORTING REVIEW IN THIS CASE.

Zimmerman's is a peculiarly idiosyncratic request for review by this Court. Nearly the entirety of his first argument turns on a non-federal question of law: whether Austin's city charter subjects contributions to council officeholders to the same limits as are set for

[15] Zimmerman assays no "importance" argument on this point.

contributions to council candidates.[16] This is not simply a non-federal question; it is not even a state law question. It is a city law question: what does Austin's charter provide in regard to the matter raised by Zimmerman about differential treatment?

The city explained the legal error in Zimmerman's textual analysis, as well as the factual baselessness of his suggestion that his notion had any roots in facts. And the appeals court found the city's analysis a reasonable reading of its own charter. Pet. App. 7. This approach is consistent with the Court's approach. A city's interpretation and implementation of its own ordinances and charter provisions are entitled to significant deference. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992).

In any event, whether the appeals court's reading of the Austin charter's comparative treatment of candidate and officeholder contributions is correct or not is a matter devoid of national significance. Since the

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[16] He also argues that there is a constitutionally telling difference between the treatment of contributions to candidates for campaigns and contributions for legal defense funds and debt-retirement contributions to former officeholders. *See, e.g.*, Pet. 21. Virtually no attention was given to these esoteric—really, immaterial—arguments in briefing or judicial analysis below. They played no role in the Fifth Circuit's analysis of the case or, for that matter, Judge Ho's dissent from en banc review. They provide no basis for the Court to hear this case. As the district court found more generally, the individual contribution cap is "not a content-based restriction." Pet. App. 38. The special situations addressed by the legal fund and debt retirement provisions do not affect that finding. *See Williams-Yulee*, 135 S.Ct. at 1668 (all aspects of problem do not have to be addressed in "one fell swoop").

debate over that comparative treatment in the city charter is the crux of Zimmerman's main challenge to the contribution limits, it follows that he has not provided the Court a plausible basis for the exercise of its discretionary powers of review in favor of taking up his case.

Zimmerman's second argument that the Fifth Circuit's ruling on contribution limits was mistaken is that it should have concluded that the contribution limits were "too low." Pet. 26. There is no suggestion or indication in the Zimmerman petition that other cities or political subdivisions or, for that matter, state legislatures are following Austin's lead in determining what level of contributions to set for their campaigns. Instead, Zimmerman asks the Court to don an accountant's green eyeshades just for this case and measure Austin's contribution limits item-by-item against current-day calculations of other limits that have been ruled on by this Court. This is an argument for error-correction *par excellence*, and falls well short of presenting an issue of national importance. Ever since *Buckley*, the Court has warned against courts inquiring into whether state and local authorities have fine-tuned the dollar limits sufficiently to the courts' liking. *Buckley*, 424 U.S. at 30; *Shrink Missouri*, 528 U.S. at 388. The judicial concern in this regard is to ensure that the level has not been dropped so low that contributions have become pointless and candidate voices have dipped below the level of public notice. *Shrink Missouri*, 528 U.S. at 397. The courts below found not only that the contribution limit had not dropped to

critical levels, but that Austin's elections for its city council were thriving, democracy-wise. Zimmerman calls none of those conclusions into question.[17] City council races in Austin districts in the 90,000 population range are vigorously contested before a closely attentive voting audience. The contribution limits establish no impediment.

Judge Ho's dissent from denial of en banc review effectively highlighted the shortcomings in Zimmerman's challenge that the Austin limits were too low.[18] He explained areas that he thought relevant to the inquiry that Zimmerman had failed to address in testimony and evidence, Pet. App. 66-68, and concluded on his part that Zimmerman's failure to argue the proper legal theory or offer "any evidence" to support his claim should leave such issues free for others to raise at another time, *id*. 68. Austin does not subscribe to this theory of why another case on another day might be plausible and appropriate, but the dissent's discussion does shine a spotlight on why *this* case is not the right one for this Court to take on the question of when

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[17] Members of the Court have found that these kinds of empirical judgments are better left to local legislative voices and choices than to the courts. *Randall*, 548 U.S. at 248 (plurality).

[18] This two-judge dissent says the focus should have been on the $1,075 statewide limit in *Shrink Missouri*. Pet. App. 64-65. Using that measure, as well as 2000 census population for Missouri and CPI-adjusted dollars through July 2018 for both the Missouri limits and Austin's limits shows that Austin's limits are an order of magnitude *higher* than Missouri's per person (.004 for Austin versus .0003 for Missouri).

courts should delve more deeply, and how, into whether limits are set too low.

Finally, even error correction provides no reason for review in this case. As in *Shrink Missouri*, this case presents a contribution limit overwhelmingly adopted by voter initiative (72% here, 74% in *Shrink Missouri*), and a trial record reflecting that Austin shouldered its "evidentiary obligation." 528 U.S. at 393. Three live fact witnesses deeply rooted in Austin election campaigns testified to the factual basis for the widespread understanding of Austin citizens that the former campaign finance system functioned as a pay-to-play, corrupt system whereby contributions were expected to, and often did, yield the desired vote by a council member. Those same witnesses' testimony, combined with testimony by the city's expert, showed, as *Shrink Missouri* demands, that city elections under the new contribution caps are vibrant affairs, roiling with voter and candidate involvement and debate.[19]

III. THIS IS A CASE TOO FLAWED TO PERMIT CLOSE ANALYSIS OF THE ISSUES RAISED.

Even were the issues Zimmerman asks the Court to review otherwise perceived as appropriate ones for the Court to consider on full review, this case remains

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[19] Zimmerman's insinuation that one of the city's witnesses, Mr. Butts, did not defend the $350 cap, Pet. 12-13, is incorrect. He specifically testified that the cap was *not* too low to allow financing of viable council campaigns. ROA.1006.

an inappropriate one for such review to occur. The case was brought by a candidate wanting to receive more and larger contributions from individuals. No actual or putative contributors joined him in his legal quest. He went it alone, a candidate seeking reelection.

And now he is not an officeholder *or* a candidate. He lost his reelection bid in 2016 and, if he runs for the same office again, it will not be until 2020—at which point it is unclear what the contribution limits will be since they are subject to inflation adjustments upwards each of the next two years. Plus, his case is even more problematic at this point because a key feature of his argument below was that the city's campaign finance system unduly protects incumbents, yet he ran under that system as an incumbent and lost.

Constitutional disputes over campaign finance regulations frequently present issues of national import. This case is not one of those kinds of disputes, and it is not a proper vessel to hold such disputes. The issues are in-grown and fact-laden, and the candidate trying to raise them—never joined by any contributors—has been escorted from the scene of legal battle by the voters of his district.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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