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

REPLY BRIEF FOR PETITIONER

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I. This Case Presents Precisely the Kind of Conflict With Supreme Court Precedent That Warrants Review by *Certiorari*.

Zimmerman replies as follows in support of his petition for *certiorari*. Consistent with the limitation on the scope of replies, *see* Sup. Ct. Rule 15.6, Zimmerman addresses certain new points raised by the City of Austin's brief in opposition, which focuses primarily on the issues regarding the Base Limit.

A. The Fifth Circuit's failure to invalidate the base limit for underinclusiveness conflicts with this Court's precedent.

The City writes that Zimmerman's argument that the Base Limit is void for underinclusiveness because it does not limit officeholder contributions "is inextricably bound to an interpretation…of Austin's city charter that carries no implications outside Austin's own backyard." Response at 2.

This response conceives of the issue, and the Fifth Circuit's error, too narrowly. The Fifth Circuit's interpretive gloss conflicts with this Court's decisions establishing that the federal courts have no authority to apply their own saving construction to a *state or local* (as opposed to federal) law to insulate it from constitutional attack. *See* Pet. at 22-23; *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610, 621 (1976) ("Even assuming a more explicit limiting interpretation of the ordinance could remedy the flaws…we are without power to remedy the defects by giving the ordinance constitutionally precise content."); *Gooding v. Wilson*, 405 U.S. 518, 520 (1972) ("Only the Georgia courts can supply the requisite

construction, since of course 'we lack jurisdiction authoritatively to construe state legislation.'") (quoting *United States v. Thirty-seven (37) Photographs*, 402 U.S. 363, 369 (1971)). The Base Limit is not even fairly susceptible to the construction the Fifth Circuit gave it, as Zimmerman already explained. *See* Pet. at 23.

The Fifth Circuit's decision on this issue warrants review by *certiorari* not merely because it misinterpreted Austin's charter, but because it misinterpreted the charter in a way that conflicts with Supreme Court precedent governing the power of the federal courts when presented with First Amendment challenges to state and local laws. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (*certiorari* granted "to resolve an apparent conflict with this Court's precedents"); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 926 (1982) (noting the lower court decision "appears to be inconsistent with prior decisions of this Court," explaining that the lower court "misread" a relevant case and "also failed to give sufficient weight to [a certain] line of cases"). If this precedent were properly applied, the Fifth Circuit would have had to acknowledge that the Base Limit is content-based, requiring Austin to defend the distinction between campaign and officeholder contributions under strict scrutiny.

Similarly, *certiorari* is also appropriate because the Fifth Circuit's failure to address the exceptions for (i) legal contributions, and (ii) debt-retirement contributions by former officeholders, is inconsistent with the Supreme Court's analysis of underinclusiveness, even in the context of intermediate

scrutiny. Austin claims in response that "[v]irtually no attention was given to these esoteric—really, immaterial—arguments in briefing or judicial analysis below." Response at 18 n.16. This is only half true. While *Zimmerman* gave them substantial attention, consistently and prominently raising these additional exceptions, both at trial, *see* ROA.884-85, 955 (trial testimony from City witnesses acknowledging debt-retirement contributions present threat of quid pro quo corruption); ROA.695 (Zimmerman testifying to receipt of legal fund contributions of $5,000 and $3,500); ROA.318-320, and on appeal, Zimmerman Brief 48-51, Zimmerman Response and Reply 50-51, Austin is correct to observe that these arguments were wholly ignored by both courts below. And that is precisely the problem. As Zimmerman explained, in *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 193 (1999), this Court invalidated a restriction on commercial speech under the *Central Hudson* test after giving painstaking attention to the failure of the Government to justify distinctions in the law. Just last Term, the Court invalidated California's "licensed notice" applicable to certain clinics "even under intermediate scrutiny" because the state could not defend the exceptions available for other clinics. *Nat'l Inst. of Family and Life Advocates v. Becerra*, 585 U.S. __, slip op. 14-15 (2018), and invalidated restrictions in Minnesota polling places even though polling places are a "nonpublic forum" in which the "requirement of narrow tailoring" does not even apply. *Minnesota Voters Alliance v. Mansky*, 585 U.S. __, slip op. 12-13 (2018). The Fifth Circuit's failure to require Austin to provide any rationale for its exceptions for legal-fund and debt-retirement contributions thus denigrates campaign contributions to a level of review

even more permissive than that applicable in these other contexts, including review of commercial speech restrictions. Review is appropriate to correct the lower court's failure to apply correct constitutional analysis as illustrated by these and other cases.

B. The Fifth Circuit's failure to invalidate the Base Limit for being too low conflicts with this Court's precedent.

Regarding Zimmerman's argument that the Base Limit is so low that it does not reasonably target cognizable contributions, Pet. at 26-37, Austin's primary response is to re-assert that the Fifth Circuit's disposition is consistent with the analysis in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000). Response at 14, 19. In other words, the City has elided the substance of Zimmerman's argument, which is that the prevailing treatment of the lower courts—whereby the amount of a base limit is entirely divorced from the government-interest inquiry—contradicts *Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (per curiam), and the view of five Justices in *Randall v. Sorrell*, 548 U.S. 230, 261 (2006), *id.* at 272-73 (THOMAS, J., concurring)), and diverges from standard principles of constitutional law. *See especially* Pet. at 26-29. The fact that the City has avoided confronting the core of Zimmerman's argument is an indication of its merits. Zimmerman will not rehash this argument here, but will address the new points raised in the City's response. *See* Sup. Ct. Rule 15.6.[1]

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[1] The City correctly points out that Prof. Krasno was its only expert witness (Response at 9 n.9); the other witnesses were designated as fact witnesses.

First, the City's continued focus on the question argued by the parties and addressed in *Shrink* and *Randall—i.e.*, whether a dollar limit is tailored to permit amassing sufficient campaign resources—is an exercise in misdirection. *See* Response at 19 ("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."). Zimmerman has expressly disavowed this argument. Zimmerman Reply on Appeal at 51; Zimmerman Pet. for Reh'g En Banc at 20; *see also* ROA.463-65 (Zimmerman trial brief). It should not be—it *cannot* be—necessary for a plaintiff challenging severe base limits to retain an expert to crunch mountains of campaign data and opine on the purported robustness of debate in local elections, particularly where the limit is so low that nobody can even claim with a straight face that it reasonably targets cognizable "large" contributions in the first place. The point Zimmerman has raised is that the dollar level of a base limit cannot be divorced from the question whether it is tailored *to the government interest in addressing quid pro quo corruption*. That is the issue that should be addressed.

Second, the City makes a passing reference to the issue of nominal damages. Response at 8 n.7; *see* ROA.40 (complaint seeking nominal damages as to all provisions). The City fails to distinguish between the issues Zimmerman won below, and those he lost. A plaintiff is entitled to nominal damages for a violation of constitutional rights. *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *see also Familias Unidas v. Briscoe*, 619 F.2d 391, 403 (1980). Even if Zimmerman waived his claim to nominal damages on those issues he won at

trial (by failing to seek amendment of the judgment in his favor to include nominal damages), he did not waive claims to damages as to the Base and Aggregate Limit provisions that he lost at trial. Zimmerman timely appealed those issues, and all his claims as to them, including nominal damages, remain pending.

Third, in a footnote, the City cites *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015), for the unelaborated proposition that "all aspects of a problem do not have to be addressed in 'one fell swoop.'" Response at 10-11. While true that *Williams-Yulee* rejected an underinclusiveness challenge, it was only after the Court found, based on timely-presented evidence and argument by the government, that the law targeted the precise activity presenting "a categorically different and more severe risk" to the interest asserted. 135 S. Ct. at 1669. Moreover, *Williams-Yulee* observed that there was no evidence of a "pretextual motive" for the disparate restriction, *id.* at 1670. Here, the evidence suggests that the Base Limit's failure to capture officeholder contributions is anything but coincidental. It was the Austin City Council that drafted the successful 2006 amendment that, while leaving all *unsuccessful candidates* subject to the requirement to disgorge leftover campaign funds within ninety days, carved out a gratuitous exception providing "[a]n officeholder may retain up to $20,000 of funds received from political contributions for the purposes of officeholder expenditures." ROA.12393 (see F(3) and F(6)). It was also the Austin City Council that amended the Blackout Period on fundraising in 2006 to expressly capture "officeholder" contributions, while declining to similarly amend the Base Limit (even

though the Base Limit was amended in other ways at the same time). *See* Pet. at 6-7, 23.

II. This Case Presents an Ideal Vehicle for Review of the Issues Presented.

Austin's closing argument, questioning whether this case is an appropriate vehicle for presentation of the issues raised, is premised on the City's own misapprehension of the core arguments Zimmerman raises and on a misapprehension of the nature of a facial challenge.

While many campaign finance and other First Amendment cases reach this Court after preliminary rulings, this case was presented to a district court in a two-day bench trial, followed by extensive post-trial briefing to guide the district court's decision. The Fifth Circuit held oral argument and produced an opinion, with a further opinion issued by two judges dissenting from the denial of rehearing *en banc*. This Court is presented with a robust record. The issues remaining are legal issues ripe for this Court's consideration.

The City's reference to the fact that Zimmerman is not joined by a contributor as a co-plaintiff, and that Zimmerman ran for re-election as an incumbent and lost, Response at 22, reflects a misunderstanding of the nature of facial challenges under the First Amendment. Once the plaintiff establishes injury-in-fact (which Austin does not contest as to the Base Limit), Austin must defend the challenged provisions on their face and as applied to others not before the court. *Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 958 (1984).

The issues Zimmerman raises are issues of national importance, even if the City has avoided confronting them directly. One can almost throw a dart at the federal reporter and hit a constitutional case reviewing commercial speech or other restrictions under intermediate scrutiny with more rigorous review than the lower courts applied here to the Base Limit, a severe restriction on core freedoms of speech and association. This is a divergence from standard First Amendment review and, respectfully, an anomaly that this Court should correct. This is particularly true where Zimmerman's Base Limit challenge presents a scenario that both *Buckley* and *Shrink* expressly stated they were not confronted with. *See Buckley*, 424 U.S. at 24-29 (emphasizing the alternate avenues of association lessening the impact of the $1,000 limit); *Shrink*, 528 U.S. at 395 n.7 (indicating that the lack of such alternative avenues of association was not in question regarding Missouri's limit).

CONCLUSION

For the reasons stated in Zimmerman's petition and in this reply, the petition should be granted.

Respectfully submitted,

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