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

JENNIFER VIRDEN, *Plaintiff*,	:	
vs.	:	No. 1:21cv00271-RP
CITY OF AUSTIN, *Defendant*.	:	

CITY OF AUSTIN'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Defendant City of Austin responds in opposition to Plaintiff's Opposed Motion for Preliminary Injunction (Doc. 5) ("P.I. Motion"). The prerequisites for obtaining a preliminary injunction are no less important because they are so familiar.[1] Plaintiff Virden has not met them.

I. CONTEXT AND TIMING OF VIRDEN'S PRELIMINARY INJUNCTION REQUEST

A. *Zimmerman v. City of Austin*

This lawsuit brought by Virden is an offshoot of previous litigation in which then-and-now-ex-councilmember Donald Zimmerman launched a First Amendment challenge to four campaign finance provisions added to Austin's city charter by a 1997 citizen initiative led by a group called "Austinites for a Little Less Corruption!." By an overwhelming 72% margin, Austin voters added provisions to the city charter that: (a) establish dollar limits on individual contributions to mayoral and

[1] A plaintiff-movant must establish that there is a likelihood of success on the merits, that she is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in her favor, and that such preliminary relief is in the public interest. *City of Austin v. Kinder Morgan Texas Pipeline, LLC*, 447 F.Supp.3d 558, 567 (W.D. Tex. 2020), quoting *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

city council candidates; (b) establish aggregate limits on the amount of money that could be contributed to such candidates by those outside the Austin area; (c) imposed a temporal restriction prohibiting such candidates from soliciting or accepting campaign contributions other than in the six months before an election; and (d) required candidates—subject to exceptions and conditions—to disgorge leftover contributions after an election concludes.

Acting under Federal Rule of Civil Procedure 65(a)(2), this Court, Judge Yeakel presiding, consolidated Zimmerman's preliminary injunction request with trial on the merits and set trial for mid-December 2015. *Zimmerman v. City of Austin*, No. 1:15cv628-LY, Order of Sept. 24, 2015 (Doc. 25). After a two-day bench trial, the Court upheld the individual contribution limits and kept the aggregate contribution limit in place and operative. The Court invalidated the charter's temporal and disgorgement provisions. *Id.* Findings of Fact and Conclusions of Law (July 20, 2016) (Doc. 67).

As to the 6-month temporal provision, the Court first found that the City had presented "ample evidence" that it did not impose a significant burden on candidate fundraising because, among other things, most contributions flow to a candidate in the three months immediately preceding an election and that the flow of contributions into campaigns before important votes is a standard concern. *Id.* at 12. But the Court found insufficient evidence that the six-month fundraising period quelled the threat of *quid pro quo* corruption any better than, for example, a seven-month period would. *Id.* Said the Court:

> A contribution seven months before an election is more likely to be intended for use in a candidate's campaign than an "off-year" contribution more than twelve months before an election.

Id. The Court invalidated the charter's temporal restriction.

B. City Council Action In Light Of Court's *Zimmerman* Ruling

Both sides appealed, and the judgment ultimately was affirmed in its entirety. *Zimmerman v. City of Austin*, 881 F.3d 378 (5th Cir.), *cert. denied*, 139 S.Ct. 639 (2018). But during the appeal's pendency, Austin's city council took heed of the Court's insight about the comparative difference between a seven-month and a one-year temporal restriction. Three and a half years ago, on October 5, 2017, it doubled the time the fundraising window could be open and on a 10-1 vote adopted an ordinance establishing a new, one-year temporal restriction for city candidates to solicit and receive contributions to their campaigns. *See* City Clerk J. Goodall Declaration ¶ 11 & Attachment A (Ord. 20171005-029).[2] The specific provision of the ordinance that Verdin attacks is City Code § 2-2-7(B): "The campaign period for a general election begins the 365th day before the date of the general election." This restriction has governed, and been honored, during two candidate election cycles, including the one in 2020 in which Virden uncomplainingly ran.

C. Virden's Delay In Seeking Preliminary Injunctive Relief

Austin's next general election is November 8, 2022, with six city offices (Mayor and Council Districts 1, 3, 5, 8, and 9) on the ballot. Goodall Decl. ¶ 12. Plaintiff Virden claims that if the fundraising window for one of the 2022 elections—she has

[2] The attached declaration ("Goodall Decl.") is this response's only exhibit.

not vouchsafed which one—does not open until the Code-set date of November 8, 2021, her First Amendment rights of free speech and association will be violated. Plaintiff's Verified Complaint ¶ 96 (Doc. 1) (filed March 25, 2021).

Virden's suit was filed nearly three and a half years after the provision she now challenges was adopted and after she had already unsuccessfully run in 2020 for an Austin city council seat—by necessity, specifically identified, of course. Goodall Decl. ¶¶ 4, 6. After waiting still another week to file her preliminary injunction motion, she nonetheless urged the Court to hurry and rule preliminarily in time for her to raise money *as a candidate for some city office* so she can purchase publicity for that as-yet unannounced candidacy to publicizewhere she stands on measures at issue in an imminent election in which voting commences only four days from now. P.I. Motion at 2 ("desires to collect funds with which to fund advertisements in advance of the May 1 City elections"); Goodall Decl. ¶ 16 (early in-person voting for May 1 no-candidacy election begins April 19).

As explained below, Virden is not entitled to her requested preliminary injunction. Preliminary relief of this sort is "an extraordinary remedy never awarded as of right." *Benisek v. Lamone*, 138 S.Ct. 1942, 1943 (2018) (*per curiam*), quoting *Winter*, *supra* at 24. The burden for justifying such extraordinary relief is on Virden, and she can only meet it by a "clear showing" that she can meet all prerequisites to obtaining such relief. *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997) (*per curiam*). Virden comes nowhere near shouldering her burden.

II. Absence Of Irreparable Injury And The Related Failure Of Standing

A. Delay Shows No Irreparable Injury

Virden's failure of diligence in pursing preliminary injunctive relief is sufficient in itself to deny her motion. In election-related cases no less than in the more general run of cases, a party requesting emergency relief of the sort Virden seeks has to show "reasonable diligence." *Benisek*, *supra* at 1944. Diligence like that is something Virden plainly cannot show.

The code provision she seeks to have thrown out in an emergency ruling has been on the books for roughly three and a half years. The Fifth Circuit ruling that she claims dictates success for her—*Zimmerman v. City of Austin*—in this case issued three years ago, on February 1, 2018. In the interim since these events, Virden has run a campaign for Austin city council in which she claims to have been unusually successful in raising money and garnering votes, albeit ending up on the losing end. Virden Complaint ¶¶ 29-30.[3] From the inception of that campaign, she faced the same temporal restraint on fundraising that she now claims irreparably harms her to the point that she wants immediate, emergency relief. Yet never during all of that time did she seek invalidation of § 2-2-7(B)'s 365-day fundraising restriction—and in contrast to here, she likely would have been able to establish legal standing to raise the claim. Then, even after the mid-December conclusion of her 2020 campaign, she

[3] In her three-month 2020 general election campaign, Virden received almost $100,000 in contributions, not counting her $50,000 personal loan to the campaign. Goodall Decl. ¶ 7. In the brief ensuing runoff, she raised above a $150,000 more. *Id.* ¶ 8.

inexplicably waited another three and a half months to file for emergency relief, asking the Court to issue an emergency ruling in her favor within the month.

Virden's multi-year delay followed by her request for a rushed judicial ruling to help her raise money to influence an election in which she is not even a candidate epitomizes the very lack of diligence that the unanimous Supreme Court in *Benisek* held dooms a request for preliminary relief such as hers. As explained in a leading commentary on federal courts, a long delay after the threatened harm should reasonably have been perceived "may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction." 11A Wright & Miller, FED. PRAC. & PROC. CIV. § 2948.1 (3d ed.).

This Court has applied this principle to support a denial of preliminary injunctive relief. In *Embarcadero Technologies, Inc. v. Redgate Software, Inc.*, 2017 WL 5588190 (W.D. Tex. Nov. 20, 2017), the Court found the plaintiffs' delay in seeking preliminary relief "fatal to their request" in part because it cast doubt on the purported irreparability of the alleged harm. *Id.* *3. The Court then cited a list of supporting authority for its conclusion. *Id.* *4. Among these authorities is the oft-cited opinion in *Gonannies, Inc. v. Goupair.com, Inc.*, 464 F.Supp.2d 603 (N.D. Tex. 2006), which explained that, absent a good explanation, substantial delay "militates against the issuance of a preliminary injunction" by suggesting an apparent lack of urgency, *id.* at 609. No such explanation has been, or can be, forthcoming in this instance.

Virden offers nothing more in support of her claim of irreparable injury than a bare-bones, one-paragraph argument that she is asserting a First Amendment claim

and that suffices. P.I. Motion at 17. But *Benisek* plainly belies her argument. It is a First Amendment case, too, and post-dates by five years the authority on which Virden relies. Besides, none of the authority Virden relies on dealt with a plaintiff's excessive and unjustified delay in seeking emergency relief and, thus, does not stand in opposition to the principles just discussed and their applicability to Virden.[4]

Virden's failure to satisfy the irreparable harm part of the test for obtaining preliminary injunctive relief is sufficient for the Court to deny her motion without further analysis. As this Court has found, a movant such as Virden cannot be given the requested relief unless she can satisfy the irreparable harm requirement. *Kinder Morgan*, *supra* at 567, citing *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001). Again, a leading commentary lends support to this principle: "Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief." 11a Wright & Miller, *FED. PRAC. & PROC. CIV.* § 2948.1. Here, as the next section demonstrates, there is still more reason to deny the relief, but Virden's failure on irreparable injury is enough in itself.

[4] Finally, brief attention is given here to Virden's insistence that she needs contributions immediately so that she can confront voters in the May 1 election with her positions on some propositions on the ballot. The propositions were placed on the May 1 ballot on February 9. *In re Durnin*, 2021 WL 791079 (Tex. March 2, 2001), at *1. Ever since, Virden has been free to establish a special-purpose political action committee, solicit contributions to it, and run ads opposing (or supporting) propositions. She may spread her views throughout the city in ads funded by contributions she solicits—just not as a candidate for city elective office. It is hard to find any First Amendment harm in such a situation. In any event, she waited too long to seek emergency relief for so attenuated a legal assertion.

B. Virden Lacks Standing

Before invoking the four-part test for whether a preliminary injunction should issue, and trying to demonstrate that those elements can be met, a plaintiff has to establish her standing to seek relief in the first place. A plaintiff in that situation must demonstrate that she faces a sufficient possibility of injury from what she challenges to meet the minimum jurisdiction test in Article III. *See, e.g., Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 98 (5th Cir.), *cert. denied*, 486 U.S. 1023 (1988). And the mere "possibility" of such injury is insufficient. *Winter*, *supra* at 22. Virden has not met the test for standing, and, therefore, her request for preliminary injunction should be denied for this additional, independent reason.

Virden has not taken the steps necessary to begin soliciting and accepting contributions as a candidate for city elective office. She has asserted that she "will run" for such an office, but she will not say, and has not said, which one. *See* Complaint ¶ 10 ("mayor *or* . . . council district"). So she is presently not running for any city elective office. More importantly for present purposes, even were she to belatedly make a concrete choice and announce an office for which she *is* a candidate for the 2022 election, she has not taken the necessary first step under the law that allows her to begin soliciting and accepting campaign contributions for that office (whatever it turns out to be). That is, she has not appointed a campaign treasurer for any 2022 city race. Goodall Decl. ¶ 14. Yet, this is an essential prerequisite for her exercise of the First Amendment right she claims in this case:

> A candidate may not knowingly accept a campaign contribution or make or authorize a campaign expenditure at a time when a campaign treasurer appointment for the candidate is not in effect.

Tex. Elec. Code § 253.031(a).[5]

She did file, and still has in effect, an appointment of a campaign treasurer for her 2020 race for Council District 10. Goodall Decl. ¶ 15. But that is for a specific, now-concluded candidacy. *See id.* Attachment C (Box 6–Office Sought–"Austin City Council District 10"). That office is not on the 2022 ballot. *Id.* ¶ 12.

Thus, as of the date of this response's filing, Virden is not a candidate for a city office in 2022 and is legally disabled—completely separate and independent of the city code provision she challenges—from soliciting and accepting contributions as a candidate for any such office. Until she takes at least one, and likely both, of those steps, Virden lacks standing to challenge § 2-2-7(B) of the City Code as a violation of her First Amendment rights.[6]

She falls short of establishing the necessary standing to give this Court jurisdiction to issue a preliminary injunction to protect her interests for reasons similar to those that left Zimmerman without standing to challenge the aggregate contribution limits in *Zimmerman v. City of Austin*. In that case, the Fifth Circuit held that Zimmerman had failed to establish a "serious intention" to engage in conduct "proscribed by law." 881 F.3d at 389. An injury sufficient for Article III purposes requires more

[5] Such appointments must be filed with Austin's city clerk if the candidacy is for, and the contributions will be made for, an elective city office. Tex. Elec. Code § 252.005(3).

[6] Virden is the only plaintiff in the case, and the only claim she makes on her own behalf is as a would-be candidate. There are no "contributor" plaintiffs. *See, e.g.*, *Gordon v. City of Houston*, 79 F.Supp.3d 676, 684 n.20 (S.D. Tex. 2015) (denying candidate standing to pursue claim on behalf of potential contributors).

than vague and amorphous intentions of the Zimmerman kind in that case or of the Virden kind in this case. Rather, the injury must be "concrete, particularized, and actual or imminent." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010).

Virden has had ample opportunity to position herself to claim concrete and imminent injury at the hands of the City's § 2-2-7(B) temporal restriction on soliciting and accepting campaign contributions, but has simply been unwilling for whatever reason to take the actual steps necessary to actualize her claim. In this respect, she is in the same position as the challenger to a Wisconsin campaign finance law in *Koschnick v. Doyle*, 2011 WL 1238185 (W.D. Wisc. March 31, 2011). There, the challenger to the campaign finance law was held to lack standing to bring his First Amendment claim because he had not declared his candidacy for a specific office, but only an "intent at some future time to run again." *Id.* at *4. This, the court there held, rested on too many "if-then" statements to establish a threatened injury that is "real, immediate and direct." *Id.* at *5. So, just as standing was lacking in that case, it is lacking in this case—and the requested emergency relief should be denied for that reason.

III. THE PUBLIC INTEREST FACTOR WEIGHS IN THE CITY'S FAVOR

Even assuming Virden could overcome the irreparable injury and standing hurdles that block her effort to obtain emergency relief, the balancing of the equities and evaluation of where the public interest lies strongly favors Austin. Austin is a home rule city, and its ordinances must be seen by the courts as being actions taken in furtherance of the public interest. *See, e.g.*, *Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 52 (2d Cir. 1998). In that light, such ordinances are on a par

with state statutes, as to which the Fifth Circuit has fairly recently explained, when a statute is enjoined, it follows that the state "necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Planned Parenthood of Great Texas Surgical Health Svcs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2019); *see also Valentine v. Collier*, 956 F.3d 797, 803 (5th Cir. 2020) (same).

This factor in the preliminary injunction calculus thus favors the City over Virden, who has failed for whatever reason to take the necessary and available steps to put herself in a position where she faces irreparable injury.

IV. LIKELIHOOD OF SUCCESS ON THE MERITS REQUIRES EVIDENCE

The Court need not reach this factor since Virden fails on irreparable injury and standing. But the constitutional issue raised is complex and hardly as simple and straightforward as Virden's analysis suggests. As in the *Zimmerman* case, being able to engage in discovery, obtain expert evaluations, and more carefully evaluate the underlying facts are critical to reaching the reasoned decision that something as important as ensuring that Austin elections are free from corruption or the appearance of corruption demands. Virden's push for quick relief, without any opportunity for factual development of so complex a topic, should not be allowed to obscure this important point. The Austin city council followed the path described by this Court when it loosened the charter's temporal restriction and made it applicable for a year, instead of the then-six months. Overriding that effort without the opportunity for factual development, as Virden would have done, seems an unwise approach.

One example suffices to show the problem with Virden's facile assumption that the Fifth Circuit's *Zimmerman* opinion settles the issue of temporal restrictions beyond any need for debate or real hearing.

"Bundling" of campaign contributions is a tried-and-true method for working around limits on individual campaign contributions and the purpose behind them. A federal appeals court has specifically observed this problem, noting "how easily campaign contributions can be bundled to circumvent limits." *Ognibene v. Parkes*, 671 F.3d 174, 196 n.25 (2d Cir. 2011), *cert. denied*, 567 U.S. 935 (2012). Four Supreme Court justices, albeit in dissent, have noted the threat "large bundlers and donors" present to the integrity of campaign finance schemes. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 756 (2011) (J. Kagan dissenting, with three other justices).

When the Fifth Circuit affirmed the Court's invalidation of the Austin charter's six-month window for fundraising, it did so on the ground that the individual contribution limit was already in place, and validated by that court, and the temporal restriction could not be layered on top to add more protection from the same harm the individual limits were directed at preventing. 881 F.3d at 393. Instead, the *Zimmerman* court relied on the plurality opinion in *McCutcheon v. FEC*, 572 U.S. 185 (2014), to hold that there must be "specific evidence" that the timing of a contribution creates a risk of corruption or the appearance of it that is distinct from what is created by the size of a contribution. 881 F.3d at 393.

But, given an opportunity to develop it, the City is of the present view that specific evidence of that very sort is likely to be forthcoming in connection with protections against use of bundling of contributions in timeframes closer to elections. The Supreme Court has recognized that government may target campaign finance activities that might be used to circumvent more basic restrictions directed a preventing corruption or its appearance. *McCutcheon* itself recognizes it. 572 U.S. at 211-12. Earlier, in *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001), "all Members of the Court agree[d] that circumvention is a valid theory of corruption; the remaining bone of contention is *evidentiary*." *Id.* at 456 (emphasis added). And the Fifth Circuit has agreed, placing the burden on the state, but saying that it should have the opportunity to justify a temporal restriction as an "anticircumvention measure." *Catholic Leadership Coal'n of Texas v. Reisman*, 764 F.3d 409, 433 (5th Cir. 2014).

Austin's code has a lengthy provision about the handling of bundled contributions and setting some protective measures in place to lessen their potential for mischief. *See* City Code § 2-2-22. Virden focuses only on lobbyist-related bundling. P.I. Motion at 16.[7] But the bundling section of the code does not foreclose other manipulations of bundling in ways that run counter to the provisions limiting the amounts for individual contributions. It is not difficult to imagine the potential for creating at least the appearance of corruption if large companies with a specific interest in the development of a certain area of city law—the complex sign ordinances, for example—were

[7] Subsections (D) and (E) of Code § 2-2-22 address lobbyist-related bundlers.

to bundle contributions from their employees and friends and family and present them not long before an council election to some particular councilmember. Evidence would have to be developed, but, given a chance for development, it might reveal such bundling to constitute the very kind of circumvention of the anti-corruption protections afforded by other campaign finance limitations that *McCutcheon* and its progeny recognize may be valid restrictions. Development of evidence is central to evaluation of such situations, and Virden should not be able to avoid such development through her tardy preliminary injunction request.

CONCLUSION

For the foregoing reasons, the Court should deny Virden's motion for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2021, I served a true and correct copy of the foregoing pleading on all counsel of record through the Court's ECF system.

__/s/ *Renea Hicks*_____
Max Renea Hicks