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

DONALD ZIMMERMAN, Plaintiff,	)	
v.	)	Civil Case No. 1:15-cv--628
CITY OF AUSTIN, TEXAS Defendant.	)	DECLARATORY AND INJUNCTIVE RELIEF SOUGHT

PLAINTIFF'S MEMORANDUM IN SUPPORT
OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff Zimmerman is running for re-election to City Council. The City has no authority to tell Plaintiff to wait until May 12, 2016 to begin fundraising. Nor may the City impose arbitrary limits on the quantity of support Zimmerman may accept in the aggregate from individuals who reside outside of Austin or are not registered to vote, or from associations of persons (rather than individuals). Consequently, the fundraising blackout period and the aggregate limit discriminating against certain categories of contributors must be enjoined immediately. The Court should also preliminarily enjoin Austin's unjustifiable requirement that City candidates completely dissolve their campaign funds between elections.

FACTUAL AND STATUTORY BACKGROUND[1]

Plaintiff Zimmerman is the District 6 representative on Austin City Council, having first been elected in December 2014, and a candidate for re-election to that position in the city's general election to be held November 8, 2016. Plaintiff's Verified Complaint (hereinafter, "VC") ¶ 15. Zimmerman believes that he must begin fundraising *now*, and without restriction by the provisions challenged here. *Id.*

The City of Austin's ("Austin" or "City") charter and code of ordinances encompass numerous fundraising restrictions.[2] First, Austin has enacted base contribution limits, limiting contributions from any "person" to a mere $350 per candidate, per election. AUSTIN, TEX. charter art. III, § 8(A)(1); **Exhibit D** (notification of increase to $350). There is an exception to

[1] Plaintiff provides a more detailed factual summary in his Verified Complaint, and incorporates and adopts by reference each and every allegation in his Verified Complaint. The undersigned counsel provides **Exhibit A**, attesting that all exhibits herein referenced are true and correct copies of the originals. All exhibits referenced in this Memorandum are incorporated in full.

[2] A copy of article III, § 8 of the Charter is attached as **Exhibit B** and incorporated fully herein. A copy of chapter 2-2, "Campaign Finance," of the Code of Ordinances, is attached as **Exhibit C** and incorporated fully herein.

this stringent dollar limit permitting "small-donor political committees" to contribute $1,000 per candidate, per election. Charter art. III, §§ 8(A)(1), 8(B).[3] The City code even limits contributions to any "specific-purpose political committee [SPAC] supporting or opposing a candidate in a city election" to the same base and aggregate limits applicable to contributions given to candidates, without regard to whether the SPAC is independent from the supported candidate. VC ¶¶ 63-65.

Although these base limits restrict the amount that any eligible person may contribute to candidates (and even to independent SPACs), Austin also specifically targets certain types of contributors and activity of special concern. Lobbyists are subject to a near-total ban, mandating that "no person who is compensated to lobby the city council…and no spouse of the person, may contribute more than $25 in a campaign period" to city candidates or specific-purpose committees. VC ¶ 67. Austin also imposes an aggregate limit on the bundling activity of individuals associated with a "business association" that is itself a registered lobbyist, owned in whole or part by a registered lobbyist, employs a registered lobbyist, or even hires a person to lobby on its behalf. VC ¶ 76. The Code also generally prohibits contributions from being made, solicited or accepted at a City-owned building. VC ¶ 66.

Aside from these hard limits and prohibitions, Austin also requires candidates to report all contributions received. Comprehensive campaign finance reports are required every January and July 15, and in election years, additional reports are due 30 and eight days before Election Day. VC ¶¶ 68-70. Candidates must also file "Special Pre-Election Reports" if they accept contributions above a certain amount within the last nine days before an election. VC ¶ 75. These last-minute reports must be filed essentially within 24 hours of triggering activity. *Id.*

[3] The restrictions herein discussed do not apply to the solicitation, acceptance, or use of contributions for a "Criminal or Civil Litigation Fund." Charter art. III, § 8(H). However, such funds may not be used for campaign purposes.

Every report must disclose the full name and address of any person giving more than $50 in the reporting period, along with the date and amount of the contribution(s). VC ¶ 71. Reports must also disclose the occupation and employer of any person giving more than $200 in a reporting period. VC ¶ 74. Lastly, the City requires candidates to make extensive disclosures regarding individuals who bundle contributions. VC ¶ 76.

Layered atop (i) the severely low base limits; (ii) the near-total ban on lobbyist contributions; (iii) the aggregate limit on bundling by individuals associated with certain "business associations" that even hire a lobbyist; and (iv) the robust reporting requirements, Austin also imposes the following provisions subject to this motion for preliminary injunction.

42-Month Blackout Period. Austin imposes a temporal ban prohibiting fundraising for a full 42 months out of every 48-month cycle. The Charter provides that

> 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). This "Blackout Period" bans fundraising until May 12, 2016, a mere six months before Election Day (November 8, 2016).

Zimmerman does not have the personal resources to fund his own campaign. VC ¶ 17. He would immediately solicit and accept contributions from like-minded persons but for the Blackout Period. VC ¶ 21. Five individuals have provided verified statements that they would immediately contribute but for the blackout, and plaintiff expects many more to certify the same intent. VC ¶ 22; **Exhibit E**. Because of this fundraising ban, Zimmerman has been unable to raise funds necessary to undertake desired expenditures for his campaign. VC ¶ 18-20.

Article III, § 8(A)(3) aggregate limit. The Charter provides that "no candidate and his or her committee shall accept an aggregate contribution total of more than [$36,000] per election,

and [$24,000] in the case of a runoff election, from sources other than natural persons eligible to vote in a postal zip code completely or partially within the Austin city limits." Charter art. III, § 8(A)(3) (the brackets reflect current limits, after indexing for inflation).

The mere existence of this aggregate limit has prevented Zimmerman from executing desired campaign activities and engaging in protected speech. 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." VC ¶¶ 30-31. Zimmerman desires to purchase or rent a fundraising list of like-minded individuals who reside throughout Texas and the United States and solicit campaign contributions from them. VC ¶ 33. Zimmerman also plans to place targeted digital ads on the internet, including social media sites such as Facebook and Twitter, seeking financial support from like-minded audiences. VC ¶ 32. However, this activity is not viable with the aggregate limit in place. Because the maximum possible return from contributors subject to the aggregate limit is only $36,000, it is not worth the investment required to (1) purchase an expensive fundraising list, (2) contract with a political fundraising professional, and (3) devote valuable time and resources to drafting effective fundraising appeals and executing a fundraising strategy. VC ¶ 33. Zimmerman also desires to avoid devoting any resources to monitoring arbitrary information required to determine whether contributors fall in a category ensnared under the aggregate limit. VC ¶¶ 37-40. Therefore, so long as the aggregate limit under art. III, § 8(A)(3) remains in place, Zimmerman's protected speech is chilled, and to the extent he can even keep an accurate tally of which contributors fall under the aggregate limit, he will not retain funds in excess of the aggregate $36,000 ceiling. VC ¶ 35.

Dissolution Requirement. The Charter provides that "no later than the 90th day after an election…a candidate…shall distribute the balance of funds received from political contributions in excess of any remaining expenses for the election" to contributors, charity, or the Austin Fair Campaign Fund. Charter art. III, § 8(F)(3). However, successful candidates with unexpended funds are granted an exception: they may retain up to $20,000 in an "officeholder" account, *id.* art. III, § 8(F)(3), (6), which may be used, among other things, for "newsletters; contributions to charitable organizations; membership dues; nonpolitical advertising; contributions to not-for-profit organizations," and even "to make campaign contributions." VC ¶ 61.

Zimmerman had $1,200 remaining in his campaign account after the 2014 election, and he would have kept them for use in his discretion for campaign purposes if not for the Dissolution Requirement; instead, he has not been free to use them for campaign purposes. VC ¶¶ 41-44. If the Dissolution Requirement is enjoined, Zimmerman would use the $1,200 for campaign purposes immediately. VC ¶ 122. Regardless of the outcome of the November 2016 election, Zimmerman will run for City office again, and he wishes to retain any unexpended funds in his campaign account beyond the 90-day post-election period, using them for campaign purposes. VC ¶ 122.

Penalties. Violations of any of these provisions constitute class C misdemeanors punishable by fines. VC ¶ 78. "Each contribution, expenditure, or other action in violation of chapter 2 constitutes a separate offense." *Id.*

ARGUMENT

Plaintiff requests a preliminary injunction so he can exercise his fundamental rights to speech and association, protected under the First Amendment to the United States Constitution, without any further delay in advance of the November 2016 City of Austin elections.

I. Preliminary Injunction Standard

A plaintiff seeking a preliminary injunction must establish:

(a) a substantial likelihood of success on the merits;
(b) a substantial threat of irreparable harm if the injunction is not granted;
(c) that the threatened injury outweighs any damage that the injunction might cause the Defendants; and
(d) that the injunction will not disserve the public interest.

Planned Parenthood v. Sanchez, 403 F.3d 324, 329 (5th Cir. 2005).

However, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions," *McCutcheon v. FEC*, __ U.S. __, 134 S. Ct. 1434, 1452 (2014), and "[t]he burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *see also Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Therefore, "[w]hen seeking a preliminary injunction in the First Amendment context, the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction." *Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012).

Because the "purpose of a preliminary injunction is to prevent irreparable injury to the parties and 'preserve the court's ability to render a meaningful decision on the merits,'" *Planned Parenthood of Hidalgo County v. Suehs*, 828 F. Supp.2d 872, 880 (W.D. Tex. 2012), the "relative position" to preserve is Austin not enforcing the challenged provisions against Plaintiff. *See Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 536 (5th Cir. 2013) (affirming preliminary injunction against enforcement of a contribution limit under Texas Election Code).

Facial challenges. In the First Amendment context, a statute is facially unconstitutional if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013).

II. Plaintiff is Likely to Succeed on the Merits as to All Counts

Plaintiff has a likelihood of success on the merits as to each challenged law.

A. The challenged provisions burden "the most fundamental" First Amendment rights and are subject to rigorous review.

All of the challenged provisions severely burden political speech and association. But "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam). "Indeed…the First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *McCutcheon*, 134 S. Ct. at 1441 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Accordingly, "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Id.* at 14.

Additionally, the Supreme Court has recognized that candidates frequently represent not just themselves but a political cause, *see Anderson v. Celebrezze*, 460 U.S. 780, 790-94 (1983); *id*. at 792-93 ("[A]n election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens."), and burdens on candidacies burden voters' "choice[s] on the issues as well." *Williams v. Rhodes*, 393 U.S. 23, 33 (1968).

In light of the fundamental nature of the activity at issue, and the centrality of candidates to the "expression of views on the issues of the day," *Anderson*, *supra*, Austin bears a heavy burden in seeking to justify these restrictions.

The level of scrutiny applicable to a law restricting political activity is determined by the character of the restriction. *See Catholic Leadership*, 764 F.3d at 424.

Scrutiny of expenditure limits. "Laws that burden political speech are subject to strict scrutiny, which requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011). Several times the Supreme Court has applied strict scrutiny to laws that *indirectly* burdened campaign expenditures without imposing an outright ban or limit. *See, e.g.*, *Ariz. Free Enter.*, 131 S. Ct. at 2818; *Davis*, 554 U.S. at 724; *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 477 n.9 (2007). *See also EMILY's List v. FEC*, 581 F.3d 1, 15 n.14 (D.C. Cir. 2009) (noting that certain regulations are "best considered spending restrictions").

Scrutiny of contribution limits. Contributions "enable[] like-minded persons to pool their resources in furtherance of common political goals." *Buckley*, 424 U.S. at 22. The "freedom of association 'is diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly or optimally effective.'" *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981) (quoting *Buckley*, *supra*, at 65-66)). Plaintiff requests this Court apply strict scrutiny even if the Court believes a particular provision is a contribution limit. *See* VC ¶ 82. However, Plaintiff still wins under "closely drawn" scrutiny, because it is a "rigorous standard of review," requiring "the State [to] demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgment of associational freedoms." *McCutcheon*, 134 S. Ct. at 1444.

B. The Blackout Period is facially unconstitutional.

Austin's Blackout Period categorically bans city candidates from "solicit[ing] or accept[ing] a political contribution except during the last 180 days before an election." Charter art. III, § 8(F)(2).

Plaintiff describes below how this severe burden functions as an expenditure limit and should be subject to strict scrutiny. However, Plaintiff still wins under closely drawn scrutiny, because the blackout (1) is an aggregate limit that does not address *quid pro quo* corruption and (2) is not appropriately tailored to avoid the unnecessary abridgment of associational freedom.

i. The Blackout Period is an especially pernicious burden on First Amendment rights.

Any restriction on the right to make or receive political contributions—whether an amount limitation, a temporal ban, or a ban on solicitation—burdens a fundamental right and incurs First Amendment scrutiny. The Blackout Period is especially damaging to the robust public discussion of candidates and issues that *Buckley* and its progeny so vigorously protect.

First, Austin's Blackout Period is exceedingly long, banning solicitations and contributions for 42 months of every four-year cycle. Wealthy candidates can begin campaigning as early as they want with their own money. However, for non-self-funding candidates, the Blackout Period acts simultaneously as a limit on campaign *expenditures*, as money that cannot be raised cannot be spent. *See Texans for Free Enter.*, 732 F.3d at 539 ("[Plaintiff's] ability to speak is undoubtedly limited when it cannot raise money to pay for speech."). Regardless of how small the prospective contributions from any single source, the blackout imposes an *aggregate* limit of zero dollars in receipts by a candidate for a period of time. This distinguishes the Blackout Period from base contribution limits because, even under base limits, the candidate's *aggregate* fundraising potential is unlimited. For these reasons, the

Blackout Period is materially different from base limits and instead functions as an expenditure limit on City campaigns. *See, e.g.*, *Zeller v. Florida Bar*, 909 F. Supp. 1518, 1524 (N.D. Fla. 1995) (judicial canon prohibiting contributions to judicial candidates earlier than one year before the election "necessarily ha[s] an impact on the amount of the candidate's campaign expenditures"); *accord Opinion of the Justices to the House of Representatives*, 637 N.E.2d 213, 216 (Mass. 1994).[4]

Second, temporal restrictions—much less temporal *bans*—on political activity are particularly suspect. In politics, "timing is of the essence," *Catholic Leadership*, 764 F.3d at 431, and it is important to "get[] the message out in a timely[] or…even instantaneous fashion." *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1009 (9th Cir. 2003).

Third, several courts have enjoined temporal contribution bans in part because they hobble challengers *vis-à-vis* incumbents, as challengers "not only lack [access to the press enjoyed by incumbents]," but the contribution ban "also forbids them any means of counterbalancing the decided advantage enjoyed by the incumbents." *State v. Dodd*, 561 So.2d 263, 265 (Fla. 1990); *accord Emison v. Catalano*, 951 F. Supp. 714, 723 (E.D. Tenn. 1996). The Supreme Court itself has recognized that fundraising limitations disproportionately "handicap a candidate who lack[s] substantial name recognition or exposure of his views before the start of a campaign." *Davis v. FEC*, 554 U.S. 724, 741 (2008) (quoting *Buckley*, 424 U.S. at 56-57).

[4] The fundraising blackout is even more burdensome than the aggregate limits invalidated in *McCutcheon*, which restricted a single individual from contributing substantial sums of money in an election cycle. One could at least see the logic of the Government's (appropriately rejected) argument that such a limit purported to address the perception of corruption. Austin instead targets the aggregate receipts of a candidate for office, regardless of how miniscule the desired contributions. If McCutcheon's First Amendment rights were "intru[ded]" upon to a "substantial" degree, *McCutcheon*, 134 S. Ct. at 1456, Austin's law snuffs out core political association rights *entirely* for a substantial period of time. Rather than merely making it difficult to "amass the resources" necessary for an effective campaign, as with too-low base contribution limits, *see Randall v. Sorrell*, 548 U.S. 230 (2006), Austin's fundraising blackout makes it impossible to amass *any* resources until May 2016.

ii. Fighting "quid pro quo" corruption is the only cognizable government interest in this area.

Whether under strict or "closely drawn" scrutiny, the Supreme Court "has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption." *McCutcheon*, 134 S. Ct. at 1450. The interest is defined narrowly to mean only "*quid pro quo* corruption"; that is, "the notion of a direct exchange of an official act for money"—"dollars for political favors." *Id.* at 1441. "Ingratiation and access…is not corruption," *Catholic Leadership*, 764 F.3d at 425 (quoting *Citizens United*, 558 U.S. 310, 360 (2010)), nor is "spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties." *Id.* (quoting *McCutcheon*, *supra*, at 1450). Government may not seek to "'level the playing field'… 'equalize the financial resources of candidates,'…or 'restrict the speech of some elements of our society in order to enhance the relative voice of others.'" *McCutcheon*, *supra*, at 1450.

Moreover, the corruption threat must be supported by evidence of a real, not merely conjectural, danger. *Id.*

iii. Under *McCutcheon* and *Catholic Leadership*, aggregate limits do not address corruption.

In *McCutcheon*, the Supreme Court drew a clear distinction between two basic types of contribution limits imposed under the Federal Election Campaign Act of 1971, as amended. The federal base limits "restrict how much money a donor may contribute to any particular candidate or committee." *Id.* at 1443. Federal law prior to *McCutcheon* also imposed a system of aggregate limits that "ha[d] the effect of restricting how many candidates or committees [an individual] donor may support, to the extent permitted by the base limits." *Id.* at 1443. For the

2013-14 cycle, an individual was limited to contributing a total of $48,600 to federal candidates and a total of $74,600 to other political committees. *Id.*

McCutcheon's controlling opinion drew a doctrinal line between base and aggregate limits. McCutcheon first recalled the narrow *quid pro quo* corruption interest identified in *Buckley*:

> As *Buckley* explained, Congress may permissibly seek to rein in 'large contributions [that] are given to secure a political *quid pro quo* from current and potential office holders. In addition to 'actual *quid pro quo* arrangements,' Congress may permissibly limit 'the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions' to particular candidates.

McCutcheon, 134 S. Ct. at 1450 (quoting *Buckley*, 424 U.S. at 26-27) (internal citations omitted). Recognizing that base limits have been upheld as a permissible anticorruption measure, *McCutcheon* held that "the aggregate limits do little, if anything, to address that concern, while seriously restricting participation in the democratic process." *Id.* at 1442. The fundamental problem "is that once the aggregate limits kick in, they ban all contributions of *any* amount." *Id.* at 1452 (emphasis in original). The Court reasoned that Congress's legislative "selection of a $5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption" and, consequently, "[i]f there is no corruption concern in giving nine candidates up to $5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given $1,801, and all others corruptible if given a dime." *Id.*[5]

The Fifth Circuit's analysis in *Catholic Leadership* followed inexorably from *McCutcheon*'s distinction between base and aggregate limits. The Fifth Circuit pointed out that under the challenged provision, a newly-formed general purpose committee could contribute up

[5] *McCutcheon* also found the federal aggregate limits to be invalid for lack of proper tailoring, even assuming—without deciding—that "closely drawn" scrutiny applied. 134 S. Ct. at 1445-46, 1456-59.

to $500 total during the restricted period, including, if the committee so chose, to any single candidate, but would then be prohibited from making contributions of any amount until 60 days after its registration. The Court explained:

> Texas's enshrinement of the 60-day, 500-dollar limit demonstrates the Texas Legislature's belief that a $500 donation to any particular candidate does not pose a risk of corruption . . . . But if a single $500 contribution does not risk corruption, it is hard to see how three $167 contributions hold out such a significant risk of corruption that the former is permitted and the latter is not.

764 F.3d at 432. Thus, the State could not sustain a restriction that prevented general-purpose committees from supporting candidates at amounts equal to or even less than the base limit by way of an aggregate cap, even one that applied temporarily (for the 60-day waiting period).

After holding that the aggregate temporal limit did not directly address *quid pro quo* corruption, the Fifth Circuit further held that, even if Texas could assert an interest in preventing crafty contributors from using general purpose committees to circumvent the base and temporal limits on contributions to specific-purpose committees during legislative sessions and judicial elections, the 60-day limit still failed for two reasons. *Id.* at 433. First, because the 60-day waiting period applied "regardless of the proximity of the [general-purpose] committee's formation to a legislative session or a judicial election," it was "vastly overbroad." Id. "*But more importantly*," specifically considering the State's anti-circumvention rationale, "Texas would still be unable to justify an *aggregate* limit—as opposed to per-candidate, per-committee, and per-party base limits—under the logic of *McCutcheon*." *Id.* at 433 (first emphasis added, second emphasis in original); *see also McCutcheon*, 134 S. Ct. at 1447 (noting that *Buckley* upheld the $1,000 base limits against an overbreadth argument, but "never addressed [an] overbreadth [challenge] in the specific context of aggregate limits, where [it] has far more force").

iv. Austin's Blackout Period is an aggregate limit and invalid for lack of a cognizable interest.

1. *McCutcheon* and *Catholic Leadership* dictate the result here.

McCutcheon reiterates that the threat of *quid pro quo* corruption arises only in the context of large contributions from one person to one particular candidate, *McCutcheon*, 134 S. Ct. at 1442, 1452, 1460-61, and the aggregate limits failed to address this threat because "once they kick in, they ban all contributions of any amount." *Id.* at 1452.

In the same way, during Austin's Blackout Period, contributions of "any amount" are banned, effectively imposing even a temporal *base* limit of zero on contributions from any single person, even though the same person may contribute up to the base limit during the last six months before the election. The logic of *McCutcheon* dictates that Austin may set an appropriate base limit, but restrictions unrelated to the danger of large financial transfers from one contributor simply do not address *quid pro quo* corruption. 134 S. Ct. at 1452; *Catholic Leadership*, 764 F.3d at 432.

But the Blackout Period goes even further, acting as an aggregate limit of zero on any City candidate's *solicitation* or *receipt* of contributions. Even before *McCutcheon*, several courts identified temporal contribution bans as aggregate limits and invalidated them for failure to address any corruption threat. *See Shrink Mo. Gov't PAC v. Maupin*, 922 F. Supp. 1413, 1424 (E.D. Mo. 1996) ("*Maupin II*") (stating that a ban on all contributions while the state legislature was in session "amounts to an imposition of an aggregate limit on total contributions incumbents and candidates receive during the banned time-period, in essence, a zero contribution limit"); *Zeller*, 909 F. Supp. at 1527 ("These restrictions amount to imposition of an aggregate limit on the total contributions judicial candidates receive during that time—namely, nothing."). Even if

an individual wanted to give $10 to Zimmerman, the contribution is absolutely prohibited until May 12, 2016.

In *Zeller*, the district court explained its holding invalidating a temporal fundraising ban as follows:

> Defendants have wholly failed to establish a sufficient nexus between the interest they are trying to further—preventing the actuality or appearance of corruption—to the blanket prohibition on solicitation and collection of…contributions for a lengthy period of time. Indeed, the fact that contributors can give the same sum of money to judicial candidates within the one year period prior to an election, which they cannot give outside the period, demonstrates that Canon 7C(1) does not further the State's compelling interest in preventing corruption.

909 F. Supp. At 1525. Earlier this year, the federal district court in Houston invalidated Houston's similar blackout period, noting (among other reasons) that the defendants failed to present "any evidence showing how contributions given before February 1st of an election year present a different threat of *quid pro quo* corruption or its appearance from those given after February 1st." *Gordon v. City of Houston, Tex.*, __ F. Supp. 3d. __, 2015 WL 138115 (S.D. Tex. 2015); *see also Opinion of the Justices to the House of Representatives*, 637 N.E.2d.

Thus, even before *McCutcheon*, the Austin blackout period was clearly invalid under the rationale of several federal and state courts. *McCutcheon* and *Catholic Leadership* now compel this conclusion.

Austin can address the corruption threat through a base limit. While Plaintiff challenges the current ($350) base limit as unconstitutionally low, Austin retains discretion to impose a base limit at an appropriate level. And if it is not corrupting for a single person to contribute an amount within the base limit after May 12, 2016, "it is difficult to understand" how contributions of even trifling amounts solicited or accepted on May 11, 2016, or in July 2015, can be corrupting. *See McCutcheon*, 134 S. Ct. at 1452. Just as the Fifth Circuit held in striking down Texas's waiting period and ten-contributor requirements, "the logic undergirding *McCutcheon*

stands out as deeply problematic for [Austin's] attempts to justify its aggregate contributions cap." *See Catholic Leadership*, 764 F.3d at 433; *see also id.* (even regarding anti-circumvention measures, "Texas would still be unable to justify an *aggregate* limit—as opposed to per-candidate, per-committee, and per-party base limits—under the logic of *McCutcheon*.") (emphasis in original).

2. *Thalheimer v. City of San Diego* does not support the blackout.

Austin will attempt to rely on *Thalheimer v. City of San Diego*, which upheld an ordinance prohibiting candidates from soliciting or accepting contributions prior to "the twelve months preceding the primary election for the office sought." 645 F.3d 1109, 1114 (9th Cir. 2011). This Ninth Circuit case is irreconcilable with *Catholic Leadership*, and it is wholly unpersuasive for several reasons.

Most obviously, it was decided pre-*McCutcheon* and there is no indication the litigants or the court distinguished between aggregate and base limits. *Thalheimer's* analysis contradicts the holdings of *McCutcheon* and *Catholic Leadership* that aggregate limits do nothing to address corruption. More generally, the court's review is inconsistent with the "rigorous" review of contribution limits illustrated by *McCutcheon*, 134 S. Ct. at 1452, 1456-62. The *Thalheimer* court even purported to hold *the plaintiffs* to the burden of bringing forth evidence of an injury from the fact that contributions are banned for a time period. *See* 645 F.3d at 1123 n.3, 1124 (referring to "Plaintiffs' burden" and "scant evidence of harm suffered from the temporal ban"). It is established in the Fifth Circuit that even burdens for "minimal periods of time" on the right to make political contributions constitute irreparable injury. *Texans for Free Enter.*, 732 F.3d at 539. *Thalheimer*, *supra*, essentially accepted without question the government's claim that off-year contributions were more likely linked to corruption than contributions closer to elections. *See also Thalheimer v. City of San Diego*, 09-CV-2862 IEG (BGS), 2012 WL 177414, *11 (S.D.

Cal. Jan. 20, 2012). However, this rationale finds no support in the Supreme Court's holdings regarding base limits. To the contrary, "timing is of the essence in politics," *Catholic Leadership*, 764 F.3d at 431, and the various cases preliminarily enjoining such temporal limits indicate that *Thalheimer* was an outlier, even before *McCutcheon*.

3. The true purpose behind the fundraising blackout appears to be something other than addressing corruption.

In *McCutcheon*, the Supreme Court said that "[t]he improbability of circumvention [of the federal base limits] indicates that the aggregate limits instead further the impermissible objective of simply limiting the amount of money in political campaigns." 134 S. Ct. at 1456; *see also Ariz. Free Enter.*, 131 S. Ct. at 2825 (noting "[t]here is ample support for the argument that the matching funds provision seeks to 'level the playing field," the "clearest evidence" being "the very operation of the provision"). Similarly here, the "very operation" of Austin's aggregate fundraising blackout belies any anticorruption interest and instead indicates it is aimed at some other impermissible purpose, such as limiting total fundraising and/or expenditures, or maintaining an arbitrarily abridged campaign season, perhaps in the City's paternalistic impulse to prevent voters from being exposed to election advertisements too early. The fundraising blackout serves only to "handicap a candidate who lacked substantial name recognition or exposure of his views before the start of a campaign." *Davis*, 554 U.S. at 741 (quoting *Buckley*, 424 U.S. at 56-57). Whatever the true purpose, it is insufficient to support the serious First Amendment burden imposed.

v. The Blackout Period is facially unconstitutional because it is not appropriately tailored.

Even if the Blackout Period were supported by a legitimate interest, it would be invalid for lack of tailoring. "In the First Amendment context, fit matters," *McCutcheon*, 134 S. Ct. at

1456, and *McCutcheon* demands a rigorous examination of whether the blackout period is any broader than necessary to address the proffered threat. *See id.* at 1456-59. In *Catholic Leadership*, the Fifth Circuit held that Texas's temporal contribution limit was not appropriately tailored because Texas could not explain (i) a justification for the particular parameters it chose (60 days rather than another time period), 764 F.3d at 429, 433; or (ii) why more narrowly-tailored base limits were not acceptable in lieu of an aggregate contribution ban. *Id.* at 433. Austin's blackout clearly fails for these same reasons, among others.

1. There is no nexus between the period of Austin's ban and any corrupting activity.

Austin's Blackout Period is entirely arbitrary, as there is no nexus between the period of the ban (six months before any general or recall election) and any activity arguably posing an increased corruption threat, such as a Council session.[6] The fact that Defendants cannot link the specific period of the ban to any corrupting activity is fatal. *Catholic Leadership* held the temporal ban on general purpose committees was not "closely drawn" because the 60-day time period was arbitrary, 764 F.3d at 433 ("Texas does not provide any evidence supporting a *60-day* aggregate contribution cap as necessary") (italics in original), and because a temporal contribution limit that "kicks in regardless of…proximity…to a legislative session or judicial election is vastly overbroad." *Id.* *See also Gordon*, 2015 WL 138115, *12 (noting lack of "evidence showing a nexus between the…almost eleven-month temporal ban on soliciting and receiving contributions…and any activity arguably posing a risk of *quid pro quo* corruption or its appearance"); *Zeller*, 909 F. Supp. at 1525 (holding that the government "wholly failed to establish a sufficient nexus between the interest they are trying to further—preventing the

[6] Austin's elected officeholders—its mayor and councilmembers—conduct business year-round, as the Code calls for council meetings to be held every Thursday. Code § 2-5-24(A).

actuality or appearance of corruption—to the blanket prohibition on solicitation and collection of judicial campaign contributions for a lengthy period of time"). *Cf. N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 716 (4th Cir. 1999) (upholding state moratorium on contributions to legislative incumbents and candidates because it was "narrowly tailored" in that the prohibition (i) applied only to "lobbyists and the political committees that employ them—the two most ubiquitous and powerful players in the political arena," and (ii) "last[ed] only during the legislative session, which typically, though not invariably, has covered just a few months in an election year.").[7]

2. Austin's 42-month ban is asymmetrical to any threat.

Austin's blackout lasts 42 months. Courts have preliminarily enjoined temporal contribution bans of far less severe duration. *See Maupin II*, 922 F. Supp. at 1419 (granting preliminary injunction against state law that banned contributions for "four and one-half months" during session, which "would prevent candidates and political committees from amassing the resources necessary for effective advocacy"); *Gordon*, 2015 WL 138115, *13 (enjoining Houston's blackout period that banned fundraising until the last nine months before election day); *Emison v. Catalano*, 951 F. Supp. 714, 717, 722 (E.D. Tenn. 1996); *Zeller*, 909 F. Supp. at 1520.

3. More narrowly-tailored base limits provide a less restrictive alternative.

Even if Austin could muster an explanation as to why it chose to ban fundraising for 42 months, as opposed to another time period, a complete fundraising blackout for *any* period of time is still too blunt an instrument because the City cannot "advance[] [any] reason why more narrowly-tailored base contribution limits" during its chosen period "would not similarly serve

[7] Even if the Blackout Period tracked a City Council session or some other similar time period, Austin still could not justify it in light of the option of using more narrowly-tailored base limits. *Catholic Leadership*, 764 F.3d at 433.

its interests." *See Catholic Leadership*, 764 F.3d at 436. This "would impose a lesser burden on First Amendment rights, as compared to aggregate limits that flatly ban contributions beyond" certain time periods. *See McCutcheon*, 134 S. Ct. at 1458.

4. Austin has already addressed the threat of *quid pro quo* corruption with narrow contribution bans and reporting requirements.

To the extent Austin can assert a legitimate interest in targeting contributions presenting a higher than normal risk of corruption, it has already done so by limiting city lobbyists and their spouses to nominal contributions of $25, imposing an aggregate limit on the bundling activity of individuals associated with "business associations" that even hire a lobbyist, and requiring detailed reporting of such bundling activity. *See* VC ¶ 67, 76. Therefore, the Blackout Period is spectacularly overbroad in that it applies to everybody, while these purportedly high-risk contributors are already targeted with narrower measures. Any contribution restriction that applies globally rather than only against the specific threat proffered by the Government must be rejected for lack of tailoring. *See, e.g., State v. Dodd*, 561 So.2d 263, 265 (Fla. 1990) (invalidating legislative-session contribution ban because it applied to all candidates, even nonincumbents who posed no *quid pro quo* threat). *See also FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) (invalidating expenditure restriction because even if "large pooling of financial resources…pose a potential for corruption," the law "is a fatally overbroad response" because "its terms apply equally to informal discussion groups that solicit neighborhood contributions"); *Family PAC*, *supra*, at 812-14. *Cf. Bartlett*, *supra*, at 716.

Moreover, city candidates are already required to electronically report all contributions of anything more than a *de minimus* amount according to a robust schedule, and these reports are posted on the internet almost immediately. The Supreme Court and the Fifth Circuit have repeatedly found that bans and limits are not appropriately tailored means of addressing

corruption in light of technology permitting timely public access to campaign finance information. *See Catholic Leadership*, 764 F.3d at 429. Austin's "choice to enact a [42-month contribution] limit is badly 'asymmetrical' to its interest in preventing *quid pro quo* corruption." *Id.* (quoting *Citizens United*, 558 U.S. at 361).

***

The alternative means of addressing the threat of corruption which the City has already adopted provide examples of how the City may prevent corruption without unduly abridging associational rights. *See McCutcheon*, 134 S. Ct. at 1458; *Catholic Leadership*, 764 F.3d at 429; *Zeller*, 909 F. Supp. at 1527. The Blackout Period, layered atop these narrower provisions, is overkill. "This prophylaxis-upon-prophylaxis approach requires that [the court] be particularly diligent in scrutinizing the law's fit." *McCutcheon*, 134 S. Ct. at 1458 (internal quotations omitted).[8]

C. The art. III, § 8(A)(3) aggregate limit is facially unconstitutional.

The Charter provides that "no candidate and his or her committee shall accept an aggregate contribution total of more than [$36,000] per election, and [$24,000] in the case of a runoff election, from sources other than natural persons eligible to vote in a postal zip code completely or partially within the Austin city limits." Charter art. III, § 8(A)(3) (brackets reflect current limits, after indexing for inflation). This law expressly imposes an aggregate limit on contributions. Additionally, the law discriminates against contributors 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.

[8] The controlling *McCutcheon* opinion pointed out that "[i]t is worth keeping in mind that the base limits themselves are a prophylactic measure. As we have explained, restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements. The aggregate limits are then layered on top, ostensibly to prevent circumvention of the base limits. This prophylaxis-upon-prophylaxis approach requires that [the court] be particularly diligent in scrutinizing the law's fit." 134 S. Ct. at 1458.

This aggregate limit reduces the pool of potential contributors to city campaigns, in turn reducing the funds available to support communications and other activities.

The limit also imposes drastically burdensome compliance requirements if one is to request and review information necessary to determine whether a contributor falls within a disfavored category and monitor the aggregate total. Zimmerman does not desire to commit any campaign resources to monitoring such information, and certainly not in real time to avoid any burdensome refunds, *see* Code § 2-2-24(A) (refunds must be made by cashier's check). These compliance burdens impose a discrete constitutional injury apart from the aggregate limit's direct effect of limiting contributions available to the campaign. VC ¶ 38-40.

i. Art. III, § 8(A)(3) is facially invalid because it is an aggregate limit that does not address *quid pro quo* corruption.

Article III, § 8(A)(3) is expressly an aggregate limit. For the reasons discussed above, such limits do not address *quid pro quo* corruption. *Catholic Leadership*, 764 F.3d at 432 (aggregate limit does not address corruption directly); *id.* at 433 (aggregate limit would not be permissible as anti-circumvention measure). If it is not corrupting for the first 100 contributors to give up to the base limit, it cannot be corrupting for the 101st person to give the same amount. *Catholic Leadership*, 764 F.3d at 432-33. Federal district courts have applied *McCutcheon* to invalidate aggregate contribution limits by noting that aggregate limits "arbitrarily" treat "late donations…differently than early donations" because late contributors are denied the right to contribute up to the base limit. *Seaton v. Wiener*, 22 F. Supp. 3d 945, 950-51 (D. Minn. 2014). *See also CRG v. Barland*, 48 F. Supp. 3d 1191, 1195 (E.D. Wis. 2014) ("CRG cannot be prevented from making a donation up to the base statutory limit simply because of the aggregation of previous donations.").

ii. Art. III, § 8(A)(3) is facially invalid because Austin cannot justify discrimination against the targeted contributors.

Courts sometimes uphold contribution bans or limits narrowly targeting groups posing a special corruption concern, such as lobbyists or government contractors. *E.g.*, *Bartlett*, 168 F.3d at 716. However, the government must adduce evidence that the targeted group poses a special threat, and even if it does, government may not simply ban contributions from such groups in lieu of less burdensome alternatives. *See McConnell v. FEC*, 540 U.S. 93, 231-32 (2003), *overruled on other grounds by Citizens United*, 558 U.S. at 365-66 (invalidating federal ban on contributions from minors because government produced no evidence of special threat and, even if so, a total ban was overinclusive). Austin cannot produce any rationale—much less any evidence—justifying discrimination against the categories it has chosen.

Discrimination against nonresidents. Austin cannot disfavor political contributions from persons—natural or not—residing outside a given territory. Residency-based contribution bans are exceedingly rare, but at least two federal circuit courts have squarely considered and rejected them. *See Landell v. Sorrell*, 382 F.3d 91, 148 (2d Cir. 2004), *rev'd on other grounds and remanded sub nom. Randall v. Sorrell*, 548 U.S. 230 (2006) ("[W]e are unpersuaded that the First Amendment permits state governments to preserve their systems from the influence, exercised only through speech-related activities, of non-residents."); *VanNatta v. Keisling*, 151 F.3d 1215, 1221 (9th Cir. 1998) (finding no evidence that "all out-of-district contributions lead to the sort of corruption discussed in *Buckley*"). Additionally, in dismissing a third-party candidate's suit seeking an injunction preventing out-of-state persons from contributing to her opponents, the Ninth Circuit recognized that the plaintiff was seeking to "enhance[]" the "weight of in-state opinions" "by managing the flow of money," which would "abridge people's constitutionally-protected liberty to contribute to the candidates of their choice." *Whitmore v.*

FEC, 68 F.3d 1212, 1216 (9th Cir. 1996). *Cf. State v. ACLU*, 978 P.2d 597 (Ak. 1999) (pre-*McCutcheon* state court case upholding non-resident aggregate limit).

Discrimination against persons not "eligible to vote." Austin cannot disfavor political contributions from persons who reside in an eligible zip code but are not "eligible to vote." To be eligible to vote in an election in Texas, one must be a "qualified voter," Tex. Elec. Code § 11.001, which entails the following criteria:

> (a) In this code, "qualified voter" means a person who:
>
> (1) is 18 years of age or older;
>
> (2) is a United States citizen;[9]
>
> (3) has not been determined by a final judgment of a court exercising probate jurisdiction to be:
>
> (A) totally mentally incapacitated; or
>
> (B) partially mentally incapacitated without the right to vote;
>
> (4) has not been finally convicted of a felony or, if so convicted, has:
>
> (A) fully discharged the person's sentence, including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court; or
>
> (B) been pardoned or otherwise released from the resulting disability to vote;
>
> (5) is a resident of this state; and
>
> (6) is a registered voter.
>
> (b) For purposes of Subsection (a)(4), a person is not considered to have been finally convicted of an offense for which the criminal proceedings are deferred without an adjudication of guilt.

Id. § 11.002.

Therefore, Austin's "elilgible to vote" requirement incorporates all of the requirements of a "qualified voter" listed above. Among other things, this requires one to be registered to vote. However, the government may not require one to be a registered voter to engage in protected speech. Just as a state may not require petition circulators to be registered voters because

[9] Federal law prohibits foreign nationals from contributing to federal, state or local candidates. 52 U.S.C. § 30121.

petition circulation is core political speech, *Buckley v. Am. Constitutional Law Foundation, Inc.*, 525 U.S. 182, 194-95 (1999) ("*ACLF*") (invalidating requirement that petition circulators be registered voters in part because it would "decrease[] the pool of potential circulators"), Austin may not limit contributions by non-registered voters because campaign contributions are core political speech. In any event, Austin has no evidence justifying discrimination against non-registered voters.

Similarly, without evidence of an increased threat of corruption from contributions by minors, Austin may not disfavor their contributions. *McConnell*, 540 U.S. at 231-32.

This list of factors relevant to voter eligibility also demonstrates the severe compliance burden imposed by this aggregate limit. Candidates first must ensure they are keeping a real-time tally of all contributions, grouped by zip code. Then, for contributors who provide an Austin zip code, 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. *See* VC ¶ 36-40.

Discrimination against associational/entity contributors. Art. III, § 8(A)(3) limits aggregate contributions from all "sources other than natural persons." This disfavors contributions from political committees and any other type of association eligible to contribute.[10] However, it is elementary that "[t]he First Amendment protects political association as well as political expression" by lone individuals. *Citizens Agn. Rent Control/Coal. for Fair Housing v. City of Berkeley*, 454 U.S. 290, 295 (1981). The Supreme Court has recognized that "[t]he

[10] Corporate contributions are not an issue here, because Texas law prohibits contributions from corporations to candidates. Tex. Elec. Code § 253.094(a).

tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; in the political process it can focus on a candidate or a ballot measure." *Id.* at 294. By such "collective efforts individuals can make their views known, when, individually, their voices would be faint or lost." *Id.* Thus, contributions from political committees are at least as protected as contributions from individuals. *See id.* at 296. In *Catholic Leadership*, the Fifth Circuit struck down the waiting period and ten-contributor requirements that applied only to general purpose committees. 764 F.3d at 432-34, 436-37 (addressing both burdens as they restricted contributions from committees to candidates); *see also Shrink Mo. Gov't PAC v. Maupin*, 71 F.3d 1422, 1425 (8th Cir. 1995) ("*Maupin I*") (invalidating state ban on organizational contributions to candidates refusing to accept "voluntary" spending limit because "[o]rganizational contributions are constitutionally protected irrespective of any agreement").

iii. Art. III, § 8(A)(3) is not appropriately tailored.

Under the logic of *McCutcheon* and *Catholic Leadership*, aggregate limits are not appropriately tailored to address *quid pro quo* corruption. "The difficulty is that once the aggregate limits kick in, they ban all contributions of *any* amount." *McCutcheon*, 134 S. Ct. at 1452 (emphasis in original). Therefore, the aggregate nature of this limit renders it invalid. *See also VanNatta*, 151 F.3d at 1221 (aggregate non-resident limit invalid because it bans contributions "regardless of size or any other factor that would tend to indicate corruption").

Moreover, Austin cannot justify the parameters it has chosen—namely, the specific categories of disfavored contributors—just as Congress had no evidence to justify disfavoring minors' contributions. *McConnell*, 540 U.S. at 231-32; *see also Catholic Leadership*, 764 F.3d at 433 (holding that the 60-day aggregate limit was not "closely drawn" because Texas failed to justify the specific parameters of the limit (60 days)). Indeed, all of the criteria that determine

whether a person is subject to the aggregate limit are arbitrary. Consider a contribution from a natural person residing in Austin who has not yet registered to vote but is otherwise "eligible to vote." This person may not contribute even $10 if her chosen candidate has already hit the aggregate limit. But if she registers to vote, her contribution suddenly is permissible, and she may give up to the base limit. There is no nexus between such factors and corruption.

D. The Dissolution Requirement is facially unconstitutional.

Charter art. III, § 8(F)(3) provides that "no later than the 90th day after an election…a candidate…shall distribute the balance of funds received from political contributions in excess of any remaining expenses for the election" to contributors, charity, or the Austin Fair Campaign Fund.

This provision flatly prohibits candidates from spending leftover funds for political speech, at least later than 90 days after the election.[11] Instead, candidates are compelled to release the funds for one of three government-preferred purposes. Whether one considers this restriction as an overall limit on expenditures with respect to the past campaign, such as invalidated in *Buckley*, 424 U.S. at 57-58, or a ban on carrying over funds to a subsequent campaign, it is a "direct and substantial restraint[] on the quantity of political speech," limiting "expression at the core of our electoral process and of the First Amendment freedoms." *Buckley*, *supra*, at 39. Laws that indirectly "burden"—much less flatly *prohibit*—"political speech are…subject to strict scrutiny." *Ariz. Free Enter.*, 131 S. Ct. at 2817. The government's burden is not lessened where it restricts expenditures by a candidate as opposed to an independent group. *See Davis*, 554 U.S. at 740. The Dissolution Requirement is invalid because (1) it does not address *quid pro quo* corruption; (2) it compels association; and (3) is not appropriately tailored.

[11] The text of the provision is ambiguous as to whether leftover funds may be used for new political expenditures *incurred after Election Day* but within the 90 days. Regardless of the City's interpretation on this finer point, the provision clearly bans campaign expenditures after 90 days.

i. The Dissolution Requirement is invalid because it does not address *quid pro quo* corruption.

Campaign expenditure ceilings have been baldly unconstitutional since *Buckley*. 424 U.S. at 57-58. Expenditure ceilings do not address corruption because they are unrelated to "large contributions…given to secure a political *quid pro quo* from current and potential office holders." *McCutcheon*, 134 S. Ct. at 1450 (quoting *Buckley*, 424 U.S. at 26-27).

One federal court, striking down a ban on expenditures of campaign funds received prior to the enactment of a campaign reform bill, correctly recognized that "a ban on only certain expenditures does not address the obligation arising from receipt," and "[t]here is simply no link between the elimination of corruption and the ban on expenditures of money already received." *Service Employees Int'l Union v. Fair Political Practices Comm.*, 721 F. Supp. 1172, 1178 (E.D. Cal. 1989) ("*SEIU*"). The Eighth Circuit likewise invalidated an anti-"war chest" provision that was strikingly similar to Austin's, also concluding that it was not directed at corruption. *Maupin I*, 71 F.3d at 1427-28.

As *McCutcheon* held that an aggregate limit on contributions from wealthy contributors does "little, if anything," to combat corruption, then certainly an indiscriminate ban on candidate *expenditures*—drawn without regard to the sources or sizes of contributions supporting the expenditures—is unrelated to *quid pro quo* corruption.

Given the complete lack of nexus between the Dissolution Requirement and corruption and "the very operation of the provision," *see Ariz. Free Enter.*, 131 S. Ct. at 2825, it appears the Dissolution Requirement was actually intended to control overall campaign expenditures or level the playing field between elections, both impermissible purposes. *McCutcheon*, 134 S. Ct. at 1450.

ii. The Dissolution Requirement compels speech.

Aside from the effective prohibition on using unexpended funds for campaign speech, the Dissolution Requirement violates candidates' First Amendment rights by compelling that the funds be expended at a time other than the candidate's own choosing and in certain specified ways. *Maupin I*, 71 F.3d at 1428. This is a content-based speech regulation "[m]andating speech that a speaker would not otherwise make[,] necessarily alter[ing] the content of the speech." *Riley v. Nat'l Federation of the Blind*, 487 U.S. 781, 795 (1988).

iii. The Dissolution Requirement is not appropriately tailored.

The Dissolution Requirement is "badly asymmetrical" to Austin's interest in preventing *quid pro quo* corruption, *see Catholic Leadership*, 764 F.3d at 429, for several reasons.

First, just as with the arbitrary parameters of the 6-month fundraising window under the Blackout Period, Austin cannot explain any nexus between the time period of permitted campaign expenditures (an arbitrary 90 days after the election) and any corruption threat. *See Catholic Leadership*, 764 F.3d at 433.

Second, even if Austin could identify a cognizable threat from the expenditure of funds during some temporal window (and it cannot), and even if Austin could ban campaign expenditures for a temporal period (and it cannot), Austin goes two steps beyond a temporal ban by requiring candidates to (1) rid themselves of unexpended funds (2) to government-preferred recipients (doubly unconstitutional as compelled speech). It is hard to imagine a more "disproportionate" means, even if Austin had a legitimate interest. *See McCutcheon*, 134 S. Ct. at 1458.

Third, whatever the intended purpose of the provision, it is undermined by the specific exception for incumbent "officeholders," who may retain $20,000 for "officeholder" expenses.

Charter art. III, § 8(F)(3), (6). In other words, unsuccessful candidates must dissolve their accounts, but successful candidates may keep substantial funds for ostensible official items including "newsletters, contributions to charitable organizations, membership dues, nonpolitical advertising, contributions to not-for-profit organizations," and even "campaign contributions." Code § 2-2-41. It takes real pique for incumbents to pretend that campaign accounts must be dissolved between elections but then enact a self-serving exception for this laundry list of "officeholder" expenses, all of which would also be permissible uses of political funds governed by the Texas Election Code and may indirectly aid the officeholder's candidacy. For example, the officeholder could use a "newsletter" to disseminate information about her political positions and successes without constituting a "campaign expenditure." *See Osterberg v. Peca*, 12 S.W.3d 31, 51 (Tex. 2000) (noting that the definition of "campaign expenditure" is limited to expenditures for express advocacy); *SEIU*, 721 F. Supp. at 1176 (noting that a candidate might "indirectly aid" his campaign by disseminating political views but avoiding campaign expenditures).

Fourth, the Dissolution Requirement is overinclusive because it captures even the candidate's own personal contributions to his campaign. A candidate's personal funds given or loaned to his campaign qualify as "contributions" under the plain terms of the definitions in both Austin and Texas law. Code § 2-2-2(6); Tex. Elec. Code §§ 251.001(2), (3). The City may not direct how a candidate spends funds received from others, much less the candidate's own funds.

III. Plaintiff Will Suffer Irreparable Harm Without the Injunction

Without immediate relief, Plaintiff loses irreplaceable time for soliciting funds to run an effective campaign for city-wide office, and all those who would contribute to his campaign are denied the right of political association. Even without such a looming electoral deadline, the

Fifth Circuit has "repeatedly held…that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Texans for Free Enter.*, 732 F.3d at 539 (internal quotations omitted); *see also Free Market Found. v. Reisman*, 540 F. Supp.2d 751, 758 (W.D. Tex. 2008).

IV. Balancing of Harms

Without a preliminary injunction, Plaintiff and his would-be contributors will continue to suffer irreparable injury to their constitutional rights. By contrast, Defendants suffer no comparable injury if the Court grants a preliminary injunction. The result would simply be that candidates and their supporters would be permitted to associate up to the base limits Austin has already enacted upon signing of the order rather than waiting until May 12, 2016. The Supreme Court has made clear that in any conflict between First Amendment rights and regulation, courts "must give the benefit of any doubt to protecting rather stifling speech," and that "the tie goes to the speaker, not the censor." *Wisc. Right to Life*, 551 U.S. at 469, 474. "The harm and difficulty of changing a regulation cannot be said to outweigh the violation of constitutional rights it perpetuates. It would be far worse that an election continue under an unconstitutional regime than the [government agency] experience difficulty or expense in altering that regime." *Foster v. Dilger*, No. 3:10-CV-00041, 2010 WL 3620238, at *7 (E.D. Ky. Sept. 9, 2010) (not designated for publication). Moreover, "Defendant's legitimate interests can be protected by the reporting statutes if preliminary injunctive relief is granted." *Free Market Foundation*, 540 F. Supp.2d at 759.

V. Effect on the Public Interest

The public itself is harmed when political speech is curtailed. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which

information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Therefore, "injunctions protecting First Amendment freedoms are always in the public interest." *Texans for Free Enter.*, 732 F.3d at 539. *See also Laredo Rd. Co. v. Maverick County, Tex.*, 389 F. Supp.2d 729, 748 (W.D. Tex. 2005) ("[B]ecause its rights to free speech, as protected by the First Amendment, will be curtailed…[t]he granting of a preliminary injunction in favor of the Plaintiff will not disserve the public's interest, as a government's constituents have a vested interest in their government enacting constitutionally sound laws.").

VI. The Court Should Waive the Bond Requirement of FRCP 65(c)

Under Federal Rule of Civil Procedure 65(c), "[t]he amount of security required is a matter for the discretion of the trial court; it may elect to require no security at all." *Corrigan Dispatch Co. v. Casa Guzman*, 569 F.2d 300, 303 (5th Cir. 1978). Cases raising constitutional issues are particularly appropriate for a waiver of the bond requirement. *See Ogden v. Marendt*, 264 F. Supp.2d 785, 795 (S.D. Ind. 2003); *Smith v. Bd. of Elec. Comm'rs*, 591 F. Supp. 70, 71 (N.D. Ill. 1984). Because "there will be no monetary or other damages to any Defendant if a preliminary injunction is granted and later dissolved," the bond requirement is unnecessary. *See Free Market Found. v. Reisman*, 540 F. Supp.2d at 759. Accordingly, Plaintiff respectfully requests that the court waive the bond requirement in the event that it grants Plaintiff's motion for preliminary injunction.

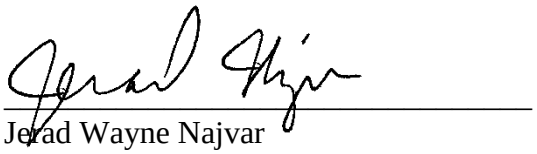
CONCLUSION

For the reasons shown, after entertaining the City's response and hearing, this Court should grant a preliminary injunction preventing Defendants from enforcing the Blackout Period,

the article III, § 8(A)(3) Aggregate Limit, and the Dissolution Requirement of the City of Austin Charter and Code of Ordinances against Plaintiff or against any other candidate.

Dated July 28, 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Memorandum in Support of Motion for Preliminary Injunction, and accompanying exhibits, have been served upon the following on July 28, 2015 as follows, and will be served with the complaint:

By email: anne.morgan@austintexas.gov
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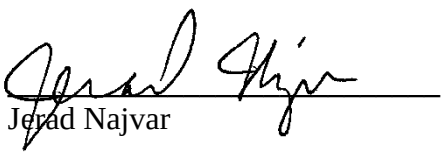

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