No. _____

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

PETITION FOR WRIT OF CERTIORARI

Jerad Wayne Najvar
Counsel of Record
NAJVAR LAW FIRM, PLLC
2180 North Loop West
Suite 255
Houston, Texas 77018
(281) 404-4696
jerad@najvarlaw.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Questions Presented

Whether Austin's $350 base limit on campaign contributions violates the First Amendment; and

Whether Zimmerman established standing to challenge Austin's aggregate limit on the total amount of campaign contributions a candidate may accept "from sources other than natural persons eligible to vote in a postal zip code completely or partially within the Austin city limits."

Parties to the Proceeding

Petitioner is Donald S. Zimmerman. Respondent is the City of Austin, Texas, a municipal corporation.

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The Fifth Circuit's opinion is reported at 881 F.3d 378, and reproduced at App. 1-31. The order of the Fifth Circuit denying rehearing and rehearing en banc, with dissent, is reported at 888 F.3d 163 and reproduced at App. 59-74. The District Court's findings of fact and conclusions of law are unreported but reproduced at App. 32-53, and the District Court's final judgment is unreported but reproduced at App. 54-55. The District Court's order denying Zimmerman's Rule 59(e) motion is unreported but reproduced at App. 56-58.

Jurisdiction

The Fifth Circuit entered its judgment on February 1, 2018. App. 1. It denied a timely petition for rehearing and rehearing *en banc* on April 18, 2018. App. 59. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The text of the First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The text of Article III, Section 8 of the Austin City Charter is set forth in full in App. 75-81. The text of subsection 8(A) is as follows:

§ 8. – LIMITS ON CAMPAIGN CONTRIBUTIONS AND EXPENDITURES.

(A) Limits On Contributions to Candidates.

(1) No candidate for Mayor or City Council and his or her campaign committee shall accept campaign contributions in excess of $300 per contributor per election from any person, except for the candidate and small-donor political committees.

(2) Each candidate may authorize, establish, administer, or control only one campaign committee at one time.

(3) No candidate and his or her committee shall accept an aggregate contribution total of more than $30,000 per election, and $20,000 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. The amount of the contribution limit shall be modified each year with the adoption fothe budget to increase or decrease in accordance with the most recently published federal government, Bureau of labor Statistics Indicator, Consumer Price Index (CPI-W U.S. City Average) U.S. City Average. The most recently publsiehd Consumer Price Index on May 13, 2006, shall be used as a base of 100 and the adjustment thereafter will be to the nearest $1,000.00.

Indexed for inflation, at the time suit was filed and at trial, the Base Limit (§ 8(A)(1)) was $350 and the

Aggregate Limit (§ 8(A)(3)) was $36,000 (and $24,000 in a runoff). App. 3.

The text of relevant definitions in Texas Election Code § 251.001 is as follows:

> (2) "Contribution" means a direct or indirect transfer of money, goods, services, or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a transfer. The term includes a loan or extension of credit, other than those expressly excluded by this subdivision, and a guarantee of a loan or extension of credit, including a loan described by this subdivision. The term does not include:
>
> > (A) a loan made in the due course of business by a corporation that is legally engaged in the business of lending money and that has conducted the business continuously for more than one year before the loan is made; or
> >
> > (B) an expenditure required to be reported under Section 305.006(b), Government Code.
>
> (3) "Campaign contribution" means a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure. Whether a contribution is made before, during, or after an election does not affect its status as a campaign contribution.
>
> (4) "Officeholder contribution" means a contribution to an officeholder or political

committee that is offered or given with the intent that it be used to defray expenses that:

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

(B) are not reimbursable with public money.

(5) "Political contribution" means a campaign contribution or an officeholder contribution.

Statement of the Case

Factual Background

In the summer of 2015, Petitioner Zimmerman wanted to immediately raise campaign funds for use in responding to the political attacks and to prepare for his 2016 re-election campaign, but he ran headlong into the campaign fundraising limits and prohibitions of the Austin City Charter. Among other restrictions, the Charter imposed a severe, $350 Base Limit on contributions to candidates; an Aggregate Limit on the total a candidate may accept from any contributors who were not "eligible to vote" within Austin or its environs; a "Blackout Period" flatly prohibiting the solicitation or acceptance of political contributions until the last six months before an election; and a "Disgorgement Requirement" mandating the disgorgement of campaign funds leftover after an election. App. 2-3. To understand these restrictions, one must first understand the state-law context in which they apply.

State law sets out certain requirements applicable to all candidates for "public office" in Texas, Tex. Elec. Code § 251.001(1) (defining "candidate"), including

reporting and disclosure requirements, and defines relevant terms. "Campaign contributions" are contributions "offered or given with the intent that [they] be used in connection with a campaign for elective office[.]" *Id.* § 251.001(3). "Officeholder contributions" are "contribution[s] to an officeholder or political committee that [are] offered or given with the intent that [they] be used to defray expenses that: (A) are incurred by the officeholder in performing a duty or engaging in an activity in connection with the office; and (B) are not reimbursable with public money." *Id.* § 251.001(4). "Political contribution" is an umbrella term that "means a campaign contribution or an officeholder contribution." *Id.* § 251.001(5). Austin does not purport to provide its own definitions of any of these terms, *see* AUSTIN, TEX. Code § 2-2-2 (Definitions) (ROA.12298),[1] but employs the terms in its Charter. Moreover, as will be relevant below, the Austin Code of Ordinances states that officeholders "may maintain an officeholder account in accordance with the Texas Election Code," and, in addition to expenditures for official staff and the like, specifically authorizes expenditures from such accounts for the purpose of "newsletters," "nonpolitical advertising," and even "campaign contributions" to other candidates. Code § 2-2-41; *see* App. 6.

The four challenged provisions were first approved pursuant to a charter amendment election in 1997. App. 2; see ROA.12368-72 (1997 Ordinance). The initial Base Limit was set at $100, and the Aggregate Limit at $15,000. *Id.* The language of the Base Limit,

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[1] "Charter" and "Code" refer to the City of Austin Charter and Code, unless otherwise indicated.

providing that "No *candidate* for Mayor or City Council and his or her campaign committee shall accept campaign contributions in excess of one hundred dollars," was roughly paralleled by the language of the Blackout Period, providing that "Any *candidate* for Mayor or City Council, and his or her committee, shall neither solicit nor accept contributions except during the last one hundred eighty…days preceding a scheduled election[.]" ROA.12368-69 (emphasis added).

While the 1997 charter amendments were the result of a citizen initiative, in 2006, the *City Council* initiated and drafted amendments yielding the present text of the challenged provisions, which were also approved by voters. App. 33. First, the Council amended Section 8(A) to increase the dollar levels of the Base and Aggregate limits (to $300, and $30,000/$20,000 for runoffs, respectively) and index them for inflation. ROA.12391-95 (2006 Ordinance). Second, City Council created an exception to the disgorgement provision so that successful candidates (*i.e.*, officeholders) could retain $20,000 "for…officeholder expenditures" (§ 8(F)(3), (6)) (while unsuccessful candidates still had to disgorge all campaign funds). Third, the 2006 amendments added a provision permitting former officeholders to "solicit and accept political contributions" to retire debt and unreimbursed personal expenditures that had been incurred for officeholder purposes. § 8(F)(5).[2] Fourth,

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[2] Charter art. III, § 8(F)(5) provides in full:

> An officeholder who, after an election, has unpaid expenses remaining, or who has unreimbursed campaign expenditures from personal funds that were made with the

City Council amended the language of the Blackout Period (§ 8(F)(2)) so that it expressly applied to officeholders, and replaced the term "contributions" with the term "political contributions." App. 77-78.

Lastly, the City Council added current § 8(H) (the "litigation fund exception"), providing that "[n]othing in [article III]"—which includes the Base Limit and the Aggregate Limit—"applies to the solicitation, acceptance, or use of contributions for" litigation undertaken in a person's capacity as candidate or officeholder. App. 80; ROA.12394.

Layered atop the Base and Aggregate limits, Austin law also forecloses other avenues contributors might otherwise have available to support or associate with favored candidates. *Cf. Buckley v. Valeo*, 424 U.S. 1, 23, 28-29 (1976) (per curiam). Contributions *to* "any specific-purpose political committee supporting or opposing a candidate in a city election" are limited by the same Base and Aggregate limits applicable to Austin candidates. Code § 2-2-54. Therefore, any two or more persons wishing to pool resources and support an Austin candidate are limited to contributing $350 to such effort.[3] Any such specific-purpose committee, or

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> intent to seek reimbursement from political contributions, may solicit and accept political contributions after leaving office until the unpaid expenses are paid and the unreimbursed expenditures are reimbursed. An officeholder may also pay the unpaid expenses and reimburse the unreimbursed expenditures from political contributions received during a subsequent campaign.

[3] Under Texas law, if a group of one or more persons decide to pool resources to support an identified candidate for Austin office, they

any general-purpose committee or other entity, in turn may only contribute $350 *to* an Austin candidate, including expenditures coordinated with the candidate. Charter art. III, § 8(A)(1) (Base Limit restricting contributions from "any person"); Code §§ 2-2-17 (defining "person" to include political committees); 2-2-2(10) (defining "independent expenditure"). Every dollar worth of expenses incurred by a volunteer in activity coordinated with the campaign counts against the $350 limit, because there is no exception under Austin law for any amount of volunteer-incurred expenses. *See* Code § 2-2-2(6), (12); *cf.* 52 U.S.C. § 30101(B)(ii)-(iv) (federal campaign finance statute excluding from the definition of "contribution," *inter alia*, volunteer travel expenses up to $1,000 and payment by political party for campaign materials used in connection with volunteer activities). Moreover, because municipal races are nonpartisan in Texas, candidates cannot rely on the value of a party brand on the ballot, and the party organization is a general purpose committee subject to Austin's $350 limit on direct or coordinated support.

Zimmerman filed suit in July 2015, seeking declaratory and injunctive relief, nominal damages, and attorneys' fees, costs and expenses. The district court effectively denied injunctive relief, but set an accelerated trial schedule. After discovery, a two-day

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are defined as a "specific purpose committee," *see Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 415 (5th Cir. 2014), and must register with Austin. *Id.* at 430 n.27 (recognizing mandatory nature of committee label); Tex. Elec. Code §§ 252.001, .006.

trial was held in December 2015, followed by post-trial briefing.

Trial – Base Limit

At least three supporters affirmed their desire to contribute in excess of the Base Limit, at levels of $2,500, $500, and $500-$1,000, respectively. ROA.1061; 14130; 14186. Zimmerman first argued that the City could not justify a severe $350 limit on contributions given to further campaign speech while the same contributor was free to give $1,000,000 to an incumbent to cover officeholder expenses, or for a candidate/officeholder litigation fund, or to help a former officeholder retire debt (and then potentially run again).

Zimmerman argued that the plain text of the Base Limit captures only "campaign contributions," leaving "officeholder contributions" unlimited, thus imposing a facially content-based speech restriction subject to strict scrutiny under *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015). The City argued that the Base Limit should be read to capture officeholder contributions, despite its text, because § 8(G) of the charter provides that "[a]ny incumbent mayor or councilmember is subject to the regulations applied to candidates for the office he or she holds." *See* App. 7. Zimmerman pointed out that § 8(G) adds nothing to the analysis, because "candidates," under the Base Limit, are still only prohibited from accepting "campaign contributions" in excess of $350, Charter art. III, § 8(A)(1), not officeholder contributions.

Zimmerman also raised the ability of candidates and incumbent officeholders to accept unlimited litigation fund contributions pursuant to the express

exception in § 8(H). Zimmerman even testified that he had already received legal fund contributions of $5,000 and $3,500, and a pledge of $4,000 from another contributor. ROA.695. Debt retirement contributions given to *former* officeholders are also clearly unimpeded by the Base Limit (*see* n.__ *supra* (reproducing Charter art. III, § 8(F)(5)), even if one were inclined to accept Austin's argument as to the effect of § 8(G) on the scope of the Base Limit, because § 8(G) only applies to "incumbent[s]." The City's own witnesses admitted that contributions to retire officeholder debt by former officeholders contribute to the very same appearance of corruption that purportedly provides the justification for limits on campaign contributions. ROA.955 (Professor Krasno); ROA.884-85 (Fred Lewis). Zimmerman argued that these exceptions for legal fund and debt retirement contributions invalidated the Base Limit for underinclusiveness, even under intermediate scrutiny, but the City never defended them at trial.[4]

The District Court gave no indication that it agreed with Austin's argument that the Base Limit should be read as if it applied to officeholder contributions. Instead, the trial court wrote that the Base Limit "is dissimilar from the regulations in *Reed*" because it "applies to all campaign contributions and does not distinguish between types of speech or ideas conveyed." App. 6. The trial court failed entirely to address the exceptions for litigation funds and former officeholder debt retirement. *Id.* at 6-10.

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[4] Instead, the City argued Zimmerman lacked standing to discuss the effect of these exceptions. *See* City Brief on Appeal at 45 n.23.

Zimmerman's second main argument against the Base Limit is that Austin lacks a sufficient government interest for its severe limit of $350 because it is so low that it could not possibly be perceived as addressing any threat of *quid pro quo* corruption.

Zimmerman argued that, given the extremity of Austin's $350 limit, and the foreclosure of the alternative avenues of association so critical to *Buckley*'s analysis, the Base Limit imposes a far heavier burden on associational rights than that considered in *Buckley*, and Austin bears a heavier burden to demonstrate that its $350 limit is calibrated to address the cognizable threat of *quid pro quo* corruption. *See* Zimmerman brief 51-52.

The City designated three witnesses as experts to testify as to the relation between the challenged provisions and the *quid pro quo* threat. See ROA.871; 1003. They acknowledged that they could not point to even a single incident involving an actual quid pro quo. ROA.176-77 (D. Butts: "I'm not aware of anyone taking money and then changing their vote or, you know, all of a sudden deciding, yeah, I'm with you now or any of that kind of stuff."). Lewis and Butts testified only to alleged general perceptions of the appearance of corruption related to certain individuals and firms seeking business with the City in the 1990s. ROA.842-43, 872-73, 970, 1004-08. Likewise, the City's paid expert, Professor Krasno, only addressed base limits in a general way. ROA.891-94; *see also* ROA.1378-1405 (expert report). Neither Fred Lewis nor David Butts were aware of any analysis the City performed in 2006 to arrive at its level of $300. ROA.872, 1007. Krasno

made no attempt to defend the particular $350 level Austin has imposed. ROA.951.

In fact, the City made a frank concession in response to an interrogatory, admitting that "the City has avoided setting the limit at a point so high that individuals making contributions *at higher levels* either are *or are reasonably perceived to be* creating conflicts of interest when a city council member acts in his or her official capacity in some manner." ROA.1149-50 (emphasis added).[5] The City, in its own words, "does not contend that the current amount of $350 per individual presents a danger of real or apparent quid pro quo corruption." *Id*.

All further evidence in the record is consistent with Austin's candid admission that $350 is so low that it is not even perceived to be targeted to the threat of corruption. The *Austin Chronicle* wrote immediately before the November elections that Austin's "extremely low" base limit incentivizes spending by outside groups, and the "low contribution limit" advantages "wealthy candidates" who can "self-finance." ROA.1212-15. The editorial board of the *American-Statesman*, Austin's primary daily newspaper, while consistently critical of Zimmerman, nonetheless admitted that it did "not object to a modest loosening of the $350 limit." ROA.1223. City witness Butts was quoted twice in news reports stating that the limit should be higher. ROA.1178 (*American-Statesman* citing Butts and "several other political consultants" as favoring

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[5] This interrogatory response was admitted at trial without limitation. ROA.658.

increased limits); ROA.1198. Butts acknowledged this and reiterated it at trial. ROA.1006-08.

Aside from the testimony of Butts and Lewis and their examples of "large" contributions between $1,000 and $10,000 (in 1997 dollars), the City relied heavily on the fact that the 1997 measure was pushed by a group calling itself "Austinites for a Little Less Corruption! a/k/a No More Corruption," and was approved with 72% of the vote. App. 2. However, the City's expert, Professor Krasno, admitted that the word "corruption," as used in the group's name, "mean[s] different things to different people," that there was no evidence (polling, exit interviews, or the like) indicating whether voters in 1997 cast their ballots for a permissible or impermissible purpose, and that his view of what the margin of victory for the charter amendments means in terms of public perception of corruption was merely his "assumption" and "speculation." ROA.944-46.

Finally, Zimmerman argued that, given that the City's testimony was limited to an alleged appearance of corruption arising from large contributions from those with business before the Council, Austin can address such threat with a more narrowly-tailored limit applicable to City contractors, without unnecessarily abridging the rights of all contributors. See Zimmerman br. at 62.

Trial – Aggregate Limit

The Aggregate Limit restricts total contributions from all persons not "eligible to vote" in a certain zip code envelope. App. 75. Texas law provides that "to be eligible to vote in an election in this state, a person must" be a "qualified voter," Tex. Elec. Code § 11.001, and to be a "qualified voter," one must be a "registered voter." *Id.* § 11.002. By its terms, then, even contributions from residents of a permissible ZIP code who are not registered to vote count against the Aggregate, as do all contributions from non-natural persons (all entities or associations, including political committees).

Zimmerman wanted to aggressively solicit contributions from like-minded conservative donors *without respect to* whether they qualified as registered voters within Austin's ZIP code list. ROA.684-85 (trial); ROA.548-49 (post-trial verification). However, the Aggregate Limit caused him to shelve these plans unless the provision were to be enjoined. Zimmerman argued that he had standing to challenge the limit for several reasons.

First, undertaking his desired fundraising strategy would have required an upfront investment of capital ($5,000 for a list of donors, along with fees for a fundraiser and social media specialist), as well as valuable campaign time. ROA.548 ¶4. Zimmerman decided that devoting his scare resources—time and money—to this plan was not a wise campaign decision because, *even if it were completely successful*, the maximum potential return was limited. *Id*.

But even with Zimmerman's desired plans suspended awaiting an injunction, when the fundraising window opened, the Aggregate Limit imposed compliance burdens on the campaign. Zimmerman's campaign manager Tim Kelly's uncontradicted statement submitted with the Rule 59(e) motion stated that "trying to comply with the Aggregate Limit has burdened the campaign from the day we first were able to begin fundraising continuing through today," because "[c]hecking whether the zip code is on the list takes at least some time which I could be using for other campaign activities." ROA.553 ¶21; *see also* ROA.550 ¶8. As of August 17, 2016, Kelly calculated "$9,979 in contributions that we know count against the Aggregate Limit because they came from contributors whose zip code is outside the envelope or…the contributor is a political committee." ROA.553 ¶23. For contributors who had given an address *within* the envelope, Kelly stated that he had not yet checked their voter registration status, and explained why it would take approximately 42 hours to do so. ROA.550-53. With the law in place, if Zimmerman had actually paid for the contributor list and begun targeting out-of-Austin contributors, Kelly would have had to immediately devote those 42 hours to figure out how much *more* of the already-collected money counted against the Aggregate (from contributors within the envelope but not registered to vote), and then continually and carefully monitored the residence and registration status of every additional check. Zimmerman stated that

> If the Aggregate Limit were not in place, I *would have already* prepared substantive fundraising appeals describing my political principles in

> relation to specific issues in Austin, and *distributed* those appeals to lists of potential contributors without respect to their place of residency or voter registration status.

ROA.548 ¶3 (emphasis added).

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The trial court upheld the Base Limit, and held that Zimmerman lacked standing to challenge the Aggregate Limit.[6] App. 52-53. Zimmerman filed a Rule 59(e) motion to amend the judgment (as referenced above), challenging the District Court's holdings as to both provisions. ROA.536. Following denial of this motion on October 26, 2016, App. 56, Zimmerman appealed.

The Fifth Circuit's Decision

The Fifth Circuit panel, on February 1, 2018, upheld the District Court's ruling that the Base Limit was constitutional, and that Zimmerman lacked standing to challenge the Aggregate Limit. *Zimmerman v. City of Austin, Tex.*, App. 1.

As to the Base Limit, the Fifth Circuit did not attempt to defend the trial court's holding as to *Reed*. Instead, it avoided the issue by "defer[ring]" to Austin's suggested interpretation that, "although subsection (A) refers only to 'campaign contributions,' it is intended to reach any contribution to a candidate or incumbent

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[6] The District Court declared the Blackout Period and Dissolution Requirement facially unconstitutional and permanently enjoined their enforcement. App. 52-53. Those provisions are not at issue in this petition.

officeholder." App. 7. "In light of that interpretation," the panel wrote, "the base limit does not constitute a content-based regulation on speech." *Id*.

The Fifth Circuit, like the trial court, did not address the additional and undisputed exceptions for litigation funds and former-officeholder debt retirement.

Regarding scrutiny of the dollar level of the Base Limit, the Fifth Circuit ignored Zimmerman's argument that the extremely low level coupled with the foreclosure of alternate avenues required heightened scrutiny, and simply parroted *Buckley* for the proposition that contribution limits "entail[] only a marginal restriction upon the contributor's ability to engage in free communication" and "involve[] little direct restraint," App. 8-9 (quoting *Buckley*, 424 U.S. at 20, 21), and said that "[w]hen following a well-trodden path, the evidentiary bar is not high." App. 10. The Fifth Circuit noted the district court's reliance on evidence of "a perception of corruption among Austinites before the limit's enactment in 1997" and the 72% vote for the amendments, which the panel characterized as "exactly the kind of evidence that the Supreme Court in *Shrink Mo.* found clearly sufficient." App. 10.

The panel then rejected Zimmerman's argument that the anti-corruption interest does not support a limit of $350, finding that this argument "conflates *Buckley*'s government-interest inquiry with its tailoring inquiry." App. 11. "Concluding that Austin had [established]…an interest" in setting *a* base limit, the Fifth Circuit eschewed any analysis of whether $350 was calibrated to the kind of "large" contributions that

concerned the *Buckley* Court. App.11-12. Instead, the panel proceeded to discuss whether a limit of $350 "'prevent[s] candidates from 'amassing the resources necessary for effective advocacy,'" that is, for tailoring under *Randall/Nixon*, App. 12-14, despite the fact that Zimmerman expressly disclaimed any *Randall*-style tailoring-to-permit-amassing-resources argument. *E.g.*, Zimmerman Brief 51. In an incomplete analysis, the Fifth Circuit wrote that there "are no…danger signs" under Randall, noting that Austin's limit is set "per election, not per election cycle," "indexed for inflation," and "on par with limits imposed in other states and localities and upheld by other courts." App.12-13. As to the last point, the Fifth Circuit claims—erroneously—that "in *Shrink Mo.* the Supreme Court upheld Missouri's $275 limit…on contributions to candidates for any office representing fewer than 100,000 people," which "was equivalent to approximately $390 at the time this appeal was filed." App. 13.

As to the Aggregate Limit, the Fifth Circuit held that Zimmerman's decision to suspend his fundraising plans and "forego solicitations is not an injury sufficient to confer standing," claiming that Zimmerman "failed to establish a serious intention to engage in conduct *proscribed by law*." App. 16 (emphasis added). Without acknowledging the nearly $10,000 Zimmerman had amassed against the Aggregate from outside the zip code envelope, and never opining what the actual total was if Zimmerman had counted those *within* the envelope but *not registered*, the panel, just as the district court, focused on the *assumption* that Zimmerman had not raised funds close enough to the $36,000 limit to justify a

credible threat of actual prosecution. The Fifth Circuit also suggested that Zimmerman would only have standing if he had spent the time and money to execute his plans and accepted funds up to the limit, stating: "[E]ven if the solicitations had yielded a flood of out-of-area contributions, Zimmerman could have demonstrated a serious interest in *violating the limit* while still protecting himself from prosecution by not accepting contributions once he reached (or neared) the limit," and "the risk that soliciting funds from persons outside of the Austin area *would have resulted in prosecution* is speculative and depends in large part on the actions of third-party donors." App. 18.

The panel then concluded that the compliance burdens did not confer standing either. App. 20-21.

Petition for rehearing

Zimmerman timely petitioned for panel and en banc rehearing, and the City responded to the en banc petition, pursuant to the Fifth Circuit's request. Zimmerman's petitions for panel and *en banc* rehearing were denied on April 18, 2018. App. 59.

Two judges dissented from the denial of rehearing *en banc*. App. 60. Judge James C. Ho, joined by Judge Edith H. Jones, would have found the Base Limit invalid under current Supreme Court precedent, even under "closely-drawn" scrutiny, because Austin produced insufficient evidence to support a base limit at such a low level. App. 65-66. Judge Ho began by noting how the broader concept of corruption, illustrated in *Shrink*, was clarified and limited to *quid pro quo* corruption in *Citizens United v. FEC*, 558 U.S. 310, 360-61, and *McCutcheon v. FEC*, 134 S. Ct. 1434,

1451. App. 62. Judge Ho then noted that *quid pro quo* corruption must be established by evidence rather than "mere conjecture," and said that "[t]his standard is fatal to Austin's $350 contribution limit," because "[i]t is at best 'conjectural' that a $351 contribution to help defray the costs of campaign speech would create a genuine risk of an unlawful quid pro quo exchange," "particularly because the record is devoid of any evidence to the contrary." App. 63. Judge Ho wrote that "[t]he district court merely credited the City's assertion that voters in 1997 had a 'perception' of 'inordinate influence' based on 'large contributions, in the $1000-2500 range'—which is $1,420-$3,545 in 2015 dollars." *Id*. Judge Ho described the City's defense as relying on "amorphous concerns about 'inordinate influence'—not *quid pro quo* corruption," and concluded that it "would not remotely justify a substantially lower contribution limit of $350—less than 25 percent of the 'large contributions' that concerned Austin voters." *Id.* He also pointed out the panel's error in relying on the $275 limit referenced in *Shrink*, as the statewide $1,075 limit was the only limit at issue before the Supreme Court in *Shrink*. App. 64.

Reasons for Granting the Petition

I. The Fifth Circuit's Failure to Invalidate the Base Limit for Underinclusiveness Conflicts With This Court's Precedents, Under Strict and Intermediate Scrutiny.

While the severe $350 Base Limit restricts "campaign contributions," it does not apply to "officeholder contributions," debt-retirement contributions to former officeholders (who can retire debts from previous officeholder activities and then run for office again), or litigation-fund contributions. The Fifth Circuit should have held the limit invalid for underinclusiveness, and its failure to do so conflicts with Supreme Court and circuit precedent, under strict or closely-drawn scrutiny.

A. The Fifth Circuit's decision to adopt Austin's mere litigation position, reading the Base Limit as if it applied to officeholder contributions, conflicts with decisions of this Court.

Because the Base Limit is facially content-based, severely restricting contributions given for campaign speech but allowing unrestricted contributions to incumbents for newsletters and other speech, the Fifth Circuit should have applied strict scrutiny under *Reed*, 135 S. Ct. at 2228 ("A law that is content based on its face is subject to strict scrutiny …"). This would have required Austin to demonstrate that its $350 limit on campaign contributions was narrowly tailored to combat *quid pro quo* corruption despite allowing unlimited contributions to incumbents—a task Austin plainly would have failed. But the Fifth Circuit saved

Austin from this burden by adopting the City's mere litigation position, and reading the Base Limit as if it applied to officeholder contributions. This holding is irreconcilable with Supreme Court precedent.

This Court has recognized that *authoritative* constructions of a state or local law may save it from a First Amendment attack, but that such constructions must come from the state or local authorities. *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)). An authoritative construction might be shown by "well-established practice," *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 (1988), but that requires "a well-understood and uniformly applied practice…that has virtually the force of a judicial construction." 486 U.S. at 770 n.11. Other cases illustrate the type of evidence that can satisfy this standard. *See Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (rejecting facial challenge by relying on trial court's express factual findings after five-day hearing evidencing city policy); *Nationalist Movement*, 505 U.S. at 131, 131 n.9 (recognizing that "the county has made clear how it interprets and implements the ordinance" based on an official vote of the county commissioners to amend a particular form). Here, the trial court made no factual finding that Austin had established a practice of enforcing the Base Limit against officeholder contributions. At best, the City relies on a lack of any policy whatsoever on this point, *see* City's Response to Pet. for Reh'g En Banc 6-7, but the *lack* of an authoritative construction cannot support the

counter-textual reading Austin urges. *City of Lakewood*, 486 U.S. at 770 n.11 ("[W]e have never held that a federal litigant must await a state-court construction or the development of an established practice before bringing the federal suit.").[7]

Nor can the Fifth Circuit's gloss be explained as a reasonable reading of an ambiguous text. Section 8(G) cannot be interpreted to bootstrap the word "officeholder" into § 8A(1), because if that is what it meant, then it would render the Council's 2006 amendment of § 8(F)(2)—to expressly refer to officeholder contributions—unnecessary surplusage. And because Council declined to add "officeholder" into the Base Limit when it added it into the Blackout Period, there was no need to add another reference to the state definition, as in § 8(F)(1).

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[7] The chair of the city's Ethics Review Commission testified that candidates with questions about interpretations of campaign finance provisions often ask the city clerk's office, which "refers them to the existing candidate packet…but the clerk doesn't really answer substantive questions beyond that." ROA.14143 (38:16-18). The "candidate packet" (index to contents at ROA.1234-35) *does not make any representation that the Base Limit applies to officeholder contributions*; instead, it provides the state reporting form and instruction guide (ROA.1236-87), and affirmatively directs candidates to the TEC's "Campaign Finance Guide for Candidates and Officeholders Who File With Local Filing Authorities," ROA.1235, which explains that "[t]here are two types of political contributions: campaign contributions and officeholder contributions." *See* unchanged) available at https://www.ethics.state.tx.us/guides/coh_local_guide.pdf.

B. The Fifth Circuit's decision to uphold the Base Limit, ignoring the exceptions for debt retirement and legal-fund contributions, conflicts with Supreme Court and circuit court decisions regarding underinclusiveness under intermediate scrutiny.

There is no dispute that contributions for litigation funds, and contributions to help *former* officeholders retire debt, are unlimited. As to debt retirement, the City's own witnesses admitted that contributions given to retire officeholder debt present the very same threat of corruption as campaign contributions. ROA.955; ROA.884-85. As to the litigation-fund exception, Zimmerman himself—*while sitting as the District 6 incumbent*—accepted contributions of $5,000 and $3,500 for his legal fund. ROA.695.

In the commercial speech context, this Court has described the required tailoring as "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (quoting *Fox*, 492 U.S. at 480). *McCutcheon* cited the same language. 134 S. Ct. at 1456-57. In *Greater New Orleans*, the Court struck down federal restrictions on casino gambling advertisements under this test, finding that "there was little chance that the speech restriction could have directly and materially advanced its aim, while other provisions of the same Act directly undermined and counteracted its effects." *Id.* at 193 (internal quotations omitted). The Court found that "the

Government present[ed] no sound reason why [the distinctions in the law] bear any meaningful relationship to the particular interest asserted[.]" *Id.* Just last term, the Court invalidated two state statutes for underinclusiveness under intermediate scrutiny. *Nat'l Inst. of Family and Life Advocates v. Becerra*, 585 U.S. __, slip op. at 15 (2018) (*NIFLA*); *Minnesota Voters Alliance v. Mansky*, 585 U.S. __, slip op. 12-13 (2018). In *NIFLA*, the Court found that "the licensed notice is not sufficiently drawn to achieve" the government interest in informing low-income women about certain services "even [under] intermediate scrutiny," because the statute required only some clinics to provide the notice and exempted other clinics serving low-income women. *NIFLA*, slip op. at 14-15. In *Mansky*, considering restrictions applicable to polling places in Minnesota, a "nonpublic forum" in which the "requirement of narrow tailoring" does not even apply, the Court still held that "the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out." *Mansky*, slip op. 12-13.

The City has the burden to justify the lines it draws, *see NIFLA*, slip op. 15, but it cannot possibly justify a severe $350 limit on campaign contributions to all candidates (many of whom are not incumbents and will never exercise government authority) while permitting unlimited contributions to incumbents for legal expenses, where the potential for corruption is more acute.

II. Base Limit Too Low

The Fifth Circuit erred in ignoring Zimmerman's actual argument: Austin's $350 Base Limit is so low that it cannot reasonably be perceived as sufficiently related to the interest *Buckley* identified—"the problem of *large* campaign contributions[,] *the narrow aspect of political association where the actuality and potential for corruption have been identified*[.]" 424 U.S. at 28 (emphasis added).

A. The Fifth Circuit's holding—that the dollar level of a base limit is *irrelevant* to whether it is sufficiently related to the government interest—marks an unwarranted expansion of the interest *Buckley* identified.

The Fifth Circuit refused to engage Zimmerman's argument that, because *Buckley* defined the cognizable interest in terms of "large" contributions, Austin's limit must be analyzed to determine whether it is tailored to that interest, instead holding that such would "conflate[] *Buckley*'s government-interest inquiry with its tailoring inquiry." App. 11. This is the prevailing, potentially universal, view of the lower courts following the Supreme Court decision in *Shrink*. *E.g., Lair v. Motl*, 873 F.3d 1170 (9th Cir. 2017) ("This step of the inquiry is divorced from the actual amount of the limits[.], *reh'g denied*, 889 F.3d 571 (2018). However, this view accords more weight to *Shrink* than *Shrink*—in which the Court did not describe the challengers as raising Zimmerman's argument—will bear. It further ignores the paragraph in *Buckley* in which this tailoring-to-government-interest argument was specifically addressed, 424 U.S. at 30, and ignores

the statements of five justices of this Court in *Randall*, expressing the common-sense view that a limit can be so low that it may not reasonably address the *quid pro quo* interest. 548 U.S. at 261; *id.* at 272-73 (THOMAS, J., concurring).

The *Shrink* Court characterized the challengers' argument as that Missouri had not produced evidence of corruption to support *any* base limit, *see* 528 U.S. at 390-91, and petitioners in *Randall* challenged Vermont's limits as preventing amassing sufficient campaign resources and discriminating against challengers, *see* 548 U.S. at 248 ("In the cases before us, the petitioners challenge Act 64's contribution limits on that basis."). Therefore, it does not appear that the challengers in either case focused their argument on the issue Zimmerman raises, and the Court certainly did not address it directly. Yet the Fifth Circuit's brutal truncation of the tailoring inquiry emanates from *Shrink*'s paragraph stating that *Buckley* "referred…to the outer limits of contribution regulation by asking whether there was any showing that the limits were so low as to impede the ability of candidates to 'amass the resources necessary for effective advocacy,'" 528 U.S. at 397 (quoting *Buckley*, 424 U.S. at 21), and that "the issue in later cases…must go to the *power to mount a campaign* with all the dollars likely to be forthcoming," *id.* (emphasis added); *see also id.* at 395-96. *See* App. 12 (Fifth Circuit citing *Randall*, 548 U.S. at 248-49; *Shrink*, 528 U.S. at 397). Even if these statements are controlling in challenges premised on tailoring-to-prevent-amassing-sufficient-resources, these statements cannot foreclose an argument that a limit is so low that it *does not implicate the government interest at all*. This is

particularly true where the *Shrink* opinion does not directly address the tailoring-to-government-interest argument, but where *Buckley* did, and expressly left the door open for this type of challenge.

One paragraph in *Buckley* directly addressed the petitioners' arguments that the limit was "unrealistically low because much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence," 424 U.S. at 30, and demonstrably did *not* foreclose all such arguments. While *Buckley* said a court should take "no scalpel to probe" a dollar level for "fine tuning," it also recognized that "distinctions in degree become significant…when they can be said to amount to differences in kind." 424 U.S. at 30. In other words, while a court should not nit-pick miniscule distinctions, it must recognize when a dollar level is materially distinguishable from that upheld in *Buckley*. The Court even provided an example, referring to the distinction between *Kusper v. Pontikes*, 414 U.S. 51 (1973) and *Rosario v. Rockefeller*, 410 U.S. 752 (1973). *Buckley*'s reference to *Kusper* and *Rosario* can mean only one thing: it expected courts to recognize the distinction between a "reasonable" and non-arbitrary dollar level, *see Rosario*, *supra*, at 761, and dollar levels that are different "in kind," so low that they unnecessarily "lock" contributors out of associating with supported campaigns at levels that do not represent a reasonable threat of *quid pro quo* corruption. *Cf. Kusper*, 414 U.S. at 61. Thus, *Buckley* did *not* deem all base limits to be sufficiently tailored to the anti-corruption interest, regardless of dollar level.

Indeed, in *Randall*, five members of this Court unambiguously endorsed the principle that a base limit could be set so low that it could not reasonably be thought to address the quid pro quo interest. 548 U.S. at 261 (plurality op.) ("[O]ne might reasonably believe that a contribution of, say, $250 (or $450) to a candidate's campaign was less likely to prove a corruptive force than the far larger contributions at issue in the other campaign finance cases we have considered."); *id.* at 272-73 (Thomas, J. concurring) ("[I]t is almost impossible to imagine that any legislator would ever find his scruples overcome by a $201 donation."). *See also McCutcheon*, 134 S. Ct. at 1446 (noting that "$5,000…hardly raises the specter of abuse [regarding circumvention] that concerned the Court in *Buckley*").

The Court should grant review and correct this mistaken application of *Shrink*, which marks an illogical departure from the fundamental nature of tailoring analysis in constitutional jurisprudence, which should *always* turn on whether the chosen measure is sufficiently related to the interest that purportedly supports it. *See McCutcheon*, 134 S. Ct. at 1445 ("[W]e must assess the fit between *the stated governmental objective* and the means selected to achieve that objective.") (emphasis added). The Fifth Circuit should have recognized that Austin's $350 is different "in kind" and invalid because it is too low to reasonably be perceived as addressing the potential of *quid pro quo* corruption.

B. The Fifth Circuit's failure to appreciate the materially different framework in Austin conflicts with *Buckley* and progeny.

Austin's Base Limit is different "in kind" for another reason: the campaign finance framework surrounding the limit forecloses alternative avenues of associating with candidates, presenting a situation both *Buckley* and *Shrink* expressly stated they were not confronted with.

Buckley's concluding paragraphs upholding the base limit specifically summarize the alternatives available to federal contributors under FECA, and call them "significant[]." 424 U.S. at 28-29. The Court even explained the potential for pooling contributions through a proliferation of PACs ("major special interest groups") and "political funds," each of which was eligible to contribute $5,000 ($21,000 in 2015) to a candidate. *Id.* at 28 n.31. These alternative opportunities for association with the supported candidates "limited [the] effect upon First Amendment freedoms caused by the $1,000 contribution ceiling." *Id.* at 29. *Shrink* referred to these alternatives in rejecting the argument that Missouri's limits were "different in kind" such that they required greater scrutiny. 528 U.S. at 395. The *McCutcheon* plurality again highlighted the importance of these alternate avenues to *Buckley*'s holding on the base limit, and found that the lack of "ready access to alternative avenues for supporting [individuals'] preferred politicians and policies" increased the burden from the aggregate limits. 134 S. Ct. at 1449. The Ninth Circuit carefully analyzed the alternative avenues available in

Montana's scheme. *Lair*, 873 F.3d at 1187. But the Fifth Circuit wholly ignored how Austin's framework forecloses these same alternate avenues.

This table compares the FECA regime surveyed by *Buckley* with that in Austin today, as described at page __, *supra*:

First Amendment Activity	**FECA in 1976 (*Buckley*)**	**Austin**
Contribution to candidate	**$6,248** ($1,000 limit + $500 volunteer expense exception, adjusted to 2015)[8]	$350, with all expenses incurred in coordination with the campaign counted against same limit

[8] *Buckley* itself held expenses incurred by volunteers in coordination with the campaign had "the same" "effect" "as if the person had contributed the dollar amount to the candidate" directly, in the course of upholding FECA's treatment of such expenses as contributions counting against the limit (subject to the $500 exception). 424 U.S. at 36-37. Thus, the value of this $500 exception *must* be considered to view the value of the contribution limit upheld in *Buckley* in context.

Contribution to PAC	**$105,084 aggregate** ($25,000 adjusted to 2015) (to a single PAC or all PACs combined per election cycle)[9]	**$350, including to PACs solely interested in independent expenditures (Code § 2-2-54(A)(1))**
PAC-to-candidate limit	**$21,000** ($5,000 adjusted to 2015)	$350
Party affiliation	Federal candidates associated with party on ballot	Austin candidates not associated with party on ballot (state law)

Thus, the contributor considered in *Buckley* was free not only to give an effective amount of $6,248 (all figures in 2015 dollars) directly to a candidate, she could also give an aggregate $105,000 in unearmarked contributions to one PAC or a series of PACs, *each* of which could contribute $21,000 to any particular candidate, and fund unlimited independent expenditures. The contributor could also associate with the candidate's political party. It was in this context

[9] *See Buckley*, 424 U.S. at 38 (discussing FECA § 608(b)(3), the original version of the aggregate limit, later amended and then invalidated in *McCutcheon*, 134 S. Ct. at 1462).

that *Buckley* held the FECA base limit "focuse[d] *precisely* on the problem of large campaign contributions," but had only a "limited effect" on First Amendment freedoms in light of these additional avenues of association. 424 U.S. at 29 (emphasis added). In the absence of these alternative avenues of association, it follows that Austin's $350 limit is materially more burdensome than any limit previously considered by the Supreme Court, and requires greater scrutiny.

C. The evidence here was insufficient under any level of First Amendment review.

As demonstrated above, Austin's $350 Base Limit is different "in kind" from any base limit this Court has considered, warranting more rigorous judicial engagement, but it should not have survived *any* level of review.

The Fifth Circuit found that the "perception of corruption among Austinites," "as well as the fact that 72% of voters voted in favor of the base limit, is exactly the kind of evidence that the Supreme Court in *Shrink Mo.* found clearly sufficient." App. 10.

First, the Fifth Circuit gives no indication that it appropriately adjusted its analysis in light of the fact that Shrink's important-state-interest analysis has been repudiated as conceiving of the corruption interest too broadly. *See Citizens United v. FEC*, 558 U.S. 310, 359 (2010); *cf. Shrink*, U.S. at 389. To this extent, the Fifth Circuit's analysis conflicts with the Ninth Circuit's in *Lair v. Bullock*, 798 F.3d 736, 746 (9th Cir.

2015), which expressly recognized that a tighter analysis than *Shrink* employed is required.

Second, even if one assumes the City's "perception" evidence supports imposing *a* base limit, does not support a base limit at $350. When describing the types of "large" contributions that contributed to this claimed "perception" at trial, David Butts offered examples of $5,000 and $10,000. ROA.971, 989. The City's attorney hypothesized a danger from a $12,000 contribution. ROA.989. Fred Lewis gave the lowest numbers, recalling "large contributions" between $1,000 and $2,500. ROA.873. In short, everyone was apparently too embarrassed to venture a claim that a contribution lower than that, even anywhere close to $350, reasonably leads to a perception of *quid pro quo* corruption. As Judge Ho pointed out in dissent, the lowest number provided at trial ($1,000) is the equivalent to $1,420 in 2015, and the "'evidence' would not remotely justify a substantially lower contribution limit of $350—less than 25 percent of the 'large contributions' that concerned Austin voters." App. 63; *cf. Randall*, 548 U.S. at 285 ("The limits set by the legislature…accurately reflect the level of contribution considered suspiciously large by the Vermont public.") (SOUTER, J., dissenting).

Neither does the 72% margin of victory for the 1997 amendments bear on whether the Base Limit is constitutional. The Fifth Circuit cited *Shrink* in relying on this evidence, but *Shrink* cited the public vote as "attest[ing] to the perception *relied upon here*," 528 U.S. at 394 (emphasis added), a perception of corruption that, as noted above, has been repudiated. Moreover, the record here directly undermines the idea

that anyone can draw a conclusion from the mere vote margin: Professor Krasno admitted that he can only "assume" and "speculate" as to why Austin voters supported the amendments. ROA.944-46.[10]

The Fifth Circuit's analysis is further tainted because the panel erroneously believed that *Shrink* "upheld Missouri's $275 limit—which, adjusted for inflation, was equivalent to approximately $390 at the time this appeal was filed[.]" App. 13. As Judge Ho pointed out, the only limit this Court upheld in *Shrink* was the (then) $1,075 statewide limit, which is equivalent to $1,525 in 2015 dollars. Even adjusting for population, the *Randall* plurality found it "difficult to treat *Shrink*'s (then) $1,075 limit as providing affirmative support for the lawfulness of Vermont's far lower levels." 548 U.S. at 252.

While the City's evidence was decidedly insufficient, Zimmerman produced evidence that *affirmatively negated* any argument that Austin's $350 reasonably relates to the *quid pro quo* interest.

First, Austin admitted that contributors can give *in excess* of $350 and still not give rise to a "reasonabl[e] perce[ption]" of *quid pro quo* corruption. ROA.1149-50 (interrogatory answer). Regardless of scrutiny, if the government cannot even *claim* that its limit abridging

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[10] At least one district court has recognized that vote results cannot support such an inference in the absence of evidence of what motivated their votes. *See Giant Cab. Co. v. Bailey*, No. 13-CV-426 (D. N.M. Sept. 4, 2013) (finding of fact no. 18) (court has no evidence from which to determine whether voters who approved corporate contribution ban were motivated by permissible or impermissible purpose) (ROA.346).

fundamental rights is set at an appropriate level, the Court's work is done.

Setting aside this candid admission, there is no evidence on which to uphold the choice of $350, even granting appropriate deference. Legislative deference is not supposed to be a blank check to rubber stamp irrational choices; it is premised on the legislature "draw[ing] *reasonable inferences* based on *substantial evidence*." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994) (emphasis added). This should require Austin to point to *some* evidence of a deliberative process resulting in the choice of $300 in 2006. If it had done so, perhaps the Court would have agreed with the City that it should not nit-pick the particular data or discussions that informed such deliberation. But Austin produced *no* evidence of any consideration arriving at $300. If this were a commercial speech case, the Fifth Circuit probably would have ruled for Petitioner on this basis alone. *See American Academy of Implant Dentistry v. Parker*, 860 F.3d 300, 310 (5th Cir. 2017) (rejecting state agency's argument that the restriction on use of term "specialist" advances government interest, noting that "the Board has not done much heavy lifting here" and "offers no justification for the line that it draws" "other than unsupported assertion").

All evidence in this case regarding outside observations of the Base Limit reveal that it is *not perceived* as targeting corruption. News reports, the *Statesman* editorial board, and political consultants otherwise critical of Zimmerman are critical of the Base Limit for being too low and for advantaging self-financing candidates.

Holding Austin's Base Limit invalid for lack of a cognizable interest would not prevent cities from defending appropriate base limits, where they can point to some basis satisfying minimal requirements. But in this case, (1) the City does not even *claim* that it targets cognizable contributions; (2) there is *no* evidence of consideration of an appropriate level; (3) the City's witnesses are too embarrassed to claim anything less than $1,000 (in 1997 dollars) presents an appearance of corruption, and one admits (at trial and to the newspaper) the limit should be higher; and (4) all evidence of outside observations reveal that the limit is *perceived* as too low. Upholding the Base Limit under these circumstances would not reflect deferential review, but effectively no review.

III. The Fifth Circuit's (and Ninth Circuit's) Deferential and Incomplete Scrutiny of Base Limits Reflects An Anomaly in First Amendment Jurisprudence that this Court Should Correct.

This case illustrates that, despite perfunctory recitations of the free speech and associational interests at stake, lower courts still treat the fundamental right to make political contributions—particularly in the review of base limits—as a First Amendment backwater.

This unfortunate conclusion is evident at every step of the analysis here. The Fifth Circuit sidestepped the fatal content-based distinction between campaign and officeholder contributions only by too eagerly accepting Austin's mere litigation position, judicially re-writing the ordinance to avoid addressing it under strict scrutiny. Then, the Fifth Circuit failed even to

acknowledge the two other exceptions Zimmerman raised—both undisputed—for litigation funds and former officeholder debt retirement. Austin did not even defend these distinctions. Such underinclusiveness should have been fatal, just as it has been in many commercial speech and other intermediate-scrutiny cases. Austin cannot justify limiting campaign contributions (including to non-incumbent candidates) to a miniscule amount where contributors can give unlimited amounts to incumbents for legal funds, or help them retire debts and run for office again.

Even without these troublesome exceptions that undermine its purported purpose, the Base Limit should not have survived even a cursory inquiry into whether it was calibrated at a level that addresses the requisite interest without unnecessarily abridging First Amendment rights. The fact that there was no evidence of any discussion or analysis leading City officials to peg the limit at $300 in 2006, and that the City actually responded to Petitioner's interrogatory with an admission that it does not target large contributions, reflects the wilting level of review that at least some government officials believe allows them to truncate these most fundamental rights. As this Court said last term in a different context, "surely a First Amendment issue of this importance deserved better treatment." *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, __ S. Ct. __, No. 16-1466, slip op. __ (2018). The Fifth Circuit, in refusing to engage Zimmerman's argument that $350 is not tailored to the government interest, applied a level of "deference to legislative judgments [that] is inappropriate in deciding free speech issues."

Id.; *see also McCutcheon*, 134 S. Ct. at 1441-42 ("those who govern should be the *last* people to help decide who *should* govern") (emphasis in original). As Zimmerman demonstrated above, this deference is not mandated by *Buckley*, but emanates from a misapprehension of *Shrink*, and this Court can clarify that a meager $350 limit is different in kind from the $6,248 limit *Buckley* upheld, in a framework that also afforded the various alternative avenues identified. Two judges of the circuit court here would have held that Austin's limit fails under even closely-drawn scrutiny. In *Lair*, five judges of the Ninth Circuit, dissenting from the denial of rehearing *en banc*, similarly criticized the *Lair* panel's opinion upholding Montana's base limits as too lenient, in light of this Court's decisions post-dating *Shrink*. *Lair v. Motl*, 889 F.3d 571, 572-73 (9th Cir. 2018); *see also id.* at 574 (calling for the court to apply at least the evidentiary standard applied in "intermediate scrutiny contexts," and citing *Lorillard Tobacco Co. v. Reilly*, 553 U.S. 525, 555 (2001)). In the alternative, if the Court believes it necessary, then *Buckley* and progeny should be overruled to the extent they accord lesser judicial scrutiny to contribution restrictions, and strict scrutiny should apply to all limits on political contributions. The Court granted review in *Shrink* in part given the large number of jurisdictions imposing contribution limits. 528 U.S. at 385. The same is true today, and review should be granted to restore appropriate review.

IV. Aggregate Limit Standing: The Fifth Circuit's Conclusion that Petitioner's Self-Censorship Was Insufficient Injury-in-Fact Conflicts with *Arizona Free Enter. v. Bennett*, Because Motivating a Choice to Avoid Campaign Speech Imposes a First Amendment Injury, Irrespective of the Threat of *Violating* Any Law.

In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), similar to Austin's argument here, the government argued that no First Amendment burden had been demonstrated *because there was no evidence of candidates hovering just below the level of expenditures that would trigger public funds for their opponents*. *Id.* at 744-45. The Court held that "the burden imposed…is *evident and inherent in the choice* that confronts privately financed candidates and independent expenditure groups," and said that it does "not need empirical evidence to determine that the law at issue is burdensome." *Id.* at 746 (emphasis added).

Bennett illustrates the error in the panel's preoccupation with the prospect of Zimmerman suffering *actual prosecution* for exceeding $36,000. The plaintiffs suffered First Amendment injury solely because choosing to follow through with their campaign plans would have incurred certain burdens; there was no law for them to even violate, much less a possibility of prosecution.

Zimmerman's situation is materially indistinguishable: he could only have proceeded with his robust out-of-Austin fundraising program if he had committed to shouldering significant burdens; namely, diverting valuable campaign time to compliance. The

panel's disposition requires that Zimmerman *actually shoulder these burdens* and skate up to the limit to establish standing. But "the injury required for standing need not be actualized." *Davis v. FEC*, 554 U.S. 724, 734 (2008). Even so, Zimmerman irretrievably lost the exercise of his First Amendment rights each day that he withheld his desired plans, having been forced to withhold substantive political communications materially indistinguishable from those withheld in *Bennett*, and to change his targeted fundraising audience, which changes the message he promotes. The panel's focus on prosecution for exceeding the $36,000 mark ignores the principle that "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 558 U.S. at 340.

Conclusion

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

Jerad Wayne Najvar
Counsel of Record
NAJVAR LAW FIRM, PLLC
2180 North Loop West
Suite 255
Houston, TX 77018
281.404.4696
jerad@najvarlaw.com

Counsel for Petitioner