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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-51366

[Filed February 1, 2018]

DONALD ZIMMERMAN,

Plaintiff - Appellant Cross-Appellee

v.

CITY OF AUSTIN, TEXAS,

Defendant - Appellee Cross-Appellant

Appeals from the United States District Court for the Western District of Texas

Before SMITH, BARKSDALE, and HIGGINSON, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

Donald Zimmerman, a former Austin City Councilmember, challenges four provisions of Austin's campaign-finance law: a base limit on contributions to candidates; an aggregate limit on contributions from persons outside of the Austin area; a temporal restriction prohibiting all contributions before the six months leading up to an election; and a disgorgement provision requiring candidates to distribute excess campaign funds remaining at the end of an election.

Following a bench trial, the district court upheld the base limit, concluded that Zimmerman lacked standing to challenge the aggregate limit, and struck down the temporal restriction and the disgorgement provision as unconstitutional abridgements of First Amendment rights. For the following reasons, we affirm.

I.

A.

In 1997, voters in the city of Austin, Texas, approved a ballot initiative to amend the City Charter and add various restrictions on campaign contributions and expenditures. The measure passed with 72% of the vote. It was spearheaded by a group called "Austinites for a Little Less Corruption! a/k/a/ No More Corruption!" and, according to testimony presented at trial, was a response to the public perception that large campaign contributions from land developers and those with associated interests were creating a corrupt, "pay-to-play" system in Austin politics.

Four of the restrictions are at issue here. First, Article III, § 8(A)(1)—the base contribution limit—prohibits candidates for mayor or city council from accepting campaign contributions of more than "$300 per contributor per election from any person," with that amount to be adjusted annually for inflation. Austin, Tex. Code, Art. III, § 8(A)(1). At the time this suit was filed, the applicable limit was $350. Second, § 8(A)(3)—the aggregate contribution limit—prohibits candidates from accepting "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," (which the parties refer to as the "zip code envelope"). *Id.* § 8(A)(3). Those amounts are also subject to adjustment for inflation, and were $36,000 and $24,000, respectively, at the time this suit was filed. Third, § 8(F)(2)—the temporal restriction—prohibits candidates or officeholders from soliciting or accepting political contributions except for during the 180 days before an election. *Id.* § 8(F)(2). Finally, § 8(F)(3)—the disgorgement provision—requires candidates to "distribute the balance of funds received from political contributions in excess of any remaining expenses" to the candidate's contributors, a charitable organization, or the Austin Fair Campaign Fund. *Id.* § 8(F)(3). Candidates may, however, retain up to $20,000 "for the purposes of officeholder expenditures." *Id.* § 8(F)(6).

As will become relevant, Texas law distinguishes between "campaign contributions" and "officeholder contributions." "Campaign contributions" are contributions "to a candidate or political committee that [are] offered or given with the intent that [they] be used in connection with a campaign for elective office or on a measure." Tex. Elec. Code § 251.001(3). "Officeholder contributions" are contributions "to an officeholder or political committee that [are] offered or given with the intent that [they] be used to defray" officeholder expenses. *Id.* § 251.001(4). The catchall phrase "political contribution" includes both campaign contributions and officeholder contributions. *Id.* § 251.001(5). Section 8(A)(1) of Austin's Charter refers to either "campaign contributions," Austin, Tex. Code, Art. III, § 8(A)(1), or "contribution[s]" generally, *id.* § 8(A)(3). Section 8(F), which specifically states that it incorporates the definitions set forth in the Texas

Election Code, *id.* § 8(F)(1), refers to "political contributions." *Id.* § 8(F)(2)–(6).

B.

Donald Zimmerman ran for the District 6 seat on Austin's city council in 2014. District 6, located in northwest Austin, had an estimated population of 92,721 in 2014, with 70,808 eligible voters. Six candidates competed for the District 6 seat. Zimmerman won the general election and the ensuing runoff. After serving a two-year term, he ran for re-election in 2016 and lost.

Zimmerman initiated this lawsuit in July 2015, alleging that the four provisions of the Austin City Charter enumerated above are unconstitutional restrictions on free speech. After a bench trial, the district court held that the base limit was constitutional in light of the city's interest in preventing *quid pro quo* corruption; that Zimmerman did not have standing to challenge the aggregate limit because he did not come close to reaching the relevant limits; that the temporal restriction was an unconstitutional limit on contributions because the city had failed to show that it was sufficiently tailored to serve an interest in preventing *quid pro quo* corruption; and that the disgorgement provision was an unconstitutional restriction on expenditures because the city had failed to show that it was the least restrictive means of preventing *quid pro quo* corruption. The district court permanently enjoined Austin from enforcing the temporal restriction and the disgorgement provision. The parties timely cross-appealed the rulings adverse to them.

C.

"The standard of review for a bench trial is well established: findings of fact are reviewed for clear error and legal issues are reviewed *de novo*." *Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1036 (5th Cir. 2015) (quoting *One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 262 (5th Cir. 2011)). "A finding of the trial judge 'is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)). Accordingly, we review the trial judge's factual findings with great deference, and cannot reverse them simply because we would reach a different conclusion. *See id.* "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574.

II.

Zimmerman first challenges the district court's decision regarding the $350 base limit on campaign contributions.[1] He contends that the base limit is

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[1] The base limit applies to contributions to candidates for both mayor and city council. Austin Tex. Code, Art. III, § 8(A)(1). However, we restrict our review to only the limit on contributions to candidates for city council because Zimmerman has not run for mayor in the past nor alleged any intent to run for mayor and thus does not have standing to challenge Austin's contribution limits as they apply to mayoral candidates. *See Daggett v. Comm'n on Gov't Ethics & Election Practices*, 205 F.3d 445, 462–63 (1st Cir. 2000) (affirming dismissal of challenge to gubernatorial campaign limits

subject to strict scrutiny as either a content-based restriction on speech or an indirect burden on campaign expenditures and that it fails to pass muster under that stringent standard. Alternatively, he contends that even if strict scrutiny does not apply, the limit is not justified by a sufficiently important governmental interest and, even if it were, it is not sufficiently tailored to that interest. We disagree on all points.

A.

First, the limit is not a content-based restriction on speech. Zimmerman argues that the base limit applies only to campaign contributions, but not officeholder contributions, because the language of the base limit refers only to "campaign contributions," while other provisions in the Charter refer more broadly to "political contributions"—which, under the Texas Election Code, includes both "campaign contributions" and "officeholder contributions." According to his argument, that leaves officeholders free to collect unlimited amounts for the purpose of defraying officeholder expenses, including the production and dissemination of constituent newsletters, *see* Austin, Tex. Code § 2-2-41 (stating that officeholders may use funds from officeholder accounts for the purpose of "newsletters"). On that basis, Zimmerman argues that because a contributor can give only $350 to fund campaign speech but can give an unlimited amount to fund a newsletter describing an incumbent's

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on standing grounds where no plaintiff had run for governor in the past or claimed that, but for the limit, they would give more than the challenged limit to a gubernatorial candidate).

achievements, the base limit constitutes a content-based restriction on speech.

Austin responds that the base limit draws no such distinction between campaign contributions and officeholder contributions. It points first to subsection (G) of Article III, Section 8 of the Charter, which provides that "[a]ny incumbent mayor or councilmember is subject to the regulations applied to candidates for the office he or she holds." Austin, Tex. Code, Art. III, § 8(G). It also points to subsection (F), the only subsection of Article III, § 8 that states that its terms "have the same meaning they have in Title 15 of the Texas Election Code." *Id.* § 8(F). Because the base limit appears in subsection (A), Austin argues that it does not incorporate the definitions from the Texas Election Code and that, although subsection (A) refers only to "campaign contributions," it is intended to reach any contribution to a candidate or incumbent officeholder. Finding Austin's interpretation to be a reasonable interpretation of the Charter, and one that avoids a possible constitutional conflict, we defer to it. *See Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013) ("We defer to [a city's] interpretation of how the law is to be enforced, so long as it does not conflict with the statutory text." (quoting *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 895 (5th Cir. 2012))); *id.* ("Our task as a federal court is, to the extent possible, to construe the provisions to avoid a constitutional conflict." (quoting *Voting for Am., Inc.*, 488 F. App'x at 895)). In light of that interpretation, the base limit does not constitute a content-based regulation on speech.

Zimmerman's second argument for strict scrutiny is more easily disposed of. He contends that the base limit

burdens expenditures and that burdens on expenditures, even indirect ones, are subject to strict scrutiny. *See, e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 736–40, 748 (2011) (applying strict scrutiny to law that indirectly burdened expenditures by penalizing personally financed candidates for spending above a certain threshold). In some vague sense, of course, contribution limits indirectly burden expenditures. You have to raise money to spend it, and contribution limits mean that you cannot raise as much from any one contributor. But the Supreme Court has been clear that contribution limits are analytically distinct from expenditure limits, create a far lesser burden on speech, and, for that reason, are subject to less searching scrutiny. *See FEC v. Colo. Republican Fed. Campaign Comm'n*, 533 U.S. 431, 437 (2001) (noting "line between contributing and spending"); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259–60 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."). We decline Zimmerman's invitation to blur the line that the Supreme Court has drawn.

B.

As a limit on political contributions, Austin's base limit is subject to the closely-drawn test set forth in *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). In *Buckley*, the Supreme Court explained that contribution limits are generally subject to a lower level of scrutiny than expenditure limits because "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a

marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20. Because "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support," the communicative value of a contribution "does not increase perceptibly with the size of [the] contribution." *Id.* at 21. A contribution limit therefore "involves little direct restraint on [a contributor's] political communication." *Id.* However, contribution limits do impinge on associational freedoms by limiting a contributor's ability to affiliate him or herself with a candidate. *Id.* at 22. And, while they do not directly relate to a candidate's ability to speak, contribution limits "could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 21. Accordingly, they are subject to something akin to intermediate scrutiny and "may be sustained if the [governmental entity] demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25.

1.

The only governmental interests yet recognized by the Supreme Court as sufficient to justify limits on campaign contributions are the prevention of actual corruption and its appearance. *See id.* at 26–27 (defining interest in terms of "limit[ing] the actuality and appearance of corruption resulting from large individual financial contributions"); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014); *Citizens United v. FEC*, 558 U.S. 310, 359 (2010). While the importance of

those interests is beyond dispute, their invocation still must be justified with some evidentiary showing that the state or locality enacting a contribution limit faces a problem of either actual corruption or its appearance. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390–94 (2000). "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Id.* at 391. When following a well-trodden path, the evidentiary bar is not high, but the existence or perception of corruption must still be more than "mere conjecture." *Id.* at 391–92.

Here, Austin has demonstrated a sufficiently important interest in preventing either actual corruption or its appearance.[2] Austin presented evidence—credited by the district court—that there was a perception of corruption among Austinites before the limit's enactment in 1997. The evidence presented, including testimony that large contributions created a perception that economic interests were "corrupting the system" and turning the City Council into a "pay-to-play system," 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. *See id.* at 393–94 (stating that the

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[2] Zimmerman argues that the legitimacy of Austin's asserted interest is undermined by the fact that the limit applies to campaign contributions but not officeholder contributions, and is therefore underinclusive. However, that argument is of no help because, as we concluded above, we defer to Austin's interpretation of its Charter under which there is not a distinction drawn between campaign contributions and officeholder contributions.

case did "not present a close call" regarding the sufficiency of the state's justification based on testimony that "large contributions have 'the real potential to buy votes,'" "newspaper accounts of large contributions supporting inferences of impropriety," and the fact "an overwhelming 74 percent of the voters" approved the limit (alteration omitted)).

In a creative attempt to evade this Supreme Court guidance, Zimmerman contends that Austin's base limit cannot be justified by an interest in preventing corruption because the limit is too low. He reasons that *Buckley* defined the interest in preventing corruption in terms of *large* contributions, and that Austin's $350 limit bars contributions that are not large and therefore do not implicate the interest in preventing actual corruption. But that conflates *Buckley*'s government-interest inquiry with its tailoring inquiry. *Buckley* sets out a two-part test. First, the need for a contribution limit must be justified by a sufficiently important interest. *See* 424 U.S. at 26–28. Second, the amount of the limit must be sufficiently tailored such that the limit does not unnecessarily impinge First Amendment rights. *See id.* at 28–29; *see also Shrink Mo.*, 528 U.S. at 395–97 (considering amount of limit in context of tailoring inquiry, after finding limit justified by government interest in preventing corruption or its appearance). Austin's choice to set the contribution limit at $350 goes to whether the limit is sufficiently tailored, not whether Austin had a sufficiently important interest to justify setting any contribution limit at all. Concluding that Austin had such an interest, we turn to consider whether the limit it established is "closely drawn to avoid unnecessary

abridgment of associational freedoms." *Buckley*, 424 U.S. at 25.

2.

There is no constitutional minimum contribution amount below which legislatures cannot regulate. *Shrink Mo.*, 528 U.S. at 397. Rather, a contribution limit is unconstitutional if it is "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contribution pointless." *Id.* While courts have "no scalpel to probe" what limit is low enough to prevent actual corruption or its appearance but not a dollar lower, *Randall v. Sorrell*, 548 U.S. 230, 248–49 (2006) (quoting *Buckley*, 424 U.S. at 30), they nonetheless must "exercise . . . independent judicial judgment as a statute reaches [the] outer limits" of what is constitutionally permissible, *id.* at 249. Accordingly, where there are "danger signs" that a limit may be so low that it risks "preventing challengers from mounting effective campaigns," then "courts, including appellate courts, must review the record independently and carefully with an eye toward assessing the statute's 'tailoring,' that is, toward assessing the proportionality of the restrictions." *Id.* at 249.

Here, there are no such "danger signs." First, unlike in *Randall*, Austin's contribution limit is per election, not per election cycle, meaning that it is reset between general and runoff elections. *Compare id.* (finding danger sign present where limit was per election cycle, including primary and general elections) *with* Austin, Tex. Code, Art. III, § 8(A)(1) (establishing contribution limit "per election") *and id.* Art. I, § 2-2-7(A) ("A

general election, special election, and a runoff election each have . . . separate campaign periods for purposes of City Charter Article III, Section 8 . . . ."). Second, the $350 limit is on par with limits imposed in other states and localities and upheld by other courts. *See Randall*, 548 U.S. at 250 (finding danger sign where limit at issue was below those imposed by other states and upheld in the past). For example, in *Shrink Mo.* the Supreme Court upheld Missouri's $275 limit—which, adjusted for inflation, was equivalent to approximately $390 at the time this appeal was filed—on contributions to candidates for any office representing fewer than 100,000 people. *See* 528 U.S. at 383; *see also Frank v. City of Akron*, 290 F.3d 813, 818 (6th Cir. 2002) (upholding limits of $100 on contributions to candidates for ward council member and $300 on contributions to candidates for at-large council member and mayor in city of approximately 217,000). Austin's $350 limit on contributions to candidates for city council, who represent districts of approximately 100,000 people, is not so low by comparison as to raise suspicion.[3] Furthermore, and unlike the limit at issue in *Randall*, Austin's contribution limit is indexed for inflation. *Compare* 548 U.S. at 251–52 (finding danger sign where contribution limit was lower than those upheld in prior cases and not indexed for inflation) *with* Austin, Tex. Code, Art. III, § 8(A)(1) (stating that contribution limit shall be adjusted annually in accordance with the Consumer Price Index).

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[3] In 2015, District 6, the district in which Zimmerman ran, had an estimated population of 95,502. That appears from the record to be slightly higher than the average district population.

Ultimately, a contribution limit is closely drawn so long as it does not "prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy'" or "magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage." *Randall*, 548 U.S. at 248 (quoting *Buckley*, 424 U.S. at 21). Here, there was evidence presented, and credited by the district court, that the contribution limit did not prevent candidates from running "full-fledged" campaigns. One former council person testified that the limit did "[n]ot at all" impede her ability to run an effective campaign and that, in fact, the limit was "good for democracy" because it meant that she "was out there talking to a heck of a lot more people." And as to the advantages of incumbency, Zimmerman himself, an incumbent, was defeated when he ran for reelection in 2016. Accordingly, because the limit does not "render political association ineffective, drive the sound of a candidate's voice below the level of notice, [or] render contribution pointless," *Shrink Mo.*, 528 U.S. at 397, we do not disturb Austin's decision to set the limit at $350. *See McCutcheon*, 134 S. Ct. at 1456 (stating that a campaign-finance regulation need not be "perfect" or "the single best disposition" but "reasonable" and proportional to the interest served).

III.

Zimmerman next challenges the district court's determination with respect to the aggregate limit. The district court held that Zimmerman lacked standing to challenge the aggregate limit because he had not established a sufficient injury-in-fact traceable to that limit. We agree.

"The requirement that a litigant have standing derives from Article III of the Constitution, which confines federal courts to 'adjudicating actual "cases" and "controversies."'" *Moore v. Bryant*, 853 F.3d 245, 248 (5th Cir. 2017) (quoting *Henderson v. Stalder*, 287 F.3d 374, 378 (5th Cir. 2002)). "A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Standing "requires that the plaintiff demonstrate that he or she 'has suffered an "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.'" *Assoc. of Cmty. Orgs. for Reform Now (ACORN) v. Fowler*, 178 F.3d 350, 356 (5th Cir. 1999) (quoting *Bennett v. Spear*, 520 U.S. 154, 162 (1997)). An "injury in fact" "must be '(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical' to pass constitutional muster, but it need not measure more than an 'identifiable trifle.'" *Id.* at 358 (internal citation omitted) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973)). To establish an injury sufficient to raise a First Amendment facial challenge, "a plaintiff must produce evidence of an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute." *Nat'l Fed'n of the Blind of Tex. v. Abbott*, 647 F.3d 202, 209 (5th Cir. 2011) (quoting *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545 (5th Cir. 2008)). A plaintiff's burden to establish standing changes with the procedural posture of the case. *See ACORN*, 178

F.3d at 357. This being an appeal from a bench trial, Zimmerman must point to evidence of actual injury. *See Lujan*, 504 U.S. at 561.

A.

Zimmerman first contends that the aggregate limit caused an injury in fact because it caused him to change his campaign strategy and withhold solicitations he otherwise would have sent to individuals outside of the Austin area. He stated in a signed declaration that he would like to purchase a list of conservative donors (costing at least $5,000), but that doing so is "not worth the time and financial investment when the maximum return [he] can hope for is artificially limited to $36,000." However, Zimmerman's decision to forego solicitations is not an injury sufficient to confer standing.

First, Zimmerman has failed to establish a serious intention to engage in conduct proscribed by law. *See Miss. State Democratic Party*, 529 F.3d at 545–47 (holding that party lacked standing to challenge statute requiring semi-closed primary elections because it did not take any steps towards holding a fully closed primary and thus failed to establish a "serious interest" in violating the statute). The aggregate limit does not preclude solicitations; it precludes only "accept[ing]" aggregate contributions over the relevant limit from persons outside of the Austin area. *See* Austin, Tex. Code, Art. III, § 8(A)(3). Stating his desire to *solicit* funds thus does not establish an intent to accept funds above the proscribed limit. And, by choosing to not solicit funds, Zimmerman did not take steps towards reaching or exceeding the aggregate limit of the kind that would demonstrate a serious intent to violate the

statute. *See Miss. State Democratic Party*, 529 F.3d at 546 ("Without concrete plans or any objective evidence to demonstrate a 'serious interest' in [violating a statute, plaintiff] suffered no threat of *imminent* injury.").

Furthermore, his decision cannot be excused on the ground that soliciting funds from outside of the Austin area would have been futile. The evidence shows that a list of potential donors from outside of the Austin area would have cost Zimmerman approximately $5,000. He could have lawfully accepted up to $36,000 in contributions from such donors. If the investment of $5,000 would have been futile, it was not so because of the aggregate limit. Zimmerman's subjective decision that a potential return of $36,000 was not worth the $5,000 investment does not excuse him from the Article III requirement that a plaintiff must face an injury that is actual or imminent and not conjectural or hypothetical. *See id.* at 547 (rejecting argument that standing requirements can be relaxed when taking steps to engage in prohibited conduct would have been futile, particularly where plaintiff could have, but did not, take certain lawful steps to protect the right allegedly injured). Nor can the decision to forego solicitations be excused on the ground that it alone would have exposed Zimmerman to possible prosecution. *Cf. Babbitt*, 442 U.S. at 298 (stating that a plaintiff need not expose himself to prosecution in order to challenge the law). The aggregate limit prohibits only "accept[ing]" total contributions of more than $36,000 from persons outside of the Austin area. Austin, Tex. Code, Art. III, § 8(A)(3). Thus, even 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.

Second, standing cannot be conferred by a self-inflicted injury. *See ACORN*, 178 F.3d at 358. While solicitations are a form of protected speech, *see United States v. Kokinda*, 497 U.S. 720, 725 (1990), and while government action that chills protected speech without prohibiting it can give rise to a constitutionally cognizable injury, *see Laird v. Tatum*, 408 U.S. 1, 11 (1972), to confer standing, allegations of chilled speech or "self-censorship must arise from a fear of prosecution that is not 'imaginary or wholly speculative.'" *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006) (quoting *Babbitt*, 442 U.S. at 302); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."). Here, 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. Soliciting funds from persons outside of the Austin area would have resulted in possible prosecution only if more than 100 such persons contributed the maximum allowable $350 (and if Zimmerman accepted all such contributions). There is no evidence in the record of such interested donors. *See In re Cao*, 619 F.3d 410, 421 (5th Cir. 2010) (holding that political party had standing to challenge expenditure and contribution limits where evidence showed it had met the proscribed limits and would have spent more but for the limits).

Finally, while changing one's campaign plans or strategies in response to an allegedly injurious law can itself be a sufficient injury to confer standing, the change in plans must still be in response to a reasonably certain injury imposed by the challenged law. For example, in *Constitutional Party of Pennsylvania. v. Aichele*, 757 F.3d 347 (3d Cir. 2014), and *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006), on which Zimmerman relies, the plaintiffs changed their campaign plans in response to alleged future injuries that were "inevitable," *see Miller*, 462 F.3d at 317, or that had in fact been imposed on others in the past, *see Constitutional Party of Pa.*, 757 F.3d at 363–64. But here, prosecution for violating the aggregate limit was far from an inevitable result of soliciting donations from persons outside of the Austin area.

B.

Zimmerman also contends that his speech has been chilled due to the threat of an ethics complaint. Relying on *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014), he contends that Austin permits any person, including a political opponent, to file an ethics complaint and that Austin's advice that liability can be avoided if the violation was not "knowing," *see* Austin Tex. Code, Art. I, § 2-2-5(A) (stating that "a person who knowingly violates this chapter or a provision of City Charter Article III, Section 8 . . . commits a Class C misdemeanor"), has been rejected by the Supreme Court. *See Susan B. Anthony List*, 134 S. Ct. at 2344 (rejecting argument that because plaintiff had not stated an intent to make a knowing or reckless false statement, fear of enforcement of law prohibiting knowing or reckless false statements was misplaced).

While *Susan B. Anthony List* did reject a similar argument, Zimmerman misses its broader point. There, relying on *Babbitt*, the Supreme Court simply noted that a plaintiff does not have to "confess that he will in fact violate [a] law" in order to challenge its constitutionality. *Id.* at 2345; *see Babbitt*, 442 U.S. at 301 (holding that plaintiffs had standing to challenge law prohibiting use of "dishonest, untruthful and deceptive publicity" in consumer publicity campaigns despite absence of an intent on behalf of plaintiffs to "propagate untruths" where plaintiffs engaged in publicity campaigns in the past and stated intent to do so in the future and where "erroneous statement is inevitable in free debate" (quotation marks omitted)). Nothing in *Susan B. Anthony List*, as we read it, changes the core requirement that to bring a preenforcement challenge, a plaintiff must "produce evidence of an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute," *Nat'l Fed'n of the Blind of Tex.*, 647 F.3d at 209, as well as a "credible threat of prosecution," *Babbitt*, 442 U.S. at 298; *accord Susan B. Anthony List*, 134 S. Ct. at 2343–44. Zimmerman has failed to establish such an intention, whether it involves a knowing violation or not.

C.

Finally, Zimmerman contends that he has suffered an injury-in-fact due to the diversion of resources required to comply with the aggregate limit. However, there is no evidence that anyone in his campaign actually expended any additional time or money as a result of the aggregate limit. First, his campaign manager submitted a declaration stating that "it would

take 42 hours of my time to verify [the] voter registration status" of all contributors. But he does not state that he ever actually spent that time verifying the status of all contributors. According to his declaration, the only time that he actually went through the steps necessary to verify voter-registration status was in order to verify the signatures on Zimmerman's ballot-access petition. Because he did not actually expend any additional resources in order to comply with the aggregate limit, Zimmerman's injury in this regard is hypothetical.

Second, Zimmerman contends that compliance with the aggregate limit has caused an injury because it takes time just to keep a "running tally" of contributions by zip code. However, according to the trial testimony of a campaign consultant, maintaining a database of contributors by zip code appears to be a standard campaign practice. Accordingly, the time spent maintaining a "tally" of contributions by zip code is insufficient to establish standing. *See ACORN*, 178 F.3d at 359 (rejecting argument for injury based on resource expenditure where ACORN "failed to show that any of its purported injuries relating to monitoring costs were in any way caused by any action by [the defendant] that ACORN now claims is illegal, as opposed to part of the normal, day-to-day operations of the group").

IV.

Austin challenges the district court's conclusion that the six-month temporal limit on fundraising is unconstitutional. Finding that Austin had failed to present evidence "to show how a contribution made seven months before election day presents a different

threat of *quid pro quo* corruption than a contribution made three months before election day," the district court concluded that Austin had failed to establish that the limit served the interest of preventing actual corruption or its appearance. Once again, we agree with the district court.

As with dollar limits, temporal limits on contributions are subject to *Buckley*'s "closely-drawn" test. *See Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 432 (5th Cir. 2014). Accordingly, Austin must show (1) that the six-month limit serves the sufficiently important interest of preventing actual corruption or its appearance and (2) that it employs means that are closely drawn. *See Buckley*, 424 U.S. at 25; *McCutcheon*, 134 S. Ct. at 1450. As before, Austin must justify the limit with some evidence of actual corruption or its appearance. *See Shrink Mo.*, 528 U.S. at 391–95. Furthermore, following *McCutcheon*, an additional limit on contributions beyond a base contribution limit that is already in place must be justified by evidence that the additional limit serves a distinct interest in preventing corruption that is not already served by the base limit. *See* 134 S. Ct. at 1452 (addressing an aggregate limit on how much money any one donor may contribute in total to all candidates and stating that "if there is no risk that additional candidates will be corrupted by donations of up to $5,200"—the applicable base limit—"then the Government must defend the aggregate limits by demonstrating that they prevent circumvention of the base limits"); *Holmes v. FEC*, 875 F.3d 1153, 1161 (D.C. Cir. 2017) (stating that an "additional constraint 'layered on top' of the base limits" must "separately . . . serve the interest in preventing the appearance or

actuality of corruption" (quoting *McCutcheon*, 134 S. Ct. at 1458)). That is to say, Austin needed to establish that even if a $350 contribution near the time of an election is not likely to lead to actual corruption or its appearance, the same contribution made at another time is. Furthermore, while the quantum of evidence needed is not clearly established, *see Shrink Mo.*, 528 U.S. at 393 (declining to further define the state's evidentiary obligation), what is needed to justify a temporal limit is additional to and distinct from what is needed to justify a dollar limit on contributions. *See id.* at 391 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). While *Buckley* and the long line of cases following it make clear that the dangers of large contributions "are neither novel nor implausible," *id.*, there is not the same well-trodden path regarding the dangers of contributions made far in time from an election.

The district court found that Austin failed to produce sufficient evidence to justify the temporal limit. The only evidence presented on the connection between the timing of a contribution and corruption was the testimony of a former councilmember that "if we had money flowing through city hall . . . in a general way . . . it would really have a detriment [sic] to people's belief in council members making appropriate decisions," and the testimony of the city's expert witness, a political scientist with expertise in campaign finance, that, in his opinion, the temporal limit "directly alleviated concerns of the appearance of *quid pro quo* corruption" by "limit[ing] the period of time in which people could . . . reward candidates, particularly

incumbent officeholders." He further noted that "before important votes, money flows in." However, as the district court noted, there was also testimony that the Austin City Council is in session and voting year round, such that the risk of money coming in before votes is no less of a concern in the six-month window before an election than at any other time. Accordingly, evidence suggesting a perception of corruption arising from contributions made shortly before votes does not establish a perception of corruption arising from contributions made many months before an election. If a contribution of $350 or less immediately before a vote during the six months before an election will not result in either actual corruption or its appearance, there is no evidence showing that the same contribution made before a vote 12 months before an election would. Accordingly, we agree with the district court that Austin failed to produce sufficient evidence to justify the temporal limit.

The cases Austin cites to support its position are not persuasive. First, *O'Toole v. O'Connor*, 802 F.3d 783 (6th Cir. 2015), considered a temporal limit on contributions to judicial campaign committees not politicians or political candidates. *Id.* at 787–88. "But a State's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1667 (2015). Accordingly, *O'Toole*'s reasoning is inapplicable here. Second, *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), and *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011), which upheld temporal limits on campaign contributions without any specific evidence that the

timing of a contribution creates a risk of actual corruption or its appearance that is distinct from that created by the size of a contribution, *see Bartlett*, 168 F.3d at 715–16; *Thalheimer*, 645 F.3d at 1122, each predates *McCutcheon*, which, as explained above, requires such evidence. *See Holmes*, 875 F.3d at 1161 (stating that "additional constraint[s] 'layered on top'" of base limits must "separately . . . serve the interest in preventing the appearance or actuality of corruption" (quoting *McCutcheon*, 134 S. Ct. at 1458)).[4]

V.

Austin next contends that the district court erred by holding that Zimmerman has standing to challenge the disgorgement provision and that that provision is unconstitutional. It argues that because Zimmerman was not required to disgorge the funds he had remaining after his campaign, but rather could retain them for purposes of making officeholder expenditures, he was not injured and that the provision is constitutional because it does not implicate any First Amendment rights. We disagree on both points and once again affirm the district court.

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[4] Additionally, the Ninth Circuit in *Thalheimer* noted that its "own case law contain[ed] a vivid illustration of corruption in San Diego municipal government," notably "involving campaign contributions timed to coincide with the donors' particular business before the city council". 645 F.3d at 1123 n.3.

A.

The disgorgement provision, § 8(F)(3) of the Austin City Charter, requires candidates to "distribute the balance of funds received from political contributions in excess of any remaining expenses for the election" to the candidate's contributors, a charitable organization, or the Austin Fair Campaign Fund. Austin, Tex. Code, Art. III, § 8(F)(3). Candidates may, however, retain up to $20,000 "for the purposes of officeholder expenditures." *Id.* § 8(F)(6). Austin argues that because Zimmerman finished his 2014 campaign with only $1,200 remaining, he was not injured by the disgorgement provision because he could retain that full amount in an officeholder account. But that misses the nature of the First Amendment right at issue. Zimmerman has the right to use campaign funds to advocate for his own election. *See Buckley*, 424 U.S. at 52–53. That right was impaired by his inability to retain excess funds from the 2014 election for use in future campaigns. *See Shrink Mo. Gov't PAC v. Maupin*, 71 F.3d 1422, 1427–28 (8th Cir. 1995) (holding that a similar disgorgement provision burdens First Amendment rights by requiring candidates to use all campaign funds during the current campaign and prohibiting them from using those funds in future elections).

Austin also argues—for the first time in its reply brief—that Zimmerman lacks standing to challenge the disgorgement provision because he could, or perhaps should, have used his remaining funds to pay off his

campaign debt.[5] Zimmerman ended his 2014 campaign with $18,000 in debt, all owed to himself, and $1,200 remaining in his campaign account after all other expenses had been paid. Austin argues that because Zimmerman chose to retain the remaining $1,200 in his officeholder account rather than use it to pay off his debt, his alleged injury was manufactured to create standing. An injury sufficient to confer standing "cannot be manufactured for the purpose of litigation." *Barber v. Bryant*, 860 F.3d 345, 354 (5th Cir. 2017), *cert. denied*, 2018 WL 311355 (Jan. 8, 2018). But here, there is evidence that Zimmerman had legitimate reasons for choosing to retain the funds in his officeholder account and did not do so simply to manufacture standing. *Cf. id.* (stating that, in religious-display cases, personal confrontation with the offending display must "occur in the course of a plaintiff's regular activities; it cannot be manufactured for the purposes of litigation"). Zimmerman testified that he retained the $1,200 because he "wanted to have some money in the bank" for officeholder expenses.

Austin also argues—again for the first time in its reply brief—that Zimmerman "appears" to have treated his leftover funds inconsistently with a city ordinance in place at the time. What was then § 2-2-43 of the City Code, titled "Existence of Campaign Debt," stated that

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[5] Ordinarily, we do not consider arguments raised for the first time in a reply brief. *See Jones v. Cain*, 600 F.3d 527, 541 (5th Cir. 2010) ("Arguments raised for the first time in a reply brief are generally waived."). However, because standing is a jurisdictional requirement, we consider these arguments. *See La. Landmarks Soc'y, Inc. v. City of New Orleans*, 85 F.3d 1119, 1122 n.3 (5th Cir. 1996) ("[S]tanding is jurisdictional and, therefore, non-waivable.").

> [t]he existence and amount of a campaign debt relating to a prior campaign period shall be determined based on the actual outstanding obligations of the candidate or campaign committee as of the date of the election for which the debt is incurred, and *all funds held by the candidate or candidate's campaign committee in cash or bank accounts on that date shall be considered an offset to the campaign debt.*

On that basis, Austin argues that Zimmerman's remaining $1,200 should have been used to pay off his debt and that he therefore should not have had any remaining funds at all to which the disgorgement provision could apply. We disagree with Austin's reading of the ordinance and, finding the ordinance unambiguous, do not defer to Austin's interpretation. *See Voting for Am., Inc.*, 732 F.3d at 387 ("We defer to [a city's] interpretation of how the law is to be enforced, so long as it does not conflict with the statutory text." (quoting *Voting for Am., Inc.*, 488 F. App'x at 895)). As the district court concluded, the ordinance applies to the calculation of campaign debt and does not require candidates to use remaining funds to pay off debts. It says only that remaining funds "shall be considered an offset," but says nothing requiring candidates to actually use remaining funds to pay off their debts. Rather, candidates and officeholders with either remaining unpaid expenses or unreimbursed personal expenditures can continue to solicit and accept contributions after an election in order to pay off those expenses. *See* Austin, Tex. Code, Art. III, § 8(F)(4)&(5). Furthermore, the disgorgement provision by its terms requires only that funds "in excess of any remaining *expenses*" be distributed, *see id.* § 8(F)(3) (emphasis

added), while subsections 4 and 5 refer separately to "unpaid expenses" and "unreimbursed campaign expenditures from personal funds." The difference in drafting suggests that while remaining funds must be used to pay off expenses—that is, amounts owed to others—they are not required to be used to reimburse oneself for personal expenditures. *See Silva-Trevino v. Holder*, 742 F.3d 197, 203–04 (5th Cir. 2014) (stating that courts are to give effect to legislatures' use of distinct terms).

B.

With respect to the constitutionality of the disgorgement provision, Austin argues only that there is no First Amendment right to use funds remaining after one campaign in a new and different campaign. It contends that the First Amendment rights associated with campaign contributions exist only during the election cycle in which a contribution is given, and that the "First Amendment clock is re-set" if and when a new campaign begins.

We find that argument to be without force or support. Austin again appears to overlook the nature of the right at issue. While it is true that a donor's interest in voicing support for a particular candidate may end with the passing of one election cycle—for any number of reasons, the donor may no longer support that same candidate if and when the candidate runs again—that does not mean that all First Amendment rights associated with that contribution so too must end. When a contribution is made, it communicates the donor's support for a candidate. But, once in the hands of the candidate, it then "helps the candidate communicate a political message." *Shrink Mo.*, 528

U.S. at 400 (Breyer, J., concurring). The candidate's expenditure of that money to engage in political speech is then afforded its own constitutional protection. *See Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 196 (1981) (plurality opinion) (describing contributions as "speech by proxy" and explaining how entities that receive contributions then use those contributions to "engage[] in independent political advocacy"). Accordingly, by prohibiting candidates from spending money raised in one election cycle on speech in the next, the disgorgement provision acts as an indirect burden on expenditures and thus implicates First Amendment rights. *See Maupin*, 71 F.3d at 1427–28 (holding that disgorgement provision burdens First Amendment rights by, *inter alia*, prohibiting candidates from using funds in future elections); *see also Davis v. FEC*, 554 U.S. 724, 740 (2008) (striking down as unconstitutional an indirect burden on expenditures not justified by the interest in preventing corruption).

As a burden on expenditures, the disgorgement provision is subject to heightened scrutiny. But, on appeal, Austin does not attempt to justify the provision as sufficiently tailored to serve its interest in preventing corruption. Accordingly, we affirm the district court's conclusion that the disgorgement provision is an unconstitutional abridgement of First Amendment rights.

VI.

Finally, Austin argues that Zimmerman has waived his right to attorneys' fees under 42 U.S.C. § 1988(b) by not moving for fees in the district court. But that issue is not properly before us now. Precisely because Zimmerman did not move for fees below, and the

district court has therefore not ruled on the issue, it is not properly presented for our review. *See Luv N' Care, Ltd. v. Groupo Rimar*, 844 F.3d 442, 451 n.8 (5th Cir. 2016) (declining to address issues raised by the parties but not decided by the district court).

For the foregoing reasons, we AFFIRM.

APPENDIX B

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

CAUSE NO. 1:15-CV-628-LY

[Filed July 20, 2016]

DONALD ZIMMERMAN, PLAINTIFF,
V.
CITY OF AUSTIN, DEFENDANT.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On December 14, 2015, the court called the above styled and numbered cause for bench trial. Plaintiff Donald Zimmerman appeared in person and through counsel. The City of Austin appeared through counsel. The parties concluded their presentations of evidence on December 15, 2015, and subsequently submitted post-trial briefs. Having carefully considered the pleadings, exhibits, trial testimony, arguments of

counsel, and the applicable law, the court makes the following findings of fact and conclusions of law.[1]

The court has jurisdiction over this case pursuant to Title 28 of the United States Code, Sections 1331 and 1343. This civil action arises under the First and Fourteenth Amendments of the United States Constitution and Title 42 of the United States Code, Section 1983.

I. BACKGROUND

In 1997, the citizens of the City of Austin (the "City") voted with a 72% majority to add to the Austin City Charter Article III, Section 8, governing financing of Austin City Council campaigns. In 2006, 68% of Austin voters voted to revise Article III, Section 8 to, *inter alia*: raise the individual contribution limit to $300, indexed for inflation; raise the aggregate limit on contributions from groups and individuals outside the City to $30,000 in a general election and $20,000 in a runoff election, each indexed for inflation; and modify the requirements for the disbursement of campaign funds after an election. The provisions remain in effect today.

By this suit, Zimmerman challenges these provisions of the 2006 version of Article III, Section 8 of the Austin City Charter. Zimmerman was elected to serve on the Austin City Council in 2014, and is a candidate for re-election in the City's general election

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[1] All findings of fact contained herein that are more appropriately considered conclusions of law are to be so deemed. Likewise, any conclusion of law more appropriately considered a finding of fact shall be so deemed.

to be held November 8, 2016. The challenged provisions are applicable to Zimmerman's re-election campaign. Each challenged provision is discussed individually below. Zimmerman seeks a declaratory judgment that the challenged provisions are unconstitutional and a permanent injunction enjoining the City from enforcing the provisions.

II. ANALYSIS

"Discussion 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). The First Amendment affords the broadest protection to such political expression in order to assure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957); *see also Buckley*, 424 U.S. at 14. "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). "This of course includes discussions of candidates. . . and all such matters relating to political processes." *Id*. at 218-19. The United States has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley*, 424 U.S. at 14-15. "[I]t can

hardly be doubted that the constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

To this end, the First Amendment protects political association as well as political expression. *Buckley*, 424 U.S. at 15. *Buckley* and its progeny instruct that we should give varying levels of constructional scrutiny to campaign-finance regulations depending on the type of regulation at issue in order to "draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014).

"[E]xpenditure limitations. . .represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Buckley*, 424 U.S. at 21. These restrictions "limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'" *Id*. at 39 (citing *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19. Expenditure limitations therefore are subject to strict scrutiny, "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id*. at 44–45. A regulation limiting expenditures may only be

upheld if the regulation "promotes a compelling interest and is the least restrictive means to further the articulated interest." *McCutcheon*, 134 S. Ct. at 1444. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

"The right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute." *McCutcheon*, 134 S. Ct. at 1441. "By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication" and therefore receives a lessened, but nonetheless rigorous, level of scrutiny. *Buckley*, 424 U.S. at 20. Contribution limitations may be upheld if the regulating governmental unit "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id*. at 25. A closely drawn limitation on campaign contributions "leav[es] persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources" and "do[es] not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." *Id*. at 28-29.

Under each of the tests, the government—here the City—has the burden of demonstrating the constitutionality of the regulations. *McCutcheon*, 134 S. Ct. at 1452. With regard to both expenditure and contribution limitations, the Supreme Court has identified only one legitimate governmental interest: preventing *quid pro quo* corruption or its appearance. *Id*. at 1450-51. "That Latin phrase captures the notion of a direct exchange of an official act for money." *Id*. at 1441; *see also McCormick v. United States*, 500 U.S. 257, 266 (1991); *McDonnell v. United States*, 579 U.S. ____, Case No. 15-474, slip op. at 22 (2016) (defining *quid pro quo* corruption as "the exchange of a thing of value for an official act"). Governmental entities "may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others. *McCutcheon*, 134 S. Ct. at 1441. "[Gjovernment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford." *Id*. "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, does not give rise to. . .*quid pro quo* corruption." *Id*. at 1450. In determining whether the City has demonstrated a legitimate interest in preventing *quid pro quo* corruption or its appearance, the court cannot "accept[] mere conjecture as adequate to carry a First Amendment burden." *Id*. at 1452.

A. Base Limit

Zimmerman first challenges the provision of the Austin City Charter that prohibits a candidate for Mayor of Austin or the Austin City Council from accepting more than $300[2] from any one person per election. Austin City Charter, Art. III, § 8(A)(1) (the "Base Limit").

Zimmerman argues the Base Limit is a content-based restriction and therefore subject to strict scrutiny because it does not apply to contributions to incumbent candidates for officeholder expenses. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015). Regulation of speech is content-based if it applies to particular speech because of the topic discussed or the idea or message expressed. *Id.* at 2227. In *Reed*, the Supreme Court concluded that restrictions on different categories of signs, such as "ideological signs," versus "political signs," were content-based regulations and therefore subject to strict scrutiny. *Id.*

The Base Limit at issue in this case is dissimilar from the regulations in *Reed*. The Base Limit applies to all campaign contributions and does not distinguish between types of speech or ideas conveyed. The Base Limit does not address the content of the regulated speech in any manner. The court concludes that the Base Limit is not a content-based restriction.

The Base Limit is properly construed as a restriction on campaign contributions and is therefore subject to the "closely-drawn" test. *See McCutcheon*, 134 S. Ct. at 1445. The City has the burden of

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[2] Indexed for inflation. *See* Austin City Charter, Art. III, § 8(A)(1).

demonstrating that the Base Limit serves "a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *See Buckley*, 424 U.S. at 25. In *Buckley*, the Supreme Court upheld a $1000 limit on contributions to candidates for federal office. *Id*. at 143. The Court found that "the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1000 contribution ceiling." *Id*. at 29. The Court reasoned that "to the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id*. at 26-27. Further, "[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id.* at 27. The Supreme Court later stated in *Nixon v. Shrink Missouri Government PAC* that "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." 528 U.S. 377, 395 (2000).

The City presented evidence at trial that there was a perception of corruption in Austin before the City adopted a limit on campaign contributions in 1997. David Butts, a campaign consultant involved in Austin city elections since 1977, testified that large contributions, in the $1000-$2500 range, sometimes as high as $10,000, from developers, engineering firms, banking institutions, architects, and law firms created

a widespread perception in the community that economic interests, such as those in the land development arena, had "inordinate influence" over the Austin City Council and were "corrupting the system." Fred Lewis, who worked on campaigns for the Austin City Council and Mayor in the early 1990s, testified that the City Council was seen as a "pay-to-play system," where a contributor "paid in contributions and in exchange. . . got development rights." Lewis also testified that he was involved when the City Council proposed increasing the Base Limit in 2006, and that the City Council's goal in raising the limit was to balance between "allow[ing] candidates to raise more funds to get their message out with the need to prevent the appearance of *quid pro quo* corruption." Furthermore, the fact that 72% of Austin voters voted in favor of the Base Limit in 1997 suggests that at least the perception of corruption as a result of large contributions existed in Austin at that time. *See Nixon*, 528 U.S. at 394 ("And although majority votes do not, as such, defeat First Amendment protections, the statewide vote on [contribution limits] certainly attested to the perception relied upon here: An overwhelming 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof.") (internal citations omitted). The court concludes the Base Limit serves the City's sufficiently important interest of addressing *quid pro quo* corruption and its appearance.

Zimmerman further argues that the Base Limit is not closely drawn as a means of addressing the appearance of *quid pro quo* corruption. The Supreme Court stated in *Buckley* that "a limitation upon the

amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 20. "Even a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25 (internal citations omitted). The Court specifically rejected the contention that $1000 or any other amount was a constitutional minimum below which legislatures could not regulate. *Id*.; *see also Nixon*, 528 U.S. at 397. The Court instead asked 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. *Buckley*, 424 U.S. at 21.

Expounding on *Buckley*, the Supreme Court in *Nixon* reversed the Eighth Circuit's holding that a $275 limit on contributions to candidates for state representative was unconstitutional. 528 U.S. at 397. The Court explained the appropriate inquiry is "whether the contribution limitation [is] so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Id*.

The Supreme Court later stated in *Randall v. Sorrell*, "[w]e cannot determine with any degree of exactitude the precise restriction necessary to carry out [a contribution limit's] legitimate objectives." 548 U.S. 230, 248 (2006). "In practice, the legislature is better equipped to make such empirical judgments, as legislators have particular expertise in matters related

to the costs and nature of running for office." *Id*. (internal citations omitted) (holding unconstitutional statutes limiting contributions to $200 in gubernatorial race and significantly lower amounts in state Senate and House of Representatives races).

This court recognizes the tautology that the more money a candidate has, the more he or she will be able to communicate with the public. However, Zimmerman's evidence does not reveal that the Base Limit renders political association ineffective or drives candidates' voices below the level of notice. Zimmerman called several political consultants as witnesses to show that there are many expensive elements of campaigns, from lists of email addresses of potential donors to the fees of political consultants themselves. Zimmerman also called Marco Mancillas, an unsuccessful candidate for Austin City Council in the 2014 election. Mancillas testified that there were people that would have donated more than the amount permitted by the Base Limit to his campaign. He posited that would have allowed him to send out more direct mail, make more phone calls, and have more people canvassing. However, Mancillas also testified that he spent about $24,000 on his 2014 campaign, roughly $300 less than Zimmerman, who won in a different district. Further, Mancillas confirmed that he received only 77 votes, and a candidate that spent under $600 received 224 votes, almost three times as many as Mancillas, suggesting that inability to raise more money from individual donors might not have been the source of Mancillas's difficulty.

Moreover, the City presented testimony from former Austin City Councilmember Laura Morrison that the

Base Limit was not an impediment to running a full-fledged campaign for Austin City Council in 2008. Morrison testified that being constrained by the Base Limit meant that she was "out there talking to a heck of a lot more people than just, say, one person who gave me $100,000; that's good for democracy."

The court concludes that the City's interest in preventing *quid pro quo* corruption and its appearance justifies the limited effect upon First Amendment freedoms caused by the Base Limit. With regard to the specific amount of the Base Limit, the court gives deference to the legislative branch of government, here the City, which is "better equipped to make.. .empirical judgments. . .related to the costs and nature of running for office." *See Randall*, 548 U.S. at 248 (2006).

Zimmerman has not shown that the Base Limit of $300, indexed for inflation, is so low as to impede the ability of candidates to amass the resources necessary for effective advocacy. *See Buckley*, 424 U.S. at 21.

The court concludes that the Base Limit, like the restriction in *Buckley*, has only a limited effect on Zimmerman's First Amendment freedom, that the City's legitimate interests are served by the limit, and the limit therefore passes constitutional muster.

B. Blackout period

Zimmerman next challenges the provision of the Austin City Charter that prohibits candidates for Mayor of Austin or the Austin City Council from soliciting or receiving contributions until 180 days before Election Day. Austin City Charter, Art. III, § 8(F)(2) (the "Blackout Period").

Temporal bans on contributions are subject to the "closely-drawn" test. *See Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 432 (5th Cir. 2014). The City must show that the Blackout Period serves a sufficiently important interest and employs closely drawn means to do so. *Id*. ("Even though the aggregate limit at issue here is only temporary, and, after the 60-day window passes, the general-purpose committee is largely free to spend as it pleases, Texas must still show that the 60-day, 500–dollar limit employs means closely drawn."); *see also McCutcheon*, 134 S. Ct. at 1452 (holding aggregate limits on total contributions to all candidates in election are not closely drawn to avoid unnecessary abridgment of associational freedoms, reasoning that "once the aggregate limits kick in, they ban all contributions of any amount"); *Gordon v. City of Houston, Tex.*, 79 F. Supp. 3d 676, 689 (S.D. Tex. 2015). In *Catholic Leadership*, the Fifth Circuit held unconstitutional a provision of the Texas Election Code that prohibited a general-purpose committee from engaging in more than $500 of political contributions during a 60-day window. 764 F.3d at 445. The court reasoned that a temporal restriction on contributions that "kicks in regardless of the proximity. . .to a legislative session or a judicial election is vastly overbroad." *Id*. at 433.

In *Thalheimer*, the Ninth Circuit upheld a ban on contributions to candidates outside of a 12-month pre-election window. 645 F.3d at 1122. The court relied on the lower court's reasoning that "contributions made near an election are clearer expressions of political speech, whereas 'off-year contributions' are more likely linked to business the donor has before the city, thus creating the appearance of quid pro quo 'corruption by

the sale of influence.'" *Id*. at 1121; *see also North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) (upholding statute placing hold on lobbyists' ability to contribute while legislature is in session because hold prevents corruption and the appearance of corruption).

In *Gordon*, the United States District Court for the Southern District of Texas granted a preliminary injunction enjoining enforcement of a temporal ban on candidates for city offices soliciting or receiving contributions at all times except for nine months before an election and four months after. 79 F. Supp. 3d at 690-91. The court concluded that the City of Houston failed to establish that the temporal ban advances the prevention of *quid pro quo* corruption or its appearance because the city did not cite 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." *Id*. at 691. This court finds the logic of *Gordon* persuasive.

Here, the City presented ample evidence that the Blackout Period is not a significant burden on candidates' fundraising, including testimony from Lewis that the "vast majority" of funds is raised within the three months immediately preceding an election, and testimony from Morrison that she worked on matters other than fundraising to lay the groundwork for her campaign until the Blackout Period was over. The City also presented testimony from Dr. Jonathan Krasno, an Associate Professor of Political Science at Binghamton University, that money flowing in before important votes is a "fairly standard concern."

The City, however, did not present evidence or argument to show how a contribution made seven months before election day presents a different threat of *quid pro quo* corruption than a contribution made three months before election day. *See Gordon*, 79 F. Supp. 3d at 691. As Lewis testified, the Austin City Council is in session and voting on matters year-round, so the danger that contributions would influence votes is no less a concern in the six-month window in which fundraising is allowed than during any other time of the election cycle. Further, the six-month window at issue here is more restrictive than the twelve-month window addressed in *Thalheimer*. *See* 645 F.3d at 1122. A contribution seven months before an election is more likely to be intended for use in a candidate's campaign than an "off-year" contribution more than twelve months before an election.

Finally, the Base Limit is a more closely-drawn measure in place to limit contributions to an amount that does not incentivize candidates to engage in *quid pro quo* corruption regardless of when a contribution is made. *See Catholic Leadership*, 764 F.3d at 436 ("[The state] advances no reason why more narrowly tailored base contribution limits. . .would not similarly serve its interests."). The City has demonstrated neither that the Blackout Period serves the City's sufficiently important interest of preventing *quid pro quo* corruption, nor that the Blackout Period is closely drawn to avoid unnecessary abridgment of associational freedoms. *See Buckley*, 424 U.S. at 25.

The court concludes that the City has not tied the Blackout Period to any sufficiently important City interest, resulting in the ordinance being an

infringement of Zimmerman's First Amendment freedom of association.

C. Aggregate Limit

Zimmerman also challenges the provision of the Austin City Charter that prohibits a candidate for Mayor of Austin or Austin City Council from accepting more than $30,000[3] in a general election and $20,000[4] in a runoff election from sources other than natural persons eligible to vote in a zip code completely or partially within city limits of the City of Austin. Austin City Charter, Art. III, § 8(A)(3) (the "Aggregate Limit").

Both contributing persons and contributed-to candidates can have sufficient injuries-in-fact to challenge campaign-finance restrictions. *Catholic Leadership*, 764 F.3d at 423. To establish standing, Zimmerman must show that: (1) he has suffered, or imminently will suffer, a concrete and particularized injury-in-fact; (2) the injury-in-fact is fairly traceable to the defendant's conduct; and (3) a favorable judgment is likely to redress the injury-in-fact. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Justice v. Hosemann*, 771 F.3d 285, 291 (5th Cir. 2014). The basic inquiry is whether the "conflicting contentions of the parties. . .present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). "To prove an injury in fact

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[3] Indexed for inflation. *See* Austin City Charter, Art. III, § 8(A)(3).

[4] Indexed for inflation. *See* Austin City Charter, Art. III, § 8(A)(3).

sufficient to raise a First Amendment facial challenge. . .a plaintiff must produce evidence of an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute." *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 209 (5th Cir. 2011). When a plaintiff has alleged an intention to engage in a course of conduct proscribed by statute that is arguably affected with a constitutional interest, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo prosecution as the sole means of seeking relief. *Id*. But "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Younger v. Harris*, 401 U.S. 37, 42 (1971). When plaintiffs "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible," they do not allege a dispute susceptible to resolution by a federal court. *Babbitt*, 442 U.S. at 299.

In the 2014 City of Austin election, the Aggregate Limit indexed for inflation was $36,000 in the general election and $24,000 in the runoff. Zimmerman received less than $3,000 in the general election and less than $5,000 in the runoff election from sources other than natural persons eligible to vote in a zip code completely or partially within Austin city limits. In fact, only two of the more than 70 candidates in the general election received half or more of the $36,000 limit, and only one candidate in the runoff election received half or more of the $24,000 limit. Zimmerman did not present evidence at trial demonstrating a likelihood or a potential that he would come closer to

reaching or exceeding the Aggregate Limit in a subsequent election.

The court concludes that Zimmerman has not shown that he has or imminently will suffer a concrete and particularized injury-in-fact fairly traceable to the Aggregate Limit. Zimmerman therefore does not have standing to challenge the Aggregate Limit.

D. Dissolution Requirement

Finally, Zimmerman challenges the provision of the Austin City Charter that requires a candidate for Mayor of Austin or the Austin City Council to distribute the balance of funds received from political contributions in excess of any remaining expenses for the election no more than 90 days after an election to (1) the candidate's contributors, (2) a charitable organization, or (3) the Austin Fair Campaign Fund; except that a successful candidate (an officeholder) may retain up to $20,000 for officeholder expenditures. Austin City Charter, Art. III, § 8(F)(3) (the "Dissolution Requirement").

The Eighth Circuit analyzed a similar provision in *Shrink Missouri Government PAC v. Maupin* and determined the provision should be subject to strict scrutiny. 71 F.3d 1422, 1428 (8th Cir. 1995). The court reasoned that the dissolution provision could be interpreted as a requirement to speak in the current election or as a restriction on expenditures in potential future elections, and is subject to strict scrutiny in either case. *Id*.; *see also Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to

refrain from speaking at all."); *McCutcheon*, 134 S. Ct. at 1444 ("[E]xpenditure limits. . .may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest."). This court agrees that the Dissolution Requirement is subject to strict scrutiny.

The Eighth Circuit struck down the dissolution provision at issue in *Maupin* because it was not narrowly tailored to serve a compelling government interest. 71 F.3d at 1428. The court rejected the state's argument that the dissolution requirement "ensur[es] the opportunity of all citizens, not just those who have amassed large war chests in noncompetitive races, to participate in the political process as candidates" and reasoned that "the contributor's political free speech interests are not well served if a candidate is compelled (1) to waste campaign contributions on unnecessary speech (in order to spend down the campaign's accumulated assets) or (2) to turn over those contributions to the Missouri Ethics Commission or return them to contributors." *Id*.

The City first argues Zimmerman does not have standing to challenge the dissolution requirement because the amount of his outstanding debt exceeded the balance of his funds remaining after the 2014 election. Zimmerman finished the 2014 race with approximately $1,200 remaining, which required disposal in compliance with the Dissolution Requirement. The City refers to Section 2-2-43 of the Austin City Charter to assert that a candidate must use excess funds to pay down campaign debt. The provision reads:

> The existence and amount of a campaign debt relating to a prior campaign period shall be determined based on the actual outstanding obligations of the candidate or campaign committee as of the date of the election for which the debt is incurred, and all funds held by the candidate or candidate's campaign committee in cash or bank accounts on that date shall be considered an offset to the campaign debt.

Austin City Charter § 2-2-43. This provision deals with calculation of campaign debt and does not require that a candidate use excess campaign funds from the candidate's election to pay off debts. The fact that the amount Zimmerman's of outstanding debt exceeded the balance of his remaining funds does not negate his standing to challenge the Dissolution Requirement.

The City also argues that the Dissolution Requirement serves the purpose of reducing *quid pro quo* corruption or its appearance by preventing candidates from creating "war chests" for later campaigns and discouraging people from coming in at the last minute and giving money to the likely winner of the election. However, the City does not explain or present evidence to show how a "war chest" or these last minute contributions implicate *quid pro quo* corruption or its appearance.

In its brief, the City asserts that once it became clear that Morrison would win in the 2008 runoff election, she returned to her campaign office and found "envelopes full of contributions that came from erstwhile opponents," which "may have been legal, but. . . certainly have a certain aroma to them, an aroma that could only be worse, in corruption terms,

without the individual limits." This is the type of "mere conjecture" the Supreme Court has stated is not "adequate to carry the government's First Amendment burden." *McCutcheon*, 134 S. Ct. at 1452. "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, does not give rise to. . .*quid pro quo* corruption." *Id*. at 1450. "[G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford." *Id*. at 1441.

And finally, the Base Limit is a more narrowly tailored measure that, as the City points out, provides a protection from these last minute contributions being accepted by a candidate as *quid pro quo*. *See Catholic Leadership*, 764 F.3d at 436 ("[The state] advances no reason why more narrowly tailored base contribution limits. . .would not similarly serve its interests.") The City has demonstrated neither that the Dissolution Requirement "promotes a compelling interest," nor that it is the "least restrictive means to further the articulated interest." *McCutcheon*, 134 S. Ct. at 1444.

The court concludes that the Dissolution Requirement is unconstitutional as an undue restriction on Zimmerman's protected speech under the First Amendment.

E. Conclusion

The court finds and concludes that (1) the Base Limit is a constitutional regulation of protected First Amendment activity, (2) the Blackout Period is unconstitutional under the First Amendment,

(3) Zimmerman does not have standing to challenge the Aggregate Limit, and (4) Dissolution Requirement is unconstitutional under the First Amendment. The court will render separately a final judgment enjoining the City from enforcing the Blackout Period and the Dissolution Requirement.

SIGNED this 20th day of July, 2016.

s/_____
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

APPENDIX C

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

CAUSE NO. 1:15-CV-628-LY

[Filed July 20, 2016]

DONALD ZIMMERMAN,	)
PLAINTIFF,	)
	)
V.	)
	)
CITY OF AUSTIN,	)
DEFENDANT.	)
	)

FINAL JUDGMENT

Before the court is the above styled and numbered cause. On this same date, the court rendered Findings of Fact and Conclusions of Law, by which the court concluded that Article III, Sections 8(F)(2) and (3) of the Austin City Charter are unconstitutional. Accordingly,

IT IS ORDERED that the City of Austin is **PERMANENTLY ENJOINED AND RESTRAINED** from enforcing Article III, Sections 8(F)(2) and (3) of the Charter of the City of Austin, Texas.

IT IS FURTHER ORDERED that the case is hereby **CLOSED**.

SIGNED this 20th day of July, 2016.

s/_____
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

APPENDIX D

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

CAUSE NO. 1:15-CV-628-LY

[Filed October 26, 2016]

DONALD ZIMMERMAN, PLAINTIFF,

V.

CITY OF AUSTIN, DEFENDANT.

ORDER

Before the court is Plaintiff's Motion to Alter or Amend the Judgment filed August 17, 2016 (Clerk's Doc. No. 69), the City of Austin's Response in Opposition to Plaintiff's Motion to Alter or Amend the Judgment filed August 31, 2016 (Clerk's Doc. No. 72), and Plaintiff's Reply in Support of Motion to Alter Or Amend The Judgment filed September 6, 2016 (Clerk's Doc. No. 73). Plaintiff seeks reconsideration of this court's Findings of Fact and Conclusions of Law (Clerk's Doc. No. 67) and Final Judgment (Clerk's Doc. No. 68), each rendered July 20, 2016.

Plaintiff moves to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil

Procedure ("Rule 59(e)"). Rule 59(e) "serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. International Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989) (internal quotations omitted). Additionally, relief under Rule 59(e) is also appropriate when there has been an intervening change in the controlling law. *Schiller v. Physicians Res. Group, Inc*., 342 F.3d 563, 567 (5th Cir. 2003). A motion for reconsideration is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of the court's order. *See Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990). Reconsideration of an order is an extraordinary remedy that should be used sparingly. *See Templet v. HydroChem, Inc*., 367 F.3d 473, 479 (5th Cir. 2004).

Zimmerman argues (1) the court's conclusion that Zimmerman does not have standing to challenge the Aggregate Limit is a manifest error of law; (2) the judgment must be amended in light of new evidence regarding Zimmerman's compliance burdens and changes to Zimmerman's campaign plans; and (3) the court's conclusion that the Base Limit is not a content based restriction is a manifest error of law. Having reviewed the motion, response, reply, and applicable law, the court concludes that there has been no showing that the court's Findings of Fact and Conclusions of Law (Clerk's Doc. No. 67) or Final Judgment (Clerk's Doc. No. 68) included any manifest errors of law or fact. Further, the newly asserted evidence does not change the conclusions of the court stated in its orders. Therefore, the court will deny Plaintiff's motion to alter or amend the judgment.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Alter or Amend the Judgment (Clerk's Doc. No. 69) is **DENIED**.

SIGNED this 26th day of October, 2016.

s/_____
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-51366

[Filed April 18, 2018]

DONALD ZIMMERMAN,

Plaintiff - Appellant Cross-Appellee

v.

CITY OF AUSTIN, TEXAS,

Defendant - Appellee Cross-Appellant

Appeals from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING AND
REHEARING EN BANC
(Opinion: February 1, 2018, 881 F.3d 378)

Before SMITH, BARKSDALE, and HIGGINSON, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

The Petition for Rehearing is DENIED and the court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

In the en banc poll, two judges voted in favor of rehearing (Judges Jones and Ho) and twelve judges voted against rehearing (Chief Judge Stewart and Judges Smith, Dennis, Clement, Owen, Elrod, Southwick, Haynes, Graves, Higginson, Costa, and Willett).

ENTERED FOR THE COURT:

s/_____
STEPHEN A. HIGGINSON
UNITED STATES CIRCUIT JUDGE

JAMES C. HO, Circuit Judge, with whom EDITH H. JONES, Circuit Judge, joins as to Parts I and II, dissenting from denial of rehearing en banc:

The unfortunate trend in modern constitutional law is not only to create rights that appear nowhere in the Constitution, but also to disfavor rights expressly enumerated by our Founders. *See*, *e.g.*, *Silvester v. Becerra*, 138 S. Ct. 945 (2018) (Thomas, J., dissenting from denial of certiorari). This case reinforces this regrettable pattern.

There is no more quintessentially American principle than the right of the people to participate in their own governance. The First Amendment protects the freedom of speech, and that freedom emphatically includes the right to speak about who our elected leaders should and should not be. This foundational American liberty includes not only the freedom to engage in one's own political speech, but also the freedom to support like-minded candidates for office.

The First Amendment therefore protects campaign contributions. For example, in *Randall v. Sorrell*, the Supreme Court invalidated various campaign contribution limits imposed by the State of Vermont. 548 U.S. 230 (2006). That included a limit of $300 per election cycle—that is, $150 per election (primary and general), or $215 in 2015 dollars—for state senators representing between 20,000 and 120,000 people. *Id.* at 236–38 (plurality); *see also* Joint App'x at 21–22, *Randall*, 548 U.S. 230 (Nos. 04-1528, 04-1530, 04-1697), 2005 WL 3477006, at *55–56, 79.

This case involves a similarly low contribution limit of $350 per election, in 2015 dollars, for city council members representing fewer than 100,000 people in Austin, Texas. *Zimmerman v. City of Austin*, 881 F.3d 378, 387 & n.3 (5th Cir. 2018). For several reasons, we should have granted rehearing en banc and held that the Austin contribution limit violates the First Amendment.

I.

Campaign contributions are not personal gifts—they are donations to support and defray the costs of campaign speech. *See*, *e.g.*, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 261 (1986) ("[I]ndividuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction."); *McCormick v. United States*, 500 U.S. 257, 272 (1991) ("[E]lection campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.").

Accordingly, the Supreme Court has carefully delimited the narrow circumstances in which the government may permissibly interfere with campaign contributions. In fact, the only legitimate government interest for limiting campaign contributions is preventing unlawful *quid pro quo* corruption or the appearance thereof. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014) (plurality). And as the Court has made clear, *quid pro quo* corruption requires "a direct exchange of an official act for money." *Id.* at 1441.

The Court has also explicitly rejected other purported justifications for restricting campaign contributions. It has held that amorphous concerns about "improper influence" or "access" are too ambiguous and imprecise to warrant interference with First Amendment rights. *Compare Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 388–89 (2000), *with McCutcheon*, 134 S. Ct. at 1451 ("The line between *quid pro quo* corruption and general influence . . . must be respected in order to safeguard basic First Amendment rights."), *and Citizens United v. FEC*, 558 U.S. 310, 360–61 (2010) ("Ingratiation and access . . . are not corruption."). Nor may government regulate contributions "simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others." *McCutcheon*, 134 S. Ct. at 1441.

Moreover, the risk of *quid pro quo* corruption must be established by evidence—courts may not "accept[ ] *mere conjecture* as adequate to carry a First Amendment burden." *Id.* at 1452 (emphasis added) (quoting *Shrink*, 528 U.S. at 392).

This standard is fatal to Austin's $350 contribution limit. It 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. Justice Thomas put it well: "I cannot fathom how a $251 contribution could pose a substantial risk of securing a political *quid pro quo*"—referring to Missouri's $250 contribution limit in elections involving fewer than 100,000 constituents, which adjusted for inflation is $390 in 2015 dollars. *Randall*, 548 U.S. at 272–73 (Thomas, J., concurring) (alterations and quotations marks omitted) (quoting *Shrink*, 528 U.S. at 425 (Thomas, J., dissenting)). His words are equally applicable here: I too cannot fathom how a $390 contribution could pose a substantial risk of securing a political *quid pro quo*.

The district court should have heeded Justice Thomas's common-sense observation—particularly because the record is devoid of any evidence to the contrary. The 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.

There are numerous problems with the City's defense. It credits voter "perception"—which is perilously close to "mere conjecture." It raises amorphous concerns about "inordinate influence"—not *quid pro quo* corruption. And even ignoring these defects, this "evidence" would not remotely justify a substantially lower contribution limit of $350—less than 25 percent of the "large contributions" that concerned Austin voters.

Not surprisingly, then, when a respected panel of this Court upheld the district court's judgment, it did not rely on any of the dollar values identified by the district court. Instead, the panel invoked Supreme Court precedent: "[I]n *Shrink Mo.* the Supreme Court upheld Missouri's $275 limit—which, adjusted for inflation, was equivalent to approximately $390 at the time this appeal was filed—on contributions to candidates for any office representing fewer than 100,000 people." 881 F.3d at 387. In other words, the panel ruled that the difference between the $390 limit in *Shrink* and the $350 limit challenged here was immaterial for First Amendment purposes. *Id*. ("Austin's $350 limit . . . is not so low by comparison as to raise suspicion.").

But the reliance on *Shrink* is mistaken for at least two reasons.

To begin with, Austin's $350 limit is more than 10 percent *less* than the $390 limit at issue in *Shrink*. As Justice Thomas explained in his concurrence, the *Randall* plurality treated "the limits in *Shrink* as a constitutional minimum, or at least as limits below which 'danger signs' are present." 548 U.S. at 269 (Thomas, J., concurring).

But there's an even more basic problem here: The Supreme Court did *not* pass judgment on the constitutionality of the $390 limit in *Shrink*. 528 U.S. at 382–83 (describing the inflation-adjusted "$1,075 [limit] for contributions to candidates for statewide office (including state auditor)" as the "particular provision challenged here"); *see also Shrink Mo. Gov't PAC v. Adams*, 204 F.3d 838, 840 (8th Cir. 2000) (analyzing on remand "the $525 and $275 limits"

because the Supreme Court "reviewed *only* the statewide limit of $1,075") (emphasis added). Rather, as *Randall* explained, "the *lowest limit* this Court has previously upheld [is] the limit of $1,075 per election . . . for candidates for Missouri state auditor." 548 U.S. at 251 (plurality) (emphasis added) (citing *Shrink*, 528 U.S. 377).

Thus, in holding the Vermont limit unconstitutional, *Randall* specifically noted that "Vermont's limit is *well below* . . . $1,075." *Id.* (emphasis added). So too here: Austin's $350 limit is "well below" $1,075 (or $1,525 in 2015 dollars). Moreover, *Randall* observed that the "comparable Vermont limit of roughly $200 per election . . . is less than one-sixth of Missouri's current inflation-adjusted limit." *Id*. And again, so too here: Austin's $350 limit is less than one-fourth of the inflation-adjusted $1,525 limit upheld in *Shrink*.

Because Austin's contribution limit is "substantially lower" than the limits previously upheld by the Supreme Court, there are "danger signs that [Austin's] contribution limit[] may fall outside tolerable First Amendment limits." *Id*. at 253. *See also id.* at 252 ("it [is] difficult to treat *Shrink*'s (then) $1,075 limit as providing affirmative support for the lawfulness of Vermont's far lower levels"); *id.* at 269 (Thomas, J., concurring) (emphasizing plurality's "treatment of the limits in *Shrink* as a constitutional minimum, or at least as limits below which 'danger signs' are present"). Based on the evidence presented below, and under my reading of *Shrink* and *Randall*, it is difficult to see how Austin's $350 limit is "closely drawn" to serve a recognized government interest, as required by the

Supreme Court. *Randall*, 548 U.S. at 253–63 (plurality) (citing *Buckley v. Valeo*, 424 U.S. 1, 20–22, 36–37 (1976)).

II.

A majority of this Court has decided not to rehear this case en banc. But that decision need not foreclose a future challenge to Austin's contribution limit. Indeed, although I would have held unconstitutional Austin's limit based solely on the record in this case, there is additional evidence and argument that Mr. Zimmerman could have marshaled—but did not—that would have brought the unconstitutionality of the Austin contribution limit into even sharper relief.

In his effort to distinguish *Shrink*, Mr. Zimmerman adjusted for both inflation and population size. But he did not additionally adjust for what I will call locality considerations—such as media market costs and other cultural factors—that affect the cost of campaigning in a particular area. It would not be surprising if the cost of reaching voters were significantly greater in Austin than in Missouri. Accordingly, it may well be that a $350 contribution limit is substantially more disruptive to effective campaign advocacy in Austin than in Missouri. *See Randall*, 548 U.S. at 248 ("Following *Buckley*, we must determine whether [Vermont's] contribution limits prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy.'") (second alteration in original) (quoting *Buckley*, 424 U.S. at 21).

Nothing in Supreme Court precedent precludes such locality considerations in assessing the constitutionality of campaign contribution limits. To

the contrary, the parties in *Randall* well understood the relevance of such considerations.[1] And our sister circuits have too.[2]

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[1] *See*, *e.g.*, Brief for Petitioners at 9, 12, *Randall*, 548 U.S. 230 (No. 04-1528), 2005 WL 3839201 (addressing "the unique and idiosyncratic aspects of running a campaign in different Vermont legislative districts" and "taking into account various factors including the size of the district, density of population, available media outlets, and other factors"); Brief for Respondents, Cross-Petitioners Vermont Public Interest Research Group et al. at 45, *Randall*, 548 U.S. 230 (Nos. 04-1528, 04-1530, 04-1697), 2006 WL 325190 (suggesting "that campaigns in Vermont would be significantly less expensive than in other parts of the country" due to both "Vermont's small population and intimate campaigning style" and its "relatively inexpensive cost of television advertising"); Transcript of Oral Argument at 31– 32, *Randall*, 548 U.S. 230 (Nos. 04-1528, 04-1530, 04-1697), 2006 WL 560656 ("Vermont has the second lowest gubernatorial spending in the country. In the record it shows that in the largest urban area in the State, in the Burlington area, you can buy three 30-second TV ads in prime time on tier[-]one cable for $45.").

[2] *See*, *e.g.*, *Lair v. Bullock*, 697 F.3d 1200, 1213 (9th Cir. 2012) ("Montana remains one of the least expensive states in the nation in which to run a political campaign. . . . Montana specifically justified the low limits based on the relative inexpense of campaigning in Montana, a state where, for many offices, campaigning primarily takes place door-to-door, and only occasionally through advertising on radio and television.") (brackets and quotation marks omitted); *Frank v. City of Akron*, 290 F.3d 813, 818 (6th Cir. 2002) ("many means of contacting voters . . . are relatively inexpensive in a town the size of Akron"); *Daggett v. Comm'n on Gov'tal Ethics & Election Practices*, 205 F.3d 445, 459 & n.13 (1st Cir. 2000) ("[C]ampaigns [in Maine] are inexpensive compared to most other states. . . . [T]he average cost of a competitive House race in 1994 ranged from a high of $430,994 in California to a low of $4,449 in Maine."); *see also Thompson v. Dauphinais*, 217 F. Supp. 3d 1023, 1033 (D. Alaska 2016) ("[I]n a

Because Mr. Zimmerman neither presented this legal theory here nor offered any evidence to support it, the panel decision should not foreclose another Austin citizen from presenting evidence and argument regarding such locality considerations in a future challenge to the Austin contribution limit. *See De La Paz v. Coy*, 786 F.3d 367, 373 (5th Cir. 2015) ("[A]ccording to black letter law, 'a question not raised by counsel or discussed in the opinion of the court' has not 'been decided merely because it existed in the record and might have been raised and considered.'") (quoting *United States v. Mitchell*, 271 U.S. 9, 14 (1926), and citing Henry Campbell Black, *Handbook on the Law of Judicial Precedents, or, The Science of Case Law* 37 (1912)). Nor should it foreclose a challenge to Austin's contribution limit for mayoral races, which was not at issue in this case. 881 F.3d at 384 n.1.

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state like Alaska . . . the cost of campaigns for state or municipal office are relatively low."); *Cal. Prolife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1298 (E.D. Cal. 1998) ("The facts pertinent to each jurisdiction, such as the size of the district, the cost of media, printing, staff support, news media coverage, and the divergent provisions of the various statutes and ordinances undermines the value of crude comparisons. . . . Similar caps in another jurisdiction may not have the same severe impact upon First Amendment rights. . . . Certain conditions, such as the fact that the size of the legislative districts in California precludes so-called retail politics, the cost of advertising in this state, the general lack of media coverage of legislative campaigns, the cost of overhead, all limit efforts to reduce cost."), *aff'd*, 164 F.3d 1189 (9th Cir. 1999); *People for Pearce v. Oliver*, No. 17-cv-752 JCH/SMV, 2017 WL 5891763, at *14 (D.N.M. Nov. 28, 2017) ("Plaintiffs also established the high cost associated with gubernatorial campaigns, particularly for advertising, which can cost $200,000 per week to run state-wide television advertisements.").

III.

The Austin contribution limit is invalid under current Supreme Court precedent. Moreover, there are more fundamental problems with such laws: Contribution limits such as Austin's are simultaneously over- and under-inclusive—defects that have been held fatal in other First Amendment contexts.

First, as to over-inclusiveness: As the Supreme Court has recognized, the First Amendment imposes such a formidable barrier to government interference with speech that it not only forbids the government from imposing a regulation that affects both protected and unprotected speech—it even forbids government from regulating unprotected activities alone, if the regulation also threatens to chill protected speech. *See*, *e.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977) ("The reason for the special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the *in terrorem* effect of the statute."); *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) (holding unconstitutional an "overly broad statute" because it "creates a 'danger zone' within which protected expression may be inhibited").

In other words, the First Amendment prophylactically protects speech from government intrusion. Yet campaign contribution limits turn this principle on its head: They prophylactically *prohibit* protected speech, in hopes of targeting the

"appearance" of unprotected activity in the form of *quid pro quo* corruption.

By design, contribution limits categorically bar all contributions over a certain threshold, irrespective of the purpose or motivation of the donor. But this is dramatically over-inclusive. Many contributions have nothing to do with the appearance of—let alone any actual—*quid pro quo* corruption. Countless Americans contribute for no other reason than to "support candidates who share their beliefs and interests." *McCutcheon*, 134 S. Ct. at 1441. Because the candidate and the donor share common beliefs, the candidate is already "expected to be responsive to those concerns," without any inkling of a *quid pro quo* agreement. *Id.* Indeed, many Americans contribute without ever even communicating with the candidate—for example, a donor might simply be inspired by the candidate's prior record of public service, proposed future action, or a particular speech or debate performance. Such contributions are far from corrupt—to quote *McCutcheon*, they "embody a central feature of democracy." *Id.* The Court nevertheless allows their criminalization. This is textbook over-inclusiveness.

Campaign contribution limits are also impermissibly under-inclusive. In other contexts, the Supreme Court has held that the First Amendment forbids laws that infringe on the freedom of speech—even where the government's interest is compelling—if the law is under-inclusive and therefore fails to further a recognized government interest. *See*, *e.g.*, *The Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) ("[T]he facial underinclusiveness of [the statute] raises serious doubts about whether Florida is, in fact,

serving, with this statute, the significant interests which appellee invokes in support of affirmance."); *Citizens United*, 558 U.S. at 362 ("[T]he statute is both underinclusive and overinclusive. . . . [I]f Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder's interests would be implicated by speech in any media at any time.").

Take *Buckley*, for example. The Court held that citizens have a First Amendment right to spend money on their own political speech to support a political campaign—also known as independent expenditures—despite the obvious risk that such independent expenditures may pose the same potential for *quid pro quo* corruption as direct campaign contributions. 424 U.S. at 45 (invalidating limits on independent expenditures, while upholding campaign contribution limits, even "assuming, *arguendo*, that large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions").

This raises an obvious question: If the government cannot regulate independent expenditures, what government interest is served by regulating only campaign contributions? As any proponent of campaign finance regulation will tell you, a donor with suspect intentions can circumvent campaign contribution limits—and achieve his nefarious goals—simply by making independent expenditures instead. So either the government regulates everything—or there's no point in regulating any of it.

Indeed, that is what the Court said in *Buckley* itself. There, the Court invalidated a rule that restricted independent expenditures that expressly advocated for a candidate, on the ground that it would be pointlessly under-inclusive: Donors could simply make independent expenditures that avoid express advocacy but still benefit the candidate. As the Court observed, it "would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." *Id.* Accordingly, the Court held that "*no substantial societal interest would be served*" by such a restriction because it still "permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office." *Id.* (emphasis added).

Limits on campaign contributions are even more under-inclusive—especially considering that, as the Supreme Court has made clear, donors have the right under the First Amendment to make *any* independent expenditures they desire.

I finish where I began: Campaign speech is core political speech under the First Amendment. Yet current Supreme Court jurisprudence disfavors it. Contribution limits such as Austin's are both over-inclusive and under-inclusive—defects the Court has found unacceptable in other First Amendment contexts.

* * *

Under our Constitution, the people are not subjects, but citizens. As citizens, we enjoy the fundamental right to express our opinions on who does and does not belong in elected office.

To be sure, many Americans of good faith bemoan the amount of money spent on campaign contributions and political speech. But if you don't like big money in politics, then you should oppose big government in our lives. Because the former is a necessary consequence of the latter. When government grows larger, when regulators pick more and more economic winners and losers, participation in the political process ceases to be merely a citizen's prerogative—it becomes a human necessity. This is the inevitable result of a government that would be unrecognizable to our Founders. *See*, *e.g.*, *NFIB v. Sebelius*, 567 U.S. 519 (2012).

So if there is too much money in politics, it's because there's too much government. The size and scope of government makes such spending essential. *See*, *e.g.*, *EMILY's List v. FEC*, 581 F.3d 1, 33 (D.C. Cir. 2009) (Brown, J., concurring) ("The more power is at stake, the more money will be used to shield, deflect, or co-opt it. So long as the government can take and redistribute a man's livelihood, there will always be money in politics.").

But whatever size government we choose, the Constitution requires that it comply with our cherished First Amendment right to speak and to participate in our own governance. If we're going to ask taxpayers to devote a substantial percentage of their hard-earned income to fund the innumerable activities of federal,

state, and local government, we should at the very least allow citizens to spend a fraction of that amount to speak out about how the government should spend their money. I respectfully dissent.

APPENDIX F

AUSTIN CHARTER: ARTICLE III, SECTION 8

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. The amount of the contribution limit shall be modified each year with the adoption of the 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 published Consumer Price Index on May 13, 2006, shall be used as a base of 100 and the adjustment thereafter will be to the nearest $50.00.

(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 of the 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 published 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.

(B) Small-Donor Political Committees.

(1) A small-donor political committee is a political committee which has accepted no more than $25 from any contributor during any calendar year, has had at least 100 contributors during either the current or previous calendar year, has been in existence for at least six months, and has never been controlled by a candidate.

(2) Such a committee shall not contribute more than $1000 per candidate per election for the offices of Mayor and City Council.

(C) Coordinated Expenditures.

Any expenditure supporting the election of a candidate or opposing the election of an opponent made with the prior consent of the candidate or his or her committee, or with cooperation or strategic communication

between the candidate or his or her committee and the person making the expenditure, is considered a contribution and an expenditure.

(D) Contributions Considered To Be From One Committee.

Contributions made by separate political committees established, administered, maintained, or controlled by the same person or persons, including any parent, subsidiary, branch, division, department or local unit of the person, or by groups of those persons, shall be considered to be made by a single political committee.

(E) Responsibility Of Candidate To Prevent Violations.

The candidate, or his or her committee, shall determine whether accepting each contribution would violate this section before accepting the contribution.

(F) Time Restrictions On Candidate Fundraising; Officeholder Accounts.

(1) In this section terms have the same meaning they have in Title 15 of the Texas Election Code. The term "officeholder account" means an account in which funds described by subsection (F)(4) must be kept. "Officeholder" means the mayor or a council member.

(2) 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.

(3) Except as provided by subsection (F)(6), no later than the 90th day after an election, or if a candidate is in a runoff election no later than the 90th day after the runoff, a candidate or officeholder shall distribute the balance of funds received from political contributions in excess of any remaining expenses for the election: (a) to the candidate's or officeholder's contributors on a reasonable basis, (b) to a charitable organization, or (c) to the Austin Fair Campaign Fund.

(4) An unsuccessful candidate who, after an election, has unpaid expenses remaining, or who has unreimbursed campaign expenditures from personal funds that were made with the intent to seek reimbursement from political contributions, may solicit and accept political contributions after the election until the unpaid expenses are paid and the unreimbursed expenditures are reimbursed.

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

(6) An officeholder may retain up to $20,000 of funds received from political contributions for the purposes of officeholder expenditures.

(7) An officeholder shall keep funds retained under subsection (F)(6) in an account separate from any other funds including personal funds of the officeholder and any other political funds of the officeholder. The funds kept in an officeholder account may be used only for officeholder expenditures. The funds kept in an officeholder account may not be used for campaign expenditures. The funds kept in an officeholder account may not exceed $20,000.00 at any time.

(8) When an officeholder leaves the Council the funds remaining in an officeholder account must be paid to the Austin Fair Campaign Fund.

(G) Applicability To Councilmembers.

Any incumbent mayor or councilmember is subject to the regulations applied to candidates for the office he or she holds.

(H) Criminal or Civil Litigation Fund.

Nothing in this article applies to the solicitation, acceptance, or use of contributions for:

(1) defending a criminal action or prosecuting or defending a civil action brought by or against the person in the person's status as a candidate or officeholder; or

(2) participating in an election contest or participating in a civil action to determine a person's eligibility to be a candidate for, or elected or appointed to, a public office in this state.

(I) Enforcement.

The city council may by ordinance adopt penalties and enforcement procedures for violations of this Article.

(J) Severability.

If any provision of this section, or the application of that provision to any persons or circumstances, shall be held invalid, then the remainder of this section, to the extent that it can be given effect, and the application of that provision to persons or circumstances other than those to which it was held invalid, shall not be affected thereby, and to this extent the provisions of this section are severable.

Amendment note: Section 8 appears as amended at the election of May 13, 2006. This section was added at the election of November 4, 1997. It took effect on November 7, 1997, the date of the canvass.