No. 16-51366

In the United States Court of Appeals for the Fifth Circuit

Donald Zimmerman,

Plaintiff-Appellant/Cross-Appellee,

v.

City of Austin, Texas,

Defendant-Appellee/Cross-Appellant.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

BRIEF OF *AMICI CURIAE* THE CAMPAIGN LEGAL CENTER AND DĒMOS IN SUPPORT OF DEFENDANT-APPELLEE/CROSS APPELLANT THE CITY OF AUSTIN AND AFFIRMANCE IN PART

Brenda Wright
Adam Lioz
Allie Boldt
DĒMOS
1340 Centre Street, Suite 209
Newton, MA 02459
(617) 232-5885

Paul M. Smith
Tara Malloy
Mark P. Gaber
Counsel of Record
Megan P. McAllen
THE CAMPAIGN LEGAL CENTER
1411 K Street NW, Suite 1400
Washington, DC 20005
(202) 736-2200
mgaber@campaignlegalcenter.org

Counsel for Amici Curiae

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amici Curiae
The Campaign Legal Center
Dēmos

Counsel for *Amici Curiae*
Paul M. Smith
Tara Malloy
Mark P. Gaber
Megan P. McAllen
Brenda Wright
Adam Lioz
Allie Boldt

Respectfully submitted,

/s/ Mark P. Gaber
Mark P. Gaber
Counsel of Record

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Campaign Legal Center is a nonprofit, nonpartisan organization that represents the public interest in administrative and legal proceedings to promote the enforcement of governmental ethics, campaign finance, and election laws. *Amicus curiae* Dēmos is a public policy organization working for an America where everyone has an equal say in our democracy and an equal chance in our economy. Dēmos engages in litigation, research, and advocacy to support money in politics reforms that protect the integrity of government and ensure that a diverse array of voices can be heard.

Amici submit this brief regarding one aspect of this case—Appellant/Cross-Appellee Donald Zimmerman's ("Zimmerman's") challenge to Austin's base contribution limits—because of their concern that the standard of review Zimmerman advocates for determining the constitutionality of campaign contribution limits is contrary to well-established precedent and, if adopted, would disrupt countless state and local laws properly aimed at preventing corruption and its appearance.

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[1] All parties have consented to the filing of this brief. No party's counsel or other person authored this brief, in whole or in part, or made a monetary contribution to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court has not wavered from its position that the First Amendment permits limits on campaign contributions to candidates, and that such limits are subject to lesser scrutiny than more restrictive campaign regulations, such as expenditure limitations. Over forty years ago, the Court explained in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), that contribution limits "entail[] only a marginal restriction upon the contributor's ability to engage in free communication," *id.* at 20, a restriction easily outweighed by the important interest they serve of preventing "the reality or appearance of corruption *inherent* in a system permitting unlimited financial contributions" to candidates, *id.* at 28 (emphasis added). The Court also made clear that contribution limits were subject only to the "closely drawn" test—*i.e.*, they are constitutional if supported by "a sufficiently important interest" and "closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25. Since *Buckley*, the Supreme Court has continually affirmed that base limits serve the "sufficiently important" and constitutionally "permissible objective of combatting corruption." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442 (2014).

Zimmerman now seeks to relitigate this long-settled precedent and apply strict scrutiny to Austin's base limits. He also asks this Court to question the premise—unquestioned by the Supreme Court for decades—that base limits serve the

important interest of preventing *quid pro quo* corruption and its appearance. He further asks this Court to examine, with rigorous scrutiny, the evidence upon which Austin relied in determining it needed to enact base limits. And he suggests this Court must inquire whether Austin selected the exact amount—not a dollar less—that would be required to prevent corruption or its appearance, as though this Court could precisely ascertain this amount. The positions Zimmerman advocates are contrary to settled precedent and, if adopted, would disrupt the very premise upon which campaign finance law has been built for decades.

First, binding Supreme Court precedent provides that courts should review base limits under the "closely drawn" test, not under strict scrutiny. The Court established this standard in *Buckley*, and has specifically rejected the position that strict scrutiny should apply. *See FEC v. Beaumont*, 539 U.S. 146, 161 (2003). Zimmerman's contention that this framework should be set aside, and instead Austin's base limits should receive strict scrutiny as a content-based restriction on speech, is irreconcilable with controlling law.

Second, the Supreme Court has reasoned, essentially as a matter of law, that base limits advance the important governmental interest of preventing corruption and its appearance. The Court has clarified that "[t]he importance of the governmental interest in preventing [corruption] has never been doubted," *id.* at 154 (second alteration in original) (quotations marks omitted), and that it is "neither

novel nor implausible" to presume that large contributions pose a danger of corruption or its appearance, *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000). Austin was therefore entitled to rest its base contribution limits on its interest in preventing corruption and its appearance. And under settled precedent, Austin was entitled to rely upon the experiences of other jurisdictions in identifying corruption and its appearance as a danger. In any event, Austin proffered evidence of its specific interest in preventing corruption and its appearance. Zimmerman's contention that Austin's interest was insufficiently established should be rejected as contrary to the governing standard and the record evidence.

Third, Austin's decisions as to the precise monetary amounts of its contribution limits are not subject to the exceedingly rigorous judicial review that Zimmerman demands. *See, e.g.*, Zimmerman Br. 57. Rather, Austin is owed deference in setting the appropriate base limits, as it is "better equipped to make such empirical judgments" than the courts. *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (joint opinion of Breyer, J., Roberts, C.J., and Alito, J.). For that reason, The Supreme Court has explained that it has "no scalpel to probe" the amount at which to fix limits. *Id.* at 247 (quotation marks omitted). Zimmerman is wrong, therefore, to contend that Austin must meet some strict scrutiny-like standard when setting the precise monetary amounts of its contribution limits. Austin is not required to demonstrate that each minute detail of its contribution limit scheme—including its

dollar thresholds—satisfies an anti-corruption purpose distinct from that of the limits as a whole.

Fourth, because the standard of review Zimmerman advocates is contrary to settled precedent upon which countless states and localities have relied in enacting campaign finance laws, its adoption by this Court would upend decades of stability and call into question the validity of laws far beyond Austin's. This potential ripple effect on the laws of other states and localities underscores how radical a departure Zimmerman's approach would be from long-settled law.

ARGUMENT

I. Base Contribution Limits Are Subject to "Relatively Complaisant" Review, Not Strict Scrutiny.

Under long-settled precedent, base limits may be constitutionally enacted pursuant to the "closely drawn" test and are not subject to strict scrutiny. In *Buckley*, the Supreme Court reasoned that, "[b]y 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." 424 U.S. at 20. This was so, the Court reasoned, 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," and "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the

expression rests solely on the undifferentiated, symbolic act of contributing." *Id.* at 21. Thus, the Court held, "[e]ven 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 quotation marks omitted). Concluding that the base limits under the Federal Election Campaign Act ("FECA") met this standard because they were closely drawn to "limit the actuality and appearance of corruption resulting from large individual financial contributions," *id.* at 26, the Court upheld them as constitutional.

The Supreme Court has repeatedly affirmed that the "closely drawn" test, and not strict scrutiny, governs the review of base limits. As the Court explained in *Beaumont*, it is a "basic premise . . . in setting First Amendment standards for reviewing political financial restrictions [that] the level of scrutiny is based on the importance of the political activity at issue to effective speech or political association." 539 U.S. at 161 (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259 (1986)). The Court noted that, "[g]oing back to *Buckley*[,] . . . restrictions on political contributions have been treated as merely marginal speech restrictions subject to *relatively complaisant review* under the First Amendment, because contributions lie closer to the edges than to the core of political expression." *Id.* (emphasis added) (quoting *FEC v. Colorado Republican Fed. Campaign Comm.*,

533 U.S. 431, 456 (2001) ("*Colorado II*")). For that reason, "instead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, a contribution limit involving significant interference with associational rights passes muster if it satisfies the *lesser demand* of being closely drawn to match a sufficiently important interest." *Id.* at 162 (emphasis added) (internal quotation marks omitted).

The Court has reiterated the validity of this test in every case presenting the issue since *Buckley*. *See, e.g.*, *Davis v. FEC*, 554 U.S. 724, 737 (2008) (noting that the "closely drawn" test applies to contribution limits); *Randall*, 548 U.S. at 249-53 (reviewing Vermont's contribution limits under "closely drawn" test); *McConnell v. FEC*, 540 U.S. 93, 136 (2003) (stating that contribution limit is valid "if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest" (internal quotation marks omitted)); *Colorado II*, 533 U.S. at 456 (2001) (identifying "scrutiny appropriate for a contribution limit" as "whether the restriction is 'closely drawn' to match what we have recognized as the 'sufficiently important' government interest in combating political corruption" (quoting *Shrink Missouri*, 528 U.S. at 387-88)); *Shrink Missouri*, 528 U.S. at 387-88 (reviewing Missouri's contribution limits under "closely drawn" test). And just three years ago, when offered the chance, the Supreme Court explicitly declined to revisit this longstanding precedent. *See McCutcheon*, 134 S. Ct. at 1445 ("[W]e see no need in this case to

revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review."). Likewise, this Court has followed this precedent, noting that contribution limits receive the "lessened" "closely drawn" review. *Catholic Leadership Coal. v. Reisman*, 764 F.3d 409, 424 (5th Cir. 2014).

Zimmerman suggests that this longstanding Supreme Court and Fifth Circuit precedent should be disregarded and instead strict scrutiny be applied to Austin's base limits. For support, he cites *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015), to contend that Austin's base limits constitute a content-based restriction on speech because they only apply to campaign contributions, and not to contributions in support of an officeholder's official duties. *See* Zimmerman Br. 45-48. The district court correctly rejected this argument. ROA 521-22; Record Excerpts ("RE") at Tab 4.

First, as Austin explains, Zimmerman's premise is mistaken: officeholder contributions are subject to the same limitations as campaign contributions. *See* Austin Br. 40-43. Austin has therefore not regulated campaign and officeholder contributions differently based upon their content, as Zimmerman suggests. Second, as the discussion above illustrates, the Court's settled "closely drawn" test forecloses Zimmerman's effort to import the "content-based" rubric into the campaign finance context. Under Zimmerman's approach, *every* base limit, indeed every campaign

finance regulation—including the myriad limits courts have routinely upheld—would be a content-based restriction on speech. A plaintiff could point to any type of unregulated contributions, such as contributions to charity, and allege that the government was favoring charitable giving over political giving based on the "content" of the "speech." This is fundamentally at odds with the long-settled framework for reviewing base limits. Moreover, even if base limits could be characterized as "content-based" restrictions, the Supreme Court has accounted for that concern by subjecting such regulations to heightened scrutiny under the "closely drawn" standard. Zimmerman's appeal to *Reed* is misplaced; strict scrutiny is not the appropriate standard of review. The Court should review Austin's base limit under the "closely drawn" test.

II. Preventing Corruption and Its Appearance is a Sufficiently Important Interest Supporting Base Limits.

Austin's interest in preventing corruption and its appearance is sufficiently important to warrant the enactment of base limits. Zimmerman contends, somewhat puzzlingly, that his challenge to the $350[2] base limit for city council candidates is not based on its tailoring (*i.e.*, he is not challenging whether the choice of $350 as a base limit is "closely drawn"). Indeed, he specifically *disclaims* any challenge to the

[2] In 2006, the Austin City Council set the base limit at $300, and pegged it for inflation. *See* Austin, Tex., City Charter, Art. III, § 8(A)(1). For the 2016 election, the limit was $350. *Amici* refer to the base limit throughout this brief by its most recent amount of $350.

tailoring (below or on appeal). *See* Zimmerman Br. 51 ("The district court misapprehended Zimmerman's argument . . . Zimmerman did not attempt to prove lack of tailoring under this standard, and did not argue it below. Rather, he focused his argument on the City's failure to prove its $350 limit even addresses *quid pro quo* corruption."); *see id.* at 54-55 (disclaiming relevance of *Randall* because it was about whether limits were "appropriately tailored"). Rather, Zimmerman contends his sole challenge is that Austin has not established the existence of a sufficiently important interest justify its base limits. *Id.*[3] For a number of reasons, he is mistaken.

A. Austin's Interest in Preventing Corruption and Its Appearance is Presumptively Sufficient to Justify Base Limits.

Austin's interest in preventing corruption and its appearance is presumptively sufficient, as a matter of law, to warrant enactment of base limits. On this the

[3] If, in fact, the district court "misapprehended" the nature of Zimmerman's challenge, it is easy to see how. Zimmerman acknowledges that the proper test for determining whether base limits are too low to satisfy the "closely drawn" requirement is whether they are "so low as to impede the ability of candidates to amass the resources necessary for effective advocacy." Zimmerman Br. 51; *see Buckley*, 424 U.S. at 21. He does not take issue with the district court's conclusion that Austin's base limits pass that test. *See* Zimmerman Br. 51. Yet he then proceeds to challenge, ostensibly under the government interest prong, the base limits because he alleges they fail to target "large" contributions and therefore are not aimed at *quid pro quo* corruption. *Id.* at 52-62. That sounds like a tailoring challenge. Nonetheless, Zimmerman has expressly disclaimed any tailoring objection. *See id.* at 51, 54-55. This Court should thus "take the case as it comes," *McCutcheon*, 134 S. Ct. at 1447 n.4, and evaluate whether Austin has an interest in preventing corruption and its appearance without deciding whether the choice of a $350 base limit, versus some other amount, is an appropriately tailored means of achieving Austin's interest.

Supreme Court has been unequivocal: "[t]he importance of the governmental interest in preventing [corruption] has never been doubted." *Beaumont*, 539 U.S. at 154 (second alteration in original) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978)). Indeed, the Supreme Court's acceptance of the prevention of corruption[4] and its appearance as a sufficiently important

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[4] Zimmerman contends that the Supreme Court has limited the permissible interest to exclusively *quid pro quo* corruption. *See* Zimmerman Br. 43-45. But the Supreme Court's case law on this point is unsettled. The only majority opinion to confine the definition of permissibly regulated "corruption" to the *quid pro quo* exchanges was *Citizens United v. FEC*, 558 U.S. 310, 359 (2010), but that was a case about expenditure limits, not contribution limits. Expenditure limits require support of a compelling government interest, while contribution limits only require support of a sufficiently important interest. *See supra* Part I. And although *McCutcheon* was a contribution limits case, it reviewed federal *aggregate* contribution limits—not base limits—and was decided by a plurality vote. Moreover, *Citizens United* and *McCutcheon* explicitly confirmed the continuing validity of the Court's earlier decisions—most notably, *McConnell v. FEC*, 540 U.S. 93 (2003), which had relied upon a broader understanding of corruption in upholding federal "soft money" contribution limits. *See Citizens United*, 558 U.S. at 360-61; *McCutcheon*, 134 S. Ct. at 1451 n.6 (denying the plurality "silently overruled the Court's holding in *McConnell*"). *But see Catholic Leadership*, 764 F.3d at 425 (interpreting *Citizens United* and *McCutcheon* as confining the government interest in both expenditure and contribution limit cases to *quid pro quo* corruption).

However, the scope of the permissible government interest—whether *quid pro quo* corruption or some broader conception of "corruption"—is not an issue that this Court needs to address. The Supreme Court has repeated, time and again, that base limits are an appropriate means of targeting *quid pro quo* corruption. *See, e.g.*, *Citizens United*, 558 U.S. at 359 (explaining that "contribution limits . . . have been an accepted means to prevent *quid pro quo* corruption"); *McCutcheon*, 134 S. Ct. at 1451 ("[B]ase limits remain the primary means of regulating campaign contributions."). For readability purposes, *amici* refer throughout this brief to "corruption and its appearance"; the arguments herein do not change if the qualifier "*quid pro quo*" is added.

governmental interest to warrant regulation is so established that Austin should be *presumed*, as a matter of law, to have a sufficiently important interest to justify its adoption of base limits.

For example, in *McCutcheon*, the Supreme Court stated that "[t]he Government has a strong interest, no less critical to our democratic system, in combatting corruption and its appearance." 134 S. Ct. at 1462. Indeed, the Court reasoned that not only is "the Government's interest in preventing *quid pro quo* corruption or its appearance . . . sufficiently important," but that "the same interest may properly be labeled compelling, so that interest would satisfy even strict scrutiny." *Id.* at 1445 (internal quotation marks and citation omitted); *see also id.* at 1460 ("*Buckley* made clear that the risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself.").

Likewise, in *Shrink Missouri*, for example, the Court noted 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. at 394-95. Because the interest in preventing corruption and its appearance is so plausible, the Court explained that a government seeking to establish its interest in preventing corruption and its appearance will bear only a minimal burden:

> [t]he 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. *Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible . . . .
>
> While *Buckley*'s evidentiary showing exemplifies a sufficient justification for contribution limits, it does not speak to what may be necessary as a minimum.

Id. at 391. Thus, although Austin may not proffer "mere conjecture as adequate to carry [its] First Amendment burden," *id.* at 391-92, the Supreme Court has unequivocally established that it is far from conjecture that governments have an interest in preventing corruption and its appearance.

Moreover, the Supreme Court has clarified that contribution limits are "preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*, 558 U.S. at 357. Austin is under no constitutional obligation to suffer the very corruption it fears before taking preventative steps when its fears are justifiable and rooted in common experience. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500 (1985) (recognizing Court's "deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption ha[s] long been recognized"); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."). Austin was entitled to rely on this rule of deference in choosing to act to prevent corruption or its appearance.

Finally, the long history of political corruption beyond Austin's borders is more than enough to satisfy whatever burden Austin bears in demonstrating the legitimacy of its anti-corruption interest. As the Supreme Court explained in *Shrink Missouri*, Austin may rely on the experience of the federal government, as demonstrated by the evidence and findings in *Buckley* and its progeny, or upon the experiences of others cities and states, in choosing to act to prevent corruption and its appearance in its city council races. "The First Amendment does not require a city, before enacting . . . an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses." *Shrink Missouri*, 528 U.S. at 393 n.6 (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986)). Moreover, the Supreme Court has acknowledged that its own decisions have created a reliance interest. "*Buckley* has promoted considerable reliance. Congress and state legislatures have used *Buckley* when drafting campaign finance laws." *Randall*, 548 U.S. at 244. Austin was entitled to rely on the governmental interest identified in *Buckley*, and repeated countless times since, that it has "a strong interest . . . in combatting corruption and its appearance." *McCutcheon*, 134 S. Ct. at 1462.

B. Austin Proffered Sufficient Evidence to Establish Its Interest in Preventing Corruption and Its Appearance.

Even if the Supreme Court's precedent did not establish that Austin has a presumptively sufficient interest, as a matter of law, in preventing corruption and its appearance, the City proffered sufficient evidence at trial to establish that interest.

In *Shrink Missouri*, the Court assessed the evidence Missouri had proffered in support of its interest in preventing corruption or its appearance. Among that evidence was an affidavit from a Missouri state senator, who chaired the campaign finance committee, "stat[ing] that large contributions have the real potential to buy votes." 528 U.S. at 393 (internal quotation marks omitted). The Court also noted that "newspaper accounts of large contributions support[ed] inferences of impropriety," *id.*, including large donations to statewide officers and a corruption case in which the former state attorney general used state funds to benefit campaign contributors, *id.* at 393-94. The Court also reasoned that "although majority votes do not, as such, defeat First Amendment protections, the statewide vote [on Missouri's limits] certainly attested to the perception relied upon here: [A]n overwhelming 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof." *Id.* at 394 (quotation marks omitted). Considering this evidence, the Court concluded that "this case does not present a close call requiring further definition of whatever the State's evidentiary obligation may be." *Id.* at 393.

Austin's evidence here likewise does not present a close call as to whether the City has established an interest in preventing corruption and its appearance. For example, the district court credited testimony of David Butts, a longtime Austin campaign consultant, 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."

ROA 523; RE at Tab 4. Another witness who had worked on city campaigns in the 1990s, Fred Lewis, "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." *Id.* And Lewis was involved when the City Council increased the base limits in 2006; he testified "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.'" *Id.* Finally, the district court noted that 72% of Austin voters supported the measure enacting the base limits in 1997, which "suggests that at least the perception of corruption as a result of large contributions existed in Austin at that time." *Id.* (citing *Shrink Missouri*, 528 U.S. at 394).

This evidence is similar in quantity and quality to what the Supreme Court deemed to "not present a close call" in *Shrink Missouri*.[5] Even if the Court does not apply a presumption in light of the explicit Supreme Court precedent establishing the important interest in preventing corruption and its appearance, the evidence credited by the district court easily establishes that Austin has such an interest.[6]

III. Austin is Owed Deference in Determining the Dollar Amount of Its Base Limits.

Austin is owed deference in determining the dollar amount of its base limits. Despite disclaiming any challenge to whether Austin properly tailored its base limits, *see supra* at 9-10 & note 3, Zimmerman contends that Austin's choice of $350 for its base limits is unconstitutional because, among other reasons, (1) it does not target

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[5] Like the respondents in *Shrink Missouri*, Zimmerman offered no "showing of [his] own to cast doubt on the apparent implications of *Buckley*'s evidence and the record here," 528 U.S. at 394, and thus "a more extensive evidentiary documentation" is unnecessary, *id.*

[6] Zimmerman takes issue with Austin's evidence because the City "produced no evidence of a single instance of actual corruption in Austin." Zimmerman Br. 60. As explained above, *see supra* Part II.A, Austin was not required to suffer the corruption it feared, and the Supreme Court has held that the government is not restricted to uncovering and prosecuting bribery in order to fight corruption, *see Buckley*, 424 U.S. at 28 ("[L]aws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action."). Base limits are a prophylactic measure, which aim to *prevent* corruption. It suffices therefore that Austin "did offer evidence of the claimed *perceptions* that preceded the 1997 reforms." Zimmerman Br. 60 (emphasis added). Austin may properly seek to advance its interest in preventing the *appearance* of corruption, which the record plainly establishes. *E.g.*, ROA 29.

"large" contributions and can be exceeded without creating the appearance of corruption, Zimmerman Br. 52, 57; and (2) it falls below the inflation-adjusted limits approved in *Buckley*, *id.* at 52, 56. Though the Court should "take the case as it comes," *McCutcheon*, 134 S. Ct. at 1447 n. 4, to the extent the Court considers a tailoring challenge, that challenge should be rejected as contrary to the settled deferential standard for determining whether base limits are closely drawn to achieve the government's longstanding interest in preventing corruption and its appearance.

The Supreme Court has instructed that, in reviewing the dollar amount of base limits to determine whether they are "closely drawn," courts "must determine whether [the limits] prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy,'" and "whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage." *Randall*, 548 U.S. at 248 (second alteration in original) (quoting *Buckley*, 424 U.S. at 21). This review must be conducted with deference to Austin's choices. "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.* (quoting *McConnell*, 540 U.S. at 137).

Applying the test set forth in *Buckley* and *Randall*, the district court concluded that Austin's choice of $350 was owed deference. ROA 526. The district court determined that the evidence showed Austin's city council candidates were not

impeded in amassing the resources necessary to run effective campaigns. *See* ROA 525-26. And subsequent evidence underscores that Austin's base limits do not prevent challengers from defeating incumbents; indeed, Zimmerman was an incumbent defeated in the 2016 election. *See* Austin Br. 21.

Zimmerman disregards the test announced in *Buckley* and *Randall* and instead advocates a much more exacting test—one that grants Austin *no* deference whatsoever. His position should be rejected.

First, Zimmerman contends that Austin was required to set its base limit at a "large" amount, given that *Buckley* spoke of "the problem of large contributions." Zimmerman Br. 52. Zimmerman misreads *Buckley*. *Buckley* approved the selection of a base limit intended to *avoid* large contributions and noted that courts were particularly ill-equipped to make judgments about the amount chosen, noting that "a court has no scalpel to probe" the chosen limit. 424 U.S. at 30. The Court has further explained that the judiciary "cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives." *Randall*, 548 U.S. at 248. Rather, the judiciary must ensure that the chosen limits do 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." *Id.* Zimmerman does not

even contend that Austin's base limits do so, *see* Zimmerman Br. 51, *supra* at 9-10 & n.3; let alone produce evidence of the same, ROA 526.

Second, Zimmerman's comparison to the inflation-indexed limits upheld in *Buckley* is misplaced—most importantly, because the Supreme Court has "specifically rejected the contention that $1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate." *Shrink Missouri*, 528 U.S. at 397. Even on its own terms, the comparison falls flat. Austin's base limits apply to *city council* races, in districts of 80,000 people. By contrast, *Buckley* addressed base limits for federal races; in Texas, the smallest federal race, for the U.S. House of Representatives, involves districts of 698,488 people.[7] U.S. Senators in Texas represent 27,862,596 people.[8] It makes no sense to compare the limits for municipal races to federal races on a dollar to dollar basis, as Zimmerman does. *See* Zimmerman Br. 52, 56.

More importantly, it makes no sense to reduce the constitutional analysis to a math exercise, particularly where, as here, the comparison is apples to oranges. The Supreme Court was wise, therefore, to acknowledge that "court[s] ha[ve] no scalpel to probe," *Buckley*, 424 U.S. at 30, and to accordingly focus the tailoring analysis

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[7] *See* Tex. Legislative Council, *Texas Redistricting*, http://www.tlc.state.tx.us/redist/districts/congress.html (last visited May 8, 2017).

[8] U.S. Census Bureau, *Quick Facts Texas*, https://www.census.gov/quickfacts/table/PST045216/48 (last visited May 8, 2017).

not on a mathematical comparison between dissimilar elections, but rather on whether the chosen limits impede effective candidacies in a given race, *see, e.g.*, *Randall*, 548 U.S. at 248.

No dollar cap can universally and perfectly balance anti-corruption concerns and associational rights, but closely drawn scrutiny does not require perfection. *McCutcheon*, 134 S. Ct. at 1456-57. A law must be not "perfect, but reasonable"; the legislature must adopt, not "the single best disposition[,] but one whose scope is in proportion to the interest served." *Id.* at 1456 (internal quotation marks omitted). Austin's $350 limits are more than "reasonable" and, like the large majority of states and municipalities that have adopted base contribution limits of similar amounts—are drawn "in proportion to the interest served." *Id.*

Zimmerman's contention that Austin was required to peg its base limit at the precise amount separating "corrupt" from "non-corrupt" is contradicted by settled Supreme Court precedent granting deference to governments exercising judgment in fixing base limit amounts. The district court applied the correct test for assessing Austin's chosen base limit amount, and Zimmerman has declined to challenge that analysis. This Court should not disturb it.[9]

[9] Also misplaced is Zimmerman's suggestion that Austin's base limits are overbroad because they are not limited to contractors or others that pose a heightened risk of pay-to-play corruption. *See* Zimmerman Br. 62. The Supreme Court has expressly rejected this argument, given that it is "difficult to isolate suspect

IV. Zimmerman's Argument, if Accepted, Would Imperil State and Local Contribution Limits Across the Country.

Although Zimmerman attacks only Austin's contribution limits in this case, his arguments, if accepted, have the potential to undermine state and municipal campaign finance regimes across the country.

Today, thirty-nine states limit individual contributions to candidates in state elections.[10] In addition, forty-four states limit or ban corporate contributions. Nat'l Conf. on State Legislatures, *Contribution Limits Overview*,

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contributions" and because laws may also seek to prevent the *appearance* of corruption. *Buckley*, 424 U.S. at 30.

[10] Colo. Const. art. XXVIII, § 3(1); Mo. Const. art. VIII, § 23(3); Alaska Stat. § 15.13.070; Ariz. Rev. Stat. § 16-912; Ark. Code Ann. §§ 7-6-201(7), -203; Cal. Gov't Code §§ 82022, 85301; Conn. Gen. Stat. § 9-611; 15 Del. Code Ann. §§ 8002(11)(a), 8010(a); Fla. Stat. § 106.08(1); Ga. Code Ann. § 21-5-41(a)-(b); Haw. Rev. Stat. §§ 11-302 (defining "election"), -357; Idaho Code Ann. § 67-6610A(1); 10 Ill. Comp. Stat. 5/9-1.9(1)-(2), 5/9-8.5(b); Kan. Stat. Ann. § 25-4153(a); Ky. Rev. Stat. Ann. §§ 121.015(2), -.150(6); La. Stat. Ann. § 18:1505.2(H)(1)(a), (3)(a); Me. Rev. Stat. tit. 21-A, §§ 1001(2), 1015(1); Md. Code Ann., Elec. Law §§ 1-101(w), 13-226(b); Mass. Gen. Laws ch. 55, § 7A(a)(1); Mich. Comp. Laws §§ 169.201, -.252(1); Minn. Stat. §§ 10A.01 subd. 16, 10A.27 subd. 1(a); Mont. Code Ann. § 13-37-216(1), (5), *invalidated by Lair v. Motl*, 189 F. Supp. 3d 1024 (D. Mont. 2016), *appeal filed*, No. 16-35424 (9th Cir. 2016); Nev. Rev. Stat. § 294A.100; N.H. Rev. Stat. Ann. § 664:4; N.J. Stat. Ann. §§ 19:44A-3(e), -4, -11.3(a); N.M. Stat. Ann. § 1-19-34.7(A)(1); N.Y. Elec. Law § 14-114(1); N.C. Gen. Stat. § 163-278.13(a), (d); Ohio Rev. Code § 3517.102(B)(1); Okla. Stat. tit. 74, ch. 62, app. 1, Rule 2.37; R.I. Gen. Laws § 17-25-10.1(a); S.C. Code Ann. §§ 8-13-1300(10), -1314(A)(1); S.D. Codified Laws §§ 12-27-7 to -8; Tenn. Code Ann. §§ 2-10-102(5), -302(a); Vt. Stat. Ann. tit. 17, § 2941(a)(1)-(3), (c); Wash. Rev. Code Ann. § 42.17A.405(2); W. Va. Code Ann. § 3-8-12(f)-(g); Wis. Stat. §§ 11.1101(1), -.1103; Wyo. Stat. Ann. § 22-25-102(c), (j).

http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx (last visited May 7, 2017). Many municipalities, like Austin, have their own limits.[11] Zimmerman's argument, if accepted, would subject these countless laws—which have attained repose and have governed elections for decades—to newfound scrutiny, upending settled expectations across the country.

By questioning the importance of Austin's interest in preventing corruption and its appearance, ignoring evidence of corruption arising from campaign contributions in other jurisdictions, and then discounting Austin's proffered evidence, Zimmerman is demanding a level of judicial review that might exceed even strict scrutiny and certainly goes beyond the "relatively complaisant review" to which contribution limits are subject. *Beaumont*, 539 U.S. at 161. This standard of review would threaten a raft of state statutes that are clearly constitutional under current law. *See, e.g.*, *Ognibene v. Parkes*, 671 F.3d 174, 186-188 & 186 n.12 (2d Cir. 2011).

This standard is particularly problematic because many state and local contribution limits are of relatively old vintage. And because "we would not expect to find . . . continuing evidence of large-scale quid pro quo corruption" in states and localities that have already passed contribution limits to prevent it, *Wagner v. FEC*,

[11] *See, e.g.*, Los Angeles, Cal., City Charter § 470(c)(3), (c)(4); San Antonio, Tex., Municipal Code § 2-302; Seattle, Wash., Municipal Code § 2.04.370.

793 F.3d 1, 14 (2015) (en banc), states and localities may face serious challenges in marshaling the evidence necessary to meet the radical standard that Zimmerman proposes. In essence, jurisdictions would be punished for achieving what the Supreme Court told them was an important interest—preventing corruption and its appearance—because the resulting absence of corruption would thwart the creation of the type of evidentiary record Zimmerman now demands.

Moreover, Zimmerman appears to disregard even the evidence put forward in *Buckley*. Most contribution laws were passed in the aftermath of, and in reaction to, the same corruption issues that drove the passage of FECA and formed the basis for the Supreme Court's opinion in *Buckley*. The Supreme Court has affirmed that states and localities may use the record of corruption outlined in *Buckley* to justify their own contribution limits. *Shrink Missouri*, 528 U.S. at 393. Were this Court to ignore this holding, its decision would put at risk the entire range of laws passed after FECA.

* * *

At each turn in his challenge to the district court's ruling upholding Austin's city council base limit, Zimmerman asks this Court to depart from long-settled Supreme Court precedent and ratchet up the City's burden in defending its law.

If adopted, Zimmerman's proposed level of scrutiny would mark a radical departure from settled law, and call into question countless state and local contribution limits. Zimmerman offers no reason for this Court to disrupt the law in this manner

CONCLUSION

For the foregoing reasons, the district court's ruling upholding Austin's base limits should be affirmed.

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Respectfully submitted,

Paul M. Smith
Tara Malloy
/s/ Mark P. Gaber
Mark P. Gaber
Counsel of Record
Megan P. McAllen
THE CAMPAIGN LEGAL CENTER
1411 K St. NW, Suite 1400
Washington, DC 20005
(202) 736-2200
mgaber@campaignlegalcenter.org

Brenda Wright
Adam Lioz
Allie Boldt
DĒMOS
1340 Centre Street, Suite 209
Newton, MA 02459
(617) 232-5885

Counsel for Amici Curiae

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Dated: May 8, 2017

/s/ Mark P. Gaber
Mark P. Gaber
Counsel of Record

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/s/ Mark P. Gaber
Mark P. Gaber
Counsel of Record