UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BRENT TREBOR GORDON, Plaintiff, v. CITY OF HOUSTON, TEXAS and ANNISE PARKER, in her official capacity as Mayor of the City of Houston, Tex. Defendants.	Civil Case No. 14-3146 DECLARATORY AND INJUNCTIVE RELIEF SOUGHT

PLAINTIFF'S MEMORANDUM IN SUPPORT
OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Houston officials are harassing people of faith in this City, having issued abusive subpoenas purporting to require pastors to turn their sermons over to the government. The City withdrew the subpoenas only after national outrage. The City's abusive posture, and failed leadership on other issues, including profligate spending that is worsening Houston's budget situation, continues.

Plaintiff Gordon is running for City Council. In politics, "timing is of the essence … when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 431 (5th Cir. 2014) (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring)). He must respond to these issues right now, because they are happening right now. The City has no authority to tell him to wait until February 1 to begin campaigning. This delay serves only to insulate the City from organized opposition while incumbent officials act with impunity. The fundraising blackout period must be enjoined immediately.

FACTUAL AND STATUTORY BACKGROUND[1]

Plaintiff Gordon is a candidate for Houston City Council at large in the city's general election to be held November 3, 2015. Plaintiff's Verified Complaint (hereinafter, "VC") ¶ 8. Gordon feels compelled to run because he holds strong beliefs about the appropriate policies necessary to maintain Houston's status as a booming economic hub of innovation and free markets. VC ¶ 9. He is deeply troubled by the failure of the City's current leadership to address Houston's budgetary problems, and failure to address the City's severe drainage issues. *Id.*

[1] Plaintiff provides a more detailed factual summary in his Verified Complaint, and incorporates and adopts by reference each and every allegation in his Verified Complaint. All exhibits referenced in this Memorandum are incorporated in full.

Gordon is also deeply offended at the City's blatant disregard for the constitutional rights of his fellow citizens of faith, who have been harassed with subpoenas from the City attempting to force pastors to turn their sermons over to the government. *Id.*; **Ex. 1-2.** He believes that he must begin campaigning *now*, spreading his ideas and seeking support, because people are paying attention to these issues *now*. *Id.*

The City of Houston's code of ordinances encompasses numerous fundraising restrictions. First, Houston has enacted base contribution limits, limiting contributions from any "person" to $5,000 per candidate, per election, and contributions from any "political action committee" to $10,000 per candidate, per election. HOUSTON, TEX., CODE OF ORDINANCES ch. 18, art. IV § 38(a) (1985) (hereinafter cited as "Code § 18-38(a)")[2]. Although these base limits restrict the amount that any person may contribute, Houston also completely disqualifies certain categories of persons from either contributing to, or soliciting contributions for, City candidates at all. First, persons adverse to the City in litigation (or persons with certain ownership interests in such parties) may not contribute "any funds to any candidate" "if the litigation seeks recovery of an unspecified amount or of an amount in excess of $50,000." VC ¶ 35. Second, it is unlawful for "any contractor" to make or offer a contribution "during a contract award period." VC ¶ 36. Third, members of certain City-appointed boards and commissions may not solicit contributions to candidates, nor may candidates accept contributions solicited by such persons. VC ¶ 34. Fourth, City employees may not solicit contributions for candidates "unless the employee is acting during off-duty hours or is on a duly approved leave of absence." *Id.*

Aside from these hard limits and prohibitions, Houston also requires candidates to report all contributions received. Comprehensive campaign finance reports are required every January

[2] A copy of chapter 18, article IV of the Code of Ordinances is attached as **Ex. 3** and incorporated fully herein. A copy of chapter 18, article II, which includes relevant definitions, is attached as **Ex. 4** and incorporated fully herein.

and July 15, and in election years, additional reports are due 30 and eight days before Election Day. VC ¶ 48. Every report must disclose the full name and address of any person giving more than $50 in the reporting period, along with the date and amount of the contribution(s). VC ¶ 49. Reports must also disclose the occupation and employer of any person giving more than $500 in a reporting period. VC ¶ 50. It is a crime (misdemeanor) to knowingly fail to file complete and timely reports. VC ¶ 51.

Atop (i) the base limits; (ii) the various provisions disqualifying targeted segments from solicitations and/or contributions at all, and (iii) the robust reporting requirements, Houston also imposes a temporal ban prohibiting fundraising for a full ten months out of every two year cycle. Chapter 18, section 18-35(a) of Houston's code of ordinances reads as follows:

> A candidate for city office at a city general election may neither solicit nor receive contributions except during a period commencing on the 1st day of February prior to the day of the election, and ending on the 4th day of March following the election date for the race that the candidate has entered. In the event that the candidate should be in a run-off election, the final date to receive or solicit contributions shall be the 4th day of April following the election date.

Code § 18-35(a). This provision—the "fundraising blackout" period—bans fundraising until February 1, 2015, a mere nine months before Election Day (November 3, 2015).

Gordon does not have the personal resources to fund his own campaign. VC ¶ 11. He would immediately solicit and accept contributions from like-minded persons but for the fundraising blackout period. VC ¶ 13. Four individuals have provided verified statements that they would immediately contribute but for the blackout, and plaintiff expects many more to certify the same intent. VC ¶ 14; **Ex. 5 - 8**. Because of this fundraising ban, Gordon has been unable to raise funds necessary to undertake desired expenditures for his campaign, including funding neighborhood meet-and-greet events, contracting for the design and hosting of a campaign website, among other things. VC ¶ 12.

While Gordon sits waiting for his chance to begin fundraising, others who will run for City office in November 2015 are presently raising substantial sums that will be used for their City campaigns. VC ¶ 16-23; **Ex. 9**. While "[a] candidate for city office at a city general election may neither solicit nor receive contributions except during" the narrow period permitted by section 18-35(a), the City code permits

> a candidate [to] utilize **unexpended political contributions raised in connection with a non-city elective public office** in an amount not to exceed the maximum contribution that the candidate may accept from a single donor under subsection (a) [the base limits], regardless of category, provided he files with the city secretary a statement of intent to do so at the time of the filing with the city secretary of his campaign treasurer designation, or if the filing of a campaign treasurer designation is not required, prior to the making of any expenditure in connection with his campaign for city elective office.

Code § 18-38(b) (emphasis added). Other prospective candidates for City office in November 2015 have indicated their plans to utilize this provision.

Houston also affords an exception to the blackout period (and the base limits) to incumbent officeholders, so long as they are ineligible to run again for their current office and have campaign debt to retire. Code § 18-39 (*see* VC ¶ 42).

ARGUMENT

Plaintiffs request a preliminary injunction so they can exercise their fundamental rights to speech and association, protected under the First Amendment[3] to the United States Constitution, in the immediate period leading up to the November 2015 City of Houston elections.

I. Preliminary Injunction Standard

A plaintiff seeking a preliminary injunction must establish:

(a) a substantial likelihood of success on the merits;
(b) a substantial threat of irreparable harm if the injunction is not granted;

[3] *See Everson v. Bd. Of Educ.*, 330 U.S. 1, 13-15 (1947) (First Amendment applies against the state governments by incorporation through the Fourteenth Amendment).

(c) that the threatened injury outweighs any damage that the injunction might cause the Defendants; and
(d) that the injunction will not disserve the public interest.

Planned Parenthood v. Sanchez, 403 F.3d 324, 329 (5th Cir. 2005). However, First Amendment cases involve a different dynamic with respect to the burdens within the "likelihood of success" determination.

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *McCutcheon v. FEC*, __ U.S. __, 134 S. Ct. 1434, 1452 (2014). In satisfying this burden, the government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994). "The burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (affirming issuance of preliminary injunction where district court found evidence to be in "equipoise" and concluded that the Government had failed to carry its burden under the First Amendment); *see also Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

Therefore, "[w]hen seeking a preliminary injunction in the First Amendment context, the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction." *Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012).

Because the "purpose of a preliminary injunction is to prevent irreparable injury to the parties and 'preserve the court's ability to render a meaningful decision on the merits,'" *Planned*

Parenthood of Hidalgo County v. Suehs, 828 F. Supp.2d 872, 880 (W.D. Tex. 2012), the "relative position" to preserve is Houston not enforcing the challenged provisions against Plaintiff. *See Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 536 (5th Cir. 2013) (affirming preliminary injunction against enforcement of a contribution limit under Texas Election Code).

Facial challenges. In the First Amendment context, a statute is facially unconstitutional if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Catholic Leadership*, 764 F.3d at 426.

II. Plaintiffs Are Likely to Succeed on the Merits

Plaintiffs have a likelihood of success on the merits. This criterion "is the most critical" in granting a preliminary injunction in the First Amendment context. *Carey v. FEC*, 791 F. Supp.2d 121, 128 (D.D.C. 2011).

A. Houston's fundraising blackout period burdens "the most fundamental" First Amendment rights and is subject to rigorous review.

"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) (per curiam). "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." *Id.* (internal quotations omitted). Moreover, it is established that "the dependence of a communication on the expenditure of money" does not "operate[] itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Id.* at 17. *Buckley* recognized that "virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs.

Speeches and rallies generally necessitate hiring a hall and publicizing the event." *Id.* at 19. Accordingly, "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Id.* at 14. Houston therefore bears a heavy burden in seeking to justify its temporal ban on core political activity.

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

Scrutiny of contribution limits. *Buckley* recognized that contributions "enable[] like-minded persons to pool their resources in furtherance of common political goals." *Buckley*, 424 U.S. at 22. The "freedom of association 'is diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly or optimally effective.'" *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981) (quoting *Buckley*, *supra*, at 65-66)). Consequently, even if this Court views section 18-35(a)'s unique and severe burden as a contribution limit, it is still subject to a "rigorous standard of review," and may only be sustained "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *McCutcheon*, 134 S. Ct. at 1444.

Scrutiny of expenditure limits. Section 18-35(a) imposes a blackout period on all fundraising by candidates for City office. Candidates who are wealthy enough to fund their own campaigns might like the blackout period, because they can simply begin campaigning as early as they want with their own money. However, for non-self-funding candidates, the blackout period acts simultaneously as a limit on campaign *expenditures*, as money that cannot be raised cannot be spent. *See Texans for Free Enter.*, 732 F.3d at 539 ("[Plaintiff's] ability to speak is undoubtedly limited when it cannot raise money to pay for speech."). Regardless of how small

the prospective contributions from any single source, the blackout imposes an *aggregate* limit of zero dollars in receipts by a candidate for a period of time. This distinguishes section 18-35(a) from the traditional base contribution limit on the amount that a candidate may receive from a single source, because even under base limits, the candidate's *aggregate* fundraising potential is unlimited. For these reasons, Houston's fundraising blackout period is materially different from traditional contribution limits and instead functions as an expenditure limit reducing a City candidate's campaign expenditures. *See, e.g., Zeller v. Florida Bar*, 909 F. Supp. 1518, 1524 (N.D. Fla. 1995) (judicial canon prohibiting contributions to judicial candidates earlier than one year before the election "necessarily ha[s] an impact on the amount of the candidate's campaign expenditures"); *Opinion of the Justices to the House of Representatives*, 637 N.E.2d 213 (Mass. 1994) (finding that a proposed bill that would place aggregate limit on total contributions to candidates in nonelection years "obviously also limits expenditures if the candidate's personal funds are restricted and the candidate has carried over little or no funds from a prior election year").

The effect of the blackout period is especially pernicious in that it severely handicaps challengers who are not able to self-finance their campaigns. In striking down a ban on contributions during legislative sessions, the Florida Supreme Court specifically noted that "[i]ncumbents have virtually unlimited access to the press and free publicity merely by virtue of the public forum they are privileged to occupy. Non-incumbents…not only lack such a forum[,] the [contribution ban] also forbids them any means of counterbalancing the decided advantage enjoyed by the incumbents." *State v. Dodd*, 561 So.2d 263, 265 (Fla. 1990); *accord Emison v. Catalano*, 951 F. Supp. 714, 723 (E.D. Tenn. 1996). The natural advantages of incumbency are exacerbated when combined with the fact that non-City officeholders may transfer funds to a city

campaign. Houston's blackout period perpetuates a discriminatory fundraising regime of a type that the Supreme Court "has never upheld." *See Davis v. FEC*, 554 U.S. 724, 726 (2008) (invalidating federal scheme permitting higher contribution limits for non-self-funding candidates in some circumstances where such increased limits were not available to the candidate's self-funding opponent).

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

B. The fundraising blackout is facially unconstitutional because it is not supported by a legitimate government interest.

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

Whether under strict or "closely drawn" scrutiny, the Supreme Court "has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption." *McCutcheon*, 134 S. Ct. at 1450.[4] Moreover, the government "may target only a specific type of corruption—'*quid pro quo*' corruption." *Id.* *McCutcheon* emphasized how narrowly *quid pro quo* corruption is defined, "captur[ing] the notion of a direct exchange of an official act for money." *Id.* at 1441. Therefore, Houston cannot justify any type

[4] The Fifth Circuit recently stated that "just as with expenditure limitations, the sole governmental interest…recognized as a justification for restricting contributions is the prevention of quid pro quo corruption." *Catholic Leadership*, 764 F.3d at 432 (internal quotations and punctuation omitted).

of restriction on contributions in connection with city campaigns unless it can identify a threat of *quid pro quo* corruption from such contributions—i.e., "effort[s] to control the exercise of an officeholder's official duties." *Id.* at 1450.

Moreover, the corruption threat must be supported by evidence of a real, not merely conjectural, danger. *See Id.* at 1452 ("[W]e have never accepted mere conjecture as adequate to carry a First Amendment burden.") (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000)).

b. Under *McCutcheon* and *Catholic Leadership*, as a matter of law, aggregate limits do not address corruption.

i. *McCutcheon v. Federal Election Commission*

In *McCutcheon*, the Supreme Court drew a clear distinction between two basic types of contribution limits that were imposed under the Federal Election Campaign Act of 1971, as amended. The federal base limits "restrict how much money a donor may contribute to any particular candidate or committee." *Id.* at 1443. For the 2013-14 election cycle, the base limits permit an individual to contribute up to $2,600 per election to a candidate ($5,200 total for the primary and general elections); $32,400 per year to a national party committee; $10,000 per year to a state or local party committee; and $5,000 per year to a political action committee. *Id.* at 1442. Federal law also imposes base limits on contributions to a candidate from entities such as a national or state/local party committee and a "multicandidate PAC." *Id.* Federal law prior to *McCutcheon* also imposed a system of aggregate limits that "ha[d] the effect of restricting how many candidates or committees [an individual] donor may support, to the extent permitted by the

base limits." *Id.* at 1443. For the 2013-14 cycle, an individual was limited to contributing a total of $48,600 to federal candidates and a total of $74,600 to other political committees."[5] *Id.*

The plaintiff in *McCutcheon* was an individual who, while complying with the base limits, desired to contribute more in total (both to candidates and to non-candidate political committees) than the aggregate limits would permit. *Id.* at 1443. The Supreme Court began by reiterating that preventing corruption or its appearance is the only government interest recognized as legitimate for restricting campaign finances. *Id.* at 1450. *McCutcheon* then proceeded to explain how exceedingly narrow this anticorruption interest is: the government may "only target a specific type of corruption—'quid pro quo' corruption." *Id.* *McCutcheon* explained this principle's origination in *Buckley*:

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

McCutcheon, 134 S. Ct. at 1450 (quoting *Buckley*, 424 U.S. at 26-27) (internal citations omitted).

The Court's controlling opinion recognized that base limits have been upheld as a permissible anticorruption measure, but held that "the aggregate limits do little, if anything, to address that concern, while seriously restricting participation in the democratic process." *Id.* at 1442. "The difficulty" with the Government's anticorruption argument, the Court wrote, "is that once the aggregate limits kick in, they ban all contributions of *any* amount." *Id.* at 1452 (emphasis in original). The Court reasoned that Congress's legislative "selection of a $5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable

[5] The aggregate limits contained a sub-aggregate: of the $74,600 permitted to political committees other than federal candidates, an individual was only permitted to contribute up to $48,600 to state or local party committees and PACs (as opposed to national party committees). *McCutcheon*, 134 S. Ct. at 1442-43.

risk of corruption," and consequently, "[i]f there is no corruption concern in giving nine candidates up to $5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given $1,801, and all others corruptible if given a dime." *Id.*[6]

ii. *Catholic Leadership Coalition of Texas v. Reisman*

The Fifth Circuit has already applied *McCutcheon* to recognize the aggregate nature of a contribution limit under the Texas Election Code and invalidate it for failure to address the government's anticorruption interest.

Appellants in *Catholic Leadership* were "general purpose political committees" who challenged section 253.037(a) of the Texas Election Code. The statute required that, before such committees could spend more than an aggregate of $500 (whether on contributions to candidates or other committees, or on the plaintiff committees' own speech), they (i) wait sixty days after registration with the state (the "60-day waiting period"), and (ii) collect contributions from ten persons (the "ten-contributor requirement"). 764 F.3d at 423. Therefore, section 253.037(a) prevented both contributions and expenditures *by* the plaintiff committees in excess of an aggregate $500 until the 60-day waiting period and ten-contributor requirements were met. The Fifth Circuit held both requirements to be unconstitutional insofar as each acted to restrict expenditures, and insofar as each acted to restrict contributions, and held that both were facially unconstitutional. The most relevant portions of the opinion discuss the 60-day waiting period and ten-contributor requirements' application to contributions.

Catholic Leadership's analysis followed inexorably from *McCutcheon*'s distinction between base and aggregate limits. The Fifth Circuit pointed out that under the challenged provision, a newly-formed general purpose committee could contribute up to $500 total,

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

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

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

764 F.3d at 432.

In other words, the aggregate nature of the limit was dispositive. While the Legislature may be able to set a base contribution limit as an anticorruption measure, it cannot support a restriction that prevents contributors from supporting candidates at amounts equal to or even less than the base limit by way of an aggregate cap, even one that applied temporarily (for the 60-day waiting period). The Fifth Circuit concluded that "Texas would…be unable to justify an *aggregate* limit—as opposed to per-candidate, per-committee, and per-party base limits—under the logic of *McCutcheon*." *Id.* at 433 (emphasis in original).

The Fifth Circuit likewise held that requiring newly-formed general purpose committees to wait until they acquired ten contributors before contributing in excess of an aggregate $500 did not "advance[] the state's interest in combatting *quid pro quo* corruption in any meaningful way." *Id.* at 436 (internal quotations omitted).[7]

c. Houston's fundraising blackout is an aggregate limit and invalid as a matter of law.

McCutcheon and *Catholic Leadership* dictate the result here.

[7] The Court further held that aggregate limits did not address any threat of *circumvention* of the base limits because "Texas advances no reason why more narrowly tailored base contribution limits until a committee acquired ten contributors would not similarly serve its interests." *Id.*

Houston has already asserted its anticorruption interest by means of base limits. Any "person" is limited to contributing $5,000 per election to a candidate.[8] "Political action committees" are limited to contributing $10,000 per election to a candidate. Code § 18-38(a).[9] When *Buckley* identified the cognizable corruption threat animating this entire area of law, it referred only to "*large contributions* [that] are given to secure a political *quid pro quo* from current and potential office holders," and "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of *large individual financial contributions'* to *particular* candidates." 424 U.S. at 26-27 (emphasis added). Accordingly, base limits such as these have been held to properly further the Government's anticorruption interest. By contrast, aggregate limits do not address the specter of "large individual financial contributions to particular candidates," *Id.*, and therefore they "do little, if anything, to address" corruption. *McCutcheon*, 134 S. Ct. at 1442.

Houston's blackout period effectively imposes an aggregate limit of zero on any City candidate's solicitation or receipt of contributions. The aggregate nature of this limit derives from the fact that it is not written in terms of a limit on what a *particular* candidate may solicit or receive from any *particular* "person" or other type of contributor. *Cf. Buckley*, 424 U.S. at 26-27 (referring to "large financial contributions" to "particular" candidates). Even if an individual wanted to give $100 to Gordon—an amount that is $4,900 less than the base limit—the contribution is absolutely prohibited until February 1, 2015.

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[8] "Person means an individual, corporation, partnership, labor organization, unincorporated association, firm, committee, political committee, club or other organization or group of persons whether associated with a political party or element thereof or not." Code § 18-2. Note that while the term "person" includes corporate persons, corporations are barred by state law from making political contributions to any candidates at any level of government. Tex. Elec. Code § 253.094(a).

[9] The term "person" is defined to include a "political committee," and "political committee" is a defined term in the Texas Election Code. The term "political action committee" is not defined in the code of ordinances or in the Texas Election Code. It appears that the intent and effect of this provision is to accord any "political committee" as defined in state law a limit of $10,000. *See supra*, note 7.

If it is not corrupting for a single person to contribute $5,000, or a single PAC to contribute $10,000, to a city candidate on February 1, 2015, "it is difficult to understand" how contributions of even trifling amounts solicited or accepted on January 31, or in November 2014, can be corrupting. *See McCutcheon*, 134 S. Ct. at 1452. Just as the Fifth Circuit held in striking down Texas's waiting period and ten-contributor requirements, "the logic undergirding *McCutcheon* stands out as deeply problematic for [Houston's] attempts to justify its aggregate contributions cap." *See Catholic Leadership*, 764 F.3d at 433; *see also Id.* ("Texas would still be unable to justify an *aggregate* limit—as opposed to per-candidate, per-committee, and per-party base limits—under the logic of *McCutcheon*.") (emphasis in original).

The fundraising blackout is even more pernicious than the aggregate limits invalidated in *McCutcheon*. *See* 134 S. Ct. at 1448-49.

McCutcheon described a law capping an individual contributor's aggregate contributions at $48,600 (to candidates) and $74,600 (to non-candidate committees) as a "substantial intrusion on First Amendment rights." 134 S. Ct. at 1456. Thus, the law in *McCutcheon* restricted a single individual from contributing substantial sums of money in an election cycle; one could at least see the logic of the Government's (appropriately rejected) argument that such a limit purported to address the perception of corruption. Houston, in blunderbuss fashion, instead targets the aggregate receipts of a candidate for office, regardless of how miniscule the desired contributions. If McCutcheon's First Amendment rights were "intru[ded]" upon to a "substantial" degree, Houston's law snuffs out core political association rights *entirely* for a substantial period of time. Rather than merely making it difficult to "amass the resources" necessary for an effective campaign, as with too-low base contribution limits, *see Randall v. Sorrell*, 548 U.S. 230 (2006), Houston's fundraising blackout makes it impossible to amass *any*

resources until February 1. Houston has no legitimate interest in prohibiting Gordon or any other candidate from, for example, holding a rally in November 2014—or at any time of his choosing—to talk about his vision for the City and solicit small-dollar contributions.

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

In *Zeller*, the district court invalidated a provision of the Florida code of judicial conduct prohibiting judicial candidates from soliciting or collecting contributions more than one year prior to the election. 909 F. Supp. at 1525. The court held that

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

Id.; *see also Opinion of the Justices to the House of Representatives*, 637 N.E.2d 213. Thus, even before *McCutcheon* and *Catholic Leadership*, the Houston blackout period was clearly invalid under the rationale of several federal and state courts. *McCutcheon* now compels this conclusion.[10]

[10] The City will attempt to rely on *Thalheimer v. City of San Diego*, which upheld an ordinance prohibiting candidates from soliciting or accepting contributions prior to "the twelve months preceding the primary election for

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

In *McCutcheon*, the Supreme Court said that "[t]he improbability of circumvention [of the federal base limits] indicates that that the aggregate limits instead further the impermissible objective of simply limiting the amount of money in political campaigns." 134 S. Ct. at 1456. Similarly here, Houston's aggregate fundraising blackout in no way addresses corruption. The fact that the same City officials who enacted the blackout also wrote in exceptions for debt retirement by term-limited incumbents, *see* Code § 18-39, demonstrates that the blackout is not aimed at preventing corruption. Instead, the blackout is aimed at some other impermissible purpose, such as limiting total fundraising and/or expenditures, or maintaining an arbitrarily abridged campaign season, perhaps in the City's paternalistic impulse to prevent voters from being exposed to election advertisements too early. The fundraising blackout serves only to "handicap a candidate who lacked substantial name recognition or exposure of his views before the start of a campaign." *Davis v. FEC*, 554 U.S. 724, 741 (quoting *Buckley*, 424 U.S. at 56-57). Whatever the true purpose, it is insufficient to support the serious First Amendment burden imposed by section 18-35(a).[11]

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the office sought." 645 F.3d 1109, 1114 (9th Cir. 2011). This Ninth Circuit case is not binding in this circuit, and it is wholly unpersuasive for several reasons. Most obviously, it was decided pre-*McCutcheon* and there is no indication the litigants or the court distinguished between aggregate and base limits. *Thalheimer's* analysis contradicts the holdings of *McCutcheon* and *Catholic Leadership* that aggregate limits do nothing to address corruption. More generally, the court's review is inconsistent with the "rigorous" review of contribution limits illustrated by *McCutcheon*. The *Thalheimer* court even purported to hold *the plaintiffs* to the burden of bringing forth evidence of an injury from the fact that contributions are banned for a time period. *See* 645 F.3d at 1124 (referring to "Plaintiffs' scant evidence of harm suffered from the temporal ban"). It is established in the Fifth Circuit that even burdens for "minimal periods of time" on the right to make political contributions constitute irreparable injury. *Texans for Free Enter.*, 732 F.3d at 539; *see also Catholic Leadership*, 764 F.3d at 431 (discussing necessity for immediate action in politics). *Thalheimer* also erroneously failed to require the city to adduce any evidence supporting its bald claim that "off-year contributions are more likely linked to business the donor has before the city." *Catholic Leadership* recognized the bedrock principle that "a court cannot accept mere conjecture as adequate to carry a First Amendment burden." 764 F.3d at 425. *Thalheimer* was an outlier, even before *McCutcheon*.

[11] The Supreme Court has made abundantly clear that anticorruption is the one and only legitimate governmental objective in restricting campaign finances, and any other purpose is impermissible. In *Davis v. FEC*, the Court

C. The fundraising blackout is facially unconstitutional because it is not appropriately tailored.

Wholly apart from the lack of any legitimate government interest, Houston's fundraising blackout period is invalid because it is not "closely drawn to avoid unnecessary abridgment of associational freedoms."[12] *McCutcheon*, 134 S. Ct. at 1456. "In the First Amendment context, fit matters," *Id.*, and *McCutcheon* demands a rigorous examination of whether the blackout period is any broader than necessary to address the proffered threat. *See Id.* at 1456-59. In *Catholic Leadership*, the Fifth Circuit held that Texas's temporal contribution limit was not appropriately tailored because Texas could not explain (i) a justification for the particular parameters it chose (60 days rather than another time period); or (ii) why more narrowly-tailored base limits were not acceptable in lieu of an aggregate contribution ban. 764 F.3d at 423. Houston's blackout period clearly fails for these same reasons, among others.

a. The parameters Houston has chosen for its blackout period are unmoored from any apparent indicia of any increased corruption threat.

City general elections occur in November of odd numbered years. HOUSTON, TEX. CHARTER (hereinafter, "Charter") art. V, § 5; **Ex. 10**. The blackout period bans any and all solicitations and contributions—or, more precisely, any and all *openly* solicited or accepted *for a*

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explained that it was "dangerous" to allow government to restrict political activity based on any other notion of the public good:

> Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters' choices.

554 U.S. 724, 742 (2008). The fundraising blackout does not address corruption; any other rationale animating the City incumbents who enacted it does not matter in the least.

[12] Again, the blackout period should be judged under strict scrutiny. However, it is not necessary for the Court to announce a level of scrutiny, because it fails even closely drawn scrutiny.

City race—from March 5 of an even-numbered year through and including January 31 of an election year.[13] This blackout period exceeds ten months of each two-year election cycle, and permits only nine months of fundraising before Election Day. Courts have preliminarily enjoined temporal contribution bans of less severe duration. *See Maupin*, 922 F. Supp. at 1419 (granting preliminary injunction against state law that banned contributions for "four and one-half months" during session, which "would prevent candidates and political committees from amassing the resources necessary for effective advocacy."); *Emison v. Catalano*, 951 F. Supp. 714, 717, 722 (E.D. Tenn. 1996) (preliminarily enjoining ban on contributions during five-month legislative session as not narrowly tailored because it applied to non-incumbents); *Zeller*, 909 F. Supp. at 1520 (preliminarily enjoining ban on contributions to judicial candidates earlier than one year before election).

Aside from its exceedingly long duration, the parameters of Houston's blackout period appear to be entirely arbitrary.

The City of Houston's elected officeholders—its mayor, councilmembers, and controller—conduct business year-round. Officeholders assume office each January 2 following an election year. Charter art. V, § 5. The charter requires that at least one regular City Council meeting be held every week throughout the year, "unless postponed for valid reasons." *Id.* art. VII, § 3.

The blackout period is therefore completely unrelated to the term of City Council or any other period in the calendar that would even arguably present heightened corruption concerns. The period of the blackout appears to have been plucked from thin air. Where core political

[13] If a candidate is involved in a runoff or special election, the blackout period is modified but only for candidates in those races. Code § 18-35(a), (b).

activity is at stake, this is unacceptable. Discussing the 60-day waiting period's lack of tailoring in *Catholic Leadership*, the Fifth Circuit said:

> Even though the aggregate limit at issue 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.' **But Texas does not provide any evidence supporting a 60-day aggregate contribution cap as necessary.**

Catholic Leadership, 764 F.3d at 433 (emphasis added).

Just as Texas failed to justify its 60-day window limiting general purpose committee contributions, Houston has utterly failed to offer any sufficient rationale as to why City campaign fundraising must not begin until February of an election year, as opposed to January, December, or any time before. *See also Family PAC v. McKenna*, 685 F.3d 800, 812-14 (rejecting argument that a 21-day contribution limit was closely tailored in light of modern technology). *Cf. N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 716 (4th Cir. 1999) (upholding state moratorium on contributions to legislative incumbents and candidates because it was "narrowly tailored" in that the prohibition (i) applied only to "lobbyists and the political committees that employ them—the two most ubiquitous and powerful players in the political arena," and (ii) "last[ed] only during the legislative session, which typically, though not invariably, has covered just a few months in an election year.").[14]

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

Even if Houston could muster an explanation as to why it chose to ban fundraising from March through January, as opposed to another time period, a complete fundraising blackout for *any* period of time is still too blunt an instrument because the City cannot "advance[] [any]

[14] The *Barlett* court specifically noted that "[w]ith respect to actual corruption, lobbyists are paid to effectuate particular political outcomes. The pressure on them to perform mounts as legislation winds its way through the system." 168 F.3d at 715-16.

reason why more narrowly-tailored base contribution limits" during its chosen period "would not similarly serve its interests." *See Catholic Leadership*, 764 F.3d at 436. This "would impose a lesser burden on First Amendment rights, as compared to aggregate limits that flatly ban contributions beyond" certain time periods. *See McCutcheon*, 134 S. Ct. at 1458.

c. The blackout period is underinclusive.

Any possible justification the City attempts to advance will be undermined by the provisions of the ordinance, which are simultaneously under- and overinclusive. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978). The blackout is underinclusive in at least two glaring ways.

Most obviously, the blackout period is underinclusive in light of section 18-38(b) of the code, which permits any person who has designs on a City office, but currently holds a non-City office, to aggressively raise funds through his existing campaign account and then re-purpose those funds (up to the City's base limits) to his City campaign. *See* Code § 18-38(b); VC ¶¶ 19-20. The code of ordinances sets up a discriminatory fundraising regime that effectively favors a candidate who happens to hold non-City office (or even one comfortable feigning a campaign for non-City office with ultimate plans to re-purpose the funds) *vis a vis* another candidate *for the same City office* who is not an officeholder. This discriminatory regime directly conflicts with the Supreme Court's logic in *Davis v. FEC*. The Supreme Court "ha[s] never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *See Davis*, 554 U.S. at 738.

Additionally, Houston has afforded a sweetheart exception from the blackout period—and even from the base limits—for incumbent officeholders who want to fundraise to retire campaign debts. While this exception is limited to incumbents who are term-limited out of the

office they currently hold, any such incumbent is still eligible to run for other City office. *See* Charter art. V, § 6a. Retirement of campaign debts frees up funds for future campaigns, and potentially relieves a massive personal liability that may otherwise burden the officeholder. *See Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273 (5th Cir. 1994) (concluding senatorial candidate was personally liable for contracts of his unincorporated campaign committee). Preventing even tiny contributions to nascent candidates while permitting powerful incumbent officeholders freedom to raise unlimited funds at any time of the year, and without restriction by the base limits, is offensive to the First Amendment.

d. The blackout period is overinclusive.

To the extent Houston can assert a legitimate interest in targeting contributions presenting a higher than normal risk of corruption, it has already done so by completely disqualifying certain persons. Houston has banned contributions from litigants seeking damages against the City, contractors during a "contract award period," banned persons holding appointive positions with the City government from soliciting contributions, and banned city employees from soliciting contributions except during off-duty hours. Therefore, the blackout period is spectacularly overbroad in that it applies to everybody, while these purportedly high-risk contributors are already absolutely barred from contributing (or soliciting). Any contribution restriction that applies globally rather than only against the specific threat proffered by the Government must be rejected for lack of tailoring. *See, e.g.*, *State v. Dodd*, 561 So.2d 263, 265 (Fla. 1990) (invalidating legislative-session contribution ban because it applied to all candidates, even nonincumbents who posed no quid pro quo threat). *See also FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) (invalidating expenditure restriction because even if "large pooling of financial resources…pose a potential for corruption," the law "is a

fatally overbroad response" because "its terms apply equally to informal discussion groups that solicit neighborhood contributions"); *Family PAC*, *supra*, at 812-14. *Cf. Bartlett*, *supra*, at 716.

e. Reporting requirements are a less intrusive alternative to an outright ban.

City candidates are already required to electronically report all contributions of anything more than a *de minimus* amount according to a robust schedule, and these reports are posted on the internet almost immediately. The Supreme Court and the Fifth Circuit have repeatedly found that bans and limits are not appropriately tailored means of addressing corruption in light of technology permitting timely public access to campaign finance information. *See Catholic Leadership*, 764 F.3d at 429. Houston's "choice to enact a [10-month contribution] limit is badly 'asymmetrical' to its interest in preventing quid pro quo corruption." *Id.* (quoting *Citizens United*, 558 U.S. 310, 361 (2010)).

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The alternative means of addressing the threat of corruption which the City has already adopted provide examples of how the City may prevent corruption without unduly abridging associational rights. *See McCutcheon*, 134 S. Ct. at 1458; *Catholic Leadership*, 764 F.3d at 429; *Zeller*, 909 F. Supp. at 1527. Aside from base limits, Houston has also enacted robust reporting requirements, and even disqualified specific categories of persons from soliciting and contributing to candidates *at any time*. "This prophylaxis-upon-prophylaxis approach requires that [the court] be particularly diligent in scrutinizing the law's fit." *McCutcheon*, 134 S. Ct. at 1458 (internal quotations omitted).[15]

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

III. Plaintiffs Will Suffer Irreparable Harm Without the Injunction

Without immediate relief, Plaintiff loses irreplaceable time for soliciting funds to run an effective campaign for city-wide office, and all those who would contribute to his campaign are denied the right of political association. Even without such a looming electoral deadline, the Fifth Circuit has "repeatedly held…that 'the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction.'" *Texans for Free Enter.*, 732 F.3d at 539; *see also Free Market Found. v. Reisman*, 540 F. Supp.2d 751, 758 (W.D. Tex. 2008). Therefore, because the blackout is unconstitutional, as demonstrated above, there is more than a substantial threat—there is a certainty—that Plaintiffs will suffer irreparable injury if the Court does not grant immediate preliminary injunctive relief. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) (stating that "[w]here a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed").

IV. Balancing of Harms

Without a preliminary injunction, Plaintiffs will continue to suffer irreparable injury to their constitutional rights. By contrast, Defendants suffer no comparable injury if the Court grants a preliminary injunction. The result would simply be that candidates and their supporters would be permitted to associate up to the base limits Houston has already enacted upon signing of the order rather than waiting until February 1. The Supreme Court has made clear that in any conflict between First Amendment rights and regulation, courts "must give the benefit of any doubt to protecting rather stifling speech," and that "the tie goes to the speaker, not the censor." *Wisc. Right to Life*, 551 U.S. at 469, 474. "The harm and difficulty of changing a regulation cannot be said to outweigh the violation of constitutional rights it perpetuates. It would be far

worse that an election continue under an unconstitutional regime than the [government agency] experience difficulty or expense in altering that regime." *Foster v. Dilger*, No. 3:10-CV-00041, 2010 WL 3620238, at *7 (E.D. Ky. Sept. 9, 2010) (not designated for publication). Moreover, "Defendant's legitimate interests can be protected by the reporting statutes if preliminary injunctive relief is granted." *Free Market Foundation*, 540 F. Supp.2d at 759.

V. Effect on the Public Interest

"[I]njunctions protecting First Amendment freedoms are always in the public interest." *Texans for Free Enter.*, 732 F.3d at 539. *See also Laredo Rd. Co. v. Maverick County, Tex.*, 389 F. Supp.2d 729, 748 (W.D. Tex. 2005) ("[B]ecause its rights to free speech, as protected by the First Amendment, will be curtailed…[t]he granting of a preliminary injunction in favor of the Plaintiff will not disserve the public's interest, as a government's constituents have a vested interest in their government enacting constitutionally sound laws."). More fundamentally, the public itself is harmed when political speech is curtailed. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Bellotti*, 435 U.S. at 776.

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

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

preliminary injunction is granted and later dissolved," the bond requirement is unnecessary. *See Free Market Found. v. Reisman*, 540 F. Supp.2d at 759. Accordingly, Plaintiffs respectfully request that the court waive the bond requirement in the event that it grants Plaintiffs' motion for preliminary injunction.

CONCLUSION

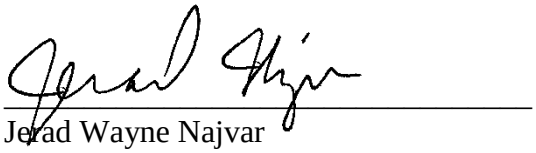
Under *McCutcheon* and *Catholic Leadership*, the blackout period lacks any legitimate government purpose. Aside from that, the blackout period is not closely drawn to avoid unnecessary abridgment of fundamental rights. Houston has already asserted its anticorruption interest by many provisions, including base limits, targeted disqualifications of categories of persons thought to pose a higher risk of corruption, and electronic reporting requirements. Houston's blackout period is actually more severe than those preliminarily enjoined by several other courts for lack of tailoring (and, in some cases, lack of a legitimate purpose) even before *McCutcheon*.[16] Moreover, even if the blackout were otherwise legitimate, the gratuitous exception for debt retirement fundraising by term-limited incumbents, and the *de facto* discriminatory regime favoring non-City officeholders (by way of Code 18-38(b)) render it fatally underinclusive.

For the reasons shown, after entertaining the City's response and hearing, this Court should grant an immediate preliminary injunction preventing Defendants from enforcing section 18-35(a) of the City of Houston's Code of Ordinances against Plaintiff or against any other candidate.

Dated November 4, 2014.

[16] See discussion *supra* at 19.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Memorandum in Support of Motion for Preliminary Injunction, and accompanying exhibits, have been served upon the following on November 4, 2014 as shown:

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By email: david.feldman@houstontx.gov and Judith.ramsey@houstontx.gov; and
By hand delivery via Office of the City Secretary, 900 Bagby, Public Level, Houston, TX 77002

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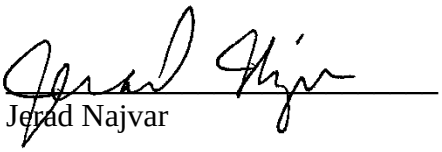

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