UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
DENVER DIVISION

GREG LOPEZ, et. al, *Plaintiffs*, v. JENA GRISWOLD Colorado Secretary of State, et. al, *Defendants*.	Case No. 1:22-cv-0247-JLK PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT (ECF 72)

REPLY CONCERNING UNDISPUTED MATERIAL FACTS

1. No response.

2. Colorado's contribution limits are not indexed for inflation. When adjusted, the limits are "rounded to the nearest lowest twenty-five dollars." Colo. Const. Art. XXVIII § 3(13). Mathematically, rounding down prevents the limits from being indexed to the inflation adjusted amount. Because § 3(13) forces Colorado to round the limits down from the inflation adjusted amount, it is impossible for the contribution limits to be indexed for inflation.

3. No response.

4. No response.

5. No response.

6. No response.

7. Defendants' response, "Defendants agree that there is legal uncertainty as to whether a candidate who initially accepts, but later withdraws from, the voluntary spending limits is entitled to keep any contribution above the ordinary contribution amount," is an admission. The remainder of Defendants' response is irrelevant.

8. No response.

9. No response.

RESPONSE CONCERNING ADDITIONAL FACTS

1. Admit.

2. Admit.

3. Admit.

4. Admit.

5. Admit.

6. Admit.

7. Admit.

ARGUMENT

The Supreme Court and Tenth Circuit have ruled that asymmetrical campaign contribution schemes unconstitutionally burden First Amendment rights. *See Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) ("*AFE*"); *Riddle v. Hickenlooper*, 742 F.3d 922 (10th Cir. 2014). Courts facing asymmetrical campaign contribution schemes consider only one issue: Whether the law creates "different contribution limits for candidates who are competing against each other." *Davis*, 554 U.S. at 738. *See also AFE*, 564 U.S. at 736-37; *Riddle*, 742 F.3d at 929.

Here, there is no question that Section 4 creates asymmetrical contribution limits on "candidates vying for the same seat." *Davis*, 554 U.S. at 744. Therefore, Section 4 "impermissibly burdens [candidates'] First Amendment right[s]." *Id*. at 738.

I. SECTION 4 BURDENS PLAINTIFFS' FIRST AMENDMENT RIGHTS.

Defendants claim Section 4 does not burden or injure Plaintiffs' First Amendment rights. *See* Opp'n at 5-7, 10-12 (ECF 76). They are wrong.

Like Section 4, the asymmetric campaign contribution scheme in *Davis* raised the contribution limit for one candidate but not the other in a race for the same office. 554 U.S. at 738. Indeed, "[t]he opponent of the candidate who exceeded [a spending] limit was permitted to collect individual contributions up to [triple] the normal contribution limit [per contributor]. The candidate [that exceeded the] limit remained subject to the original contribution cap." *AFE*, 564 U.S. at 735-36 (explaining *Davis*). Like Section 4, the *Davis* law did "not provide any way" for a candidate to "exercise [the] right" to make unlimited campaign expenditures "without abridgment." *Davis*, 554 U.S. at 740. "Instead, a candidate who wishe[d] to exercise that right ha[d] two choices: abide by a limit on [ ] expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits." *Id*.

The Federal Election Commission, like Defendants, *see* Opp'n at 10-12 (ECF 76), argued candidates do not suffer an inherent injury from an asymmetric campaign contribution law. *Davis*, 554 U.S. at 734. The Supreme Court disagreed.

The Court ruled asymmetric campaign contribution schemes are a *per se* burden on First Amendment rights, and subject to strict scrutiny. *Id*. at 740 ("Because [the *Davis* law] imposes a substantial burden on the exercise of the First Amendment right to use [private] funds for campaign speech, that provision cannot stand unless it" passes strict scrutiny.). The *Davis* law "was unconstitutional because it forced a candidate 'to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.'" *AFE*, 564 U.S. at 736 (quoting *Davis*). "Any candidate who chose to spend [over

the limit] was forced to 'shoulder a special and potentially significant burden' because that choice gave fundraising advantages to the candidate's adversary." *Id*. (quoting *Davis*).

The Court stressed that it had "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *Davis*, 554 U.S. at 738. The scheme "constituted an 'unprecedented penalty' and 'imposed a substantial burden'" on First Amendment rights that could not pass strict scrutiny. *AFE*, 564 U.S. at 736 (quoting *Davis*) (brackets omitted).

In *AFE*, the Court faced scheme that provided "additional money from the State" to a publicly financed candidate if a privately financed candidate exceeded a set spending limit. *Id*. at 727. "The logic of *Davis* largely control[led] [the Court's] approach to [*AFE*]." *Id*. at 736. "Much like the burden placed on speech in *Davis*, the matching funds provision impose[d] an unprecedented penalty on any candidate who robustly exercises his First Amendment rights." *Id*. (internal quotation marks and brackets omitted).

Like Section 4, the First Amendment "burden imposed by the [*AFE* law] [was] evident and inherent in the choice that confront[ed] privately financed candidates," *id*. at 745 (citing *Davis*)—because once a privately financed candidate chose to spend more than the limit allowed, each dollar spent gave "one additional dollar to his opponent." *Id*. at 737. Indeed, "'the vigorous exercise of the right to use personal funds to finance campaign speech' le[d] to 'advantages for opponents in the competitive context of electoral politics.'" *Id*. at 736. (quoting *Davis*).

The *AFE* law "substantially burden[ed] the speech of privately financed candidates … without serving a compelling state interest." *Id*. at 754-55. Indeed, the law "force[d] the privately financed candidate to 'shoulder a special and potentially significant burden' when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy. If the law at issue

in *Davis* imposed a burden on candidate speech, the Arizona law unquestionably [did] so as well." *Id*. at 737 (quoting *Davis*). Indeed, the burden on the privately financed candidate was "far heavier" than the burden in *Davis*. *Id*. The law had to "be justified by a compelling state interest," *i.e*., pass strict scrutiny, and it failed. *Id*. at 740, 754-55.

And in *Riddle*, the Tenth Circuit faced an asymmetrical Colorado campaign contribution scheme that allowed write-in, unaffiliated, and minor party candidates to collect individual contributions only for the general election, but allowed major party candidates (Democrats and Republicans) to collect individual contributions for the primary and general election. 742 F.3d at 924-27. Since each election had distinct contribution limits, the law effectively allowed major party candidates to collect double the amount of individual contributions that other candidates could collect each election cycle. *Id*. Because the law "treat[ed] contributors differently, the statute impinged on the right to political expression." *Id*. at 927. Following *Davis*, the Tenth Circuit held that the Colorado law was unconstitutional. *Id*. at 929-30. Like Section 4, the *Riddle* law created "favoritism between candidates vying for the same office." *Id*. at 929.

"Ultimately, the [*Davis*, *AFE*, and *Riddle*] law[s] failed because [they] imposed different contribution … limits on candidates vying for the same seat." *Id*. (internal quotation marks omitted). Only "uniform contribution limit" laws can be "constitutional." *Id*. "Imposing different contribution [ ] limits on candidates vying for the same seat is antithetical to the First Amendment." *Davis*, 554 U.S. at 744. That is why no "empirical evidence" is necessary "to determine that [Section 4] is burdensome" on First Amendment freedoms, *AFE*, 564 U.S. at 746, why none of Defendants' Statement of Additional Facts, Opp'n at 3-4 (ECF 76), are material, and why Section II of Defendants' brief is irrelevant, *id*. at 10-12.

"[T]he burden imposed by [asymmetrical campaign contribution schemes] is *evident* and *inherent* in the choice that confronts [ ] candidates." *AFE*, 564 U.S. at 745 (emphasis added). As an asymmetrical campaign contribution scheme, Section 4 burdens Plaintiffs' First Amendment rights.

II. *DAVIS*, *AFE*, AND *RIDDLE* CONTROL THIS CASE.

Defendants argue that the laws at issue in *Davis*, *AFE*, and *Riddle* are so distinguishable from Section 4, that it makes the cases irrelevant. *See* Opp'n at 6-10. They are wrong.

The crux of Defendants' argument is that "all three cases involve[d] laws that automatically benefit a candidate's opponent when the candidate exercises a constitutional right, regardless of any choice made by the opponent," while Section 4 merely "offer[s] candidates a choice between (a) normal contribution limits and unlimited expenditures, or (b) heightened contribution limits and limited expenditures." *Id*. at 6-7. Therefore, because Section 4 offers candidates choices, instead of imposing automatic advantages to a candidate's opponent as the *Davis*, *AFE*, and *Riddle* laws did, Section 4 is purportedly constitutional. *Id*. at 6-10. Not so.

The *Davis*, *AFE*, and *Riddle* laws were unconstitutional because, like Section 4, they created asymmetrical fundraising disparities between candidates vying for the same office. Laws that sanction asymmetrical fundraising substantially burden First Amendment rights. *See Davis*, 554 U.S. at 739-40 (the law "imposes a substantial burden on the exercise of First Amendment right[s]"); *AFE*, 564 U.S. at 737-38 (the law imposes "markedly more significant burden than in *Davis*"), 754-55 (the law "substantially burdens the speech of [the plaintiffs] without serving a compelling state interest"); *Riddle*, 742 F.3d at 930 ("Here we have the same statutory anomaly" as in *Davis*.), *id*. at 929 ("Though the [*Davis*] Court rested on the First Amendment rather than on the right to equal protection, the rationale applies with even greater force here.").

Furthermore, the Supreme Court ruled the asymmetrical contribution law in *Davis* was not automatically forced on a candidate, but contingent on a candidate's "*choice*." *Davis*, 554 U.S. at 739 (emphasis added). Indeed, like Section 4, the *Davis* law forced "a candidate to *choose* between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations." *Id.* (emphasis added). The Court held that candidates "may *choose*" to exceed the spending limit, "but they must shoulder a special and potentially significant burden if they make that *choice*." *Id*. (emphasis added). "The resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed *choice*." *Id*. (emphasis added).

The issue in *AFE* was "whether [public financing] can be triggered by the speech of another candidate." 564 U.S. at 743 n.9. In *AFE*, as with Section 4, candidates can *choose* whether to go above the spending cap. But that "some candidates may be willing to[,] [*i.e*., choose to,] bear the burden of spending above the cap[,] … does not make the law any less burdensome." *Id*. at 745 (citing *Davis*, 554 U.S. at 739).

Finally, the candidate choice in *Riddle*, albeit more subtle, was still a choice. Politicians that chose to run as a write-in, independent, or minor party candidate instead of participating in a major party primary were subjected to unconstitutional asymmetrical contribution limits. *Riddle*, 742 F.3d at 924-27.

At bottom, Defendants are inviting this Court to ignore binding Supreme Court and Tenth Circuit precedent based on semantic distinctions without a difference. "Ultimately, the [*Davis*, *AFE*, and *Riddle*] law[s] failed because [they] imposed different contribution … limits on candidates vying for the same seat." *Id.* at 929 (internal quotation marks omitted). Section 4's "drag on First Amendment rights is not constitutional simply because it attaches as a

consequence of a statutorily imposed choice." *Davis*, 554 U.S. at 739. Only "uniform contribution limit" laws can be "constitutional." *Riddle*, 742 F.3d at 929. "[I]mposing different contribution [ ] limits on candidates vying for the same seat is antithetical to the First Amendment." *Davis*, 554 U.S. at 744.

The fundamental question is whether Section 4 creates "different contribution limits for candidates who are competing against each other." *Id.* at 738. Because Section 4 imposes asymmetrical contribution limits on "candidates vying for the same seat," *id.* at 744, the "scheme impermissibly burdens [their] First Amendment right[s]," *id*. at 738.

III. SECTION 4 IS NOT ANALOGOUS TO A PUBLIC FINANCING SYSTEM.

Because Defendants continue this line of argument, *see* Opp'n at 5-9 (ECF 76); Mot. at 7-12 (ECF 73); Opp'n at 18-20 (ECF 14); Br. at 20-26, *Lopez v. Griswold*, No. 22-1082 (10th Cir. 2023) (ECF 10924311), it bears repeating: Section 4 is nothing like a public financing system. *See* Mot. at 11-14 (ECF 72); Opp'n at 6-9 (ECF 75).

Defendants argue Section 4 is "analogous to public financing laws." Opp'n at 7 (ECF 76). Consequently, "[i]f laws allowing candidates to select a contribution limit of zero are constitutional," *i.e.*, public financing laws sanctioned by *Buckley v. Valeo*, 424 U.S. 1 (1976), then Section 4 "easily pass[es] muster." *Id*. at 6. Not so.

"The choice imposed by [Section 4] is not remotely parallel to that in *Buckley*." *Davis*, 554 U.S. at 740. Section 4 "does not provide any way in which a candidate can exercise [his] right [to spend and raise unlimited funds] without abridgment." *Id.* Instead, Section 4 puts candidates in a constitutional vise, forcing them to choose to either "abide by a limit on [ ] expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits." *Id*.

The Second Circuit recognized that public financing systems differ from asymmetrical contribution schemes in *Corren v. Condos*, 898 F.3d 209, 227-28 (2d Cir. 2018), when, after discussing *Davis*, it "expressly distinguished" a choice to accept public financing from a choice that gives a candidate's opponent "expanded contribution limit[s]." Citing *Davis*, the *Corren* court ruled there was a difference between a candidate making a choice to accept "public financing" or "retain[ing] the unfettered right to make unlimited personal expenditures," and a candidate "choos[ing] either to restrict her spending or to trigger disparate contribution limits." *Id*. at 228 (internal quotation marks omitted); *see also Upstate Jobs Party v. Kosinski*, 559 F. Supp. 3d 93, 137 (N.D.N.Y. 2021) (citing *Corren*) ("Because monetary contributions are an expression of speech, the different contribution-limits among the two groups infringes on [plaintiff's] political associations.").

"Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Buckley*, 424 U.S. at 97-98. Like Defendants, the Ninth Circuit believed the asymmetrical contribution scheme in *AFE* was constitutional because it involved a public financing scheme. *See* Opp'n at 7 (ECF 76) (Section 4 "is more analogous to public financing laws."); *McComish v. Bennett*, 611 F.3d 510, 521 (9th Cir. 2010), *reversed sub nom AFE*, 564 U.S. 721 (2011) (*Davis* says "nothing" about public financing schemes). And just like Defendants, the Ninth Circuit cited *Buckley*, *compare* Opp'n at 6, 8 (ECF 76) *with McComish*, 611 F.3d at 522, 526, and stated "it is constitutional to subject candidates running against each other for the same office to entirely different regulatory schemes when some candidates voluntarily choose to participate in a public financing system." *McComish*, 611 F.3d at 522 (citing *Buckley*). The Ninth Circuit upheld the scheme since it believed the "law in *Davis* was problematic because it singled out the speakers to whom it applied based on their identity. The

[*AFE* law's] matching funds provision [made] no such identity-based distinctions." *Id*. The Supreme Court disagreed.

"The logic of *Davis* largely control[ed] [the Supreme Court's] approach to [*AFE*]. Much like the burden placed on speech in *Davis*, the matching funds provision [in AFE] 'imposes an unprecedented penalty on any candidate who robustly exercises his First Amendment rights.'" *AFE*, 564 U.S. at 736 (quoting *Davis*).

In *AFE*, once a privately financed candidate chose to spend more than the limit allowed, each dollar spent gave "one additional dollar to his opponent." *Id*. at 737. The law "force[d] the privately financed candidate to 'shoulder a special and potentially significant burden' when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy. If the law at issue in *Davis* imposed a burden on candidate speech, the Arizona law unquestionably [did] so as well." *Id*. (quoting *Davis*). Indeed, the burden on the privately financed candidate was "far heavier" than the burden presented in *Davis*. *Id*.

The public financing scheme "substantially burden[ed] the speech of privately financed candidates" and did "so to an even greater extent than the law [the Court] invalidated in *Davis*." *Id*. at 753. "[E]ncouraging candidates to take public financing[] [did] not establish the constitutionality of the [*AFE* law]." *Id*. The law had to "be justified by a compelling state interest," *i.e*., pass strict scrutiny, and it failed. *Id*. at 740, 754-55. Accordingly, "the goal of creating a viable public financing scheme can only be pursued in a manner consistent with the First Amendment." *Id*. at 754.

Public financing is generally legal; asymmetrical contribution limits, as exemplified by Section 4, are not. *See Davis*, 554 U.S. at 739; *AFE*, 564 U.S. at 754-55; *Riddle*, 742 F.3d at 929-30; *Corren*, 898 F.3d at 227-28 (applying *Davis*). Fundamentally, Section 4 is an asymmetrical

fundraising scheme. It is nothing like a voluntary public financing scheme. Accordingly, the choices involved in each scheme cannot be treated the same. Section 4 is analogous to the First Amendment burdening schemes in *Davis*, *AFE*, and *Riddle*. Therefore, it is unconstitutional.

IV. THE COURT SHOULD IGNORE DEFENDANTS' UNPERSUASIVE AUTHORITIES.

Defendants cite *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 37-38 (1st Cir. 1993) and *Kennedy v. Gardner*, No. 98-cv-608, 1999 U.S. Dist. LEXIS 23480, at *14 (D.N.H. Sep. 30, 1999), to defend schemes, like Section 4, that offer candidates "higher contribution limits in exchange for agreeing to an expenditure cap." Opp'n at 5 (ECF 76). Indeed, *Vote Choice* upheld a system like Section 4, *see* 4 F.3d at 39, and *Kennedy*, a case controlled by and heavily reliant upon *Vote Choice*, did as well. *See* 1999 U.S. Dist. LEXIS 23480 at *16-*23 & n.4. Both courts believed the uncoercive nature of the asymmetric contribution schemes and their "choice-increasing framework" made the laws constitutional. *Vote Choice*, 4 F.3d at 39; *Kennedy*, 1999 U.S. Dist. LEXIS 23480 at *19-*20. But neither case was decided with the benefit of *Davis*, *AFE*, or *Riddle*.

When the Supreme Court decided *Davis*, it overruled a district court that relied heavily on *Vote Choice*, and it ignored that district court's coercive choice argument. *See Davis v. Federal Election Comm'n*, 501 F. Supp. 2d 22, 29-31 (D.D.C. 2007) (three-judge court), *reversed*, 554 U.S. 724, 738 (2008). *See also* Opp'n at 3-6 (ECF 75). Indeed, the Supreme Court was only concerned about whether the *Davis* law created asymmetrical contribution limits on "candidates vying for the same seat." 554 U.S. at 744. And because the *Davis* law created asymmetrical contribution limits, the "scheme impermissibly burden[ed] [a candidate's] First Amendment right[s]." *Id*. at 738.

Davis, which binds this Court, effectively overruled *Vote Choice* and *Kennedy*.

CONCLUSION

Plaintiffs' motion should be granted.

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Respectfully submitted,

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