IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:22-cv-00247-PAB

GREG LOPEZ,
RODNEY PELTON, and
STEVEN HOUSE,

Plaintiffs,

v.

JENA GRISWOLD, Colorado Secretary of State, in her official capacity, and
JUDD CHOATE, Director of Elections, Colorado Department of State, in his official capacity,

Defendants.

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

For nearly 50 years, Colorado has required its candidates for state office to raise only limited amounts from any single donor. Now, in an election year, Plaintiffs ask this Court to throw out Colorado's contribution limits in their entirety on the basis of a preliminary record. The people of Colorado have made clear time and again that they do not want this, having repeatedly enacted and reenacted contribution limits both through popular initiative and through the legislative process. This would be a massive disruption to the status quo that has prevailed in Colorado for the last half-century. Plaintiffs cannot make the necessary showing required to obtain a preliminary injunction, and their motion should be denied.

BACKGROUND

Colorado and its voters have a long history of enacting contribution limits for candidates for state office. In 1974, Colorado passed the Campaign Reform Act, which included, among other things, limits on cash contributions. *See* § 49-27-111, C.R.S. (1963). In 1996, the voters of Colorado passed an initiative repealing and reenacting much of the campaign finance laws, including the limits on contributions to candidates, by a margin of almost 2-1. *See* Title I, art. 45, ed.'s note, C.R.S. (2021). This initiative, the Fair Campaign Practices Act ("FCPA"), contained both a contribution limit and a provision doubling the contribution limits when a candidate accepted voluntary spending limits and her opponent did not. *See* §§ 1-45-104, -105 (1997).

In 2002, the people of Colorado took their desire for transparent and clean elections even further and enshrined much of their campaign finance law in the Colorado Constitution. *See* Colo. Const. art. XXVIII. The very first sentence of this constitutional amendment states:

> The people of the state of Colorado hereby find and declare that large campaign contributions to political candidates create the potential for corruption and the appearance of corruption; that large campaign contributions made to influence election outcomes allow wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process; . . . and that the interests of the public are best served by limiting campaign contributions . . . .

Colo. Const. art. XXVIII, § 1. Both the contribution limits and the provision increasing contribution limits for candidates who accept voluntary spending limits were contained in the new constitutional provision. *See* Colo. Const. art. XXVIII, §§ 3(1), 4(5). Additionally, the contribution limits are indexed to inflation and are recalculated every four years, rounding down to the nearest $25. *Id.* § 3(13).

Despite numerous amendments to both the Fair Campaign Practices Act and Article XXVIII, neither the people of Colorado nor the General Assembly have ever repealed the contribution limits. To the contrary, in 2012, the people adopted another initiative,

> instruct[ing] the Colorado congressional delegation to propose and support, and the Colorado state legislature to ratify, an amendment to the United States Constitution that allows Congress and the states to limit campaign contributions and spending, to ensure that all citizens, regardless of wealth, can express their view to one another and their government on a level playing field.

§ 1-45-103.7(9)(a), C.R.S.

The current contribution limits for an individual contributor to candidates are:

- $400 per election cycle (including primary and general election) for state legislative candidates, as well as candidates for the state board of education, University of Colorado regent, and district attorney (referred to below as the legislative contribution limit); and
- $1250 per election cycle for candidates for Governor, Secretary of State, Attorney General, and Treasurer (referred to as the statewide candidate contribution limit).

See 8 CCR 1505-6, Rule 10.17(h). The contribution limits political parties may make to candidates are significantly higher: $679,025 for candidates for Governor; $135,775 for other statewide candidates; $24,425 for state senate candidates; and $17,625 for all other state candidates. *See id.* These limits were last indexed to inflation in 2019, and will be reindexed to inflation in the first quarter of 2023. Colo. Const. art. XXVIII, § 3(13). The contribution limits double "for any candidate who has accepted the applicable voluntary spending limit" in the Colorado Constitution if no other candidate has accepted the voluntary spending limits and the non-accepting candidate has raised at least 10% of the limit. Colo. Const. art. XXVIII, § 4(5).

LEGAL STANDARD

A preliminary injunction "is an extraordinary remedy," and "the right to relief must be clear and unequivocal." *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009). The Tenth Circuit recognizes "three types of specifically disfavored injunctions: (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1259 (10th Cir. 2005) (quotations omitted). An injunction that meets any one of these disfavored criteria "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Id.* (quotations omitted). "To get a disfavored injunction, the moving party faces a heavier burden on the likelihood-of-success-on-the-merits and the balance-of-harms factors: She must make a strong showing that these tilt in her favor." *Free the Nipple-Fort Collins v. City of Ft. Collins*, 916 F.3d 792, 797 (10th Cir. 2019) (quotations omitted).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The last two factors, the balance of equities and the public interest, "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

ARGUMENT

I. Plaintiffs seek a disfavored preliminary injunction.

The preliminary injunction sought by Plaintiffs is "specifically disfavored" because it seeks to profoundly alter the status quo. *Schrier*, 427 F.3d at 1259. Colorado has had contribution limits for state candidates since 1974. *See* § 1-45-104, C.R.S. (1996); § 49-27-111, C.R.S. (1963). The current contribution limits (adjusted for inflation) have been in place since 2003. Plaintiffs' requested injunction does not seek to modify the contribution limits—it seeks to eliminate them. This would be a significant disruption to the status quo that has prevailed in Colorado for nearly 50 years.

Therefore, Plaintiffs must make a "strong showing" that the likelihood-of-success and balance-of-harms factors tilt in their favor. *Free the Nipple-Fort Collins*, 916 F.3d at 797.

II. Plaintiffs cannot make a heightened showing that they are likely to succeed on the merits of their claim.

Plaintiffs seek to enjoin three provisions of Colorado law: the $400 contribution limit for state legislative races (Art. XXVIII, § 3(1)(a)); the $1250 contribution limit for statewide candidates (Art. XXVIII, § 3(1)(b)); and the provision that increases contribution limits when candidates accept voluntary spending limits (Art. XXVIII, § 4(5)). Plaintiffs have not established a likelihood that they will succeed on any of these challenges.

A. *Randall*'s danger signs are present for the state legislative limits, but not for the statewide candidate limits.

In *Buckley v. Valeo*, the Supreme Court upheld the constitutionality of contribution limits. 424 U.S. 1, 35 (1976). Such limits "involve[] little direct restraint on" an individual's political speech and "do[] not in any way infringe the contributor's freedom to discuss candidates

and issues." *Id.* at 21. Additionally, the Court recognized that it "has no scalpel to probe" the appropriateness of different contribution limits. *Id.* at 30 (quotations omitted). Courts have thus generally "deferred to the legislature's determination of such matters." *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (controlling op. of Breyer, J.). Only when "distinctions in degree . . . can be said to amount to differences in kind" will courts intervene to declare a limit unconstitutional. *Buckley*, 424 U.S. at 30. Contribution limits are thus constitutional "as long as the Government demonstrates that the limits are 'closely drawn' to match a 'sufficiently important interest.'" *Randall*, 548 U.S. at 247 (quoting *Buckley*, 424 U.S. at 25). Preventing corruption and the appearance of corruption are sufficiently important interests. *See id.*

In *Randall*, the Supreme Court announced a two-step test when considering the validity of contribution limits. First, courts should examine whether "danger signs" exist that the contribution limits are too low. *Randall*, 548 U.S. at 249. If such danger signs exist, courts should then "examine the record independently and carefully to determine whether [the] contribution limits are 'closely drawn' to match the State's interests," including by considering several factors recognized by the *Randall* court. *Id.* at 253.

Randall identified two danger signs courts should look for to determine whether more searching scrutiny is required: whether the contributions limits "are substantially lower than both the limits [the Supreme Court has] previously upheld and comparable limits in other States." *Id.* The Court has only proceeded to closely scrutinize a state's contribution limits when both danger signs are present. *See id.*; *see also Thompson v. Hebdon*, 140 S. Ct. 348 (2019) (per curiam).

Defendants agree that these "danger signs" are present for the state legislative contribution limits because they are lower than limits in other states and lower than limits

previously upheld by the Supreme Court. (Montana's limit is $400 per election, but unlike Colorado, does not include uncontested primaries, so some Montana legislative candidates will also be subject to a $400 limit. *See* Mont. Code Ann. § 13-37-216 (2021).) Colorado's legislative contribution limits therefore should be subject to closer scrutiny under *Randall*'s second step.

However, the $1250 contribution limits for statewide candidates do not present the same danger signs and therefore do not warrant closer scrutiny under *Randall*'s second step. First, other states have lower limits. Delaware's statewide candidates are limited to $1200 per election cycle (Del. Code Ann. tit. 15, § 8010 (2021)). Montana's limits are $1000 per election for candidates for governor and $700 for other statewide offices, which will be lower than Colorado's limits when there are uncontested primaries for those offices. (Mont. Code Ann. § 13-37-216 (2021).) Notably, federal courts have recently affirmed Montana's limits. *See Lair v. Mangan*, 476 F. Supp. 3d 1091 (D. Mont. 2020), *aff'd* 822 F. App'x 635 (9th Cir. 2020); *see also Lair v. Motl*, 873 F.3d 1170, 1172 (9th Cir. 2017). Massachusetts and Rhode Island have $1000 limits per calendar year, which are lower than Colorado's limits in an election year (though they will be higher in a two-year cycle if a contributor knows the candidate they wish to support for two calendar years). Mass. Gen. Laws ch. 55 § 7A; R.I. Gen. Laws § 17-25-10.1(a)(1). Colorado's limits are thus not "substantially lower than . . . comparable limits in other States" and so are not a danger sign. *Randall*, 548 U.S. at 253. And while the $1250 limit is lower than the lowest (inflation-adjusted) limit approved by the Supreme Court, this factor by itself does not warrant closer review under *Randall*'s second step. *See Lair*, 873 F.3d at 1187 ("Although Montana's limits are lower in absolute terms than those the Court has previously upheld, they are significantly higher than those the Court struck down in *Randall*.").

B. The statewide candidate limits are closely drawn to Colorado's interests.

Because the statewide candidate contribution limits do not present both *Randall* danger signs, they should be upheld so long as they are closely drawn to a sufficiently important government interest. *See Randall*, 548 U.S. at 247. In applying this standard when *Randall*'s danger signs are not present, courts generally defer to the legislature's determination. *Id.* at 248.

Here, Colorado has a sufficiently important government interest in deterring corruption and the appearance of corruption. The people of Colorado have spoken emphatically that this is an interest of theirs, having enacted numerous campaign finance measures by initiative. Most significantly, in Article XXVIII itself, the people of Colorado "declare[d] that large campaign contributions to political candidates create the potential for corruption and the appearance of corruption." Colo. Const. art. XXVIII, § 1. Plaintiffs contend that this is a post-hoc rationalization and was minimally discussed in the voter information booklet, Mot. for Prelim. Inj. (Doc. 8) ("Mot.") at 23–27, but these arguments make little sense—it is literally the first words of the measure enacted by the people. It is hard to imagine more clear evidence that Colorado voters have an interest in preventing—and believe contribution limits will counter—the appearance of corruption and actual corruption than when they enact an amendment to their constitution expressly saying so. *See also Citizens for Responsible Gov't State Political Action Comm. v. Buckley*, 60 F. Supp. 2d 1066, 1079–82 (D. Colo. 2000) ("The State has adequately demonstrated that Colorado's citizens reasonably perceive corruption as a result of large

campaign contributions. The evidence demonstrates a compelling governmental interest served by the FCPA's limitations on campaign contributions.").[1]

Colorado's statewide contribution limits are closely drawn to its interests of avoiding the appearance and actuality of quid pro quo corruption. Importantly, the campaign finance statutes leave ample room both for candidates to raise money and for citizens to speak on election-related matters. The limits for political parties to donate to statewide candidates are substantially higher ($679,025 for governor candidates, $135,775 for other statewide candidates). Individual contributors may donate unlimited amounts of money to Colorado issue committees (which have a major purpose of supporting or opposing ballot measures) and independent expenditure committees (which can expend unlimited money in support of candidates). The contribution limits are thus targeted and closely drawn to combating the appearance of corruption inherent in a system that allows individuals to make large contributions directly to their representatives in government and do not more broadly impact citizens' ability to make their voices heard in elections. Colorado's statewide contribution limits therefore pass constitutional muster.

C. The *Randall* factors favor the constitutionality of both the statewide candidate and legislative contribution limits.

Defendants agree that the Court must consider the *Randall* factors when passing on the constitutionality of the legislative limits. And while the Court need not address those factors

[1] Plaintiffs argue that *McCutcheon v. FEC*, 572 U.S. 185 (2014), undermined the district court's findings in the *Citizens* case because the evidence relied on by the Court there did not show "true, quid pro quo corruption." Mot. 26 n.14. In fact, *McCutcheon* further supports the district court's findings there by reaffirming that "[i]n 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." 572 U.S. at 207 (quoting *Buckley*, 424 U.S. at 27).

when addressing the limits for statewide candidates because *Randall*'s danger signs are not present, Defendants address the *Randall* factors with respect to both sets of contribution limits. Both sets of contribution limits are constitutional under *Randall*.

1. Plaintiffs have not shown that Colorado's contribution limits put challengers at a disadvantage.

The first *Randall* factor asks whether the contribution limits "will significantly restrict the amount of funding available for challengers to run competitive campaigns." 548 U.S. at 253. Plaintiffs have produced no evidence that Colorado's contribution limits do so.

Plaintiffs first point to "candidates who ran for the same offices both before and after Article XXVIII," noting, unsurprisingly, that candidates received less in contributions after Article XXVIII lowered the contribution limits. Mot. 11–12. But Plaintiffs' evidence here actually supports the constitutionality of the contribution limits. The candidates cited by Plaintiffs were all incumbents when they ran following Article XXVIII. Decl. of S. Bouey, Ex. 1 ("Bouey Decl.") ¶ 3. In fact, one of the candidates mentioned, John Andrews, did not even appear on the ballot in the post-Article XXVIII election cited by Plaintiffs. *Id.* So this evidence doesn't show any disparity between incumbents and challengers. If anything, it suggests that the contribution limits level the playing field by decreasing contributions to incumbents.

Plaintiffs next point to the sizeable increase in the cost of campaigning, citing to their expert's finding that the "average per-candidate cost of a competitive race" increased from $81,735 in 2008 to $232,128 in 2020. Doc. 8–9, ¶ 16. This, too, does not show what Plaintiffs think it does. This evidence says nothing about a disparity between challengers and incumbents. It also strongly suggests that the contribution limits do not pose a significant obstacle to

candidates' speech, as both challengers and incumbents have been able to spend significantly more notwithstanding Colorado's contribution limits.

So what is the upshot of Plaintiffs' quantitative analysis? According to their expert, when challengers are able to raise more money than incumbents—presumably neutralizing any negative impact of contribution limits—incumbents are reelected at rate of 87%, instead of 90% otherwise. Doc. 8-9, ¶ 20. Defendants have not received the expert's dataset he used in reaching these numbers, and so it is unclear whether this difference is statistically significant. Even if it is, this minor variance says nothing about causation—challengers who raise more than incumbents may have other advantages (charisma, community connections, etc.) that both explain why they are more effective fundraisers and why they win at a marginally greater rate. And Colorado challengers continue to draw on significant resources from the party, as well as independent expenditures in support of their candidacy. This evidence falls far short of the evidence relied on by the *Randall* Court, including that Vermont's law significantly curtailed funding in competitive races by practically eliminating party contributions to those races. 548 U.S. at 253–54. Therefore, the current record does not support a finding that Colorado's contribution limits put challengers at a disadvantage.

2. The ability of political parties to donate large sums to Colorado candidates strongly supports the constitutionality of Colorado's contribution limits.

The next *Randall* factor strongly favors the constitutionality of Colorado's contribution limits. The Vermont contribution limits at issue in *Randall* applied to political parties as well as individuals, which "threatened harm to a particularly important political right, the right to associate in a political party." *Randall*, 548 U.S. at 256. Such strict limits on party funds

"severely limit the ability of a party to assist its candidates' campaigns," which "weigh[s] against the constitutional validity of the contribution limits." *Id.* at 257–59.

Colorado's contribution limits for its political parties to give to candidates for state office are among the highest in the country. Colorado allows parties to contribute $679,025 per election cycle to gubernatorial candidates; $135,775 to other statewide offices; $24,425 to state senate candidates; and $17,625 to state house candidates. *See* 8 CCR § 1505-6, Rule 10.17(h). Among those states that have such limits, only Michigan, Ohio, and Tennessee have higher limits for party contributions to candidates for state office. *See* Mich. Comp. Laws § 169.246; Ohio Rev. Code Ann. § 3517.102; Tenn. Code Ann. § 2-10-306; *see also* Nat. Conf. of State Legis., *State Limits on Contributions to Candidates, 2021-2022 Election Cycle*, (June 2021), *available at* https://tinyurl.com/4k3ttr5r. Unlike the limits struck down in *Randall*, Colorado's contribution limits do not meaningfully limit the ability of a party to assist candidates and do not impede individuals' right to associate in a political party. This second factor plainly favors Colorado. *See Thompson*, 7 F.4th at 821 (acknowledging that that the limits imposed on contributions by Alaska's political parties—which are much lower than Colorado's—weighed in favor of the constitutionality of the state's overall contribution limits).

Plaintiffs seek to minimize the impact of factor, but the evidence they marshal does not support their arguments. For example, Plaintiffs argue that "the largest contribution by any party organ was $24,425" in 2020. Mot. 17. But there were no statewide races in 2020, only legislative races, so $24,425 was actually the most the party could give in such a race. In 2018, the last time candidates for statewide office appeared on the ballot, the parties spent two-and-a-half times more in contributions to candidates as they did in 2020. Bouey Decl. ¶ 4. Both the Republican

and Democratic candidates for Governor received over $600,000 in contributions from their respective state parties that year. *Id.* Plaintiffs also made the error of looking only at single contributions and not aggregating the total contributions over an election cycle; for example, a 2020 state senate candidate committee, "Rachel for Colorado," received a total of $24,425 (the maximum) in five different contributions from the state party between June 2020 and October 2020. *See* Pls.' Ex. 12.

3. Colorado's treatment of volunteer services supports the constitutionality of the contribution limits.

The third *Randall* factor, how the state treats volunteer services, favors Defendants as well. Colorado's law on whether to treat services by volunteers as contributions does not sweep as broadly as Vermont's did, nor as broadly as Plaintiffs allege. In *Randall*, the plurality was particularly concerned that travel expenses would count against contribution limits, so that a volunteer simply driving around the state may exceed contribution limits. 548 U.S. at 259–60. Plaintiffs similarly argue that a volunteer's mileage would count as a contribution. Mot. 15.

But Plaintiffs are unclear on how mileage falls under any definition of "contribution" in Colorado law. They seem to suggest that mileage is "anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall, or election." Colo. Const. art. XXVIII, § 2(5)(a)(IV). But mileage is not given to a candidate, directly or indirectly. The Colorado Court of Appeals has interpreted this provision as requiring that "(1) a thing of value (2) be put into the possession of or provided to a candidate or someone acting on the candidate's behalf (3) with the intention that the candidate receive or make use of the thing of value provided (4) in order to promote the candidate's election." *Keim*

v. Douglas Cnty. Sch. Dist., 399 P.3d 722, 729 (Colo. App. 2015).[2] Mileage is not put into the possession of or provided to a candidate with the intention of the candidate making use of that mileage and so is not a contribution to a candidate under Colorado law. And the Secretary of State's office has never advised candidates that their volunteers must report their mileage as contributions. Bouey Decl. ¶ 5. To be sure, the out-of-pocket expenses of volunteers are generally chargeable as contributions to a candidate, a factor which was also present in Vermont. *See* Colo. Const. art. XXVIII, § 2(5)(a). But given the different treatment of volunteer services, as opposed to volunteer expenses, between Vermont and Colorado, on balance the treatment of volunteer services in Colorado generally supports the constitutionality of the candidate contribution limits.

4. Colorado's adjustment of the contribution limits for inflation supports the constitutionality of the limits, at least as to statewide candidates.

The Court in *Randall* faulted Vermont's contribution limits for failing to index to inflation. 548 U.S. at 261. By contrast, Colorado's contribution limits "shall be adjusted [every four years] by an amount based upon the percentage change over a four year period in the United States bureau of labor statistics consumer price index for Denver-Boulder-Greeley . . . rounded to the nearest lowest twenty-five dollars." Colo. Const. art. XXVIII, § 3(13).

Plaintiffs assert that the effect of this rounding provision has been to prevent the contribution limits from adequately keeping up with inflation. As to the state legislative limits, that is true—because there has not been a four-year period with 12.5% inflation since the

[2] The differences between Colorado's definition of "Contribution" and the definition at issue in *Randall* are instructive. There, contribution included "anything of value paid . . . for the purpose of influencing an election" that was "intentionally facilitated by, solicited by or approved by the candidate." *Randall*, 548 U.S. at 259. Colorado's definition does not sweep so broadly.

enactment of Article XXVIII, the legislative contribution limits have not increased at all (though that appears likely to change when the rates are next adjusted). But the limits for statewide office have increased 25%, from $500 to $625 per election. Plaintiffs argue that this is substantially lower than the 55% inflation that the Denver metro area has seen since 2003.

Plaintiffs' argument overlooks two facts: first, the inflation adjustor happens once every four years, and is set to be adjusted again in the first quarter of 2023; 2022 is thus as far away from when inflation is adjusted as possible. Second, the delta between the increase in contribution limits and the increase in inflation is exacerbated by the unusually high inflation of the last 12 months. In 2019, when the rates were last adjusted, the adjusted limits for statewide office were much closer to the inflation rate: the limits had increased 25% since 2003 and inflation had increased about 39%. *See* U.S. Bureau of Labor Statistics, Databases, Tables & Calculators by Subject, *available at* https://tinyurl.com/x4hw63ee. The current gap between the inflation rate and the increase in contribution limits will narrow again in 2023. That is a far cry from Vermont's statute which had no inflation adjustor at all.

Finally, it is worth noting that Plaintiffs have not requested, either as primary or alternative relief, a modification of the inflation adjustor to more closely track inflation. Rather, they seek the extreme remedy of removing all contribution limits from Colorado races.

5. On balance, the Randall factors support the constitutionality of Colorado's contribution limits.

Considered together, the *Randall* factors paint a far different picture in Colorado than they did in Vermont.[3]

- Unlike in Vermont, the contribution limits do not further entrench incumbency advantages.
- Unlike in Vermont, Colorado political parties can and do make large 5- and 6-figure contributions to candidates, ameliorating the impacts of lower individual contribution limits.
- Unlike in Vermont, volunteers are generally able to travel and otherwise support their chosen candidates without running afoul of any contribution limits.
- And unlike in Vermont, Colorado's statewide candidate limits increase with inflation.

Overall, these four factors all favor the constitutionality of Colorado's contribution limits for candidates for statewide office. As to legislative candidates, all but the inflation factor favors their constitutionality, and even the inflation factor weighs more strongly in Colorado's favor than it did in Vermont's, where there was no possibility of an inflation adjustment at all. Therefore, Colorado's contribution limits satisfy *Randall* and are closely drawn to Colorado's significant interest in curtailing the appearance and existence of quid pro quo corruption.

[3] The *Randall* analysis concluded by asking if there were any "special justification" for Vermont's contribution limits. Defendants do not assert that any special justification supports Colorado's contribution limits, aside from the justifications argued elsewhere in this brief.

D. The Court should not invalidate the provision increasing contribution limits if a candidate accepts voluntary expenditure limits.

1. If the Court enjoins Colorado's enforcement of its contribution limits, Plaintiffs' second cause of action is moot.

In addition to the contribution limits enshrined at Article XXVIII, § 3, Plaintiffs also challenge Article XXVII, § 4(5), which doubles those limits under certain conditions. If the Court enjoins enforcement of the contribution limits, however, then Plaintiffs' request for an injunction prohibiting enforcement of § 4(5) is moot. In this hypothetical scenario, there would be no contribution limits at all, and therefore nothing to "double" under Article XXVIII, § 4(5). One cannot double a limit that does not exist.

Courts are "specifically prohibited from advising what the law would be upon a hypothetical state of facts." *Schell v. OXY USA Inc.*, 814 F.3d 1107, 1115 (10th Cir. 2016) (quotations omitted). Under the mootness doctrine, "parties must continue to have a personal stake in the outcome of the lawsuit at all stages of the litigation so the question decided affects the rights of the litigants in the case before the court." *Keller Tank Servs. II, Inc. v. Comm'r of Internal Revenue*, 854 F.3d 1178, 1193 (10th Cir. 2017) (quotations omitted). In order to maintain a request for relief, a plaintiff must establish that "granting relief . . . will have some effect in the real world." *Id.*

Here, if the Court enjoins the enforcement of Colorado's constitutional contribution limits, any ruling concerning the constitutionality of Article XXVIII, § 4(5) would amount to an advisory opinion. And an injunction prohibiting the enforcement of that section would "have no effect in the real world." *See Keller Tank Servs. II*, 854 F.3d at 1193.

2. Plaintiffs have failed to demonstrate a likelihood of success on the merits as to the claim.

On the merits, the Court should not enjoin Article XXVIII, § 4(5). Since *Buckley*, courts have consistently upheld laws that offer benefits to candidates in exchange for the voluntary acceptance of "restrictions that would otherwise be impermissible." *Corren v. Condos*, 898 F.3d 209, 218 (2d Cir. 2018) (citing *Buckley*, 424 U.S. at 57 n.65, 95). Most analogous are provisions providing public funds to candidates who agree to limit their expenditures. Time and again, courts have concluded that such provisions are permissible "as long as the candidate remains free to engage in unlimited private funding and spending instead of limited public funding." *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 284 (S.D.N.Y) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980); *see also Corren*, 898 F.3d at 219–20 (collecting cases). In general, these courts hold that "public financing schemes are permissible if they do not effectively coerce candidates to participate in the scheme." *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 436 (4th Cir. 2008).

These cases establish that where candidates may choose between different schemes, that choice enhances, rather than restricts, their First Amendment rights. *See Republican Nat'l Comm.*, 487 F. Supp. at 285. "Under this choice-increasing framework, candidates will presumably select the option that they feel is most advantageous to their candidacy. . . . [I]t appears to us that [such schemes] promote[], rather than detract[] from, cherished First Amendment values." *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996).

Corren is instructive. There, the court considered a Vermont law imposing a strict contribution limit of $0 on candidates who elect to receive public financing. 898 F.3d at 214–215. There, like here, plaintiffs argued that creating differential limits would place some

candidates at a disadvantage. *Id.* at 215–16, 220. But the Second Circuit disagreed, concluding that "because candidates remain free" to accept either option, the existence of that choice does not burden their First Amendment rights. *Id.* at 220. The court similarly rejected the argument that this choice burdened the First Amendment rights of a candidate's supporters. *Id.* at 223–24.

Section 4 similarly expands the choices available to candidates. Candidates can freely choose between the available options. In 2018, just 34% of state legislative candidates and 25% of statewide candidates elected to abide by Section 4's voluntary expenditure limits. Bouey Decl. ¶ 6. They are not "coercive." Presumably, candidates choose the option that allows them to promote their candidacy most effectively, either unlimited spending with lower contributions or limited spending with higher contribution limits.

The authorities relied on by Plaintiffs are not to the contrary because they do not involve an affirmative choice made by the candidate. First, Plaintiffs' cite the Supreme Court's observation in *Davis v. FEC*, 554 U.S. 724, 738 (2008), that it had never before upheld a law establishing differential contribution limits. Mot. at 21. But *Davis* turned not on the First Amendment rights of candidates in general (or contributors), but instead on the specific rights of candidates who would like to spend unlimited funds on their own candidacy. The challenged provision thus "impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech." *Id.* Of course, Section 4 does not implicate a candidate's ability to self-fund, which remains unfettered.

Second, Plaintiffs cite *Riddle v. Hickenlooper*, 742 F.3d 922, 925 (10th Cir. 2014), where the court invalidated a provision allowing candidates with primary elections to raise a total of

$400 between the primary and general elections while limiting other candidates to $200. The court found the statute demonstrated "favoritism" to candidates with a primary. *Id.* at 929. No such favoritism exists here, only choice. Candidates may choose to raise and spend unlimited sums—including unlimited amounts of their own money—subject to the contribution limits imposed in Section 3. Or they may choose to limit their expenditures in exchange for being able to double Section 3's limitations. Each option has its benefits. Neither is more favorable than the other. *Contra Riddle*, 742 F.3d at 929. And the enhanced limits are not automatically triggered by an opponent's exercise of their own First Amendment freedoms. *Contra Davis*, 554 U.S. at 738. Plaintiffs are thus not likely to succeed on their claim that § 4(5) is unconstitutional.

E. Plaintiffs have failed to establish that Colorado's contribution limits are underinclusive.

Finally, Plaintiffs argue that Colorado's statewide and legislative contribution limits are underinclusive because county-level officials have higher contribution limits. But the contribution limits imposed on candidates for county-level offices do not render Colorado's other limits unconstitutional. Plaintiffs opine that county-level offices present the greatest risk of corruption, Mot. at 19, but fail to substantiate that claim with any evidence from Colorado.

Regardless, "the First Amendment imposes no freestanding underinclusiveness limitation." *William-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015). Policymakers, including Colorado's voters, should be permitted to address their "most pressing concerns" without fear that failure to encompass other activity will prove fatal to their efforts. *Id.* Here, Colorado voters chose to enshrine contribution limits for statewide and state legislative races in the constitution. They also chose not to include contribution limits for county officials in the state constitution,

leaving that matter for the legislature to address. Plaintiffs have failed to establish that the contribution limits for county officials render the limits for state officials unconstitutional.

III. Plaintiffs cannot make a heightened showing that the public interest favors their requested injunction.

Because Plaintiffs seek a disfavored injunction, they must make a "strong showing" that the likelihood-of-success and balance-of-harms factors tilt in their favor. *Free the Nipple-Fort Collins*, 916 F.3d at 797. Not only have they failed to do so, but the public interest plainly favors maintaining the status quo rather than granting preliminary relief.

Colorado voters, both through their legislature and through initiative and referenda, have repeatedly demonstrated an interest in contribution limits. Colorado's limits date back to 1974, and in 1996, Colorado voters repealed and overwhelmingly reenacted many of those same limits. *See* Title I, art. 45, ed.'s note, C.R.S. (2021). Six years later, they went even further, electing to enshrine candidate contribution limits in the state constitution. In doing so, those voters plainly enunciated their ongoing interests:

> The people of the state of Colorado hereby find and declare that large campaign contributions to political candidates create the potential for corruption and the appearance of corruption; that large campaign contributions made to influence election outcomes allow wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process; . . . and that the interests of the public are best served by limiting campaign contributions . . . .

Colo. Const. art. XXVIII, § 1.

Against this backdrop, Plaintiffs seek extraordinary relief. Despite the public's repeated insistence on contribution limits, Plaintiffs ask this Court to enable the 2022 election to proceed without *any* contribution limitations and to do so without the benefit of a fully developed record.

It is not the case that merely invoking a constitutional right is sufficient to establish that the public interest lies in favor of an injunction. After all, "giving effect to the will of the people by enforcing the laws they and their representatives enact serves the public interest." *Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020).

The public has spoken time and again that they favor contribution limits for candidates. An injunction unleashing unlimited contributions on the 2022 elections is plainly adverse to that demonstrated interest.

IV. Plaintiffs' delay initiating this action undercuts allegations of irreparable harm.

A plaintiff's delay in initiating a case, even in cases arising under the First Amendment, "weighs heavily against the issuance of a preliminary injunction." *Colo. Union of Taxpayers v. Griswold*, No. 20-cv-02766-CMA-SKC, 2020 WL 6290380, at *3 (D. Colo. Oct. 27, 2020). Here, Plaintiffs are familiar with Colorado campaign finance law. Plaintiff Lopez ran for Governor in 2018, declared his current candidacy in 2019, and received his first contribution of the 2022 cycle nearly two-and-a-half years ago, on August 27, 2019. Bouey Decl. ¶ 7. Plaintiff House "has a history of campaign contributions" in the past, Compl. (Doc. 1) ¶ 6, dating back to at least 2010, and himself launched a campaign for Governor in 2014. Bouey Decl. ¶ 7. And this cycle is Plaintiff Pelton's third time running a campaign subject to Colorado's state legislative limits, following successful candidacies for the state house in 2018 and 2020. *Id.* ¶ 7.

Each of these plaintiffs has been aware of, and subject to, the limits they now challenge for several years. Each could have, but did not, challenge those limits in time for the parties to develop a factual record for the Court's review without the specter of an upcoming election.

Instead, they now ask for an "extraordinary remedy," *Beltronics USA, Inc.* 562 F.3d at 1070, which would upend Colorado's longstanding contribution limits in the middle of a cycle.

The scope of the record Plaintiffs submitted as part of their Motion reflects the fact-intensive nature of this inquiry. It also suggests that expert testimony will be necessary to fully explore their claims for relief. *See* Decl. of Seth Masket (Doc. 8-9). But with less than two weeks to respond to Plaintiff's motion, Defendants have not even seen the analysis underlying Professor Masket's declaration, let alone had the opportunity to obtain expert testimony of their own. Notably, the records in *Randall* and *Thompson* were developed over the course of ten- and seven-day bench trials, respectively. *Landell v. Sorrell*, 118 F. Supp. 2d 459, 468 (D. Vt. 2000); *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023, 1026 (D. Alaska 2016). Against this backdrop, the Court should decline to award Plaintiffs preliminary relief as to constitutional provisions to which they have been subject for several years.

V. Time is of the essence on the Court's ruling.

In light of the factors caused by the timing of this lawsuit, Defendants respectfully request that the Court issue its order in this case as soon as reasonably possible. If the Court grants Plaintiffs partial or full injunctive relief, Colorado will be facing the prospect of conducting statewide elections without contribution limits for the first time in fifty years. Colorado lawmakers may well wish to impose new contribution limits consistent with the court's order so that some contribution limits will be in place for this year's elections. However, the General Assembly is limited by the state constitution to meeting for only 120 calendar days. *See*

Colo. Const. art. V, § 7.[4] The General Assembly is currently set to adjourn on May 11, 2022. *See* Colo. Gen. Assembly, 2022 Deadline Schedule, *available at* https://tinyurl.com/5x99v7zy.

To ensure the General Assembly has sufficient time to consider the implications of any order this Court may enter, Defendants respectfully request that the Court issue its ruling as soon as possible. For the same reason, Defendants do not believe a hearing on Plaintiffs' preliminary injunction is necessary and believe the Court can rule on the papers submitted by the parties.

CONCLUSION

Colorado has had contribution limits in effect for nearly 50 years. Plaintiffs cannot make the heightened showing necessary to obtain a disfavored preliminary injunction that would bar Colorado from enforcing these contribution limits. The Court should therefore deny Plaintiffs' motion for preliminary injunction.

Respectfully submitted this 17th day of February, 2022.

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[4] If the Court orders injunctive relief, Defendants agree with Plaintiffs that either no bond or a nominal bond is appropriate here.

CERTIFICATE OF SERVICE

I certify that I served the foregoing **OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION** upon all parties herein by e-filing with the CM/ECF system maintained by the Court on February 17, 2022, addressed as follows:

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s/ Xan Serocki
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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:22-cv-00247-SKC

GREG LOPEZ,
RODNEY PELTON, and
STEVEN HOUSE,

Plaintiffs,

v.

JENA GRISWOLD, Colorado Secretary of State, in her official capacity, and JUDD CHOATE, Director of Elections, Colorado Department of State, in his official capacity,

Defendants.

DECLARATION OF STEPHEN BOUEY

I, Stephen Bouey, pursuant to 28 U.S.C. § 1746, state as follows:

1. I am the Campaign Finance/Operations Support Manager for the Elections Division within the Colorado Department of State. In this role, among other responsibilities, I have principal responsibility for managing the TRACER database and its collection of information reported by candidates, committees, and others with respect to electoral campaigns in Colorado. I also manage the campaign finance compliance team, which fields questions from candidates others about their obligations under Colorado's campaign finance laws.

2. The statements in this declaration are all based on my own personal knowledge or information I have gathered from the TRACER system or other records held by the Colorado Secretary of State's office.

3. I have reviewed Plaintiffs' motion for preliminary injunction. Under the heading "Challengers Cannot Mount Effective Campaigns," Plaintiffs listed several candidates who raised less money in elections after Article XXVIII was enacted than they did before Article XXVIII was enacted. However, based on my review of state election results available on the Secretary of State's website, all of those candidates were incumbents for the post-Article XXVIII elections listed by Plaintiffs-if they even ran at all. This means Joan Fitz-Gerald (incumbent in 2006); Ken Gordon (2004); Jim Isgar (2006); Bill Crane (2004 and 2006); Richard Decker (2004); Jerry Frangas (2004, 2006, and 2008); and Joel Judd (2004, 2006, and 2008). John Andrews did not appear on the general election ballot in 2004. So the figures cited on page 12 of Plaintiffs' motion do not compare fundraising by incumbents and fundraising by challengers.

4. I also reviewed Plaintiffs' motion at pages 17 and 18, where it discussed political party contributions to candidates in the 2020 elections. No statewide elected officials-including the Governor, Secretary of State, Attorney General, and Treasurer-were on the ballot in 2020. In 2018, the last time those state officials were on the ballot, the parties spent two-and-a-half times as much in candidate contributions as the parties did in 2020, according to data in TRACER.

Both the Republican and Democratic candidates for governor received over $600,000 from their respective parties in 2018.

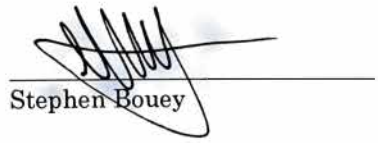
5. In my 12 years at the Secretary of State's Office, I have provided guidance to candidates regarding compliance with Colorado's campaign finance laws under 4 different secretaries of state. I do not recall ever being asked whether candidates had to report the mileage driven by their volunteers as contributions. I do not recall any campaign finance complaints asserting that volunteer mileage should count as contributions. If ever asked, my guidance would be that volunteers do not need to report their mileage as contributions because such mileage does not meet the definition of "contribution" under Colorado law.

6. In 2018, 34% of state legislative candidates and 25% of candidates for statewide office accepted the voluntary expenditure limits found in Section 4 of Article XXVIII of the Colorado Constitution.

7. I have reviewed the campaign finance filings of the individual Plaintiffs. Plaintiff Greg Lopez was a candidate for governor in 2018; filed his candidate affidavit for the 2022 governor's race in 2019; and accepted his first contribution for his 2022 candidacy on August 27, 2019. Plaintiff Rodney Pelton has also previously been a legislative candidate in Colorado, having successfully run for the Colorado House of Representatives in 2018 and 2020. Plaintiff Steven House has frequently contributed to candidates and also ran for governor in 2014.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 17th day of February, 2022.



Stephen Bouey