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' MOTION FOR PARTIAL SUMMARY JUDGMENT

MOTION

Plaintiffs, Greg Lopez, Rodney Pelton, and Steven House, by counsel, move for partial summary judgment pursuant to Fed. R. Civ. P. 56 and the parties' scheduling order. Scheduling and Discovery Order § 8(b) (ECF 39).

STATEMENT OF UNDISPUTED FACTS

1. Article 28 of Colorado's constitution, and its accompanying administrative regulations, govern the state's campaign finance laws. Colo. Const. Art. XXVIII; 8 CCR 1505-6.

2. Section 3 of Article 28 establishes the state's campaign contribution limits.

3. Colorado's current contribution limit for individuals donating to candidates for Governor, Attorney General, Secretary of State, Treasurer is $725 per election or $1,450 per election cycle (*i.e.*, primary and general election combined). 8 CCR 1505-6 § 10.17.1(b)(1).

4. Colorado's current contribution limit for individuals donating to candidates for the state legislature is $225 per election or $450 per election cycle (*i.e.*, primary and general election combined). 8 CCR 1505-6 § 10.17.1(b)(2).

5. No state has lower limits for individuals that want to contribute to candidates for the state legislature per election cycle. Only Delaware has a lower limit than Colorado for individuals that want to contribute to candidates for Governor per election cycle. Only Montana and Delaware have lower limits than Colorado for individuals that want to contribute to candidates for Attorney General per election cycle. Only Montana has a lower limit than Colorado for individuals that want to contribute to candidates for Secretary of State per election cycle. And only Delaware has a lower limit than Colorado for individuals that want to contribute to candidates for Treasurer per election cycle. *See* Ex. 1, Election cycle contribution limits index.

6. Under Section 4 of Article 28, if a candidate for Governor, Attorney General, Secretary of State, Treasurer, or the state legislature accepts the campaign spending limits set forth in 8 CCR 1505-6 § 10.17.1(j) and his opponent does not, then the individual contribution limits to the accepting candidate's campaign are doubled once the non-accepting candidate raises funds over ten percent of the applicable spending limit.

7. It is unclear if there are any legal consequences for a candidate that accepts the limited spending terms of Section 4, and contributions that double the ordinary donation limits, but subsequently reneges on the low spending commitment and retains the larger contributions to finance spending above Section 4's limit. *See* Ex. 2, Defendants' response to Plaintiffs' requests for admission at ¶¶ 1-3.

8. "Each plaintiff has been impacted by the contribution limits and voluntary spending limit option." Opinion at 4 (ECF 26).

9. The political office plaintiffs, Lopez and Pelton, intend to run for state office in Colorado again in 2024. *See e.g.*, Ex. 3, Pelton Dep. at 18:4-13. And Plaintiff House, the political

contribution plaintiff, intends to continue his long history of contributing to state level candidates for political office in Colorado in 2024 and beyond. *See* Ex. 4, House Dep. at 52:23-54:5.

LEGAL STANDARD

Plaintiffs' motion should be granted "if 'there is no genuine dispute as to any material fact and [they are] entitled to judgment as a matter of law.'" *Hamric v. Wilderness Expeditions, Inc.*, 6 F.4th 1108, 1121 (10th Cir. 2021) (quoting Fed. R. Civ. P. 56).

ARGUMENT

"[T]he State of Colorado has created different contribution limits for candidates running against each other, and these differences have little to do with fighting corruption." *Riddle v. Hickenlooper*, 742 F.3d 922, 930 (10th Cir. 2014).

Section 4 puts candidates in the untenable position of either: (1) accepting limits on their First Amendment right of political expression in exchange for doubling the amount of money they can accept from individual donors, or (2) maintaining their freedom of speech but remaining subject to some of the nation's lowest contribution limits,[1] while their opponents can collect twice as much from their donors, and limit their freedom of political association and expression. This constitutional dilemma puts candidates in a no-win situation by forcing them to choose

[1] Even though this issue is reserved for trial, it must be noted that Colorado's contribution limits are not necessarily "constitutional." *See* Opinion at 19 (ECF 26). The limits raise constitutional "danger signs." *Randall v. Sorrell*, 548 U.S. 230, 249 (2006) (plurality op.). "[L]imits that are too low can [ ] harm the electoral process." *Id*. "Were we to ignore that fact, a statute that seeks to regulate campaign contributions could itself prove an obstacle to the very electoral fairness it seeks to promote." *Id*. "[D]anger signs [are] present here. As compared with the contribution limits upheld by the [Supreme] Court in the past, and with those in force in other States, [Colorado's] limits are sufficiently low as to generate suspicion that they are" unconstitutional. *Id*. *See also id*. at 251 ($2,150 is the lowest per election cycle limit, (*i.e*., primary and general election combined), ever approved by the Supreme Court); Ex. 1 (all Colorado per election cycle limits are below $2,150 and are either the lowest, next to lowest, or third from lowest for all relevant political offices).

which First Amendment freedom to surrender, and burdens their contributors' freedom of political association. Regardless of whether they surrender a portion of their freedom of speech or freedom of association, Plaintiffs suffer a First Amendment injury.

Section 4 deprives Plaintiffs of their First Amendment rights. And because this campaign finance law does not serve a government interest that passes First Amendment scrutiny, Section 4 is unconstitutional.

I. COLORADO'S ASYMMETRICAL CONTRIBUTION LIMITS ARE SUBJECT TO HEIGHTENED SCRUTINY.

Because Colorado's asymmetrical contribution limits burden Plaintiffs' rights of speech and association, they are subject to strict scrutiny. The "First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (internal quotation marks omitted) ("*AFE*"). "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (*per curiam*). Accordingly, "the First Amendment cannot tolerate" laws that place "ceilings on overall campaign expenditures" because they limit "the ability of candidates, citizens, and associations to engage in protected political expression." *Id*. at 58-59.

"The expenditure limitations [ ] represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id*. at 19. "Laws that burden political speech are, accordingly, 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." *AFE*, 564 U.S. at 734 (internal quotation marks omitted).

Alternatively, if viewed primarily as a contribution limit regulation, Section 4 is subject to closely drawn scrutiny. "The First Amendment protects political association as well as political expression." *Buckley*, 424 U.S. at 15. The "First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas." *Id*. (internal quotation marks and citations omitted). "Making a contribution, like joining a political party, serves to affiliate a person with a candidate." *Id*. at 22. "A contribution serves as a general expression of support for the candidate and his views." *Id*. at 21. Accordingly, contributing to political candidates is a "form of political expression." *Riddle*, 742 F.3d at 927. Therefore, it is a "fundamental right," and subject to "closely drawn" scrutiny *Id*. at 927-28.

Here, Section 4 imposes asymmetrical contribution limits on candidates and their contributors, if the candidates choose to speak "too much," *i.e*., spend above the law's expenditure limit. Therefore, strict scrutiny applies.

II. THE FIRST AMENDMENT DOES NOT PERMIT COLORADO'S ASYMMETRICAL CONTRIBUTION LIMITS, REGARDLESS OF WHICH LEVEL OF HEIGHTENED SCRUTINY APPLIES.

Courts have applied strict scrutiny to strike down asymmetrical contribution limits that functioned as like Colorado's challenged regime. In *Davis v. Federal Election Comm'n*, 554 U.S. 724, 729 (2008), the Supreme Court considered a First Amendment challenge to a federal campaign finance law that enabled an "asymmetrical regulatory scheme" if a congressional candidate spent over a certain amount of his personal funds for his campaign. "The opponent of the candidate who exceeded that 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*).

The Court "concluded that the [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.'" *Id*. 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 considered a scheme wherein "candidates for [Arizona] state office who accept[ed] public financing [ ] receive[d] additional money from the State in direct response to the campaign activities of privately financed candidates." *Id*. at 727. Once a privately financed candidate exceed a set spending limit, "a publicly financed candidate receives roughly one dollar for every dollar spent by an opposing privately financed candidate." *Id*.

"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). "Under that provision, 'the vigorous exercise of the right to use personal funds to finance campaign speech' leads to 'advantages for opponents in the competitive context of electoral politics.'" *Id*. (quoting *Davis*). 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 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.

The Tenth Circuit faced similar issues in *Riddle*, where plaintiffs challenged a Colorado law 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. Because 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. *Riddle*, 742 F.3d at 924-27.

"]T]the statute treated contributors differently based on the political affiliation of the candidate being supported. And by treating the contributors differently, the statute impinged on the right to political expression." *Id*. at 927. Citing *Randall*, the Tenth Circuit applied "closely drawn" scrutiny. *Id*. at 928. "Even under this form of intermediate scrutiny," Colorado could not demonstrate that the law was "closely drawn to sufficiently important governmental interest," *i.e*., "preventing corruption or the appearance of corruption." *Id*. Following *Davis*, the Tenth Circuit held that the Colorado law was unconstitutional. *Id*. at 929-30. And despite Colorado's assertions of relevance here, *see* Opp'n at 19 (ECF 14); Br. at 26, *Lopez v. Griswold*, No. 22-1082 (10th Cir. 2023) (ECF 10924311), the *Riddle* Court found it immaterial that *Davis* involved candidates spending personal rather than donated funds. *See Riddle*, 742 F.3d at 929-30.

The *Riddle* court also observed that the state's anticorruption interest had "little to do with Colorado's statutory distinction among contributors." *Id*. at 928. There was no evidence that write-in, unaffiliated, or minor-party candidates "were more corruptible (or appeared more corruptible) than their [major-party] opponents." *Id*. Because there was no "link between the differing contribution limits and the battle against corruption, the means chosen [were] not closely drawn to the State's asserted interest." *Id*.

As it did in *Riddle*, Colorado asserts Section 4 protects its interest in "fighting corruption." *Riddle*, 742 F.3d at 928; Opp'n at 2, 8-9, 16, 21 (ECF 14). But '"corruption,' loosely conceived, [ ] is not legitimately regulated under the First Amendment." *Federal Election Comm'n v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1654 (2022). There is "only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance." *Id*. at 1652.

But "that interest is not advanced by a law that allows [some candidates] to collect larger donation than [others]." *Riddle*, 742 F.3d at 928-29. Instead, Section 4 "creates [ ] favoritism between candidates vying for the same office," *i.e*., favoritism for candidates that agree to limit their political speech by allowing them to collect double the contribution limit. *Id*. at 929.

Here, the Tenth Circuit held Section 4's enactment "was intended to encourage candidates to limit their expenditures." *Lopez v. Griswold*, No. 22-1082, 2023 U.S. App. LEXIS 3421, at *1 (10th Cir. Feb. 13, 2023). This state interest is unconstitutional. "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Buckley*, 424 U.S. at 57. The people "must retain control over the quantity and range of debate on public issues in a political campaign." *Id*. Colorado's lack of a

compelling or even legitimate state interest should end the inquiry and establish that Plaintiffs' motion should be granted.

Even so, Colorado's asymmetrical contribution limits are also not "closely drawn" to prevent corruption. *Riddle*, 742 F.3d at 928. It is undisputed that contributing to a political campaign is "a 'basic constitutional freedom.'" *Id*. at 931 (quoting *Buckley*) (Gorsuch, J., concurring). "On this account, there is something distinct, different, and more problematic afoot when the government *selectively* infringes on a fundamental right." *Id*. at 932 (Gorsuch, J., concurring). Accordingly, "the Supreme Court has never countenanced" a law like Section 4. *Id*. at 929.

Whether the test is strict or closely drawn scrutiny, Colorado "cannot adopt" discriminatory contribution limits "without some 'compelling' or 'closely drawn' purpose." *Id*. at 933 (Gorsuch, J., concurring). Here, "Colorado has articulated none." *Id*.

Section 4's "discriminatory limits are not closely drawn to the State's interest in battling corruption or the appearance of corruption." *Id*. at 929. "Colorado insists," however, "that its regulatory scheme is all about warding off corruption, or at least corruption's appearance. Yet the State never even tries to tell us how those interests might be served by a scheme that discriminates" against candidates and contributors based on how much a candidate chooses to spend on political speech. *Id*. at 932 (Gorsuch, J., concurring). "Let alone introduce evidence to support such an argument." *Id*. After all, Colorado cannot show Section 4 prevents corruption when the law allows candidates to double the contribution limits the state argues are essential to prevent corruption. *See* Opp'n at 6, 8-9, 16 (ECF 14). Nor can the state argue that the law limits spending to prevent corruption when the Supreme Court has already ruled that method unconstitutional. *See Buckley*, 424 U.S. at 58 ("[T]he First Amendment requires the invalidation of … ceilings on overall campaign expenditures.").

"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. Section 4 also presents "the statutory anomaly of candidates running against each other with different contribution limits, and the disparity is not closely drawn to the asserted interest in fighting corruption or its appearance." *Id*. at 930. Only "uniform contribution limit" laws can be "constitutional." *Id*. at 929. "Imposing different contribution [ ] limits on candidates vying for the same seat is antithetical to the First Amendment." *Davis*, 554 U.S. at 744.

III. SECTION 4'S VOLUNTARY CHARACTERISTICS ARE IRRELEVANT.

In its preliminary injunction decision, this Court held Section 4 was likely constitutional because it is merely "[a] statutory choice to limit campaign speech that is offered to all candidates without discrimination." Opinion at 18 (ECF 26). Because Section 4 is "voluntary," the law purportedly "does not burden a candidate's First Amendment rights" and is likely constitutional. *Id*. at 17-18. But this argument "miss[es] the point." *AFE*, 564 U.S. at 747.

Whether Section 4 presents a choice is irrelevant. Plaintiffs are entitled to *all* their rights, including the two rights at issue here—their right to speak without limitation, and their right to receive contributions not deemed potentially corrupting. The laws in *Davis*, *AFE*, and *Riddle* offered candidates choices too. And these laws were unconstitutional because, just 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.").

The Supreme Court ruled the asymmetrical contribution law in *Davis* forced "a candidate to *choose* between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations." *Davis*, 554 U.S. at 739 (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 here, 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).

Colorado argues that "[s]ince *Buckley*, courts have consistently upheld laws that offer benefits to candidates in exchange for the voluntary acceptance of 'restrictions that would otherwise be impermissible.'" *See* Opp'n at 18 (ECF 14) (quoting *Corren v. Condos*, 898 F.3d 209, 218 (2d Cir. 2018) (citing *Buckley*)). Indeed, Colorado equates the choice candidates face under Section 4 to the choice to participate in public campaign financing systems sanctioned by *Buckley*. *Id*. at 18-20; Br. at 20-26, *Lopez v. Griswold*, No. 22-1082 (10th Cir. 2023) (ECF 10924311).

But "the *choice* involved in *Buckley* was quite different from the *choice*" here. *Davis*, 554 U.S. at 739 (emphasis added). Likewise, with *Corren*—the case Colorado primarily relies on to defend Section 4. *See* Opp'n at 18-19 (ECF 14); Br. at 20, 22, 23, 25, 32, *Lopez v. Griswold*, No. 22-1082 (10th Cir. 2023) (ECF 10924311).[2] The candidates in *Buckley* and *Corren*, like Colorado state candidates under Section 4, were free to raise unlimited funds. *See Buckley*, 424 U.S. at 88 (candidates can raise unlimited funds if they do not accept public funding); *Corren*, 898 F.3d at 212-13 (same). But unlike the *Buckley* and *Corren* candidates, a candidate that declines to abide by Section 4 gives his opponent a fundraising advantage that will harm the declining candidate even more if he is wrong about his fundraising prospects. Indeed, both candidates must "still [ ] go out and raise the funds," but the declining candidate "may or may not [be] able to do so." *AFE*, 564 U.S. at 737. "The [declining] candidate, therefore, face[s] merely the possibility that his opponent would be able to raise additional funds, through contribution limits that remained subject to a cap." *Id*. Even so, the Supreme Court still "held that this was an 'unprecedented penalty,' a 'special and potentially significant burden' that had to be justified by a compelling state interest—a rigorous First Amendment hurdle." *Id*. (quoting *Davis*).

And the burden falls even heavier on honest candidates that decline Section 4's benefits, because it is unclear if there are any consequences or contribution refund requirements for candidates that accept higher donations and subsequently choose to spend over the Section 4's expenditure limit using the double donations they collected to reach the limit. *See* Ex. 2 at ¶¶ 1-3.

[2] Colorado relies on other public financing cases. *See* Opp'n at 18 (ECF 14); Br. at 20, 22-25, *Lopez v. Griswold*, No. 22-1082 (10th Cir. 2023) (ECF 10924311). But their authority is doubtful, as they were decided without the benefit of *Davis*, *AFE*, or *Riddle*.

The government may offer true, non-coercive choices in public financing systems, *Corren*, 898 F.3d at 219-20 (collecting cases), government appropriations, *South Dakota v. Dole*, 483 U.S. 203, 211 (1987), and entitlement programs, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 585 (2012). Section 4 is none of these. Instead, it fits squarely in the *Davis*, *AFE*, and *Riddle* line of cases involving campaign finance laws that burden First Amendment rights.

Section 4 "does not provide any way in which a candidate can exercise [his] right [to spend and raise unlimited funds] without abridgment." *Davis*, 554 U.S. at 740. 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. The choice imposed by [Section 4] is not remotely parallel to that in *Buckley*" or *Corren*. *Id*.

The Second Circuit recognized this in *Corren* 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]." 898 F.3d at 227-28. 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."). Therefore, public financing is generally legal. Creating asymmetrical contribution limits, as exemplified by Section 4, is 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*).

* * *

"Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Buckley*, 424 U.S. at 98. 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*. No "empirical evidence" is necessary "to determine that [Section 4] is burdensome" on First Amendment freedoms. *AFE*, 564 U.S. at 746. "[T]he burden imposed by [Section 4] is evident and inherent in the choice that confronts [ ] candidates. *Id*. at 745. Therefore, Section 4 should be declared unconstitutional, and its enforcement should be enjoined.

CONCLUSION

Plaintiffs' motion should be granted.

CERTIFICATION

Pursuant to § 4(A) of this Court's Civil Pretrial and Trial Procedures Memorandum, the parties conferred, and Defendants oppose this dispositive motion.

Dated: May 8, 2023

Respectfully submitted,

/s/ Ryan Morrison

Ryan Morrison
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW, Suite 801
Washington, DC 20036
202-301-3300
rmorrison@ifs.org
Counsel for Plaintiffs