UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
DENVER DIVISION

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| GREG LOPEZ, et. al,<br><br>*Plaintiffs*,<br><br>v.<br><br>JENA GRISWOLD<br>Colorado Secretary of State, et. al,<br><br>*Defendants*. | Case No. 1:22-cv-0247-JLK<br><br>PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT |

RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Admit.

2. Admit.

3. Admit.

4. Admit.

5. Deny. Article 28 § 7 of Colorado's constitution concerns "disclosure requirements relevant to candidate committees, political committees, issue committees, and political parties."

Furthermore, Colorado's voluntary spending limits are not adjusted for inflation every four years. Article 28 § 4(7) of Colorado's constitution concerns adjustments to the relevant spending limits. It states that beginning "in the first quarter of 2007 and then every four years thereafter," Section 4's spending limits "shall be adjusted 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, all items, all consumers, or its successor index, *rounded to the nearest lowest twenty-five dollars*." (emphasis added). Because the voluntary spending limits are

rounded down from the actual inflation adjusted amount, § 4(7) prevents the voluntary spending limits from being adjusted for inflation.

6. Admit.

7. Admit.

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25. Admit.

26. Admit.

## ARGUMENT

The parties present this Court with two paths. Plaintiffs' path leads to the conclusion that Section 4 is an unconstitutional asymmetrical campaign contribution scheme. *See* Mot. (ECF 72); *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). Defendants offer the path that led courts to reversal. Indeed, Defendants argue, as the district court in *Davis* held, that the relevant question is whether laws like Section 4 present a coercive choice. *See* Mot. At 6-13 (ECF 73); *see Davis v. Federal Election Comm'n*, 501 F. Supp. 2d 22, 30-31 (D.D.C. 2007) (three-judge court), *reversed*, 554 U.S. 724 (2008). And Defendants assert, as the *AFE* circuit court did, laws like Section 4 are analogous to public campaign financing programs. *See* Mot. at 7-12 (ECF 73); *McComish v. Bennett*, 611 F.3d 510, 521-22 (9th Cir. 2010).), *reversed sub nom AFE*, 564 U.S. 721 (2011). This Court should follow *Davis*, *AFE*, and *Riddle*, not the logic of decisions overturned by the Supreme Court, and deny Defendants' motion.

### I. WHETHER SECTION 4 PRESENTS A COERCIVE CHOICE IS IRRELEVANT.

Defendants claim "laws like" Section 4 are valid "as long as the choice [they] offer[ ] does not coerce candidates into accepting limits on their speech." Mot. at 7 (ECF 73). The *Davis* district court thought this too. 501 F. Supp. 2d at 30-31. And they are both wrong.

*Davis* involved 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. 554 U.S. at 729. "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*).

Like Defendants, the *Davis* district court argued that if a campaign finance scheme is "voluntary," then there is no constitutional violation. *Compare* Mot. 1-13 (ECF 73) with *Davis*, 501 F. Supp. 2d at 30. And, like Defendants, *see* Mot. at 6-13 (ECF 73), the *Davis* district court argued coercion was the key, because a campaign finance scheme could create "a competitive advantage so extreme that it works an unconstitutional burden on a candidate's First Amendment right to pursue elective office." 501 F. Supp. 2d at 30. Indeed, citing some of the same cases as Defendants do here, the district court ruled "the disadvantage imposed by the statute may be so onerous that the candidate, in effect, has no choice. In such cases, the disadvantage may well create an unconstitutional burden." *Id*. at 31 (citing *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993); *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996); *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998); and *Republican Nat'l Comm. v. Fed. Election Comm'n*, 487 F. Supp. 280 (S.D.N.Y. 1980)); *compare id*. *with* Mot. at 7-12 (ECF 73) (citing same). The district court observed the *Davis* plaintiff presented "no evidence" the law "coerces" anyone into a choice and that "whether a candidate incurs the burdens and benefits of the [law] is entirely his option." 501 F. Supp. 2d at 31. The district court reasoned, as Defendants do here, that "a statute whose application turns on such a choice does not impose an unconstitutional burden on First Amendment rights." *Id*.; Mot. at 6-13. And because the law presented "no issue of compulsion," the district court ruled it was constitutional. 501 F. Supp. 2d at 31.

The Supreme Court disagreed. It did not even address the district court's coercion argument. Because an asymmetrical contribution scheme burdens a candidate's First Amendment rights, the Court did not consider whether the scheme's choice was unconstitutionally coercive. *See Davis*,

554 U.S. at 738.[1] The Court had "never upheld" any "law that imposes different contribution limits for candidates who are competing against each other," and ruled the "scheme impermissibly burdens [a candidate's] First Amendment right[s]." *Id*.

Defendants' attempt to distinguish *Davis* from Section 4 is unavailing. The Supreme Court ruled the *Davis* law's initiation was not "automatic[ ]," Mot. at 11 (ECF 73), but contingent on a candidate's "*choice*." *Davis*, 554 U.S. at 739 (emphasis added). Furthermore, the law's "drag on First Amendment rights [was] not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Id*.

Regardless, the choice the *Davis* law presented "impose[d] a substantial burden on the exercise of [ ] First Amendment right[s]," that was "not justified by any governmental interest in eliminating corruption or the perception of corruption." *Id*. at 740. The "unprecedented step of imposing different contribution … limits on candidates vying for the same seat [was] antithetical to the First Amendment." *Id*. at 743-44.

Therefore, the "central question" is not, as Defendants assert, whether the "advantage [Section 4] provides to participating candidates rises to the level of unconstitutional coercion." Mot. at 11 (ECF 73) (internal punctuation marks and citation omitted). Rather, the fundamental question is whether Section 4 creates "different contribution limits for candidates who are competing against each other." *Davis*, 554 U.S. at 738. And because the fundamental question is whether Section 4 creates asymmetrical contribution limits, the statements in Defendants' Statement of Material Facts paragraphs 3 to 5, 8 to 12, 14 to 20, 22 to 24, and 26 are irrelevant for either Plaintiffs' (ECF 72) or Defendants' (ECF 73) motions for partial summary judgment.

[1] The dissent did not address this issue either, instead focusing on its perception that there is too much money in politics. *See Davis*, 554 U.S. at 749-57 (Stevens, J., dissenting).

"Ultimately, the [*Davis*] law failed because it imposed 'different contribution … limits on candidates vying for the same seat.'" *Riddle*, 742 F.3d at 929 (quoting *Davis*). And because Section 4 imposes asymmetrical contribution limits on "candidates vying for the same seat," *Davis*, 554 U.S. at 744, the "scheme impermissibly burdens [a candidate's] First Amendment right[s]." *Id*. at 738.

## II. SECTION 4 IS NOT ANALOGOUS TO A PUBLIC FINANCING SYSTEM.

Defendants claim Section 4 is lawful because it operates just like a public campaign financing scheme. *See* Mot. at 7-12 (ECF 73). They are wrong.

In *AFE*, the Supreme 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." 564 U.S. 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*.

Like Defendants, the Ninth Circuit stated *AFE* was distinguishable from *Davis* because it involved a public financing scheme. *See* Mot. at 11 (ECF 73) ("*Davis* itself reaffirmed *Buckley* [*v. Valeo*, 424 U.S. 1 (1976) (*per curiam*)]'s" validation of public financing schemes and the choices it presents.); *McComish*, 611 F.3d at 521 (*Davis* says "nothing" about public financing schemes). And just like Defendants, the Ninth Circuit cited *Buckley*, *compare* Mot. at 7, 9, 11 (ECF 73) *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.

Defendants also equate Section 4 to public financing systems upheld by *Buckley*. *See* Mot. at 7, 9, 11 (ECF 73). But "the choice involved in *Buckley* was quite different from the choice" here. *Davis*, 554 U.S. at 739. *Buckley* candidates, like candidates under Section 4, could choose to

raise unlimited funds. *See* 424 U.S. at 88 (candidates can raise unlimited funds if they do not accept public funding). But unlike *Buckley* candidates, Colorado candidates that do not submit to Section 4 give their opponents a fundraising advantage that will harm the declining candidates even more if they misjudge their fundraising prospects. Indeed, both Colorado 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, "this [is] 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*).

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 forces 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*." *Id*.

Finally, Defendants rely on several public financing decisions to defend Section 4. *See* Mot. at 9-12 (ECF 73). But only one of them, *Corren v. Condos*, 898 F.3d 209 (2d Cir. 2018), was decided with the benefit of *Davis*, *AFE*, and *Riddle*. And *Corren* does not support Defendants' position regarding Section 4.

*Corren* involved a public financing program that limited a candidate's spending to the amount he receives in public funds. 898 F.3d at 212-15. The *Corren* plaintiff made a First Amendment challenge because he wanted to accept and spend funds beyond his public financing

grant. *Id*. at 215. The Second Circuit dismissed the case because if a candidate chooses to accept public funds, then he accepts the conditions that come with them. *Id*. at 213.

Because *Corren* is a public financing case, it has no application here. Indeed, after discussing *Davis*, the court "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 Second Circuit 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."). Section 4 is not analogous to a public financing scheme. *See Corren*, 898 F.3d at 228. It is an unconstitutional campaign contribution scheme. There is no defense for the law.

## CONCLUSION

Defendants' motion should be denied.

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Respectfully submitted,
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