IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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.

DEFENDANTS' SUPPLEMENTAL BRIEF REGARDING MOOTNESS AND STANDING

In its August 2, 2023, minute order, the Court directed the parties to address (1) whether the claims brought by Plaintiffs Rodney Pelton and Greg Lopez are moot, and (2) whether Plaintiff Steven House has standing to bring Plaintiffs' second claim, that Section 4(5) of Article XXVIII of the Colorado Constitution violates the First Amendment.

Defendants agree with Plaintiffs that Pelton's and Lopez's first claim—that Colorado's contribution limits are unconstitutionally low—is not moot because it is subject to the capable of repetition yet evading review exception to mootness. However, Lopez's and Pelton's second claim—that Section 4(5) is unconstitutional—is moot because they have not established a reasonable probability that they will be injured by it again in the future; accordingly, the capable of repetition exception does not apply. Finally, House does not have standing to challenge Section 4(5) because it causes him no injury as a political contributor.

ARGUMENT

I. Pelton's and Lopez's first claim is not moot, but their second claim is.

Plaintiffs agree that Pelton's and Lopez's claims "arose from their status as 2022 candidates." Pls.' Br. Regarding Mootness and Standing (ECF No. 82) at 2. Because the 2022 election has passed, claims that "arose" from Plaintiffs' status as 2022 candidates are moot.

The only question is whether the "capable of repetition yet evading review" exception applies. Pelton and Lopez advance two claims: first, that Colorado's contribution limits are unconstitutionally low; second, that Section 4(5)'s voluntary spending limits are unconstitutional. Am. Compl. (ECF 46). Courts "take a claim-by-claim approach to mootness and must decide whether a case is moot as to each form of relief sought." *Smith v. Becerra*, 44 F.4th 1238, 1247 (10th Cir. 2022). The capability of repetition exception applies differently to these two claims. Defendants agree that the exception applies to Pelton's and Lopez's first claim. However, their second claim is moot because Plaintiffs cannot establish a reasonable probability that they will be injured by Section 4(5) in the future.

A. Legal Standard

The doctrine of mootness ensures that the controversy that existed between the parties at the outset of the case continues throughout the pendency of the litigation. *See, e.g.*, *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000). "The crucial question [for mootness] is whether granting a present determination of the issues offered will have some effect in the real world." *Id.* And because Plaintiffs Pelton and Lopez bring claims for injunctive and declaratory relief, their claims are moot when their

"continued susceptibility to injury is no longer reasonably certain or is based on speculation and conjecture." *Smith*, 44 F.4th at 1247.

In some cases, a court may retain jurisdiction over a moot claim under the "capable of repetition yet evading review" exception. The "exceptional circumstances" necessary to satisfy this exception occur when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again." *Patrick G. ex rel. Stephanie G v. Harrison Sch. Dist. No. 2*, 40 F.4th 1126, 1199 (10th Cir. 2022). (quotations and alterations omitted). In this context, a "'reasonable expectation' must be more than 'a mere physical or theoretical possibility'; it must be something akin to a 'demonstrated probability.'" *Steven R.F. by & through Fernandez v. Harrison Sch. Dist. No. 2*, 924 F.3d 1309, 1314 (10th Cir. 2019). The question, at this second stage, is whether there is a reasonable expectation that the "*specific*" violations alleged in the original complaint are likely to recur. *Patrick G.*, 40 F.4th at 1201 (quotations omitted) (emphasis in original).

Although defendants bear the burden of proving that a claim is moot, the burden flips when a plaintiff relies on the capable of repetition yet evading review exception. In that case, "the party asserting the exception bears the burden of establishing that it applies." *Id.* at 1200 (quotations omitted).

B. Claim 1 is not moot.

Plaintiffs' first claim challenges Colorado's campaign contribution limits, which Plaintiffs allege are "unconstitutionally low." Am. Compl. (ECF No. 46) at 7–9. Defendants agree that the "capable of repetition yet evading review" exception applies to this claim. At least

as to Pelton, the first prong of that exception is satisfied—he did not declare his candidacy until November 2021, Ex. 1, and likely could not have fully litigated these claims in this timespan. *See, e.g.*, *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1166 (10th Cir. 2023) ("Challenges to election laws may readily satisfy the first element, as injuries from such laws are capable of repetition every election cycle yet the short time frame of an election cycle is usually insufficient for litigation in federal court.").[1]

Further, both Lopez and Pelton satisfy the second prong of the test because both are currently running for office, currently either raising money (in Pelton's case) or intending to begin raising money shortly (in Lopez's case), and are currently subject to Colorado's campaign contribution limits. *See* Ex. 1 to Pls.' Br. (Doc. 82-1) ¶ 8; Ex. 4 to Pls.' Br. (Doc. 82-4) at 1. There is thus a "reasonable expectation" that Colorado's contribution limits will affect Lopez and are presently affecting Pelton.

C. Plaintiffs have not shown a reasonable expectation that Pelton and Lopez will be impacted by Section 4(5) again and so their second claim is moot.

To satisfy the capable of repetition exception, Pelton and Lopez must establish they have a "reasonable expectation" that they will again experience the same injury they allegedly experienced in 2022 with respect to Section 4(5). They have not done so.

[1] There is a serious question as to whether Lopez satisfies the first prong. He declared his candidacy for the 2022 governor's race in August of 2019, Ex. 2 at 146:7-10, but did not bring this lawsuit until January 2022. If he had brought this case in 2019, he would have had sufficient time to litigate. *See Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 183 (D.D.C. 2016) ("[A] case or controversy generally is considered 'too short' . . . if the lifespan of the dispute is less than two years.") (quoting *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016)). However, since Defendants agree Pelton satisfies the first prong, it is unnecessary to decide whether Lopez does. *See, e.g.*, *Henderson v. Ft. Worth Indep. Sch. Dist.*, 526 F.2d 286, 288 n.1 (5th Cir. 1976) ("Since this case is not moot as to [one] appellant . . . , it is not strictly necessary to consider the standing and mootness issues as they bear on [the other] appellant[.]").

Under Colorado's Voluntary Spending Limit (VSL) provision, a candidate who accepts VSL may accept double the normal contribution limit if: (a) "another candidate for the same office has not accepted the voluntary spending limit," and (b) "the non-accepting candidate has raised more than ten percent of the applicable voluntary spending limit." Colo. Const. art. XXVIII, § 4(5). According to Plaintiffs, the VSL system injures them by "unconstitutionally punish[ing] candidates that choose to exercise their First Amendment rights fully" by declining to accept a spending limit. Am. Compl. (ECF No. 46) ¶ 57.

So, for Pelton and Lopez to satisfy their burden as to the "capable of repetition yet evading review" exception, they must show a "demonstrated probability" that each of the following will occur during the 2026 election cycle: (1) the Plaintiff must choose to run for office; (2) the Plaintiff must decline VSL; (3) another candidate for the same office the Plaintiff is running for must enter the raise and accept VSL; and (4) the Plaintiff must raise at least 10% of the spending limit.

1. Pelton cannot show a reasonable expectation that he will decline voluntary spending limits.

During the 2022 election, Pelton accepted VSL, but his general election opponent did not. Ex. 3 at 10:4–9. Had Pelton's general election opponent raised more than 10% of the applicable spending limit—which he did not—Pelton would have benefited from differential contribution limits, not been hindered by it.

Although Pelton has established a reasonable expectation that he will run for office in 2026, he cannot show a reasonable expectation that the other conditions precedent to his alleged injury will occur. Most importantly, he cannot establish that he will decline VSL.

The evidence in the record suggests the opposite. During the 2022 election, Pelton accepted VSL. Ex. 3 at 10:4–6. This alone makes it more likely than not that he will accept VSL again in the future. Especially because Pelton spent just over $33,000 during the 2022 election, *id.* at 12:10–12, and the voluntary spending limit for his re-election is over $140,000. 8 CCR 1505-6, Rule 10.17.1(j)(3). During the preliminary injunction hearing, at which point the limit was just over $120,000, Pelton testified that he had accepted VSL even though he "did not know what the spending limit was," and that he did not "think that that kind of money would be spent in this race." Ex. 2 at 133:19–21.

If it is unlikely that "that kind of money" would be spent in Pelton's race, then it is in his best interest to accept VSL. That alone means there is no "reasonable expectation" that he will face differential limits in 2026—or that if he does so, he will face the lower of the two differential limits.

During his deposition, Pelton suggested that his earlier testimony may not apply to the 2026 race because he "fully expect[s] a contentious primary." Ex. 3 at 19:2–14. But this chain of events is "too speculative to support [the capable of repetition yet evading review] mootness exception, which is only to be used in exceptional circumstances." *White v. State of Colo.*, 82 F.3d 364, 366 (10th Cir. 1996) (quotations omitted). Pelton does not presently face a primary challenger, and Plaintiffs' own experts have alleged elsewhere that Colorado has a low rate of primary contests. Ex. 4 at LPH0022–25.[2]

[2] Defendants do not concede that this is accurate, but cite to the Report here to show that Plaintiffs cannot establish a "demonstrated probability" that Pelton will decline VSL in 2026. *See Steven R.F.*, 924 F.3d at 1314.

Accordingly, because Plaintiffs cannot show a "demonstrated probability" that (1) Pelton will decline VSL and (2) another candidate will enter the race and accept VSL, Claim 2 of the Amended Complaint is moot as to Pelton.

2. Lopez cannot show a reasonable expectation that he will be subject to differential contribution limits in 2026.

Like Pelton, Lopez has shown a reasonable expectation that he will run for Governor in 2026. However, the remaining conditions precedent to his alleged injury are too speculative for him to invoke the "capable of repetition" exception.

First, Plaintiffs offer no evidence to suggest that Lopez plans to decline VSL in the 2026 cycle. His declaration is silent on this point. *See* Ex. 1 to Pls.' Br. (Doc. 82-1).

Second, even if Lopez does decline VSL in 2026, Plaintiffs offer no evidence that there will be candidates for Governor in 2026 who accept VSL. Plaintiffs do note that there were such candidates in 2022, Pls.' Br. at 9, but this does not amount to a "demonstrated probability" that another candidate will satisfy this condition precedent.

Finally, even if one or more candidates accept VSL, differential contribution limits only exist if one of the non-accepting candidates raises more than 10% of the applicable limit. This is not a foregone conclusion. In 2022, for example, Lopez raised just over $155,000 in 2022, or approximately 4.5% of the $3,395,275 spending limit. Ex. 5. And Plaintiffs have argued elsewhere that the candidate that did decline VSL and raise over 10% of the applicable limit—the incumbent, Governor Polis—is a unique candidate. *See, e.g.*, Pls.' Mot. for Prelim. Inj. (ECF No. 8) at 4 (noting that "in the last election," Governor Polis "used his personal wealth to launch the most expensive campaign in Colorado history.").

With Lopez already planning to run in 2026, it is possible he will decline VSL. And it is also possible that another candidate for Governor will accept VSL. And it is possible that Lopez or another candidate who declines VSL will raise 10% of the applicable limit. But these possibilities, overlaid, do not establish a "demonstrated probability" that Lopez will suffer the "specific" injury in 2026 that he allegedly faced in 2022. *See Steven R.F.*, 924 F.3d at 1314.

II. House does not have standing to challenge Section 4(5).

House does not have standing to challenge Section 4(5) because it causes no injury to his First Amendment rights. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (standing requires (1) injury, (2) causation, and (3) redressability). As the Supreme Court explained, "contribution limits 'involve little direct restraint on' the contributor's speech." *Randall v. Sorrell*, 548 U.S. 230, 246 (2006) (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)). Contribution limits do "restrict 'one aspect of the contributor's freedom of political association,' namely, the contributor's ability to support a favored candidate, but they nonetheless 'permit the symbolic expression of support evidenced by a contribution.'" *Randall*, 548 U.S. at 246-47 (quoting *Buckley*, 424 U.S. at 21).

These interests are not injured by Section 4(5). Section 4(5) allows House to contribute up to either the normal contribution limit or double that contribution limit if the chosen candidate accepts voluntary spending limits. In either case, he is not injured because he can always contribute at least the normal contribution limit, and the normal contribution limits are not at issue in Count 2 of the amended complaint.

Even if House was injured, this lawsuit cannot redress it. An injunction against Section 4(5) would only limit how much money House can contribute to his chosen candidates. He

currently can give $450 (for Tier 2 candidates) and $1,450 (for Tier 1 candidates) to anyone who has not accepted voluntary spending limits and $900 or $2,900 to candidates who have (so long as the criteria in Section 4(5) are met). *See* 8 Colo. Code Regs. § 1505-6:10.17(h). If an injunction entered, he would not be able to give $900 or $2,900 to any of his chosen candidates. That makes him no better off and may make him worse off by limiting how much he can donate to his chosen candidates.

Finally, Plaintiffs stated in their supplemental brief that "House's constitutional interest is his First Amendment right to express his political views through contributions to his chosen candidates on an equal basis with other individual contributors and their chosen candidates." Pls.' Br. at 5. But this articulates an Equal Protection injury, and Plaintiffs neither pled nor argued for such an injury. Their reliance on *Riddle v. Hickenlooper*, 742 F.3d 922, 927 (10th Cir. 2014), is misplaced as plaintiffs there did bring an Equal Protection claim based on disparate treatment between contributors. House brought no such claim here. Plaintiffs' summary judgment briefing on Section 4(5) makes clear that they challenge that section only on First Amendment grounds. As *Randall* recognizes, the First Amendment right of contributors is an associational right, which permits the contributor to express his support for his chosen candidate. Section 4(5) in no way injures House's ability to do that.

CONCLUSION

For the foregoing reasons, the Court should dismiss Claim 2 as to Plaintiff House for lack of standing. It should also dismiss Claim 2 as moot as to Plaintiffs Pelton and Lopez. In the alternative, the Court should hold Claim 2 in abeyance as to Plaintiffs Pelton and Lopez until it

enters final judgment on Claim 1, so that Plaintiffs may reassert Claim 2 should the conditions precedent to their alleged injury come to fruition in the intervening months.

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CERTIFICATE OF SERVICE

I certify that I served the foregoing **DEFENDANTS' SUPPLEMENTAL BRIEF REGARDING MOOTNESS AND STANDING** upon all parties herein by e-filing with the CM/ECF system maintained by the Court on August 21, 2023, addressed as follows:

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