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' BRIEF REGARDING MOOTNESS AND STANDING

On August 2, 2023, the Court ordered supplemental briefing on mootness and standing (ECF 81). Pursuant to that order, Plaintiffs submit the following:

I. LOPEZ'S AND PELTON'S CLAIMS ARE NOT MOOT.

Greg Lopez's and Rodney Pelton's claims "fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *Fed. Election Comm'n v. Wis. Right to Life, Inc*., 551 U.S. 449, 462 (2007).

The "capable of repetition, yet evading review" mootness exception applies when "(1) the challenged action ended too quickly to be fully litigated and (2) a reasonable expectation exists for the plaintiff to again experience the same injury." *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1166 (10th Cir. 2023) (internal punctuation marks and citation omitted).

The Supreme Court routinely employs this mootness exception in election cases. *See, e.g., Davis v. Federal Election Comm'n*, 554 U.S. 724, 735 (2008); *Anderson v. Celebrezze*, 460 U. S. 780, 784 and n. 3 (1983)). Indeed, "[e]lection cases often fall within this exception, because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits." *Porter v. Jones*, 319 F.3d 483, 490 (9th Cir. 2003) (collecting cases).

"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." *Rio Grande Found.*, 57 F.4th at 1166 (citing *Wis. Right to Life*, 551 U.S. at 462). "The second prong of the capable of repetition exception requires a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *Wis. Right to Life*, 551 U.S. at 463 (internal quotation marks and citations omitted). This prong's "bar is not meant to be high." *Rio Grande Found.*, 57 F.4th at 1166 (citing *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988)). "[T]he same controversy [is] sufficiently likely to recur when a party has a reasonable expectation that it will again be subjected to the alleged illegality." *Wis. Right to Life*, 551 U.S. at 463 (internal quotation marks and citations omitted).

"[A] statement expressing intent to engage in the relevant [conduct] might suffice." *Rio Grande Found.*, 57 F.4th at 1166 (citing *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 736 (2008)). Indeed, in *Davis*, the candidate plaintiff challenged a campaign finance law and did not make his jurisdiction-sustaining intentions known until he made a public statement shortly before filing his U.S. Supreme Court *reply* brief. 554 U.S. at 736. The Supreme Court noted the plaintiff's intent to "self-finance another bid for a House seat," and, on that basis alone, the Court was "satisfied that [his] facial challenge [was] not moot." *Id*.

Here, Lopez's and Pelton's claims arose from their status as 2022 candidates for statewide Colorado public office and the Colorado legislature, respectively. (ECF 46, ¶¶ 4-5). Lopez's 2022 campaign was unsuccessful, but he intends to run again for statewide Colorado public office in the next available election cycle, *i.e.*, 2026, and begin raising money to support his candidacy in January 2024. (Ex. 1, Lopez Decl.). Also, his campaign committee remains active,

and he continues to file campaign contribution and expenditure reports. (Ex. 2, Lopez Comm.). These facts bear the hallmarks of a candidate that intends to run for statewide office again.

Pelton's 2022 campaign was successful, and he intends to run for reelection to the Colorado Senate in the 2026 election cycle. (Ex. 3, Pelton Dep. 18:4-13). He has already begun raising money to support his 2026 reelection campaign. (Ex. 4, Pelton Comm.). These facts also prove a candidate intends to run again.

And because plaintiffs intend to run for Colorado public office in 2026, they will face the same unconstitutional campaign contribution laws and asymmetrical campaign contribution scheme as they did in 2022 when this litigation began. (ECF 46, ¶¶ 38-62).

Indeed, plaintiffs present more evidence that they will be candidates again than the plaintiffs in either *Davis*, 554 U.S. at 736, or *Belitskus v. Pizzingrilli*, 343 F.3d 632, 636-37, 648 n.11 (3d Cir. 2003). In *Belitskus*, candidates challenged a state ballot access law for the 2000 general election without expressing any intent of running in a subsequent election and being subject to the same law again. Following the election, the Third Circuit reasoned that similarly situated candidates would challenge the ballot access law in future election cycles and so it did not dismiss the case as moot. *Id*. at 648 n.11. After all, "it is reasonable to expect political candidates to seek office again in the future." *Id*. And "[g]iven the lack of evidence to the contrary," the Third Circuit "conclude[d] that it is reasonable to assume" the plaintiffs would be subject to the same ballot access law again. *Id*. "Thus, there [was] every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints." *Id*. (internal quotation marks and citations omitted).

Here, "[t]he [2022] election is long over, and no effective relief can be provided to the [plaintiffs], but this case is not moot, since the issues … and their effects on [Lopez and Pelton]

will persist as the [Colorado laws] are applied in [the 2026] election[].” *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974). Colorado Constitution Article 28, §§ 3 and 4, and the statutes and regulations that these state constitution provisions enable, violated Lopez’s and Pelton’s First Amendment rights because they were 2022 candidates for statewide public office and state legislature, respectively. (ECF 46). The record shows that the Colorado election cycle is too short to completely litigate this election law challenge. Indeed, this case began in January 2022 and was not resolved before the 2022 election ended. The record also shows Lopez and Pelton will be candidates for statewide public office and the state legislature, respectively, again in the next election, and they will suffer the same constitutional injuries by the same state election laws again. “This is, therefore, a case where the controversy is ‘capable of repetition, yet evading review.’” *Storer*, 415 U.S. at 737 n.8.

The Tenth Circuit’s decision on the preliminary injunction does not change this analysis. The Tenth Circuit dismissed Plaintiffs’ interlocutory appeal based on a finding that *the appeal* was prudentially moot because the 2022 election cycle ended. *Lopez v. Griswold*, No. 22-1082, 2023 U.S. App. LEXIS 3421, at *3 (10th Cir. Feb. 13, 2023). Whether a motion for a preliminary injunction is prudentially moot is a different question than whether the underlying claims are moot. That is clear from the Tenth Circuit’s opinion itself, which relied on the fact that this Court would “likely enter a final judgment” before an injunction was needed for the next election. *Id*. at *4. And if plaintiffs are successful, that final judgment will prohibit Colorado officials from enforcing the offending state election laws, creating an “effect in the real world” sufficient to overcome any claim of prudential mootness. *See Jordan v. Sosa*, 654 F.3d 1012, 1034 (10th Cir. 2011).

At bottom, the Tenth Circuit believed a preliminary injunction was unnecessary because it could not remedy any alleged injury during the 2022 election cycle. And it expected this Court to render judgment on the merits of plaintiffs' claims before the next election. Plaintiffs' claims are not moot.

II. HOUSE HAS STANDING TO CHALLENGE SECTION 4.

Plaintiffs' claim against Colorado Constitution Article 28, § 4 ("Section 4"), should proceed regardless of Steven House's standing to pursue it. "If at least one plaintiff has standing, the suit may proceed." *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023) (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*., 547 U. S. 47, 52, n. 2 (2006)). Lopez's and Pelton's standing to challenge Section 4 is unquestioned. And their claims against it are not moot. *See* Section I *supra*. Therefore, whether House, individually, has standing to challenge Section 4 is irrelevant to the justiciability of Plaintiffs' claims against that law. *Biden*, 143 S. Ct. at 2365.

Even so, House has individual standing to challenge Section 4.

Plaintiffs brought this pre-enforcement claim against Section 4 to avoid government sanctions for exercising their First Amendment rights. Pre-enforcement standing arises when "a plaintiff satisfies the injury-in-fact requirement [by] alleg[ing] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [law], and there exists a credible threat of [enforcement] thereunder." *Susan B. Anthony List v. Driehaus*, 573 U. S. 149,159 (2014).

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. "The First Amendment protects political association as well as political expression." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (*per curiam*). 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 v. Hickenlooper*, 742 F.3d 922, 927 (10th Cir. 2014). Therefore, it is a "fundamental right." *Id*.

House exercised this fundamental right to its fullest extent in both 2022 elections—the primary and general elections, respectively. In each election, House's candidate faced an opponent that Section 4 allowed to accept double the amount House contributed, even though House wanted to contribute more. Accordingly, Section 4 limited his "fundamental right" because of the candidate he chose to support. *Id*.

"'[A] credible threat' exist[s] that Colorado w[ill], in fact," enforce Section 4 and, thus, create a First Amendment injury. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2308 (2023) (citing *Susan B. Anthony List*, 573 U. S. at 159). Colorado has shown it will enforce its campaign finance laws. *See, e.g*., Ex. 2. Accordingly, "a credible threat" exists that if House contributes an amount that violates Section 4, then Colorado will force House's candidate to return the contribution, *see* 8 CCR 1505-6 § 23.3.4(a)(2), thus prohibiting House from exercising his First Amendment rights on an equal basis with individuals that contribute his candidate's opponents. Therefore, House has standing to challenge Section 4.

A. Section 4's terms.

Under Section 4(4) and (5), "[i]f a candidate accepts the applicable spending limit and another candidate for the same office refuses to accept the spending limit," then the "applicable

contribution limits [in 8 CCR 1505-6 § 10.17.1] shall double for any candidate who has accepted the applicable voluntary spending limit" as long as "[a]nother candidate in the race for the same office has not accepted the voluntary spending limit," and a "non-accepting candidate has raised more than ten percent of the applicable voluntary spending limit."

Candidates that accept Section 4's spending limit and double donations must "file a statement to that effect with the secretary of state," *see* Section 4(3), "within ten days" of "becom[ing] a candidate" in their in their candidate affidavit. CRS 1-45-110(1).

Finally, "[i]f a candidate accepts the applicable spending limit and another candidate for the same office refuses to accept the spending limit, the accepting candidate shall have ten days in which to withdraw acceptance." Section 4(4).

B. 2022 election cycle.

Section 4 injured House's First Amendment rights throughout the 2022 Colorado election cycle—during both the primary and general election. Indeed, House pledged "to give full, aggregate-maximum contributions" to candidates running for various offices and subject to different contribution limits "as the 2022 election season progresse[d]." (ECF 1 ¶ 35; ECF 46 ¶ 35). "If it were lawful," House would have contributed an amount "in excess of the [2022] contribution limits." (ECF 1 ¶ 36; ECF 46 ¶ 36).

1. Primary election.

The contribution limit for gubernatorial candidates in the 2022 primary election was $625. *See* Colo. Const. art. 28, § 3(1)(a)(I); 8 CCR 1505-6 § 10.17.1(b)(1)(A) and (h) (2022). Under Section 4, if a candidate for state elected office accepted the campaign spending limits and a candidate for the same office did not, then the individual contribution limits for the accepting

candidate are doubled if a non-accepting candidate raises funds over ten percent of the applicable spending limit.

Here, Lopez entered the 2022 Republican primary for governor in August 2019 and did not accept Section 4's terms. (Ex. 2; Ex. 5, Lopez Candidate Affidavit). In March 2021, House donated to Lopez the maximum amount allowed for the primary. (Ex. 6, House 2022 Contributions). Later, in June 2021, Governor Polis, a non-accepting Section 4 candidate, announced his re-election campaign and raised over ten percent of the applicable voluntary spending limit. *See* 8 CCR 1505-6 § 10.17.1(i)(1) (2022) (voluntary spending limit: $3,395,275); (Ex. 7, Polis Candidate Affidavit; Ex. 8, Polis Contribution Reports). Consequently, Polis's fundraising enabled all Section 4 accepting gubernatorial candidates to receive double the maximum donation from their individual contributors. *See* Section 4.

In September 2021, Heidi Ganahl entered the Republican primary and accepted Section 4's terms. (Ex. 9, Ganahl Candidate Affidavit; Ex. 10, Ganahl Comm.). Accordingly, she was immediately able to accept twice as much from individual contributors than Lopez could accept.

House wanted to contribute to candidates "in excess of the [2022] contribution limits" to help them "communicate" their political "messages." (ECF 1 ¶ 36; ECF 46 ¶ 36). But House's fundamental right of political expression of contributing to Lopez was injured because he could not give over the maximum contribution to Lopez. Only Ganahl's contributors could donate twice the limit in the primary election. "And by treating the contributors differently, [Section 4] impinged on the right to political expression for those who support [Lopez]." *Riddle*, 742 F.3d at 927.[1] Therefore, Section 4's asymmetrical campaign contribution scheme violated House's First

[1] The *Riddle* court faced an equal protection challenge to asymmetrical campaign contribution limits, but it relied on Supreme Court First Amendment jurisprudence to make its ruling because

Amendment rights because it limited how much he could donate to Lopez, and gave him standing to challenge the law. *Id*.

2. General election.

As he pledged to do, House exercised his First Amendment rights after the primary election and throughout the 2022 election cycle. (ECF 1 ¶¶ 35-36; ECF 46 ¶¶ 35-36). Indeed, multiple times, House fulfilled his pledge to contribute full, aggregate-maximum contributions—primary and general election contribution limits combined. *See* 8 CCR 1505-6 § 10.17.1(h) (2022) ("* A candidate may accept the contribution limit for both the primary election and the general election."). However, the candidates that House chose to support had opponents that accepted Section 4's terms and were able to receive double the amount that House was allowed to contribute to his candidates.

After Ganahl won the Republican primary for governor and withdrew her acceptance of Section 4's terms, (Ex. 1; Ex. 11, Ganahl Withdrawal), House contributed to her the combined primary and general election maximum amounts, $1,250. *See* 8 CCR 1505-6 § 10.17.1(b)(1)(A) and (h) (2022); (Ex. 6). However, Zachary Varon, an unaffiliated independent gubernatorial candidate that accepted Section 4's terms in March 2021, was allowed to collect double that amount, *i.e*., $2,500, to prepare for the general election even before Ganahl entered the race. (Ex. 12, Other Candidate Affidavits; Ex. 13, 2022 Election Results).[2] Later, Kevin Ruskusky and Paul Noel Fiorino entered the governor's race, accepted Section 4's terms, and immediately gained the ability to accept $2,500 too. (Ex. 12). Accordingly, Section 4 allowed three of Ganahl's

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the First Amendment's "rational applie[d]" and it used First Amendment scrutiny to decide the case. 742 F.3d at 929-30 (citing *Davis*, 554 U.S. 737-44).

[2] Governor Polis raised Section 4's requisite amount of money for a non-accepting candidate before Ganahl entered the race. Section II(B)(1) *supra*.

opponents to accept $2,500 contributions, but limited House's "fundamental right" of "political expression" to $1,250 for Ganahl, *Riddle*, 742 F.3d at 927, even though he wanted to give "in excess of" the contribution limits. (ECF 1 ¶ 36; ECF 46 ¶ 36).

House also supported Peggy Propst, a candidate for District 8 of the State Board of Education, (Ex. 6; Ex. 13; Ex. 14, Propst Comm.), and contributed to her the maximum amount allowed, $400. Colo. Const. art. 28, § 3(1)(b); 8 CCR 1505-6 § 10.17.1(b)(2) and (h) (2022). However, Section 4 allowed supporters of Propst's opponent, James Treibert, to contribute double that amount.

Indeed, Propst declined Section 4's spending limit, (Ex. 14), and Treibert accepted it. (Ex. 15, Treibert Comm.). And Propst raised more than ten percent of Section 4's 2022 spending limit on candidates for the State Board of Education. *See* Colo. Const. art. 28, § 4(5)(b); 8 CCR 1505-6 § 10.17.1(i)(4) (2022) (voluntary spending limit: $88,225); (Ex. 16, Propst Contributions). Accordingly, Section 4 allowed Treibert's supporters to contribute $800, but limited House's "fundamental right" of "political expression" to $400, *Riddle*, 742 F.3d at 927, even though he wanted to give "in excess of" the contribution limits. (ECF 1 ¶ 36; ECF 46 ¶ 36).

"[B]y treating the contributors differently, [Section 4] impinged on the right to political expression for those who support [Ganahl and Propst]." *Riddle*, 742 F.3d at 927. Therefore, Section 4's asymmetrical campaign contribution scheme violated House's First Amendment rights because it limited how much he could donate to Ganahl and Propst, and gave him standing to challenge the law. *Id*.

III. HOUSE'S SECTION 4 CLAIM IS NOT MOOT.

Like Lopez's and Pelton's claims, House's claim is capable of repetition, yet evading review. *See* Section I *supra*.

"House has a history of campaign contributions," (ECF 46 ¶ 32), and he has "given maximum donation to" all types of candidates for state office. *Id*. at ¶ 33. In the 2018 election cycle, Section 4 inflicted the same constitutional injury on him as it did in 2022. And because House intends to contribute to Colorado state candidates for "[a]s long as [he] live[s]," as well as give over the current contribution limits if legally permitted, (Ex. 17, House Dep. 52:23-54:5), a ruling that Section 4 is unconstitutional will redress his First Amendment injury. Accordingly, his Section 4 claim is not moot.

Indeed, during the 2018 election cycle, House supported a candidate for State Senate District 9 and a candidate for State Senate District 24, and contributed the maximum amount allowed, $400, to both candidates. Colo. Const. art. 28, § 3(1)(b); 8 CCR 1505-6 § 10.17.1(b)(2) and (g) (2018); (Ex. 18, 2018 Election Results; Ex. 19, 2018 House Contributions). Neither candidate accepted Section 4's spending limits. (Ex. 20, House's 2018 Candidates). But each candidate had an opponent that did. (Ex. 21, 2018 Opponents). House's candidates raised more than ten percent of Section 4's 2018 spending limit on candidates for state senate. *See* Colo. Const. art. 28, § 4(5)(b); 8 CCR 1505-6 § 10.17.1(h)(3) (2018) (voluntary spending limit: $110,700) (Ex. 22, House's 2018 Candidates Contributions). And because Section 4's requirements were met, the law allowed supporters of the opponents of House's candidates to contribute $800, but his "fundamental right" of "political expression" was limited to $400. *Riddle*, 742 F.3d at 927. Therefore, Section 4 violated House's First Amendment rights in the 2018 and 2022 election cycles. *Id*.

"If it were lawful," House would contribute to "candidates in excess of the current contribution limits." (ECF 46 ¶ 36). Thus, because Section 4 has inflicted the same First Amendment injury on House in the last two state election cycles, and he intends to continue

contributing to Colorado candidates the maximum amount and more if possible, his Section 4 claim is capable of repetition, yet evading review. *See* Section I *supra*.

CONCLUSION

All of Plaintiffs' claims should proceed.

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Respectfully submitted,

/s/ Ryan Morrison
Ryan Morrison
Brett R. Nolan[3]
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW, Suite 801
Washington, DC 20036
202-301-3300
rmorrison@ifs.org
bnolan@ifs.org
Counsel for Plaintiffs

[3] Admitted in Kentucky and the bar of this Court. Not admitted to practice in the District of Columbia. Supervised by D.C. bar attorneys under D.C. App. R. 49(c)(8).