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' WRITTEN SUMMATION

In 2000, Colorado voters overwhelmingly approved Amendment 27, now enshrined in the Colorado Constitution at Article XXVIII. Not only did Amendment 27 express the people's conclusion that large campaign contributions could lead to *quid pro quo* corruption and its appearance, it imposed contribution limits to address those identified concerns.

Plaintiffs challenge those limits as unconstitutionally low. But witness after witness confirmed that Colorado's limits do not prevent candidates from amassing the resources necessary for effective advocacy. And expert testimony demonstrated that Colorado's limits do not entrench incumbent legislators at the expense of their challengers.

After six days of trial, it is clear that Plaintiffs—and their assembled experts—disagree with the policy choices of Colorado voters. But their recourse is at the ballot box, not the courtroom. Colorado demonstrates none of the concerns animating the Supreme Court's decision

in *Randall v. Sorrell*, 548 U.S. 230 (2006), and Plaintiffs cannot satisfy the high bar required of them to declare Colorado's limits facially unconstitutional.

ARGUMENT

I. The sole claim over which this Court has jurisdiction is Plaintiff Pelton's challenge to the contribution limits for state legislative office.

A. Mootness and Standing

Federal courts do not "operate as an open forum for citizens to press general complaints about the way in which government goes about its business." *F.D.A. v. All. for Hippocratic Med.*, 602 U.S. 367, 379 (2024) (quotations omitted). Before a plaintiff can obtain relief, they must first prove that they have a "personal stake" in the outcome of the litigation." *Id.* To do so, they must show "(1) an injury in fact; (2) a causal connection between the injury and the challenged action; and (3) a likelihood that a favorable decision will redress the injury." *Jordan v. Sosa*, 654 F.3d 1012, 1019 (10th Cir. 2011) (citation omitted). If a plaintiff cannot satisfy this test at the outset of the litigation, they lack standing. *Id.* If events arise during litigation that "make relief impossible," a case is moot. *Id.* at 1023.

Where, as here, plaintiffs seek injunctive and declaratory relief, they cannot rely on past injuries to satisfy standing. *Murthy v. Missouri*, 144 S. Ct. 1972, 1986 (2024). Instead, they must show a "real and immediate threat of repeated injury." *Id.* (quotation omitted); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur."). "Past injuries are relevant only for their predictive value." *Id.* at 1987. Where a theory of injury relies on "guesswork as to how independent decisionmakers will exercise their judgment," courts are particularly reluctant to find standing. *Murthy*, 144 S. Ct. at 1986.

Finally, standing and mootness are analyzed on a claim-by-claim and plaintiff-by-plaintiff basis. *Am. Humanist Ass'n, Inc. v. Douglas Cnty. Sch. Dist. RE-1*, 859 F.3d 1243, 1250 (10th Cir. 2017) ("Each plaintiff must have standing to seek each form of relief in each claim.").

Here, each Plaintiff's allegations of future injury stemming from voluntary spending limits rely on a "speculative chain of possibilities," and are thus moot. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (citations omitted). Senator Pelton has never established injury from the voluntary standing limits, undermining his standing to bring that claim. Moreover, Plaintiff Steven House and Congressman Greg Lopez have not proven that they have ever been injured by Colorado's campaign contribution limits, in House's case, or that they are likely to suffer future injury, in Congressman Lopez's case. The only claim over which this Court now has jurisdiction is Senator Pelton's challenge to the contribution limits for state legislative office.

B. Congressman Lopez and Plaintiff House cannot maintain Claim 1.

To satisfy the case or controversy requirement as to Claim 1, Plaintiffs must prove they face a "real and immediate threat" of injury stemming the contribution limits. *Murthy*, 144 S. Ct. at 1986. Apart from Senator Pelton's challenge to the state legislative limits, they cannot do so.

As a contributor, House suffers no injury from Colorado's limits, and he thus lacks standing to bring Claim 1.[1] In general, "contribution limits involve little direct restraint on [a]

[1] In *Thompson v. Hebdon*, 589 U.S. 1, 6 (2019), the Supreme Court remanded a case involving only contributors so that the Court of Appeals could apply *Randall*. The Court did not discuss the contributors' standing, but as even *Randall*'s concurrence recognizes, *Randall* "implies that it is concerned not with the impact on the speech of contributors, but solely with the speech of the candidates." 548 U.S. at 270 n.3 (Thomas, J., concurring); *see also id.* at 253 ("*Taken together,* Act 64's substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election, on the ability of political parties to help their candidates get

contributor's speech." *Randall*, 548 U.S. at 246 (quotations omitted). Although they restrict "the contributor's ability to support a favored candidate, . . . they nonetheless permit the symbolic expression of support evidenced by a contribution and they do not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.* at 246-47.

The First Amendment is concerned with speech and association, and House's speech and ability to associate are unaffected by the level at which Colorado's limits are set. He is still able to associate with and symbolically support his candidates of choice through contributions—including through maximum contributions to the extent those carry additional symbolic expression. And if House would prefer to provide additional support to his candidates of choice, nothing prohibits him from using his own voice and funds to express his support through avenues other than candidate contributions. *See* TR 179:9-181:9; *see also Buckley v. Valeo*, 424 U.S. 1, 21 (1976) ("The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated symbolic act of contributing.").

As for Congressman Lopez, his claim is moot. When this lawsuit commenced, Congressman Lopez was a candidate for Governor and subject to the statewide limits. But today he is a sitting federal congressman, TR 51:10-12, with only a vague intent to run for some unspecified office in 2026. Plaintiffs try to resuscitate Congressman Lopez's claim by alleging that it is "capable of repetition, yet evading review." Pls.' Trial Summation. (Doc. #119) at 3 ("Pls.' Br."). But "[t]his exception is narrow and only to be used in exceptional situations."

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elected, and on the ability of individual citizens to volunteer their time to campaigns show that the Act is not closely drawn to meet its objectives.").

Marks v. Colo. Dep't of Corr., 976 F.3d 1087, 1093 (10th Cir. 2020) (quotations omitted). For it to apply, Plaintiffs must prove that "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) (quotations omitted); *see also Marks*, 976 F.3d at 1093.

Congressman Lopez cannot clear that bar. Roughly two years out from the 2026 election, he doesn't know what office he intends to run for, *id.* 102:5-6, hasn't filed a candidate affidavit, *id.* 102:24-103:1, and isn't actively raising money for any race, *id.* 103:5-7. At a similar stage leading up to his 2022 race, Congressman Lopez had already announced his candidacy for governor, filed a candidate affidavit, and was raising money for that race. *Id.* 103:8-104:3.

Davis v. Federal Election Commission, 554 U.S. 724, 736 (2008) does not hold otherwise. There, a candidate overcame mootness by expressing concrete plans to "self-finance another bid for a House seat." *Id.* Such a statement is significantly more concrete than Congressman Lopez's vague plans. *See Baker v. USD 229 Blue Valley*, 979 F.3d 866, 875 (10th Cir. 2020) ("When an injury in fact depends on a plaintiff's future conduct, a plaintiff must describe concrete plans.") (quotations omitted).[2]

C. Plaintiffs' challenge to voluntary spending limits is moot, and Senator Pelton lacked standing to bring it in the first place.

All Plaintiffs' challenges to the voluntary spending limits regime were mooted with the end of the 2022 election. Again, Plaintiffs argue that they satisfy the exception for claims

[2] Defendants do not dispute that Senator Pelton has standing to challenge the contribution limits for state legislative offices, and that his claims are not moot. But he lacks standing to challenge the limits for statewide offices.

capable of repetition yet evading review because "[t]heir testimony 'expressing intent to engage in the relevant conduct' is more than enough evidence to overcome any mootness questions." Pls.' Br. at 4 (quoting *Rio Grande Found.*, 57 F.4th at 1165). The problem is that any alleged injury Plaintiffs might suffer in the future from Colorado's voluntary spending limits is dependent on the conduct of themselves and unknown third parties.

Plaintiffs' alleged injury in Claim 2 is one of "asymmetric campaign contribution" limits. Pls.' Br. at 30. In other words, Plaintiffs' alleged injury is that they may, in the future, be subject to a lower contribution limit than their opponent.

But that injury relies on a substantial chain of speculation, culminating with "guesswork as to how independent decisionmakers will exercise their judgment." *Murthy*, 144 S. Ct. at 1986; *see also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 228 (2003) *overruled in part on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (finding that Plaintiffs lack standing where claimed injury stems from their own choices). It assumes Plaintiffs Lopez and Pelton will run for reelection—but Congressman Lopez has not stated sufficient "concrete plans" to satisfy this assumption. It assumes those Plaintiffs will decline voluntary spending limits—but Senator Pelton accepted limits in each of his three previous campaigns for office, TR 133:10-13, casting doubt on his intent to decline them in the future. It assumes Plaintiffs will raise at least ten percent of the applicable spending limit. Finally, and most importantly, it assumes another candidate for the same race will accept voluntary spending

limits—but Senator Pelton admitted he does not know "what any of [his] future opponents in a future race might do with respect to voluntary spending limits." TR 135:12-16.[3]

This chain is too attenuated to establish a reasonable probability that Plaintiffs will be subject to asymmetric contribution limits in the future, especially because the evidence shows that past races in Senator Pelton's district have involved spending far below the applicable limit. *See, e.g.*, Exs. 399, 400. Senator Pelton did indicate that he has a "gut feeling" he will face a primary challenge in 2026 that might break this trend. TR 133:4-5. But this falls far short of a "reasonable expectation."

"A suit becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *In re Syngenta AG MIR 162 Corn Litigation*, 111 F.4th 1095, 1118 (10th Cir. 2024). Here, no Plaintiff is suffering harm from voluntary spending limits, nor have they established a reasonable expectation of such harm in the future.

Moreover, because Senator Pelton was never injured by the voluntary spending limits and cannot show that he faced impending harm when this suit was filed, he lacked standing to bring this claim to begin with. Senator Pelton accepted voluntary spending limits in his prior races, and in each race, he spent far less than the limit while outspending and soundly beating his opponent. TR 126:9-129:22, 133:10-134:14. And as noted above, any potential future injury to Senator Pelton from the spending limits is purely speculative. Indeed, Plaintiffs' summation brief does

[3] Plaintiff House lacks standing to bring this claim for the same reasons he lacks standing to bring Claim 1. His injury as to Claim 2 is even more attenuated than the other Plaintiffs because it depends on not only his choices, but the choices of his chosen candidates *and* their opponents.

not even argue that Senator Pelton had standing to bring Claim 2. *See* Pls.' Br. at 2. All Plaintiffs' challenges to the voluntary spending limits should be dismissed.

II. Colorado's contribution limits do not violate the First Amendment.

A. Standards governing First Amendment facial challenges.

Facial challenges brought under the First Amendment are subject to a "rigorous standard": a statute is facially unconstitutional only if "the law's unconstitutional applications substantially outweigh its constitutional ones." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024). A court undertaking this analysis must first "assess the state laws' scope." *Id.* at 2398. It then assesses "which of the laws' applications violate the First Amendment, and . . . measure[s] them against the rest." *Id.*

In the context of campaign contribution limits, the question is whether those limits prevent candidates from amassing the resources necessary for effective advocacy in a substantial number of applications, compared to those instances in which they do not. *Randall*, 548 U.S. at 248. Limits that are facially constitutional may still be found unconstitutional in an as-applied challenge if they prevent a particular plaintiff from amassing the resources necessary for effective advocacy. *See McConnell*, 540 U.S. at 159.

B. Standards governing the constitutionality of campaign contribution limits.

It is well-established that a government may limit the amount of money a candidate for office can accept from any one person. Contribution limits "involv[e] little direct restraint on" a candidate's political speech, and are therefore constitutional so long "as the Government demonstrates that the limits are 'closely drawn' to match a 'sufficiently important interest.'"

Randall, 548 U.S. at 246-47 (quoting *Buckley* 424 U.S. at 25). "[T]he prevention of [*quid pro quo*] corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits." *McConnell*, 540 U.S. at 143; *see also FEC v. Cruz*, 596 U.S. 289, 305 (2022) (making clear that the corruption in question must be *quid pro quo* corruption).

In general, courts defer to the limits a state has chosen, and as a result, limits vary significantly by state. *See, e.g.*, *Randall*, 548 U.S. at 248; *Buckley*, 424 U.S. at 30 (noting that the Court "has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000."). However, there is a "lower bound" at which contribution limits risk "harm[ing] the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Randall*, 548 U.S. at 248-49. When there are "danger signs" that such risks exist, courts independently review the record to assess whether the limits are closely drawn to the government's interest. *Id.* at 249.[4]

Independent record review is appropriate where there is "strong indication" that contribution limits pose "constitutional risks to the democratic electoral process." *Id.* at 248-49. In assessing whether "danger signs" are present, the U.S. Supreme Court has considered whether the limits are "substantially lower than . . . limits [the Supreme Court] ha[s] previously upheld"; whether the limits are "substantially lower than . . . comparable limits in other States"; and whether the limits are indexed to inflation. *Id.* at 250, 253; *see also Thompson*, 598 U.S. at 5.

[4] Justice Breyer's controlling opinion in *Randall* has since been endorsed by the full court. *See Thompson*, 589 U.S. at 6.

These factors must be evaluated in context to determine whether they are strong indicators of potential constitutional infirmity.[5] Standing alone, the fact that one state's contribution limits are lower than those previously endorsed by the Supreme Court—which has considered only a handful of such schemes—may be less reflective of unconstitutionality than a byproduct of which legal challenges have wound their way to that Court for review. Differences between states' limits may reflect differential conditions in those states, or different legislative judgments balancing the risk of corruption against other state policy priorities. And even limits that are not at all indexed to inflation may be benign if they are sufficiently high. In *Randall*, the one case in which the Supreme Court has held that danger signs warranted independent scrutiny of the record, all three danger signs were present. 548 U.S. at 249-53.

Here, Defendants agree that "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 (though unlike the limits in *Randall*, they reflect an inflation adjustment). *See* Ex. 1. However, the $1,450 limits for statewide candidates do not present the same danger signs. First, the statewide limit is not "substantially lower" than comparable limits in other states. Delaware's elected statewide candidates are subject to lower limits, and Montana's limits—which have been upheld by the Ninth Circuit—are not substantially higher than Colorado's. *See id.*; *Lair v. Motl*, 873 F.3d 1170, 1187 (9th Cir. 2017) (upholding Montana's limits). While Colorado's statewide limit is lower than the lowest (inflation-adjusted) limit approved by the Supreme Court, this factor alone does not warrant

[5] The Court asked how these signs should be weighed at the outset of trial. TR 6:19-23.

closer review, particularly since, unlike in *Randall*, Colorado's scheme includes an inflation adjustment. *See Lair*, 873 F.3d at 1187 (concluding that Montana's limits did not present "danger signs," because "[a]lthough 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*" and "are adjusted for inflation"). Accordingly, while the legislative limits warrant closer review under *Randall*'s second step, the statewide limits do not.

If danger signs are present, the court "must review the record independently and carefully with an eye toward assessing the [limit's] tailoring, that is, toward assessing the proportionality of the restrictions." *Randall*, 548 U.S. at 249 (quotations omitted). *Randall* establishes five non-exclusive factors that assist with this assessment: (1) whether the limits "significantly restrict the amount of funding available for challengers to run competitive campaigns," (2) whether political parties must abide by the same limits as individual donors, (3) whether the state's treatment of volunteer services "aggravates the problem," (4) whether the limits are adjusted for inflation, and (5) whether special justifications warrant the low contribution limits. *Id.* at 253-61. Ultimately, the question is whether Colorado's limits are so low that they prevent effective advocacy, especially for challengers seeking to unseat incumbents in competitive elections. *Id.* at 248, 253.

Randall's "closely drawn" scrutiny is distinct from traditional "strict scrutiny."[6] Under the latter framework, the state bears the burden of proving that its regulation "is 'narrowly tailored'—i.e., 'necessary'—to achieve" its compelling interest. *Alexander v. S.C. State*

[6] The Court posed this question at the outset of trial. TR 7:2-13.

Conference of the NAACP, 602 U.S. 1, 11 (2024).[7] By contrast, with contribution limits, the court does not ask whether a particular limit is the highest possible limit serving the state's anticorruption interest, i.e., whether every dollar restricted is "necessary" to achieve that interest. *See Randall*, 548 U.S. at 248 ("We cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives."). This distinction is justified by the lesser First Amendment burdens imposed by contribution limits, which function only as a "marginal" restriction on a contributor's political speech, leaving the contributor free to discuss and promote candidates and issues, and to associate with candidates, by other means. *See Buckley*, 424 U.S. at 20-22.

Randall's inquiry thus focuses on the particular dangers to First Amendment values that contribution limits may pose in extreme circumstances: if they prevent candidates from "amassing the resources necessary for effective advocacy," then limits may have "a severe impact on political dialogue." *Id.* at 21. But they are unproblematic if their effect "is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." *Id.* at 22.

[7] Though *Randall* in one place uses the phrase "narrowly tailored," it is clear both from the analysis the *Randall* Court undertakes and from subsequent Supreme Court precedent that *Randall*'s "closely drawn" scrutiny is not an assessment of "narrow tailoring" in its traditional form. *See Cruz*, 596 U.S. at 305 (distinguishing between "closely drawn" and "strict" scrutiny).

C. Colorado's contribution limits serve an important interest: preventing *quid pro quo* corruption or its appearance.

For nearly a half-century, courts have recognized that campaign contribution limits are justified by a sufficiently important government interest: "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley*, 424 U.S. at 25; *see also Randall*, 548 U.S. at 247. Nonetheless, Plaintiffs ask the Court to overrule decades' worth of caselaw and find that Colorado lacks an interest in deterring corruption or its appearance because Colorado has no demonstrated history of publicly known *quid pro quo* corruption. Pls.' Br. at 6-12. And, in doing so, they ask the Court to elevate the opinions of their experts over the expressed interests and findings of Colorado voters. But that request is wrong on both the law and the facts.

1. Preventing corruption or its appearance is a sufficiently important government interest to justify the imposition of contribution limits.

Whether Colorado's contribution limits further the important state interest of preventing actual or perceived *quid pro quo* corruption is "divorced from the actual amount of the limits—it is a threshold question whether *any* level of limitation is justified." *Lair*, 873 F.3d at 1178; *see also Randall*, 548 U.S. at 247-48 (first addressing government interest, then considering the level at which the limits were set in addressing whether those limits were "closely drawn"). By necessity, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) (recognizing anticorruption

interest related to contribution limits). And "*Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible." *Id.*

In *Nixon*, the Court expressly rejected the argument that in every case challenging contribution limits the defendant must establish anew the government's interest in deterring corruption or its appearance. *Id.* at 392 (saying it is "wrong" that "governments enacting contribution limits must demonstrate that the recited harms are real, not merely conjectural"). Instead, courts and governments may rely on the established record of the Supreme Court's decades-long observations about campaign finance.

Holding otherwise—that a state must establish a unique interest in deterring corruption or its appearance in every challenge to a contribution limit—would lead to absurd results. An interest in deterring corruption and its appearance cannot be important in one context (and one lawsuit), but insufficient in another.

Cruz, 596 U.S. at 307, on which Plaintiffs rely, Pls.' Br. at 6-12, does not suggest otherwise. There, the Court was addressing a section of the Bipartisan Campaign Reform Act that did not involve contribution limits, which had not been subject to previous Supreme Court litigation. In that context the Court required the defendant to establish, in the first instance, a link between the challenged section and the government's proposed anticorruption interest. *Id.* In fact, one reason the *Cruz* Court ruled against the government was *because* individual contribution limits "are already regulated to prevent corruption or its appearance," casting doubt on the need for the additional regulation the plaintiffs had challenged. *Id.* at 306.

As to contribution limits, the link between those limits and a government interest in deterring corruption or its appearance has been established by a half-century's worth of caselaw. First as to federal contribution limits, *Buckley*, 424 U.S. at 25, and later as to state contribution limits, *Nixon*, 528 U.S. at 910; *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 787 n.26 (1978) ("The importance of the governmental interest in preventing [*quid pro quo corruption*] has never been doubted."); *Republican Party of N.M. v. Torrez*, 687 F. Supp. 3d 1095, 1109 (D.N.M. 2023) ("Supreme Court precedent is clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits.") (quoting *McConnell*, 540 U.S. at 143).

Finally, the existence of doubled contribution limits for candidates who agree to voluntary spending limits does not weaken Colorado's anticorruption interest. First, *Randall*'s "closely drawn" standard does not equate to strict scrutiny (and its narrow-tailoring component). Dating to *Buckley*, courts have recognized that they have "no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." 424 U.S. at 30. The electorate's judgment that the default limits are generally necessary to further the state's anticorruption interest is not invalidated just because the electorate that enacted Amendment 27 was willing to double contribution limits in some circumstances, consistent with its anticorruption interest. To hold otherwise would be to subject contribution limits to the type of strict scrutiny and narrow tailoring the Supreme Court rejected in *Randall*.

Indeed, if legislators (or voters, by initiative) could never set different contribution limits for different contexts without undermining their anti-corruption interests, it would be unconstitutional for states to set different individual contribution limits for candidates of

different offices. Yet this is common practice throughout the country, *see* Ex. 1, and was a feature of the scheme the Supreme Court approved in *Shrink*, 528 U.S. at 383. Of course, it is not that states have uniformly decided that candidates for statewide offices like governor are less corruptible by specific dollar amounts than candidates for state legislative offices. Rather, in setting limits for candidates of different offices, states balance their anticorruption interest with other valid interests. So too here.

At trial, the Court wondered whether the "historic understandings of corruption or the appearance thereof" were relevant to this analysis. TR 8:17-20. Although the Supreme Court has not adopted a "history and tradition" test for the First Amendment, historical sources show that the founding generation was acutely concerned with corruption. "Corruption was discussed more often in the Constitutional Convention than factions, violence, or instability. It was a topic of concern on almost a quarter of the days that the members convened." Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 352 (2009). Moreover, the founding generation's concern with corruption extended beyond the *quid pro quo* corruption adopted by modern Supreme Court decisions. *Id.* at 373-74. If relevant, founding history supports the conclusion that the First Amendment does not prevent states from enacting limits to address corruption or its appearance.

2. As a factual matter, Colorado established an interest in preventing corruption and its appearance.

Regardless, the record established at trial is more than sufficient to carry whatever evidentiary burden the government has. *See, e.g.*, *Nixon*, 528 U.S. at 393. Most importantly, in the very first sentence of the very first section of Amendment 27, "[t]he people of the state of Colorado . . . find and declare that large campaign contributions to political candidates create the

potential for corruption and the appearance of corruption." Colo. Const. art. XXVIII, § 1. Whereas in other states, courts may be left to discern the motives of legislators based on anecdotal evidence or expert testimony, here the Court may rely directly on the words of the people who enacted Amendment 27. Colorado's contribution limits were passed because Colorado voters believe large campaign contributions create—at minimum—the appearance of corruption. Even if voters lack legislators' expertise on the costs of campaigning, Pls.' Br. at 28, that they spoke for themselves in enacting Colorado's contribution limits provides direct evidence of their interest in limiting the appearance of corruption stemming from large campaign contributions. *See, e.g.*, *Nixon*, 528 U.S. at 394 (relying on popular enactment of contribution limits as evidence that those limits "are necessary to combat corruption and the appearance thereof").

The evidence introduced at trial provides additional support. As a threshold matter, that Colorado has no recent history of *quid pro quo* corruption is a sign that the limits are working. Colorado has had contribution limits, of one fashion or another, for fifty years. Getting rid of those limits because there have been no recent *quid pro quo* corruption scandals would be "like throwing away your umbrella in a rainstorm because you are not getting wet." *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

Dr. Abby Wood, an expert in statistical methods and the empirical effects of campaign finance law, testified that "the Colorado electorate that enacted Amendment 27 and still the Colorado electorate . . . of today is concerned with *quid pro quo* corruption and not only und[ue] influence." TR 988:22-25. Dr. Wood reached this conclusion by looking at three sources beyond the text of the Amendment.

First, she considered national survey data from 2014 showing that of all the actions voters label as "corrupt," exchanging votes for money is considered the most corrupt action. TR 992:9-14; Ex. 318. Dr. Wood then went a step further and estimated the results of that study for respondents from Colorado. TR 992:24-25. Although the confidence interval widened, how Colorado respondents ordered the various corrupt activities largely mimicked the order listed by national respondents. TR 994:2-3. And if anything, Coloradans appeared "less concerned about access and self-funding than the rest of America." TR 994:18-20.

From there, Dr. Wood "estimate[d] the percent of Coloradans and the percent of everyone else in America who thought that quid pro quo corruption was more problematic" than favoring donor interests or access. TR 995:6-9. What she found was that Coloradans were "more likely [than the rest of America] to say that bribery is more corrupt than influence and also much more likely to say that bribery is more corrupt than access." TR 995:16-18; Ex. 319.

Dr. Wood admitted that she would have preferred to have more Colorado respondents in this data. But using statistical methods such as resampling, in addition to comparing "simple means," Dr. Wood was "comfortable" drawing the conclusion that "Coloradans were most concerned about quid pro quo corruption." TR 998:4-11.

Second, Dr. Wood looked at additional survey data from around the enactment of Amendment 27. Dr. Wood looked at Americans' opinions about how many politicians are "crooked," and at how many Americans labeled "corruption" the most important problem in America. TR 999:18-1000:4; Ex. 320. Here, again, Dr. Wood used statistical methods to compare Coloradans to the broader population and concluded that "Coloradans and the rest of the US aren't all that different." TR 1000:6-7. If anything, the year before Amendment 27 was

adopted, Coloradans were "a little more negative on government than the rest of the country," but after the passage of Amendment 27 they were "less likely to think that quite a few [politicians] were crooked." TR 1000:7-17; Ex. 320.

Finally, Dr. Wood looked for references to corruption in newspaper articles published around the time of Amendment 27's enactment. She then coded those references as related to *quid pro quo* corruption, influence corruption, or unclear. Here, again, both basic means and more complex statistical analysis showed that Coloradans were concerned with *quid pro quo* corruption during the enactment of Amendment 27. TR 1004:25-3; Ex. 321.

Dr. Wood concluded from these sources that the people of Colorado cared about limiting corruption and its appearance during the enactment of Amendment 27, and specifically about *quid pro quo* corruption. TR 1006:7-14.

Plaintiffs' arguments otherwise are unavailing. To cast doubt on the plain language of Amendment 27, Plaintiffs turned to Dr. David Primo, a political scientist who has been associated with the institute funding Plaintiffs' challenge for nearly two decades. TR 293:5-22; Ex. 112 at 9. But Dr. Primo's analysis suffered from a series of fatal flaws.

First, although Dr. Primo opined that "Colorado's campaign contribution limits have no meaningful impact on quid pro quo corruption or the appearance of corruption," TR 292:5-7, his causal inferences are undermined by his failure to study either the level at which contribution limits are set or attitudes in Colorado specifically.

Instead, Dr. Primo grouped states into various campaign finance "regimes," based on whether the state 1) had an individual contribution limit, 2) had a corporate contribution limit, 3) had gubernatorial public financing, and 4) had legislative public financing. Ex. 119. At most, this

enabled him to study what happens to trust and confidence in government when a state enacts or repeals a contribution limit. But it "does not account for differentials in the size of contribution levels," TR 353:12-14, meaning California (and its $72,800 limit for gubernatorial candidates) is in the same regime as Colorado (and its $1,450 limit for gubernatorial candidates). TR 353:7-11; Ex. 1. In other words, in a case about whether Colorado's contribution limits are unconstitutionally low, Dr. Primo's opinions would not change if Colorado were to increase its limit to California's plainly constitutional level. TR 357:25-358:4.

This problem is exacerbated by Dr. Primo's failure to conduct any Colorado-specific analysis. TR 301:23-302:1. Instead, he extrapolated results from a national study to make grand pronouncements about Colorado, even as he admitted he did not know whether "Colorado voters have different attitudes towards . . . how [contribution] limits affect the appearance of corruption than voters in other states[.]" TR 309:22-310:6.

Second, Dr. Primo did not measure voter attitudes towards corruption or its appearance. Instead, he used "trust" and "confidence" as proxies for corruption, but he admitted that a lack of corruption in a state is neither a necessary component of trust in government, nor sufficient to create trust in government. TR 322:21-323:2.

Moreover, many of the survey questions Dr. Primo aggregated to create his dataset are unlikely to trigger an ethics- or corruption-based response. For example, one question asked voters "how much trust and confidence do you have in your state government when it comes to handling state problems?" Ex. 305 at 2. It is unlikely that voters answering that survey would be thinking about corruption in deciding their response. *See also* TR 1015:16-1016:12.

Third, Dr. Primo converted every survey response into a 100-point scale, even though just over 300 respondents out of the nearly-60,000 datapoints included in his study answered on that scale. Ex. 305 at 5; TR 329:3-17. The problem with this approach is illustrated by two versions of the same question included in Dr. Primo's dataset. These respondents were asked "how much confidence, you yourself have in . . . state government," but some respondents were offered four choices, whereas others were offered five. Ex. 305 at 2. In both cases, the "top choice" was "a great deal" of confidence. But in Dr. Primo's dataset, a respondent saying they had "a great deal" of confidence would have been given a value of 87.5 if they were in the four-answer survey, and a value of 90 in the five-question survey. TR 1017:17-25. Even though they gave the *same response* to the *same question*.

At the outset of trial, the Court asked whether Coloradans should be governed "by the opinion of experts" as to whether large campaign contributions lead to corruption and its appearance. TR 9:3-7. Plaintiffs' experts answer yes: the Court should pay more attention to their regression analysis than the people's votes. *See, e.g.*, TR 317:19-318:20 (testimony of Dr. Primo indicating that even though "people are concerned about corruption," his study matters more than the language in Amendment 27); *id.* at 428:5-9 (Dr. Bonneau stating that, in his view, "no campaign finance regulation . . . could be justified on the grounds that it prevents corruption or the appearance of corruption").

But in analyzing the constitutional provision, courts "begin by examining the text, not by psychoanalyzing those who enacted it." *Carter v. United States*, 530 U.S. 255, 271 (2000) (citations and quotations omitted). Perhaps, when considering a legislative enactment, it is useful to test whether the legislature's assumptions about voter attitudes are accurate. But when the law

at issue is a direct enactment of the voters, there are no assumptions that need empirical testing. A significant majority of Colorado voters believe "large campaign contributions to political candidates create the potential for corruption and the appearance of corruption," and that "the interests of the public are best served by limiting campaign contributions." Colo. Const. art. XXVIII, § 1. The plain language they chose and voted for establishes the state interest.

D. Colorado's contribution limits are not facially unconstitutional.

The evidence at trial establishes that Colorado's contribution limits are closely drawn to its anticorruption interest. Because Plaintiffs have not shown that the instances, if any, in which the limits prevent candidates from amassing the funds needed for effective advocacy substantially outweigh those instances in which they do not impose such a burden, Plaintiffs' facial challenge fails. Further, a factor-by-factor analysis of the considerations highlighted in *Randall* supports the conclusion that the limits are adequately tailored.

1. Candidates in Colorado amass the resources necessary for effective advocacy.

Colorado's contribution limits are consistent with the First Amendment because they enable candidates, including challengers in competitive races, to run effective campaigns. The Court did not hear testimony from a single witness who was prevented from engaging in effective advocacy by the limits. Even if one could theorize isolated instances where the limits might harm a candidate's advocacy, the evidence simply did not establish that the contribution limits' unconstitutional applications substantially outnumber their constitutional ones.

In all three of Senator Pelton's state legislative races, he raised more funds than he spent and won the general elections by large margins (in one case, unopposed). TR 126:9-129:22.

Indeed, Senator Pelton agrees that he was able to raise the funds he needed to run effective campaigns in all three races. *Id.* 127:11-13, 128:16-19, 129:19-22.

Though Congressman Lopez lost both his bids for Governor, he failed to establish that his losses were attributable to the contribution limits. During his 2018 gubernatorial race, Congressman Lopez didn't receive a single maximum contribution from an individual. TR 90:6-92:5; Ex. 313 at 6, 10. That alone shows that his 2018 loss was not attributable to the contribution limits. And in his 2022 race, only a small fraction of the individual donations Congressman Lopez received were at the maximum permitted by law. TR 92:6-23. Indeed, in his testimony, Congressman Lopez did not identify any donor who attempted to give him more than the limits permitted or informed him that they would have given him more but for the limits. TR 55:24-56:7. Thus, Congressman Lopez has not established that the limits resulted in any infringement of his constitutional rights. A candidate has no constitutional right to receive greater contributions than his donors are willing to give.

The other witnesses who testified about their experience as candidates similarly established that they were able to campaign effectively within the bounds of the limits. In her first senatorial race, Kerry Donovan raised enough funds to win an extremely competitive race, running as a Democrat in a geographically sprawling, Republican-leaning district. TR 794:15-795:23, 800:4-9. She raised more than she spent, and despite how close her race was, she did not wish she had additional funds to enable further campaigning; she raised what she needed to run her campaign effectively. *Id.* 799:17-800:13. Bernie Buescher succeeded in raising "impressive campaign war chests," *cf. Shrink*, 528 U.S. at 396, in one race raising substantially more than typical candidates for that office, and overall garnering nearly 7,000 separate contributions over

the course of his multiple races. TR 947:13-19, 956:9-21; Ex. 381. Like Senator Donovan, Secretary Buescher won repeatedly as a Democrat in a Republican-leaning district. TR 944:7-20, 947:25-948:9, 949:12-13. And when he lost, money wasn't the issue: he substantially outraised his opponents in both of his losing races. TR 950:8-951:1, 953:15-954:19.

In fact, both Senator Donovan and Secretary Buescher found the limits advantageous in certain respects. Secretary Buescher explained that because the limits required him to raise funds from a wider swath of donors, they had the effect of creating a broader base of support for his candidacy, with each donor becoming a surrogate for his campaign. 946:9-18. And Senator Donovan found that the limits made it easier to reach out to potential supporters, because it was easier for her to ask for a smaller donation than a large one. 798:12-24.

Nor did the Court hear from any witness who ran as a challenger to an incumbent whose candidacy was hindered by Colorado's contribution limits. Senators Pelton and Donovan won all their races. Congressman Lopez lost his statewide races, but each time at the primary phase to other non-incumbent candidates. TR 92:24-93:15. Secretary Buescher was defeated twice when running as the incumbent himself, by challengers who prevailed notwithstanding the limits. TR 950:25-951:4, 954:8-19. And as discussed at greater length in Part II.D.2.a below, the expert testimony presented at trial does not support the conclusion that Colorado's limits prevent challengers from engaging in effective advocacy against incumbents in competitive races.

All told, the witness testimony shows that the limits' effect is "merely to require candidates . . . to raise funds from a greater number of persons," *Buckley*, 424 U.S. at 22, not to "drive the sound of a candidate's voice below the level of notice, and render contributions pointless," *Shrink*, 528 U.S. at 397. Even if Congressman Lopez's losses could be attributed to

the contribution limits, "a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley*." *Id.* at 396. And the bar governing Plaintiffs' facial challenge is high: they must show that the law's "unconstitutional applications substantially outweigh its constitutional ones." *Moody*, 144 S. Ct. at 2397.

For this reason, Plaintiffs' repeated references to the "outlier" case of Governor Jared Polis's self-financing are unconvincing. TR 629:12-14. The effect of Colorado's contribution limits in a race involving a self-financing candidate does not control the facial constitutionality of those limits in all applications. *See, e.g.*, *Moody*, 144 S. Ct. at 2397-98; *see also Buckley*, 424 U.S. at 52-53 ("[A] candidate . . . has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election[.]").

Because the evidence shows that Colorado's limits routinely enable candidates to amass the resources needed for effective advocacy, and does not show that challengers are specially harmed by limits, Plaintiffs' facial challenge fails.

2. *Randall*'s factors support the conclusion that Colorado's limits are facially constitutional.

Assessment of *Randall*'s non-exclusive factors further establishes that Colorado's contribution limit scheme does not disproportionately burden First Amendment interests. *Cf. Randall*, 548 U.S. at 237. First, the expert analyses uncovered no evidence that challengers are significantly disadvantaged in competitive races against incumbents. Second, political parties are permitted to give substantial donations to candidates, and parties can and do engage in effective collective political action by supporting candidates and deploying funds in ways that strategically further party goals. Third, unlike Vermont, Colorado does not count volunteer services towards

the contribution limit. And finally, Colorado includes an inflation adjuster that has worked to increase both the statewide and state legislative limits since they were first enacted.

a. Colorado's contribution limits do not prevent challengers from mounting effective campaigns.

Under *Randall*, courts must determine whether contribution limits "magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage." *Randall*, 548 U.S. at 248. This question is answered here by looking at whether incumbents are reelected at higher rates in Colorado. The undisputed evidence is that they are not. Even Plaintiffs' own expert agrees that "if one looks just at the likelihood of an incumbent losing, the contribution limits do not further entrench incumbency advantages." TR 398:23-399:1.

Defendants' expert Dr. Douglas Spencer conducted further analysis and found that Colorado's contribution limits do not "prevent[] challengers from mounting effective campaigns." TR 1080:14-17. Unlike Plaintiffs' experts, Dr. Spencer directly studied incumbency reelection rates to reach this conclusion: "If the concern is that a campaign finance contribution limit is an incumbency protection scheme, then the way to evaluate that is to see whether incumbents are winning more often or not, as an outcome-oriented measure that's quantitative, countable, observable, and relevant directly to the question." TR 1082:22-1083:2; *see also* TR 1083:16-18 ("Incumbency re-election rates are the primary metric of whether or not incumbents are being re-elected[.]"). Plaintiffs' experts did not study the question, TR 508:21-509:2, even though they admitted that incumbent success rates are a relevant measure of electoral competitiveness, TR 384:16-17, 397:22-398:8.

Dr. Spencer concluded that Colorado's contribution limits do not intrench incumbency advantages by studying the question from four different perspectives.

- First, Dr. Spencer looked at whether the incumbency rate changed in Colorado's legislature after the adoption of Amendment 27. It did not, remaining around 90% for both chambers. TR 1085:10-21; Exs. 322-24.
- Second, Dr. Spencer compared Colorado's incumbency rate to the incumbency rates of other states with varying levels of contribution limits. Compared to other states, Dr. Spencer found that "Colorado generally does not look any different systematically from the rest of the country" in terms of incumbency rates. TR 1095:8-13; Exs. 325-330.
- Third, Dr. Spencer conducted a regression analysis to try to directly measure the effect of contribution limits on incumbency rates. Unlike some of Plaintiffs' experts who relied exclusively on regression analyses, Dr. Spencer used his in conjunction with the other statistical analyses he performed. TR 1096:14-20; Ex. 331. Consistent with his other analyses, the regression "provided extra evidence that there is no relationship between the individual contribution limit and the incumbent re-election rate." TR 1108:4-13.
- Finally, Dr. Spencer performed a literature review. He found two articles that directly addressed the link between contribution limits and incumbency rates, and both concluded that imposing contribution limits *increases* the likelihood of challengers winning. TR 1108:17-1109:9. This comports with literature reviewed by Plaintiffs' expert Dr. Bonneau, who also relied on literature that found "states without contribution limits give an advantage to incumbents over challengers." TR 402:7-10; 403:13-17.

All of the analyses conducted by Dr. Spencer point to the same conclusion: Colorado's contribution limits do not hinder challengers.

Further confirming Dr. Spencer's approach is the actual behavior of Colorado's incumbents. Put simply, Colorado's incumbents do not act as though they benefit from lower contribution limits. To the contrary, they consistently sought to raise those contribution limits before passage of Amendment 27. *See* Ex. 374 (summarizing the history of Colorado contribution limits). In 1996, Colorado's incumbent legislators drastically increased the contribution limits set by statute. Ex. 353 (1996 Colo. Sess. Laws ch. 259). Later that year, Colorado's voters cut those new contribution limits by over 80%. Ex. 356 (Amendment 15). Then, in 2000, the incumbents tried again to increase their contribution limits. Ex. 354 (2000 Colo. Sess. Laws. ch. 36). This time, Colorado's voters not only cut the contribution limits, but put them in the state constitution where the incumbents could no longer alter them. Ex. 357 (Amendment 27). Repeatedly in Colorado, the voters have made clear that they want lower contribution limits for more competitive elections, and it is the incumbents who want higher limits. And this makes sense, considering the testimony that incumbents, rather than challengers, receive a higher number of maximum individual contributions. TR 680:5-13, 948:20-949:6.

Colorado's contribution limits do not prevent challengers from winning elections. Plaintiffs presented no evidence that they do. Instead, Plaintiffs argue that abolishing contribution limits would lead to more contested elections in Colorado and that as a result, candidates may change their policy positions.[8] *See* TR 449:15-450:11. Plaintiffs' approach is

[8] Plaintiffs' experts are inconsistent about whether they are talking about raising the contribution limits or abolishing them altogether. According to Dr. Bonneau, "[t]he issue is not the limits. The

faulty for three reasons: first, as a legal matter, they failed to study the relevant determinant of challenger competitiveness; second, the analyses they did perform show Colorado enjoys competitive elections; third, they didn't analyze individual contribution limits, instead arbitrarily examining individual contribution limits along with other campaign finance laws.

First, Plaintiffs' experts failed to directly study the question *Randall* posed: do Colorado's contribution limits impede challenger competitiveness? Dr. Spencer looked at the bottom line: are Colorado's limits preventing challengers from being elected? They are not; therefore, challengers are able to amass the necessary resources to be as competitive in Colorado as they are elsewhere in the country. (Of course, incumbents enjoy advantages everywhere. TR 509:18-510:6.) Dr. Cann, by contrast, studied primary contestation rates, to see "if there is at least someone who is contesting that race, then voters at least have a chance to express their preference" and because incumbents facing challengers may have "to recalibrate their estimate of the preferences of the district." TR 449:20-25. Dr. Cann may be right that these are desirable policy outcomes. But they have nothing to do with whether Colorado's contribution limits "significantly restrict the amount of funding available for challengers to run competitive campaigns." *Randall*, 548 U.S. at 253.

Second, although Defendants do not need to show that Colorado has competitive elections for their contribution limits to be sustained, Colorado does have competitive elections. Dr. Cann testified that Colorado's rate of contestation in general elections could be 3% higher if

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issue is the amount." TR 380:23-24. But Dr. Cann's quantitative analyses did not study the effects of higher limits, only the effects of abolishing the limits. TR 529:18-530:22.

it abolished all its contribution limits, like Utah and Oregon.[9] But Dr. Cann admits that Colorado "has very high levels of general election contestation" already—in fact, Colorado has more contested races than either Utah or Oregon. TR 522:16-18, 534:2-537:15; Ex. 393. And one objective measure of overall competitiveness that includes (1) primary contest rate, (2) general election contest rate, and (3) open seats shows Colorado to be between the 7th most and 16th most competitive state in the country. Ex. 390. (Utah and Oregon, again, fare far worse. *Id.*)

Finally, Dr. Cann's analysis is structurally flawed because it does not study the effect of individual contribution limits on incumbent vote share. Dr. Cann purports to show that if Colorado abolished its limits, the average challenger in the average race facing an average amount of incumbent spending would see a 3.2% increase in their vote share. TR 478:5-15, 538:15-539:7. But both the inputs and the outputs of this model preclude the conclusion that Colorado's contribution limits hinder challengers' ability to mount competitive campaigns.

As to inputs, the model ***fails to measure the effect of individual contribution limits***. Instead, Dr. Cann created his own "campaign finance restrictiveness index"—the very name of which suggests his ideological leanings—that consists of individual contribution limits, political action committee (PAC) contribution limits, corporate contribution limits, and union contribution limits. Those latter three limits are not challenged in this lawsuit. And in any event, Colorado doesn't permit corporate or union contributions at all, so by including those limits in his index, Dr. Cann has artificially decreased the overall amount of contributions permitted. TR 523:14-

[9] Interestingly, while Dr. Cann repeatedly urged that Colorado's elections would be more competitive if it abolished contribution limits like Oregon, Oregon itself chose to adopt contribution limits this year. *See* H.B. 4024 (82nd Or. Leg. Assembly), available at https://tinyurl.com/3ahy8psk.

525:2. Nor can Dr. Cann say he included all contribution limits, because he omitted party contributions to candidates, a metric (unlike corporate and union contributions) where Colorado would score as more permissive. TR 525:19-526:20; Ex. 375. And Dr. Cann admits that he didn't study the effect of raising or abolishing the individual contribution limit. TR 537:16-538:13. In short, Dr. Cann's restrictiveness index is a tool created by Dr. Cann to reach a predetermined outcome and fails to tell us anything about how individual contribution limits ***by themselves*** may affect incumbent vote share.

But even if one could use Dr. Cann's restrictiveness index to generate something meaningful about Colorado's individual contribution limits, his model still fails to tell the Court anything valuable. His model, predicting a 3.2% increase in challenger vote share, assumes, among other things, average challenger spending and average incumbent spending. But a 3.2% increase in challenger vote share will not change the outcome of the average race because in the average race, the incumbent wins by more than 3.2%. TR 548:10-549:2. More significantly, *Randall* explicitly rejected an approach that focused on the average race.

> [T]he critical question concerns not simply the *average* effect of contribution limits on fundraising but, more importantly, the ability of a candidate running against an incumbent officeholder to mount an effective *challenge*. And information about *average* races, rather than *competitive* races, is only distantly related to that question, because competitive races are likely to be far more expensive than the average race.

Randall, 548 U.S. at 255. Dr. Cann conceded as much, agreeing that competitive races see higher than average spending and ultimately agreed that the effect in such races would be less than

3.2%. TR 548:10-17.[10] And because Dr. Cann did not present his actual numbers or data, neither he nor Plaintiffs can clearly say what the effect would be in competitive races.

Dr. Cann thus failed to study the only variable challenged in this lawsuit—individual contribution limits—and failed to produce a result that is instructive in competitive rather than average races. His testimony is entitled to no weight.

Nor is Benjamin Engen's. Although Mr. Engen purported to study the effect of Colorado's contribution limits on incumbent reelection and fundraising, his analysis suffers from two fatal flaws. First, Mr. Engen used a definition of "incumbent" that is not common in the literature. TR 713:19-21. Under Mr. Engen's definition, an "incumbent" is any candidate for office who has previously received the most votes in any state-level general election for one of certain specified state offices. TR 713:15-18. In using that definition, Mr. Engen failed to study the relevant question under *Randall*: whether the limits "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." 548 U.S. at 249.

Further, his definition leads to absurd results. For example, it meant that Mr. Engen's dataset treated the 2022 gubernatorial race between the sitting Governor, Jared Polis, and a member of the University of Colorado Board of Regents, Heidi Ganahl, as a contest between two

[10] His model is flawed in other ways as well, as he admitted that his graph showing a 3.2% increase in the average race assumed incumbent spending would remain constant while the challenger spent an additional $40,000, even though he otherwise admitted that incumbent spending would increase by $70,000 in such a scenario. TR 543:9-21. He explained this discrepancy by saying that additional incumbent spending is not statistically significant, leading to the absurd conclusion that an average challenger spending $40,000 more would still receive an additional 3.2% of the vote even if the incumbent spent another million dollars. TR 544:7-11.

incumbents. 722:1-9. Four years earlier, it treated Jared Polis, a sitting United States Congressman, as a challenger running against an incumbent—Colorado's little-known Treasurer, Walker Stapleton. 722:25-723:11. And as the Court noted, it would treat Congressman Lopez as a challenger in any future race, even though he "ran and ran and ran and then finally was elected as a Congressman." TR 790:17-23.

This definitional absurdity exacerbates the second flaw with Mr. Engen's analysis: at no point did Mr. Engen compare Colorado to other states. *See, e.g.*, TR 725:15-21. As a result, Mr. Engen cannot say whether the alleged ills he identifies in Colorado are any worse than in other states, or in any way correlated to—let alone caused by—Colorado's contribution limits. Perhaps, had Mr. Engen used the common definition of incumbent, the Court could compare his analysis of incumbent fundraising and success to other states. But because he used a different definition, any such analysis would be comparing apples to oranges.

Ultimately, Mr. Engen offered no analysis "regarding incumbents as that term is commonly used." TR 724:22-25. That, combined with failing to study whether Colorado differs from other states, prevents the Court from drawing conclusions from his analysis about whether Colorado's contribution limits prevent challengers from running competitive races.[11]

b. The political party contribution limits support the constitutionality of Colorado's scheme.

Unlike in *Randall*, Colorado's five- and six-figure limits for political party contributions to candidates support the constitutionality of its overall contribution limit scheme. In *Randall*,

[11] Mr. Engen's testimony also selectively omitted evidence. Mr. Engen's data showed an *increase* in challenger success following Amendment 27 in the State House. TR at 780:8-19. Rather than explain those results, Plaintiffs dropped altogether. TR at 780:20-22.

Vermont's limits for political parties were the same "$200 to $400 limits" applicable to individual contributors. *Id*. at 257. In addition to having a "negative effect on [candidates' ability to] 'amass[] funds'" for their campaigns, these rules threatened a series of "special party-related harms." *Id.* at 257, 259. The low party limits burdened the "particularly important . . . right to associate in a political party" and "severely inhibit[ed] collective political activity," by preventing parties from aggregating many small contributions from donors to support individual candidates of the party's choice. *Id.* at 256-58. This prevented parties from fulfilling the "basic object of a political party": to collect funds from party adherents who wished to donate "with the intent that the party use the money to help elect whichever candidates the party believes would best advance its ideals and interests." *Id.* In so doing, the Court found, Vermont's limits "would reduce the voice of political parties in Vermont to a whisper." *Id.* at 259 (quotations omitted).

Those concerns are absent here. Colorado's limits for party contributions to candidates are among the highest in the country, ranging from $20,500 for state house candidates to $789,060 for governor. *See* Ex. 375. Colorado's major political parties make significant donations to candidates of their choice, including by donating to competitive races and in furtherance of other strategic party goals. TR 183:12-185:9, 649:6-652:13, 810:6-812:20.

Moreover, because Colorado's law enables political parties to contribute such large sums to candidates, it has the opposite effect on candidate fundraising than did Vermont's law: rather than negatively impacting candidates' ability to amass funds, the high limits applicable to political parties meaningfully facilitate candidates' ability to run effective campaigns. For instance, for Senator Donovan's campaigns, the party's contributions were "significant dollars" that effectively covered her campaign manager's salary. TR 811:24-812:12. Nor is she alone in

having received substantial party support. TR 672:7-675:13; Exs. 57, 59, 83, 117, 118, 335-339. And if anything, these direct contributions understate the party's impact, because they do not measure the "Get Out the Vote" expenditures from which candidates inevitably benefit.

Plaintiffs object that "practical limitations" reduce the extent to which party donations assist candidates. Pls.' Br. 21. For instance, they note that Colorado's major parties have traditionally followed a policy of neutrality at the primary phase, and that in some cases parties even choose to oppose candidates from within their own party. *Id.* at 21-22. But those are matters of party choice,[12] and the party's ability to direct its funds consistent with its goals and ideals furthers, rather than hinders, the "basic object of a political party" described in *Randall*.

Similarly, Plaintiffs complain that parties sometimes channel their funds to competitive elections and other times use their funds on Get Out the Vote efforts that will benefit multiple party affiliates. But again, those party choices do not show that Colorado's limits impair the right to associate through a political party; to the contrary, they are examples of parties exerting the very collective political action that *Randall* valued. Nor does this show that Colorado's party limits negatively impact candidates' ability to amass campaign funds. Because no candidate has a First Amendment right to claim a contribution from a political party that does not wish to support it, there will always be candidates who fail to secure party financial support—even in campaign finance regimes where there are no limits on party contributions at all.

[12] Indeed, as the trial testimony showed, the parties can jettison this practice when they wish. The Colorado Republican Party recently revised its bylaws and abandoned its longstanding primary neutrality policy to, among other actions, direct $19,000 to the U.S. congressional campaign of the party chairman. TR 638:9-639:7, 675:14-676:2.

Finally, Plaintiffs suggest that post-*Citizens United*, courts should pay little attention to party contributions because they are dwarfed by independent expenditures. Pls.' Br. 23. But independent expenditures are irrelevant to *Randall*'s discussion of political parties. *Randall* was attentive to whether party contribution limits harmed or facilitated candidates' ability to amass needed funds. Here, it is plainly the latter. Plaintiffs assert that because of independent expenditures, "[n]ow, more than ever, party contributions do not necessarily represent a significant amount of total candidate funding." Pls.' Br. 23. But this is puzzling, because independent expenditures do not represent *any* amount of candidate funding; by definition, they are independent, rather than coordinated with or provided to the candidate. They thus do not impact the percentage of candidate funds made up by party contributions.

c. Colorado's treatment of volunteer services poses no constitutional problem.

Colorado does not treat volunteer services the way that Vermont did in *Randall*. There, the Court was concerned that a volunteer could max out their donation to a candidate simply by traveling around the state because the volunteer's mileage would count as a contribution. 548 U.S. at 259-60. Not so in Colorado. Here, a contribution must be "put into the possession of or provided to a candidate or someone acting on the candidate's behalf." *Keim v. Douglas Cnty. Sch. Dist.*, 399 P.3d 722, 729 (Colo. App. 2015). Mileage incurred by a volunteer is not something put into a candidate's possession. Therefore, it is not a contribution under Colorado law and does not pose the risk identified by the Court in *Randall*.

Nor is this a source of confusion among Colorado volunteers and candidates. Stephen Bouey, the Campaign Finance and Lobbyist Program Manager at the Colorado Department of State, in his fifteen years of experience with Colorado's campaign finance system, is unaware of

any calls or emails his office has received asking questions about this. TR 888:4-13. Nor is he aware of any campaign finance complaints alleging that volunteer mileage must be reported. TR 888:17-20. Similarly, none of the candidates who testified at trial expressed any uncertainty on this point. At the preliminary injunction hearing, for example, Suzanne Taheri, former Deputy Secretary of State and candidate for State Senate, testified that she never reported her volunteers' mileage as a contribution when she was a candidate, nor did she think she had to. PI TR (03/09/2022) at 207:13-20.[13] Senator Donovan and Secretary Buescher both testified that the issue never arose for volunteers on their campaigns. TR 813:7-11; 960:15-19.

Nonetheless, Plaintiffs attempted to cast doubt on the Colorado courts' interpretation of Colorado law by parading a series of hypotheticals by Mr. Bouey. Pls.' Br. at 25. But as Mr. Bouey explained, he is not a lawyer and does not offer legal advice. TR 914:14-16. And in any event, the Secretary of State's office cannot toughen or relax obligations imposed by state law. *Keim* supplies the definition of "contribution" in Colorado, and that definition does not encompass volunteer expenses.

Nor is this ambiguous. First, Plaintiffs did not bring a vagueness challenge, obviating their reliance on vagueness caselaw. *See* Pls.' Br. at 25 (quoting *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1248 (10th Cir. 2023)). Regardless, *Keim* is not ambiguous: because a volunteer's service is not placed into the candidate's possession, it is not a contribution.

[13] *See* Fed. R. Civ. P. 65(a)(2) ("[E]vidence that is received on the motion [for preliminary injunction] and that would be admissible at trial becomes part of the trial record and need not be repeated at trial.").

d. Colorado's limits are adjusted for inflation.

In *Randall*, the Court found that failure to index contribution limits to inflation exacerbated the challenges with Vermont's regime. This conclusion was premised, in part, on the same incumbent-protection logic animating the Court's ultimate concerns with Vermont's limits. Absent an inflation adjustment, "the burden of preventing" limits from becoming too low fell on "incumbent legislators who may not diligently police the need for changes in limit levels to ensure the adequate financing of electoral challenges." *Randall*, 548 U.S. at 261.

None of those observations apply to Colorado. Unlike the limits at issue in *Randall*, Colorado's limits are adjusted for inflation. Colo. Const. art. XXVIII, § 3(13). And both the statewide and state legislative limits have increased since they were enacted in 2000. *Compare* Colo. Const. art. XXVIII, § 3 *with* 8 CCR 1505-6, Rule 10.17.

Plaintiffs dismiss this important difference between Vermont and Colorado because, in a hypothetical universe that never came to fruition, Colorado's limits might never have increased. Pls.' Br. at 14. But leaving aside this fiction, Colorado is meaningfully different than Vermont in that the people, not the legislature, are in charge of any future adjustments to the limits. Thus, there is no danger of incumbent legislators failing to adjust limits as part of an incumbent protection scheme. Further, Plaintiffs ignore other important contextual changes that may enhance candidates' ability to amass resources in elections over time, such as growth in the size of the electorate. *See* Exs. 371-72 (showing substantial increase in number of votes cast in Colorado elections from 2002 to 2022).

The Court asked about the "degree of responsiveness" to inflation required by *Randall*. TR 6:24-7:1. Although *Randall* does not specify, the fact that it ties the inflation factor to

incumbent protection and to how close the limits already are to the constitutional floor suggests that the existence, absence, or structure of an inflation adjustment must be viewed in concert with the other *Randall* factors. Perhaps an imprecise inflation adjuster, by itself, cannot save limits that fall short on the other *Randall* factors. But where, as here, the limits neither prevent challengers from running effective campaigns, nor apply to political parties or volunteer services, the existence of an adjuster—regardless of its structure—only confirms the limits' constitutionality. Certainly, *Randall* does not require that the limits be adjusted to exactly match cumulative inflation since the time of their passage, as Plaintiffs suggest. That would undermine the core principle that courts only police among different contribution limits for differences in kind, rather than differences in degree. *Buckley*, 424 U.S. at 30; *see also Randall*, 548 U.S. at 248 ("We cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives.").

Finally, to the extent the Court finds that Colorado's inflation adjuster violates the First Amendment, the Court can discretely address that provision. "[T]o determine whether partial invalidation of a state [law] is appropriate, federal courts look to state law." *Citizens for Responsible Gov. State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1195 (10th Cir. 2000) (severing unconstitutional portion of Colorado campaign finance law). Under Colorado law, courts endeavor to "strike as little of the law possible." *Dallman v. Ritter*, 225 P.3d 610, 638 (Colo. 2010). And the existence of a severability clause—like Amendment 27's, Colo. Const. art. XXVIII, § 14—"raises a presumption that parts of a law can and should be struck without upsetting the law's proper purpose." *Id.* at 639. Where a single word or phrase can address the

constitutional infirmity, Colorado courts simply strike that word. *See, e.g.*, *People v. Moreno*, 506 P.3d 849, 856 n.5 (Colo. 2022); *People v. Montour*, 157 P.3d 489, 502 (Colo. 2007).

Plaintiffs' claim, as it relates to the inflation adjuster, relies heavily on Colorado's "round down" provision. *See, e.g.*, Pls.' Br. at 14. As explained above, that provision does not raise constitutional concerns. But if it did, its invalidation requires deleting only a single word,[14] thereby preserving the "provisions or applications of [Amendment 27] which can be given effect without" the round down provision. Colo. Const. art. XXVIII, § 14.

III. Colorado's Voluntary Spending Limits regime enhances, rather than limits, political speech.

Plaintiffs' second claim challenges Colorado's Voluntary Spending Limits provision, Colo. Const. art. XXVIII, § 4(5), which doubles the applicable contribution limits under certain circumstances for candidates who agree to limit their expenditures to a specific amount, indexed to inflation. The evidence at trial shows that this provision is neither restrictive nor coercive. Instead, it only increases the ability of Colorado candidates to communicate with voters.

[14] To avoid the result that the limits will always round down, the Court can simply strike the word "lowest": "Each limit on contributions described . . . shall be adjusted by an amount based upon the percentage change over a four year period . . . rounded to the nearest ~~lowest~~ twenty-five dollars." Colo. Const. art. XXVIII, § 3(13). Under this regime, though there would be some periods in which the limits would still be rounded down, in other periods, they would be rounded up to the nearest $25 instead, removing the concern that perpetual rounding down might result in the limits "inevitably becom[ing] too low over time." *Randall*, 548 U.S. at 261.

A. Section 4(5) enables candidates to choose the contribution and spending limits that will maximize their political speech.

1. Laws that allow candidates to voluntarily accept spending limits in exchange for other benefits are constitutional so long as they are not coercive.

Since *Buckley*, courts up to and including the Supreme Court have upheld laws that enable candidates to choose between accepting voluntary spending limits in exchange for a benefit or retaining the ability to spend unlimited sums while foregoing the offered benefit. In *Buckley*, the benefit was public financing, and the Court concluded that "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." 424 U.S. at 57 n.65. Offering candidates this choice, "facilitate[d] and enlarge[d] public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. Such speech-enhancing schemes "further[], not abridge[], pertinent First Amendment values." *Id.* at 93.

Applying *Buckley*, two federal courts have upheld systems similar to Colorado's. First, *Vote Choice Inc. v. DiStefano*, 4 F.3d 26, 30 (1st Cir. 1993), addressed a Rhode Island regime permitting gubernatorial candidates to accept contributions up to twice the normal limits from an individual (as well as public financing and other benefits) in exchange for agreeing to an expenditure limit. The First Circuit found no constitutional infirmity with this choice, recognizing that "the government may legitimately provide candidates with a choice among different packages of benefits and regulatory requirements." *Id.* at 39. And since "a candidate will presumably select the option which enhances his or her powers of communication and association, . . . it seems likely that the challenged statute furthers, rather than smothers, first

amendment values." *Id.* So, too, here, where Colorado's benefit—doubling of contribution limits—leaves candidates free to select the option most likely to enhance their speech.

Second, a district court in New Hampshire also found no First Amendment violation for an even larger contribution limit disparity than Colorado has. New Hampshire allowed candidates who accepted voluntary spending limits to accept contributions up to five times greater than non-accepting candidates. *See Kennedy v. Gardner*, No. CV 98-608-M, 1999 WL 814273 (D.N.H. Sept. 30, 1999). The court found no constitutional problem, and instead held: "The choice is a fair one—an easier time raising funds but a fixed spending limit, on the one hand, or a more difficult time raising funds but unlimited ability to spend, on the other." *Id.* at *6. "'Put another way, the state exacts a fair price from complying candidates in exchange for receipt of the challenged benefit' and 'neither penalizes certain classes of office-seekers nor coerces candidates into surrendering their First Amendment rights.'" *Id.* at *8 (quoting *Vote Choice, Inc.*, 4 F.3d at 39). Colorado's offered benefit is more modest than the benefit upheld in *Kennedy*—a 2x increase to the contribution limit—and so poses no constitutional infirmity.

Several other courts have upheld systems where, as in *Buckley*, the offered benefit was public financing rather than increased contribution limits. Most recently, the Second Circuit upheld a public financing system coupled with an expenditure cap for those who opted into it. That court held that heightened scrutiny did not apply because the plaintiffs could not "show that there is a burden on candidates' rights." *Corren v. Condos*, 898 F.3d 209, 227 (2d Cir. 2018); *accord N.C. Right to Life Comm. v. Leake*, 524 F.3d 427, 436 (4th Cir. 2008) ("Since *Buckley* the circuit courts have generally held that public financing schemes are permissible if they do not effectively coerce candidates to participate in the scheme," and "we conclude that North

Carolina's public financing system is not unconstitutionally coercive."); *Daggett v. Comm'n on Gov't Ethics & Election Practices*, 205 F.3d 445, 472 (1st Cir. 2000) ("[W]e hold that Maine's public financing scheme provides a roughly proportionate mix of benefits and detriments to candidates seeking public funding, such that it does not burden the First Amendment rights of candidates or contributors."); *Gable v. Patton*, 142 F.3d 940, 948 (6th Cir. 1998) ("In general, the public funding of candidates in return for their acceptance of expenditure limits is constitutional, . . . [as long as the] benefits [do not] snowball into a coercive measure upon a non-participating candidate.") (quotations omitted); *Rosenstiel v. Rodriguez*, 101 F.3d 1544 1550 (8th Cir. 1996) ("Because participation [in the public financing system] is truly voluntary . . . , the Appellants' argument that their First Amendment rights are burdened is without merit."); *see also Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 285 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980) ("[T]he conditions imposed by Congress upon receipt of public campaign financing do not infringe upon the First Amendment rights of candidates.").

These cases are directly analogous to Colorado's voluntary spending limits regime. Clearly, Colorado could incentivize candidates to accept spending limits by offering them public financing. *See Gable*, 142 F.3d at 949 ("[A] voluntary campaign finance scheme must rely on incentives for participation[.]"). Instead, Colorado incentivizes candidates to accept spending limits by allowing them to accept up to twice the normal contribution limits (if the other criteria of Section 4(5) are also met). This difference is of no constitutional import. Section 4(5) "merely provides a . . . candidate with an *additional* funding alternative which he or she would not otherwise have and does not deprive the candidate of other methods of funding which may be thought to provide greater or more effective exercise of rights of communication or

association[.]" *Corren*, 898 F.3d at 219 (quoting *Republican Nat'l Comm.*, 487 F. Supp. at 285). The First Amendment rights of candidates are therefore not burdened. They remain free to choose between operating under Colorado's default campaign finance laws—which allow unlimited expenditures under the normal contribution limits—and accepting spending limits in exchange for higher contribution limits.[15]

2. The trial record shows that Section 4(5) enhances speech and is not coercive.

Evidence at trial confirms candidates "select the option which enhances his or her powers of communication and association." *Vote Choice, Inc.*, 4 F.3d at 39. Candidates who expect to raise and spend close to the voluntary spending limit disproportionately decline those limits. But candidates who do not expect to raise and spend much money in their race disproportionately accept the limits. Ex. 379. The only effect of Section 4(5) is to increase the political speech of those candidates who know they will not spend close to the voluntary spending limit.

[15] At the outset of trial, the Court asked: "Even if Section 4's conditional increase in campaign contribution limits for candidates limiting their expenditures does not burden First Amendment rights, how does it further a governmental interest?" TR 8:8-11. A law that does not burden First Amendment rights is subject to rational basis review. *Ysura v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009); *Corren*, 898 F.3d at 220-22. Regardless of the level of review, Section 4(5) advances the state's interest by increasing the speech of candidates who are unlikely to raise up to the spending limit, thereby providing candidates with two speech-maximizing choices, and by "relieving candidates of the burdens of private fundraising." *Id.* at 226. Contrary to Plaintiffs' suggestion, the Tenth Circuit's dicta that the scheme exists to limit campaign expenditures does not control the question of what legitimate interest Section 4(5) serves. Pls.' Br. at 31.

For the same reason, *Arizona Free Enterprise Club's Freedom PAC v. Bennett*'s observation about the "marginal corruption deterrence" served by the matching provision at issue there is irrelevant to this case. 564 U.S. 721, 752 (2011); *see also* TR 7:22-8:7 (asking this question). Colorado is not arguing that Section 4(5) furthers the anticorruption interest served by Colorado's contribution limits.

Testimony from the fact witnesses confirmed that candidates choose the option that will maximize their political speech. Senator Pelton testified that he accepted voluntary spending limits—which were $122,000 for his 2022 race—because he "[didn't] think that that kind of money would be spent in [his] race." PI TR (03/09/2022) at 133:16-21 (Sen. Pelton spent approximately $33,000 in 2022 and won his general election with about three quarters of the vote. TR 129:6-18; Ex. 400). But Senator Pelton intends to make a "different calculation about what's in [his] strategic best interests" in his 2026 election. TR 135:7-9. Specifically, because Senator Pelton expects a competitive—and presumably expensive—primary, he anticipates he may decline voluntary spending limits. *Id.*; TR 123:6-124:14.

Similarly, Congressman Lopez testified that to run a "competitive race for Governor," a candidate needs to raise "north of $4 million," TR 88:9-13, or more than the voluntary spending limit of $3,945,300, TR 80:20-23. Consistent with this opinion, Congressman Lopez declined voluntary spending limits during his gubernatorial candidacy. TR 83:7-8.

Secretary Buescher offered a similar perspective. He testified that one of the first things he did as a candidate was create a budget based on the number of voters he needed to contact in order to win. TR 796:20-797:15; 945:3-12. Based on that budget, Secretary Buescher did not consider accepting voluntary spending limits. TR 959:9-10 ("[I]n 2004, I knew that I needed to raise more money than the limits would allow.").

Trial also established that Section 4(5) does not coerce candidates into accepting voluntary spending limits. *See Gable*, 142 F.3d at 948 (noting that a choice offered to candidates "can become impermissibly coercive," amounting, in effect, to a limitation on a candidate's expenditures). To the contrary, approximately two-thirds of all Colorado candidates decline

those limits each year, Ex. 380. Senator Donovan never even seriously discussed accepting voluntary spending limits. TR 812:21-813:6. And of the witnesses to testify, just one—Senator Pelton—accepted voluntary spending limits following the passage of Amendment 27.

Ultimately, Section 4(5) supports First Amendment values. Free to choose between alternatives, candidates select the method that allows them to get their message out most effectively. Section 4(5)'s incentive is weaker than the incentive offered by public financing—it does not relieve a candidate of their need to fundraise and applies only to the subset of donors who are willing and able to donate more than the normal maximums. And since public financing's strong incentive is not coercive, Section 4(5)'s weaker incentive is also not coercive as candidates can—and most do—choose to spend unlimited amounts on their campaigns.

B. Plaintiffs' reliance on cases in which differential contribution limits are imposed, rather than chosen, upon candidates is misplaced.

Time and again, Plaintiffs refer to Section 4(5) of the Colorado Constitution as "imposing" an "asymmetric" contribution scheme. *See, e.g.*, Pls.' Br. at 32. But as the Court recognized in denying Plaintiffs' request for a preliminary injunction, Section 4(5) imposes nothing. Instead, it offers candidates a speech-enhancing choice. And "[a] statutory *choice* to limit campaign speech that is offered to all candidates without discrimination entails no . . . burden. There is no inherent constitutional defect in a law's choice-increasing framework when, as here, it does not burden a candidate's First Amendment rights." Order (Doc. #26) at 18.

According to Plaintiffs, Claim 2 is controlled by *Davis*, 554 U.S. at 740. *See, e.g.*, Pls.' Br. at 31. In *Davis*, the Supreme Court invalidated a provision of federal law that automatically increased a candidate's contribution limit when that candidate's opponent spent more than

$350,000. 554 U.S. at 729. Put differently, a candidate's decision to exercise their First Amendment right to spend personal funds on a political campaign automatically "activat[ed] . . . a scheme of discriminatory contribution limits" that benefitted their opponents. *Id.* at 740.

By contrast, here, the opponent of a candidate who rejects spending limits still must make a strategic choice between accepting higher contribution limits and a spending limit or foregoing the higher contribution limits. No asymmetric scheme is automatically triggered by any candidate's exercise of their First Amendment rights. And *Davis* itself reaffirmed *Buckley*'s holding that choosing between different benefits and detriments poses no constitutional infirmity. *Id.* at 739 ("In *Buckley*, a candidate, by foregoing public financing, could retain the unfettered right to make unlimited personal expenditures.").

The key difference between Section 4(5) and the laws invalidated in *Davis* and *Arizona Free Enterprise Club's Freedom PAC v. Bennet*, 564 U.S. 721, 727 (2011), is that in those cases, a candidate who "robustly exercise[d] [their] First Amendment right" automatically triggered a benefit to opponents that effectively penalized the first candidate for speaking. *Davis*, 554 U.S. at 739; *see also Arizona Free Enterprise*, 564 U.S. at 736. By contrast, Section 4(5) imposes no such automatic penalty when a candidate chooses to speak.[16] Instead, both candidates have the

[16] Plaintiffs argue that it does, because the doubled contribution limits for candidates that accept voluntary spending limits is not triggered unless their opponent first spends more than 10% of the applicable spending limit. Pls.' Br. at 31. But the 10% threshold serves only to substantiate the opponent's viability. By contrast, in *Davis* and *Arizona Free Enterprise*, a penalty was triggered when the candidate spent a substantial amount of money; the Supreme Court was particularly troubled that the government's goal was to "level electoral opportunities," which it deemed "a dangerous enterprise" and "basic intrusion by the government into the debate over who should govern." *Arizona Free Enterprise*, 564 U.S. at 750.

option to choose between contribution and spending frameworks that they strategically determine will best serve their interests.

C. Outlier cases in which a candidate reneges on a pledge to accept voluntary spending limits matter little to Plaintiffs' facial challenge.

The Court asked the parties about the "consequences of reneging on a pledge to limit campaign expenditures." TR 8:15-16. This question has not been addressed, or answered, by Colorado courts, and is not directly addressed by the text of the law. To the extent the Court has constitutional concerns stemming from the consequences (or lack thereof) of withdrawing voluntary spending limits, the canon of constitutional avoidance counsels in favor of adopting whatever interpretation of the consequence will allay the Court's concerns. *See, e.g.*, *Bradford v. U.S. Dep't of Labor*, 101 F.4th 707, 728 (10th Cir. 2024).

Regardless, Plaintiffs bring a facial challenge, and thus bear the burden of proving that Section 4(5) is unconstitutional in "a substantial number of applications, judged in relation to [its] plainly legitimate sweep." *Moody*, 144 S. Ct. at 2397 (quotations omitted). Even if it were to raise constitutional concerns that a candidate who withdraws acceptance of voluntary spending limits faces no consequences (to the extent that is true), such cases are outliers and cannot satisfy Plaintiffs' burden to facially invalidate the statute.

D. If Plaintiffs prevail on Claim 1, their challenge to Claim 2 is moot.

Finally, in denying the parties' cross-motions for summary judgment on this claim, the Court noted that the constitutionality of Section 4(5) is "directly related to whether the campaign contribution limits [at issue in Claim 1] are categorically too low to pass U.S. Constitutional

muster." Order Denying Mots. for Summ. J. (Doc. #88) at 3. To that end, if Plaintiffs prevail on Claim 1, their challenge to Claim 2 is moot.

In Claim 1, Plaintiffs seek an injunction prohibiting Colorado from enforcing its contribution limits. Compl. (Doc. #1) at 10-11. If they obtain that injunction, there is no case or controversy concerning Section 4(5). One cannot double a limit that does not exist. 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." *Keller Tank Servs. II, Inc. v. Comm'r of Internal Revenue*, 854 F.3d 1178, 1193 (10th Cir. 2017).

CONCLUSION

In *Randall*, the Supreme Court set out a fact-intensive standard to identify contribution limits that prevent candidates from amassing the resources necessary for effective advocacy. Here, after a lengthy trial, Colorado has established that its contribution limits clear this bar. The Court should enter judgment for Defendants.

Respectfully submitted this 23rd day of October, 2024.

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