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' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON COUNT TWO

By giving candidates a choice between regulatory systems—either high contribution limits with an expenditure cap, or normal contribution limits with no expenditure cap—Colorado allows its candidates to choose whatever system will maximize their speech. This choice enhances, rather than burdens, the First Amendment interests of Colorado candidates and voters. Plaintiffs have presented no facts establishing any burden on their First Amendment rights or that Colorado's law coerces candidates into accepting expenditure limits. Defendants are therefore entitled to summary judgment.

REPLY CONCERNING UNDISPUTED MATERIAL FACTS

5. Plaintiffs correctly pointed out that the motion for summary judgment mistakenly cited Section 7 instead of Section 4(7) of Article XXVIII of the Colorado Constitution. But Plaintiffs incorrectly assert that "Colorado's voluntary spending limits are not adjusted for

inflation every four years" under Section 4(7). This year, the voluntary spending limits ("VSL") increased by $550,025 for Governor; $110,000 for Secretary of State, Attorney General, and Treasurer; $19,775 for State Senate; and $14,275 for State House and other offices. *See* Mot. [Doc. 73], Statement of Undisputed Material Facts ("SUMF"), ¶¶ 6 & 7. This adjustment is due to inflation, as required by Section 4(7).

Plaintiffs seem to make only the minor point that because the inflation adjustment is rounded down to the nearest $25, some portion of the consumer price index's inflation measure is not captured in Section 4(7)'s inflation adjustment. But given the size of the spending limits, Plaintiffs' point is insignificant to the point of irrelevance. For example, the smallest spending limit is for State House at $102,500. An additional $25 would be .02% of that spending limit; for Governor, the $25 is .0006% of the spending limit. Accordingly, Plaintiffs' assertion that the spending limits are not adjusted for inflation is wrong and their point about the $25 rounding effect is irrelevant to Section 4(5)'s constitutionality.

REPLY ARGUMENT

Section 4(5) allows all candidates in a race to choose between different sets of benefits and regulatory requirements: higher contribution limits (if other criteria are met) and an expenditure cap, or normal contribution limits and unlimited expenditures. Unlike the unconstitutional laws in *Davis v. FEC*, 554 U.S. 724 (2008) and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) ("*AFE*"), no choice made by a Colorado candidate gives another candidate an automatic advantage. Rather, all candidates must make a strategic choice as to which regulatory mix will maximize their ability to get their messages out.

Courts uphold these speech-maximizing laws as long as they do not coerce candidates into accepting an expenditure cap. *See* Mot. [Doc. 73] at 8-10 (collecting cases). Plaintiffs do not argue, let alone present any evidence, that Section 4 is coercive. No plaintiff has testified that they were coerced into accepting VSL. *See* SUMF ¶¶ 15, 20, 22, 26. Nor does any other evidence support a finding of coercion since most candidates decline VSL. *See id.* ¶¶ 8-11.

Plaintiffs instead urge the Court to disregard the substantial body of caselaw upholding choice-increasing laws like Section 4(5). Notably, Plaintiffs did not discuss the two cases cited in Defendants' motion where courts upheld campaign finance systems that allowed candidates to select higher contribution limits in exchange for accepting expenditure limitations. *See Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993); *Kennedy v. Gardner*, No. CV 98-608-M, 1999 WL 814273 (D.N.H. Sept. 30, 1999). As in those cases, Section 4(5) "provide[s] candidates with a choice among different packages of benefits and regulatory requirements." *Vote Choice*, 4 F.3d at 39. Such a choice allows candidates to choose the system that will maximize their speech and so does not create any First Amendment burden.

The other choice-increasing laws that have been upheld by courts involve public financing systems. Similar to the laws upheld in *Vote Choice* and *Kennedy*, these public financing laws give candidates a choice to accept a benefit (public financing) in exchange for different regulatory requirements (limits on expenditures and private contributions). Plaintiffs seek to minimize the import of these public financing cases Defendants cite in two ways. First, Plaintiffs point out that most of them were decided before *Davis*. Resp. [Doc. 75] at 8. But that's irrelevant, as *Davis* was careful to differentiate the Millionaire's Amendment (which was unconstitutional) from a public financing system (which was upheld in *Buckley v. Valeo*, 424

U.S. 1 (1976)). *See Davis*, 554 U.S. at 739-40; *accord Corren v. Condos*, 898 F.3d 209, 227-28 (2d Cir. 2018) (recognizing that *Davis* "confirm[ed]" the constitutionality of public financing). So the timing of the public financing cases does not help Plaintiffs.

Second, Plaintiffs argue (somewhat circularly) that the most recent public financing case, *Corren v. Condos*, "has no application here" because it "is a public financing case." Resp. [Doc. 75] at 9. But *Corren* itself defeats the bright line Plaintiffs seek to draw between public financing cases and Section 4(5). Under the Vermont law upheld in *Corren*, once a candidate qualifies for public financing by raising enough "qualifying contributions," that candidate receives public financing grants but cannot raise any more private contributions. *See Corren*, 898 F.3d at 214-15. In other words, a publicly financed candidate has contribution limits of zero, while a non-publicly financed candidate can continue to accept contributions subject to Vermont's usual contribution limits. These asymmetrical contribution limits posed no constitutional problem in *Corren* because candidates remained free to choose whichever fundraising system allowed them to maximize their speech. Section 4(5) gives Colorado candidates the same freedom.

This feature of public financing systems also belies Plaintiffs' argument that "the fundamental question is whether Section 4 creates asymmetrical contribution limits." Resp. [Doc. 75] at 5. By their very nature, public financing systems create asymmetrical contribution limits. But this did not trouble the Court in *Buckley v. Valeo*, which found that by giving candidates the option to select public financing, the scheme "furthers, not abridges, pertinent First Amendment values." 424 U.S. 1, 93 (1976). Nor did this prevent the First, Second, Fourth, Sixth, and Eighth Circuits from upholding public financing laws. *See Corren*, 898 F.3d at 227; *N.C. Right to Life Comm. v. Leake*, 524 F.3d 427, 436 (4th Cir. 2008); *Daggett v. Comm'n on*

Gov't Ethics & Election Pracs., 205 F.3d 445, 472 (1st Cir. 2000); *Gable v. Patton*, 142 F.3d 940, 948 (6th Cir. 1998); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1550 (8th Cir. 1996). The critical distinction between these cases and Section 4(5), on the one hand, and *Davis* and *AFE*, on the other hand, is that public financing options do not "*impose*[] different contribution limits for candidates who are competing against each other." *Davis*, 554 U.S. at 738 (emphasis added). Rather, Section 4(5) and public financing systems allow candidates a choice of options which will allow the candidate to maximize his or her speech. As this Court previously recognized, "Section 4's differing contribution limits are not foisted upon specific classes of candidates—they are selected at will by the candidates." Order [Doc. 26] at 20.

Finally, Plaintiffs argue it is irrelevant that Section 4(5) gives candidates a choice because the candidates in *Davis* facing the Millionaire's Amendment also had a choice. But Plaintiffs overlook the fact that Section 4(5) imposes a choice on *both* candidates. Unlike here, the choice in *Davis* and in *AFE* is asymmetrical: once one candidate exercised a constitutional right, the opponent received a direct benefit in response:

- In *Davis*, once a candidate spent a certain amount of their own money, their opponent's contribution limits automatically increased.
- In *AFE*, once a candidate spent a certain amount of total expenditures, their opponent received direct matching funds.

Section 4(5) is different. Here, when a candidate declines VSL, their opponent also must choose whether to accept or decline VSL. And the opponent's choice, just like the candidate's choice, entails positives and negatives that each candidate must weigh for himself or herself. A law that lets both candidates choose "among different packages of benefits and regulatory requirements"

is unlike the laws at issue in *Davis* and *AFE*. *Vote Choice*, 4 F.3d at 39. And because "a candidate will presumably select the option which enhances his or her powers of communication and association," Section 4(5) "furthers, rather than smothers, first amendment values." *Id.*

CONCLUSION

The Court should grant Defendants summary judgment on Count Two.

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CERTIFICATE OF SERVICE

I certify that I served the foregoing **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON COUNT TWO** upon all parties herein by e-filing with the CM/ECF system maintained by the Court on June 13, 2023, addressed as follows:

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