IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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.

PROPOSED *AMICUS CURIAE* BRIEF OF COLORADO COMMON CAUSE, COMMON CAUSE AND CAMPAIGN LEGAL CENTER IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Lopez, Pelton and House assert constitutional challenges to, and seek a preliminary injunction prohibiting Defendants from enforcing, the contribution limits established by Article XXVIII, sections 3(1), 3(13), and 4(5) of the Colorado Constitution. *See also* 8 Colo. Code. Regs. § 1505-6:10(10.17.1(b)) (adjusted limits).

To prevail on a motion for preliminary injunction, a plaintiff must show that: "(1) the movant 'is substantially likely to succeed on the merits; (2) [the movant] will suffer irreparable injury if the injunction is denied; (3) [the movant's] threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest.'" *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016) (quoting *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009)); *Colo. Union of Taxpayers, Inc. v. Griswold*, No. 20-cv-02766-CMA-SKC,

2020 WL 6290380, *2 (D. Colo. Oct. 27, 2020).

"It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted); *see also Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 797 (10th Cir. 2019) ("A preliminary injunction is an extraordinary remedy, the exception rather than the rule."). The Supreme Court has explained that the limited purpose of a preliminary injunction is "merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

The Tenth Circuit has identified three types of "specifically disfavored" preliminary injunctions—those that: (1) alter the status quo; (2) mandate action by the nonmoving party; or (3) afford the movant all the relief that it could recover at a conclusion of a full trial on the merits. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1259 (10th Cir. 2005) (quotations omitted). Such injunctions "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Id*. (quotations omitted).

Nearly a half-century of Supreme Court precedent affirms that contribution limits are a constitutionally permissible means of advancing the government's compelling interests in preventing corruption and the appearance of corruption—so long as the limits are not so low as to prevent candidates from amassing the resources necessary for effective advocacy. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 20-29 (1976); *Nixon v. Shrink*

Mo. Gov't PAC, 528 U.S. 377, 381-98 (2000); and *Randall v. Sorrell*, 548 U.S. 230, 238-69 (2006).

Plaintiffs correctly acknowledge that *Randall* is the "key case" for evaluating whether a contribution limit is unconstitutionally low. Pls.' Prelim. Inj. Mot. 8 (ECF No. 8).[1] However, they disregard the fact-intensive nature of the *Randall* inquiry and instead move this Court to enjoin enforcement of Colorado's limit on an undeveloped factual record.

Under *Randall*, determination of the constitutionality of a contribution limit, even in the presence of so-called "danger signs," requires examination of the factual record "carefully with an eye toward assessing the statute's 'tailoring'" to the government's anti-corruption interest. 548 U.S. at 248-49 (plurality opinion). *Randall* does not authorize a leap from an observation that a contribution limit is relatively low to an immediate and reflexive conclusion that the limit is unconstitutional. Without a fully developed factual record, Plaintiffs cannot demonstrate a likelihood of success on the merits of their challenge to Colorado's contribution limits. The extraordinary relief they seek is unwarranted.

Additionally, the public interest in continued enforcement of the challenged contribution limits could not be stronger or clearer. The contribution limits of Article XXVIII were enacted by the affirmative vote of more than 66% of the electorate for the Colorado Campaign Finance Initiative (a.k.a. Initiative 27) in 2002.[2] As Plaintiffs acknowledge in

[1] In a *per curiam* opinion in *Thompson v. Hebdon*, 140 S. Ct. 348 (2019), the Supreme Court adopted Justice Breyer's *Randall* analysis.

[2] *See Colorado Campaign Finance, Initiative 27 (2002)*, Ballotpedia, https://ballotpedia.org/Colorado_Campaign_Finance,_Initiative_27_(2002) (last visited Feb. 17, 2022); *see also Official Publication of the Abstract of Votes Case for the 2001*

their preliminary injunction brief, ECF No. 8 at 25, *amicus* Colorado Common Cause supported Initiative 27 in 2002, and for the past two decades has continued to advocate enforcement of these limits with broad public support. Curbing the threat of corruption that would exist in the absence of the challenged contribution limits heavily outweighs Plaintiffs' asserted First Amendment concerns. And any urgency to Plaintiffs' claims is the result of their own delay in bringing this legal challenge, waiting until the election was imminent before seeking an injunction.

For all of the above-stated reasons and those detailed below, Plaintiffs' motion for preliminary injunction should be denied.

ARGUMENT

I. Plaintiffs have failed to show a reasonable likelihood of success on the merits of their challenge to Colorado's contribution limits under the Supreme Court's fact-based *Randall* analysis.

Since the Supreme Court first sustained the constitutionality of campaign contribution limits in *Buckley v. Valeo*, 424 U.S. 1, 20-29 (1976), it has adhered to *Buckley*'s recognition that base contribution limits serve valid anticorruption interests but "involve[] little direct restraint" on individual speech. Indeed, it has generally upheld limits on this basis alone, because once a court "is satisfied that some limit on contributions is necessary," *id.* at 30, it has "'no scalpel to probe' each possible contribution level." *Randall*, 548 U.S. at 248 (quoting *Buckley*, 424 U.S. at 30). At the same time, *Buckley* acknowledged that there must be some "lower bound" below which contribution limits

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Coordinated, 2002 Primary, 2002 General, State of Colorado, https://www.sos.state.co.us/pubs/elections/Results/2002/2002_abstract.pdf (last visited Feb. 17, 2022).

cannot be constitutionally applied, namely, when they prevent candidates from "amassing the resources necessary for effective [campaign] advocacy." *Id.* (citing *Buckley*, 424 U.S. at 21).

In *Randall*, the Supreme Court applied *Buckley*'s "closely drawn" standard to strike down Vermont contribution limits ranging from $200 to $400 per *cycle*, *id.* at 238, because the limits were "so severe" that they prevented candidates from raising the funds needed to mount competitive campaigns. *Id.* at 248. Noting, for example, that Vermont's $400 limit on contributions to gubernatorial candidates (which applied to individuals and political parties alike) cut party contributions in those races by 99%, *id.* at 254, the Court concluded that Vermont's limits threatened "to inhibit effective advocacy by those who seek election, particularly challengers," and muted "the voice of political parties," *id.* at 261.

But it arrived at that conclusion based on a thorough examination of Vermont's entire scheme of campaign finance regulation, and its analysis was grounded in record evidence demonstrating the law's effects on candidates, political parties, and campaign volunteers. *Id.* at 253. Only after such an assessment would it be appropriate to decide whether Colorado's limits are out of proportion to the valid anticorruption interests they serve. *Id.* at 248-49.

As in *Randall*, Colorado's contribution limits promote valid state interests in preventing the actuality and appearance of *quid pro quo* corruption. But even if the challenged Colorado limits are relatively low, this Court must carefully review a factual record to ensure proper tailoring. Whereas *Randall* instructs that, in the presence of "danger signs" such as low limits, courts "must review the record independently and

carefully with an eye toward assessing the statute's 'tailoring,'" *Id*. at 249, Plaintiffs mischaracterize this passage from *Randall* as requiring "independent and careful scrutiny of the limits" in the abstract, Pls.' Prelim. Inj. Mot. 8—omitting entirely the *Randall* Court's reference to the record.

Under *Randall*, determining that a contribution limit raises red flags is only the beginning of the tailoring inquiry. After observing that Vermont's limits were suspiciously low and thus warranted closer scrutiny, the *Randall* plurality proceeded to weigh the record against five "sets of considerations" that, "*[t]aken together*," 548 U.S. at 253 (emphasis added), led it to conclude that Vermont's contribution limits were unconstitutionally severe:

(1) Whether the limits "significantly restrict[ed] the amount of funding available for challengers to run competitive campaigns";
(2) Whether political parties were subject to the same limits;
(3) Whether volunteer services were treated as contributions;
(4) Whether the limits were adjusted for inflation;
(5) And finally, whether there was "any special justification" warranting a low limit.

Id. at 253-61.

The Court neither characterized these factors as exhaustive nor identified any one factor as dispositive of a limit's constitutionality. And the Court made clear that the second "step" of *Randall*'s analytical framework demands a thorough examination of the record. These are fundamentally empirical questions, and that is how *Randall* treated them, including through examination of expert witness analysis that Defendants in this case have not been afforded the opportunity to introduce. Other courts that have undertaken the *Randall* analysis, in contrast, have done so only with the benefit of a fully developed trial record. *See, e.g.*, *Thompson v. Hebdon*, 7 F.4th 811, 817 (9th Cir. 2021) (bench trial);

Zimmerman v. City of Austin, Texas, 881 F.3d 378, 382 (5th Cir. 2018) (bench trial).

II. Preliminary injunction prohibiting enforcement of Colorado's contribution limits would be adverse to the public interest.

A party seeking a preliminary injunction must show that the injunction would not be adverse to the public interest. *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016); *Colo. Union of Taxpayers, Inc. v. Griswold*, No. 20-cv-02766-CMA-SKC, 2020 WL 6290380, *2 (D. Colo. Oct. 27, 2020).

This Court explained in *Colorado Union of Taxpayers* ("*CUT*") that the Tenth Circuit has "identified three types of preliminary injunctions that are 'specifically disfavored': (1) injunctions that alter the status quo; (2) injunctions that require the nonmoving party to take affirmative action; and (3) injunctions affording the movant 'all the relief that it could recover at a conclusion of a full trial on the merits.'" *CUT*, No. 20-cv-02766-CMA-SKC, 2020 WL 6290380, at *2 (citing *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1259 (10th Cir. 2005) and *Little v. Jones*, 607 F. 3d 1245, 1251 (10th Cir. 2010)). This Court explained further that "[w]here the movant seeks one of these three types of disfavored injunctions, its motion 'must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course.'" *Id*. (citing *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft,* 389 F.3d 973, 977 (10th Cir. 2004)); *see also Fish*, 840 F.3d at 723-24.

In seeking such a disfavored injunction, the movant must "make[] a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Fish*, 840 F.3d at 724 (citing *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009)).

In *CUT*, this Court found that Plaintiffs sought a "disfavored injunction" where the injunction "would alter the status quo by prohibiting the State of Colorado from enforcing certain campaign-finance laws that it currently has the ability to enforce." *CUT*, No. 20-cv-02766-CMA-SKC, 2020 WL 6290380, at *2. The Court rejected Plaintiffs' contention that they sought "merely to press pause on campaign finance enforcement," instead recognizing that "press[ing] pause" would effectively "rewrite the current statutory scheme" governing campaign finance. *Id*. The Court also rejected Plaintiffs' contention that the injunction they sought was intended to preserve the "last uncontested status" between the parties, instead concluding that the last uncontested status was the situation that existed in the years prior to the lawsuit, when the State had the power to enforce its campaign finance laws. *Id*.

Plaintiffs in this case likewise seek a disfavored injunction to alter the status quo by prohibiting the State of Colorado from enforcing certain campaign-finance laws it currently has the ability to enforce. Without enforceable limits, candidates could receive unlimited contributions and spend those funds as this lawsuit proceeds, thus changing the status quo and increasing the risk of corruption. Plaintiffs seek to effectively rewrite the current statutory scheme governing an election that is merely months away—effectively eliminating the contribution limits that have governed Colorado elections for the past two decades. This Court must therefore closely scrutinize Plaintiffs' motion "to assure that the exigencies of the case" support Plaintiffs' request. *Id*.

Moreover, as was true in *CUT*, "Plaintiffs' delay in initiating this case and seeking an injunction weighs heavily against the issuance of a preliminary injunction." *Id*. at *3.

Plaintiff Greg Lopez filed a candidate affidavit on August 22, 2019, announcing his intent to be a candidate for governor in the 2022 election.[3] Mr. Lopez had also run for governor in 2018, having filed a candidate affidavit on May 5, 2017, for that race.[4] For nearly five years Mr. Lopez has been aware of and has campaigned under the contribution limit for which he now seeks an injunction on enforcement. Plaintiff Steven House has been making contributions under the challenged contribution limits for more than a decade.[5] Plaintiff Rodney Pelton filed a candidate affidavit on November 24, 2021, announcing his intent to be a candidate for Colorado Senate District 35 in the 2022 election.[6]

Any urgency to Plaintiffs' claims is the result of Plaintiffs' own delay in bringing this legal challenge, waiting until the election was imminent before seeking an injunction. "This delay suggests a manufactured urgency." *Id*.

While it is clear that awarding Plaintiffs the extraordinary relief they seek would be adverse to the public interest, it is equally clear that maintaining the status quo through

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[3] Colo. Secretary of State, Elections Division, *Confirmation of Candidate Affidavit Filing to Greg Lopez*, Aug. 22, 2019, *available at* https://tracer.sos.colorado.gov/PublicSite/SearchPages/CandidateDetail.aspx?Type=CA&SeqID=44661 (last visited Feb. 21, 2022).

[4] Colo. Secretary of State, Elections Division, *Confirmation of Candidate Affidavit Filing to Greg Lopez*, May 9, 2017, *available at* https://tracer.sos.colorado.gov/PublicSite/SearchPages/CandidateDetail.aspx?Type=CA&SeqID=37330 (last visited Feb. 21, 2022).

[5] Colo. Secretary of State TRACER System Contributor Search for Steven House, https://tracer.sos.colorado.gov/PublicSite/SearchPages/ContributionSearch.aspx (last visited Feb. 17, 2022) (showing contributions beginning Jan. 29, 2010).

[6] Colo. Secretary of State, Elections Division, *Confirmation of Candidate Affidavit Filing to Rodney Pelton*, Nov. 24, 2021, *available at* https://tracer.sos.colorado.gov/PublicSite/SearchPages/CandidateDetail.aspx?Type=CA&SeqID=52283 (last visited Feb. 21, 2022).

enforcement of Colorado's longstanding contribution limits—and denial of Plaintiffs' motion—directly serves the public interest of preventing actual and apparent corruption.

The Supreme Court explained in *Buckley* that it is unnecessary to look beyond contribution limits' "primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification" for the limits. 424 U.S. at 26. The Court explained that "[t]o the extent that large contributions are given to secure political quid pro quo's from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id*. at 26-27. The Court continued: "Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id*. at 27.

Section 1 of the amendment to the Colorado Constitution establishing the challenged contribution limits makes clear that the limits were enacted precisely for the purposes recognized in *Buckley* and that enforcement of these limits is in the public interest:

> The people of the state of Colorado hereby find and declare that large campaign contributions to political candidates create the potential for corruption and the appearance of corruption; that large campaign contributions made to influence election outcomes allow wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process; … and that the interests of the public are best served by limiting campaign contributions….

Colo. Const. art. XXVIII, § 1. Colorado voters who approved enactment of contribution

limits through passage of Initiative 27 by a 66% to 34% margin[7] "legitimately conclude[d] that the avoidance of the appearance of improper influence 'is also critical... if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (citing *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)).

Plaintiffs seek an especially disfavored form of preliminary relief warranting close scrutiny, but fail to meet their burden of showing that their requested injunction of Colorado's contribution limits would not be adverse to the public interest. The public's interest is in continued enforcement of Colorado's corruption-preventing contribution limits.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for preliminary injunction.

[7] *See Colorado Campaign Finance, Initiative 27 (2002)*, Ballotpedia, https://ballotpedia.org/Colorado_Campaign_Finance,_Initiative_27_(2002) (last visited Feb. 17, 2022); *see also Official Publication of the Abstract of Votes Case for the 2001 Coordinated, 2002 Primary, 2002 General*, State of Colorado, https://www.sos.state.co.us/pubs/elections/Results/2002/2002_abstract.pdf (last visited Feb. 17, 2022).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2022, I electronically filed the foregoing Brief *Amicus Curiae* with the Clerk of the Court of the U.S. District Court of the District of Colorado by using the CM/ECF system, which will accomplish electronic notice and service for all counsel of record.

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