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' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Colorado law allows candidates for public office to choose among different options for how best to finance their campaigns. Courts have consistently upheld these choice-increasing laws, as Defendants detailed in their motion for summary judgment. Plaintiffs' motion for summary judgment instead relies on cases that invalidated different laws that automatically penalized candidates regardless of the choices made by their opponents. Those laws bear little resemblance to Colorado's. Plaintiffs' motion for summary judgment should therefore be denied.

RESPONSE TO STATEMENT OF UNDISPUTED FACTS

1. Defendants partially admit paragraph 1. Defendants admit that both article XXVIII of the Colorado Constitution and the Secretary of State's regulations govern campaign finance law in the state. Defendants further state that the Fair Campaign Practices Act (§ 1-45-101, C.R.S. (2022), *et seq.*) also comprises part of Colorado's campaign finance laws.

2. Defendants partially admit paragraph 2. Defendants admit that the state's contribution limits were initially established in section 3 of article XXVIII. But because those limits are indexed to inflation, Defendants further state that the current contribution limits are established by rule.

3. Defendants admit paragraph 3.

4. Defendants admit paragraph 4.

5. Defendants admit paragraph 5 for purposes of this motion. While Defendants dispute parts of Exhibit 1, those disputes are not material to Plaintiffs' motion.

6. Defendants admit paragraph 6.

7. Defendants partially admit paragraph 7. Defendants agree that there is legal uncertainty as to whether a candidate who initially accepts, but later withdraws from, the voluntary spending limits is entitled to keep any contributions above the ordinary contribution amount. But Plaintiffs assert that this uncertainty extends to candidates who "renege[]" on the voluntary spending limits. Withdrawal from voluntary spending limits is permitted in certain circumstances. *See* Colo. Const. art. XXVIII, § 4(4). But if by "renege[]" Plaintiffs mean there are no legal consequences if a candidates accepts and then violates the voluntary spending limits, Defendants deny that, as such a candidate would be subject to sanctions. *See* Colo. Const. art. XXVIII, § 10(1) ("Any person who violates any provision of this article relating to . . . voluntary spending limits shall be subject to a civil penalty[.]").

8. Defendants admit paragraph 8.

9. Defendants partially admit paragraph 9. Defendants admit that House intends to contribute to political candidates in the future. Defendants also admit that Pelton currently

intends to run for state office again in Colorado. But contrary to paragraph 9, Pelton does not intend to run for any office in 2024, as his current senate seat is not up for reelection until 2026. And Plaintiffs have not cited any evidence to support their statement that Lopez intends to run for state office in 2024 or at any point.

STATEMENT OF ADDITIONAL FACTS

1. In the 2022 election cycle, 78 candidates for state office accepted voluntary spending limits ("VSL") and made expenditures in their campaigns. (Another 76 candidates accepted voluntary spending limits but made no expenditures.) *See* Ex. J, ¶ 3.[1]

2. In 2022, only 2 candidates (one for state house, one for state senate) who accepted VSL spent up to the limit. This is about 3% of the 78 candidates who accepted VSL and spent money in their campaigns. Neither candidate is a plaintiff in this lawsuit. *Id.* ¶ 4.

3. By contrast, 43 out of 208 candidates (21%) who declined VSL and made expenditures in their campaign exceeded the VSL limit:

   a. 25 candidates for state house declined VSL and spent more than the limit;

   b. 13 candidates for state senate declined VSL and spent more than the limit; and

   c. 5 candidates for statewide office (Governor, Secretary of State, Attorney General, Treasurer, and State Board of Education) declined VSL and spent more than the limit.

Id. ¶ 5.

[1] This number deviates slightly from the total number of candidates who accepted VSL in 2022 stated in Defendants' motion for summary judgment because a few additional candidates entered races in 2022 after Defendants served their discovery responses. The differences are not material. *See* Ex. J, ¶ 6.

4. The state house candidate who accepted VSL and reached the spending limit in 2022 later sued the state alleging that he had not intended to opt into VSL. *See Archer v. Griswold*, --- F. Supp. 3d ---, 2022 WL 16635397 (D. Colo. 2022).

5. The state senate candidate who accepted VSL and reached the spending limit received $10,100 in contributions from individuals who gave more than the $400 limit that would have applied if he declined VSL. Ex. J, ¶ 7.

6. In 2022, only 9 of the 78 candidates (12%) who accepted VSL spent more than 50% of those limits. 88% of the candidates who accepted VSL spent less than half of the limits. *Id.* ¶ 8.

7. By contrast, 78 of the 208 candidates who declined VSL (38%) spent more than half of the applicable limits; 62% spent less than half. *Id.* ¶ 9.

LEGAL STANDARDS

"Cross-motions for summary judgment are treated as two individual motions for summary judgment and held to the same standard, with each motion viewed in the light most favorable to its nonmoving party." *Banner Bank v. First Am. Title Ins. Co.*, 916 F.3d 1323, 1326 (10th Cir. 2019). A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant has the burden to show the absence of a genuine fact issue. *See Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 36 F.3d 1513, 1517 (10th Cir. 1994). If the movant makes this showing, "the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Id.* at 1518.

ARGUMENT

As detailed in Defendants' motion for summary judgment, federal courts have upheld laws that offer candidates a choice between different ways to finance their campaigns, so long as the choice does not coerce them into surrendering their First Amendment rights. *See* Defs.' Mot. for Summ. J. [Doc. 73] ("Defs.' Mot.") at 6-13. Because such laws allow candidates to choose whatever funding method lets them speak the most, such systems enhance First Amendment values and allow for a public forum where political voices are heard more, not less. This is true whether the courts have reviewed systems that offer candidates public financing in exchange for agreeing to an expenditure cap—*see, e.g.*, *Corren v. Condos*, 898 F.3d 209 (2d Cir. 2018)—or a system, like Colorado's, that offers higher contribution limits in exchange for agreeing to an expenditure cap—*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).

The arguments Defendants made in their summary judgment motion also show why Plaintiffs' summary judgment should be denied. Rather than repeat those arguments, Defendants incorporate them by reference here. *See* Defs.' Mot. at 6-13. Below, Defendants respond to the arguments raised by Plaintiffs in their motion for summary judgment.

I. Colorado's contribution limits are not subject to heightened scrutiny because they do not burden Plaintiffs' rights of speech and association.

Plaintiffs begin with the assertion that "[b]ecause Colorado's asymmetrical contribution limits burden Plaintiffs' rights of speech and association, they are subject to strict scrutiny." Pls.' Mot. for Summ. J. [Doc. 72] ("Pls.' Mot.") at 4. But Plaintiffs "have skipped a step: before such heightened scrutiny applies they must show that there is a burden on candidates' rights, and this they cannot do." *Corren*, 898 F.3d at 227; *see also Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1549

(8th Cir. 1996) ("Our first task . . . is to determine whether the challenged provisions impose any burden at all on the First Amendment rights of candidates.").

Here, Section 4(5) does not impose a burden on Plaintiffs' constitutional rights. As this Court previously held, a "statutory *choice* to limit campaign speech that is offered to all candidates without discrimination entails no such burden." Order [Doc. 26] at 18. Plaintiffs assert in response that "[l]aws that sanction asymmetrical fundraising substantially burden First Amendment rights." Pls.' Mot. at 10. But this is an overstatement. Courts have uniformly upheld laws that allow candidates to choose a public financing system, *see* Defs.' Mot. at 9-10, and many of those laws involve candidates agreeing to forego all private fundraising. In the public financing system upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976), for example, "private contributions are limited to zero" when "a candidate accepts public financing." *See FEC v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 516 (1985) (White, J., dissenting). If laws allowing candidates to select a contribution limit of zero are constitutional, Colorado's VSL laws easily pass muster.

Plaintiffs' motion relies principally on three cases: *Davis v. FEC*, 554 U.S. 724 (2008); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) ("*AFE*"); and *Riddle v. Hickenlooper*, 742 F.3d 922 (10th Cir. 2014). None of those cases concern state laws, like Colorado's, that offer candidates a choice between (a) normal contribution limits and unlimited expenditures, or (b) heightened contribution limits and limited expenditures. The only two courts to consider such laws have upheld them. *See Vote Choice*, 4 F.3d at 39; *Kennedy*, 1999 WL 814273, at *8.

Rather, all three cases involve laws that automatically benefit a candidate's opponent when the candidate exercises a constitutional right, regardless of any choice made by the opponent. For this, and other reasons articulated below, these cases do not alter this Court's prior conclusion that Section 4(5) does not burden First Amendment rights.

A. *Davis v. FEC*

Plaintiffs rely most extensively on *Davis*. The Court there held the Millionaire's Amendment, a law that automatically increased the contribution limits for opponents of self-financed candidates, was unconstitutional. But *Davis* involved an entirely different First Amendment interest: the "fundamental . . . right to spend personal funds for campaign speech." 554 U.S. at 738. Section 4(5) does not affect that interest, as Colorado candidates remain free to self-finance their campaigns without penalty.

Section 4(5) is more analogous to public financing laws—which do not burden First Amendment rights, *see* Defs.' Mot. at 7-10—than to the Millionaire's Amendment, in two ways. First, Section 4(5) does not automatically burden one candidate. In *Davis*, once a candidate exercised her fundamental right to use personal funds, that right was automatically burdened "by the activation of a scheme of discriminatory contribution limits" that benefited her opponent. *Id.* at 740. By contrast, in Section 4(5) and public financing systems, every candidate must choose whether to accept spending limits, in exchange for certain benefits, or to retain the right to spend unlimited funds while foregoing those benefits. Section 4(5) thus does not automatically trigger "a scheme of discriminatory contribution limits" like the Millionaire's Amendment. *Id.*

Second, Section 4(5) and public financing systems differ from *Davis* because they require candidates to make tradeoffs between benefits and detriments. In *Davis*, the opponent of a self-

financed candidate receives a benefit with no corresponding detriment once the self-financed candidate spends a certain amount of their own money. But here, like in a public financing system, the opponent of a candidate who rejects spending limits still must make a strategic choice: whether to accept spending limits in exchange for higher contribution limits, or not. Plaintiffs are thus wrong when they try to differentiate public financing cases by asserting that "a candidate that declines [VSL] gives his opponent a fundraising advantage that will harm the declining candidate," Pls.' Mot. at 12; in fact, that opponent will receive a fundraising advantage only if he accepts another, offsetting detriment (a limit on campaign expenditures). *See Davis*, 554 U.S. at 739 (differentiating the constitutional "choice *involved* in *Buckley* . . . from the choice *imposed*" by the unconstitutional Millionaire's Amendment) (emphasis added). Unlike in *Davis*, where a self-funding candidate's opponent automatically benefits, Section 4(5) merely gives each candidate the strategic choice that is most beneficial to their campaign.

Davis itself supports Defendants' reliance on the public financing cases. *Davis* expressly relied on *Buckley*'s conclusion that public financing systems were constitutional, recognizing that "[i]n *Buckley*, a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures." *Id.* at 739. Here, too, like *Buckley* and unlike *Davis*, a candidate who does not accept the voluntary spending limits retains the unfettered right to use their own funds and to raise and spend unlimited amounts of money.

Finally, Plaintiffs point to the Supreme Court's observation in *Davis* that "[w]e have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *Davis*, 554 U.S. at 738. But Section 4(5) doesn't *impose* different contribution limits on competitors. Rather, Section 4(5) allows all

candidates to choose their contribution and expenditure limits. As the public financing cases demonstrate, it is constitutionally permissible to require all candidates to make a strategic choice between two alternative ways of financing their campaign. And this choice enhances, rather than burdens, the candidates' First Amendment freedoms by permitting them to pursue the strategy that will maximize their speech.

B. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*

These features that differentiate Section 4(5) from *Davis*—that the law offers all candidates the same strategic choice and that choice does not confer an automatic benefit on one party—also differentiate this case from *AFE*. The Court there invalidated a law that automatically provided public matching funds to a publicly financed candidate when her opponent spent more than a certain threshold. 564 U.S. at 728-30 . Unlike Section 4(5), which gives all candidates the same choice between certain benefits and detriments, the Arizona law created only a "benefit to the publicly financed candidate": "the direct and automatic release of public money." *Id.* at 737. By giving every candidate the same choice, Section 4(5) does not "impose[] an unprecedented penalty on any candidate who robustly exercises his First Amendment rights," *id.* at 736 (quoting *Davis*, 554 U.S. at 739). To the contrary, if the opponent also declines voluntary spending limits—as most candidates do—then all candidates in the race are subject to the same contribution and expenditure limits. And if the opponent accepts the limits, the benefit the opponent receives from higher contribution limits is offset by her voluntary acceptance of a cap on spending.

C. *Riddle v. Hickenlooper*

Plaintiffs' final case bears little similarity to this one. *Riddle* concerned a state law that allowed major party candidates to accept contributions up to the limit for both primary and general elections, but only allowed minor party candidates to accept contributions for both cycles if they actually faced a primary challenge. 742 F.3d at 924. The effect of this scheme was that some candidates competing against one another in the same election faced different contribution limits based on no choice made by either candidate. As with the cases above, these disparate limits were applied automatically, not as the result of candidate choice. And as with the cases above, these detriments were not offset by any corresponding benefits. *Riddle* has nothing to say about laws like Section 4(5) that give candidates a "choice among different packages of benefits and regulatory requirements." *Vote Choice*, 4 F.3d at 39.

II. Plaintiffs have failed to present evidence showing that they are entitled to judgment as a matter of law.

The language used by Plaintiffs in their motion is dire indeed: candidates are in an "untenable position," facing a "constitutional dilemma" that puts them in a "no-win situation" in which they must "surrender a portion of their" constitutional freedoms. Pls.' Mot. at 3-4. But the facts do not match the rhetoric. Despite having a year of discovery to develop facts to support their claim that candidates and contributors are severely harmed by having to choose between two different methods of financing their campaign, they failed to identify in their motion a single candidate who was harmed by VSL.

The evidence instead shows that candidates have little trouble choosing the contribution limit that maximizes their ability to speak. 88% of candidates who choose VSL spent less than half of the limits. Statement of Add'l Facts ¶ 6. The 88% could benefit from the higher

contribution limits (provided the other requirements of Section 4(5) are met) and clearly faced no impact on their ability to spend. To the contrary, the higher contribution limits allowed them to speak more by raising more money. Only two candidates that accepted VSL spent up to the limit: one of them says he didn't mean to select VSL, and the other benefited from VSL by accepting over $10,000 in contributions greater than the normal contribution limits. *Id.* ¶¶ 2, 4, 5. By contrast, 43 candidates declined VSL and spent more than the limit. *Id.* ¶ 3. Far from a "no-win situation," these facts show that voters and candidates both win because they benefit from candidates being able to select the funding mechanism that best enables them to speak.

Plaintiffs also assert that VSL places a "burden" on "contributors' freedom of political association," but they do not develop that argument. Pls.' Mot. at 4. While some contributors might like to give candidates more money—and that's purely hypothetical, as Plaintiffs cite no evidence in support—the desire to give more does not show that contributors are unconstitutionally burdened. To the extent they argue that contributors to VSL-declining candidates suffer some equal protection injury because they can give less than contributors to VSL-accepting candidates can give, they pled no such injury in their complaint and have offered no evidence in support. As to any claim that Section 4(5) burdens contributors' First Amendment right of association by requiring them to donate at Colorado's base contribution limits, that claim merges with their challenge to those contribution limits, not their challenge to VSL. In fact, from the perspective of contributors, Section 4(5) offers only benefits because it allows them (in some circumstances) to donate more than they otherwise could.

Plaintiffs also speculate that some candidates who initially accept VSL but later decline VSL may not have to return the higher contributions they received. Mot. 12. But Plaintiffs have

presented no evidence of any candidate that did this; if there is such a candidate, whether the candidate returned the excess contributions; or the frequency with which this hypothetical situation arises. Such speculation does not satisfy Plaintiffs' burden.

Remarkably, Plaintiffs seem to embrace their lack of any evidence to support their motion for summary judgment, going so far as to argue that "[n]o 'empirical evidence' is necessary." Pls.' Mot. at 14 (quoting *AFE*, 564 U.S. at 746). But the Court in *AFE* made this statement in the context of a statute that automatically burdened candidates' speech. Because the law automatically benefited the candidates' opponent without requiring any offsetting detriment from the opponent, the burden was self-evident. Here, where all candidates must choose between different levels of benefits and detriments, no such self-evident burden exists. Plaintiffs instead must show that some burden exists. Additionally, the *AFE* Court also found that "there is evidence" of burden, a far cry from this case, where Plaintiffs presented no such evidence and Defendants' uncontested evidence belies any burden. *AFE*, 564 U.S. at 745.

In short, the evidence here fails to show that Section 4(5) burdens Plaintiffs' First Amendment rights. Instead, it points to an unmistakable conclusion: if Plaintiffs prevail, Colorado candidates will speak less, not more. This is because 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 . . . . Since the candidate remains free to choose between funding alternatives, he or she will opt for [VSL] only if, in the candidate's view, it will *enhance* the candidate's powers of communication.

Corren, 898 F.3d at 219 (quoting *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)).

CONCLUSION

The Court should deny Plaintiffs' motion for partial summary judgment.

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CERTIFICATE OF SERVICE

I certify that I served the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** upon all parties herein by e-filing with the CM/ECF system maintained by the Court on May 30, 2023, addressed as follows:

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DEFENDANTS' EXHIBIT INDEX
FOR
DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT

J.	Declaration of Stephen Bouey, dated May 30, 2023
K.	Attachment to Bouey Declaration, data compilation from TRACER database