UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
DENVER DIVISION

GREG LOPEZ, et. al, *Plaintiffs*, v. JENA GRISWOLD Colorado Secretary of State, et. al, *Defendants*.	Case No. 1:22-cv-0247-JLK PLAINTIFFS' REPLY BRIEF REGARDING MOOTNESS AND STANDING

Plaintiffs submit this reply brief pursuant to the Court's order. (ECF 84).

I. LOPEZ'S AND PELTON'S SECTION 4 CLAIM IS NOT MOOT.

Greg Lopez's and Rodney Pelton's claim against Colo. Const. art. 28, § 4 ("Section 4") "fit[s] comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *Fed. Election Comm'n v. Wis. Right to Life, Inc*., 551 U.S. 449, 462 (2007). Colorado was unconcerned about mootness when it defended Section 4 on summary judgment. (*See* ECF 73; ECF 76; ECF 77). Now, it argues the future is too complicated and uncertain to know if Section 4 will impact Lopez and Pelton again; so, that claim is moot. (ECF 83 at 1-8). But Colorado "asks for too much." *Wis. Right to Life*, 551 U.S. at 463.

Demonstrating "a reasonable expectation that the same controversy will recur," *id*., "is not" a high bar. *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1166 (10th Cir. 2023) (citing *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988)). The Supreme Court has "recognized that the capable of repetition, yet evading review doctrine, in the context of election cases, is appropriate." *Wis. Right to Life*, 551 U.S. at 463 (internal quotation marks omitted). "Requiring repetition of every 'legally relevant' characteristic of [a Section 4] challenge—down to the last detail—would

effectively overrule" the Supreme Court. *Id*. "History repeats itself, but not at the level of specificity demanded by [Colorado]." *Id*.

Colorado's reliance on cases like *Patrick G v. Harrison Sch. Dist. No. 2*, 40 F.4th 1186 (10th Cir. 2022), is misplaced. (ECF 83 at 3). The *Patrick G* plaintiff's claims were moot because they were too "fact-specific" to show "certainty of the continued dispute." 40 F.4th at 1206 (internal quotation marks omitted).

Here, however, the same Section 4 dispute occurs in every Colorado election. This election law applies to all candidates for Colorado public office. *See* Section 4. Lopez and Pelton have established—undisputedly (*see* ECF 83 at 4)—that they will run for office again in the next election. (*See* ECF 82 at 2-5). As candidates, Section 4 will burden their First Amendment rights the same way again. Therefore, "the same controversy [is] sufficiently likely to recur." *Wis. Right to Life*, 551 U.S. at 463.

Indeed, Section 4 injures the First Amendment rights of all Colorado candidates in every election. Each candidate must choose whether they accept Section 4's terms. *See* Section 4(3); CRS 1-45-110(1); (ECF 82-5, 82-7, 82-9, 82-12). Thus, Section 4 "force[s] a candidate 'to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.'" *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 736 (2011) (quoting *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008)) ("*AFE*"). This "forced" choice is "unconstitutional." *Id*.[1] No "empirical evidence" is necessary "to determine that [Section 4] is burdensome." *Id*. at 746. The First Amendment "burden" that asymmetrical campaign contribution schemes, like Section 4, place on candidates

[1] Colorado disputes that Section 4's forced choice violates the First Amendment. (*See* ECF 76 at 6-10). But that argument goes to the merits, not justiciability. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015).

is "*evident* and *inherent*." *Id*. at 745 (emphasis added). And "[b]ecause [laws like Section 4] impose[] a substantial burden on the exercise of the First Amendment right[s]" the Supreme Court has "never upheld" them. *Davis*, 554 U.S. at 738, 740.

There is "a reasonable expectation that the same [Section 4] controversy will recur" because Lopez and Pelton have undisputedly shown they will be candidates for elected office again. *Rio Grande Found*., 57 F.4th at 1166. Their Section 4 claims are not moot.

II. HOUSE HAS STANDING TO CHALLENGE SECTION 4.

Because Lopez's and Pelton's claims against Section 4 can proceed, Steven House's standing to challenge the law is irrelevant. Even defendants agree, "[i]f at least one plaintiff has standing, the suit may proceed." *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023) (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*., 547 U. S. 47, 52, n. 2 (2006)); (ECF 83 at 4 n.1 (citing *Henderson v. Ft. Worth Indep. Sch. Dist*., 526 F.2d 286, 288 n.1 (5th Cir. 1976) ("Since this case is not moot as to [one] appellant . . . , it is not strictly necessary to consider the standing and mootness issues as they bear on [the other] appellant[.]"))).

Even so, House has standing to challenge Section 4. (*See* ECF 82 at 5-12).

Colorado asserts a '"heads I win, tales you lose'" argument against House. *United States v. Moore*, 983 F. Supp. 2d 1030, 1034 n.3 (E.D. Wis. 2013). Defendants argue Section 4 cannot injure House because if his candidate's contribution limits are either "normal or double[d]," he is "always" allowed to "contribute at least the normal contribution limit." (*See* ECF 83 at 8). And even if he suffers a constitutional injury, an injunction against Section 4 does not redress it. *Id*. at 8-9. "These arguments miss the point." *AFE*, 564 U.S. at 747.

Contributing to political candidates is a "form of political expression," which is a "fundamental right." *Riddle v. Hickenlooper*, 742 F.3d 922, 927 (10th Cir. 2014). House wants to

contribute more to his chosen candidates than Colorado law allows, either under the normal limits or under Section 4's asymmetrical campaign contribution scheme. (*See* ECF 1 ¶¶ 36-62; ECF 46 ¶¶ 36-62; ECF 82 at 7-12; ECF 82-17 at 52:23-54:5). And in 2018 and 2022, Section 4 treated House differently than it treated contributors to the opponents of House's candidates. (*See* ECF 82 at 7-12). "[B]y treating the contributors differently, [Section 4] impinged on [House's] right to political expression." *Riddle*, 742 F.3d at 927. An injunction against Section 4 will end this unconstitutional differential treatment and, thus, stop the law from impinging on House's right to political expression. *Id*.

However, Colorado argues House cannot rely on *Riddle* without an Equal Protection claim. (ECF 83 at 9). Not so.

In *Riddle*, campaign contributors brought a First Amendment and Equal Protection challenge to a Colorado law that "treated contributors differently based on the political affiliation of the candidate being supported." 742 F.3d at 924, 927. Because the Tenth Circuit ruled on the Equal Protection claim, it declined to address the First Amendment challenge. *Id*. at 924. However, the Tenth Circuit used First Amendment jurisprudence to decide the case. *Id*. at 929-30 (citing *Davis*, 554 U.S. 737-44).

Indeed, the *Riddle* court applied First Amendment scrutiny to the contributors' contribution limits challenge. *Id*. at 928. And when the Tenth Circuit concluded the Colorado law was an asymmetrical campaign contribution scheme, it "follow[ed]" the First Amendment "teaching of *Davis* and" held the law was "unconstitutional." *Id*. at 929-30. It reasoned that "[u]ltimately, the [*Davis*] law failed because it imposed 'different contribution … limits on candidates vying for the same seat.'" *Id*. at 929 (quoting *Davis*). The *Riddle* court noted that *Davis* involved First Amendment and Equal Protection claims too. *Id*. at 929 n.5. And "[t]hough the [Supreme] Court

rested on the First Amendment rather than on the right to equal protection, the rationale applie[d] with even greater force" to the *Riddle* equal protection claim. *Id*. (citing Richard Briffault, *Davis v. FEC: The Roberts Court's Continuing Attack on Campaign Finance Reform*, 44 Tulsa L. Rev. 475, 488 (2009) (discussing the *Davis* Court's emphasis on equality, such as the references to "'discriminatory fundraising limitations,'" "'fundraising advantages for opponents,'" and "'the unprecedented step of imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat'" (footnotes omitted))).

"The First Amendment protects [House's] political association[s] as well as [his] political expression." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (*per curiam*). The "First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas." *Id*. (internal quotation marks and citations omitted). "Making a contribution, like joining a political party, serves to affiliate a person with a candidate." *Id*. at 22. "A contribution serves as a general expression of support for the candidate and his views." *Id*. at 21. Accordingly, contributing to political candidates is a "form of political expression" and a "fundamental right." *Riddle*, 742 F.3d at 927.

"First Amendment freedom of speech and association claims usually involve a separate analysis from equal protection claims." *Constitution Party of Kansas v. Biggs*, 813 F. Supp. 2d 1274, 1277 (D. Kan. 2011). But "neat distinctions between challenges grounded in [First Amendment] rights and those arising under the Equal Protection Clause are difficult to apply in practice. This is especially the case where, as here, the allegations involve election laws …." *Green Party v. Weiner*, 216 F. Supp. 2d 176, 188 (S.D.N.Y. 2002). "[T]he choice of which analysis to adopt may well prove irrelevant. Whether particular claims are characterized as equal protection claims with a First Amendment component or as First Amendment claims with an

equal protection component does not alter the ultimate analysis required to resolve such claims." *Id*. *Davis* and *Riddle* show that is the case with constitutional challenges to asymmetrical campaign contribution schemes.

Whether a court is faced with a First Amendment or Equal Protection challenge to an asymmetrical campaign contribution scheme, like Section 4, *Davis* and *Riddle* hold First Amendment analysis is the dispositive issue. Accordingly, House's Frist Amendment claim against Section 4 should proceed.

CONCLUSION

All of Plaintiffs' claims should proceed.

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Respectfully submitted,

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