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 IN SUPPORT OF REQEUST FOR JUDGMENT

Plaintiffs state the following in reply to defendants' summation brief (ECF 122):

I. PLAINTIFFS HAVE STANDING AND THEIR CLAIMS ARE NOT MOOT.

A. House has standing as a past and future contributor to Colorado candidates.

Defendants argue that plaintiff Steve House has standing to challenge neither Colorado's contribution limits nor Section 4. This Court already held that House has standing to challenge the contribution limits based on his history of contributing maximum donations to Colorado politicians and his intent to continue doing so in future elections. Order (ECF 88) at 2 n.1. House's testimony confirms the same facts and more.[1] *See* Plfs. Br. (ECF 119) at 2-3.

Rather than dispute House's testimony, defendants argue contributors lack standing to challenge the amount of contribution limits because any limit at all—no matter the size—still allows them "to associate with and symbolically support his candidates of choice through contributions." Defs. Br. (ECF 122) at 4. To make this argument, defendants piece together a

[1] The Court resolved only House's standing to challenge the contribution limits for the same reasons it denied summary judgment on Section 4. Order (ECF 88) at 2 n.1. House's testimony makes clear he has contributed the maximum amount to individuals whose opponents received double contributions under Section 4 and he will continue doing so. Trial Tr. Vol. 1, 153-61.

series of out-of-context quotes from *Randall v. Sorrell*, 548 U.S. 230 (2006), which only explain why limits on contributions inflict less severe First Amendment injuries than limits on expenditures. But a lesser injury is still an injury under Article III. And the *Randall* Court clearly identified two different "aspect[s]" of a contributor's First Amendment injury created by contribution limits: the "ability to support a favored candidate," and the ability to give a "symbolic expression of support." *Id.* The *Randall* Court held that contribution limits "do restrict" the former, but not the latter. *Id.* Yet both are part of a "contributor's freedom of political association." *Id.* So while House "is still able to associate with and *symbolically* support his candidates," Defs. Br. (ECF 122) at 4 (emphasis added), he is unable to "support a favored candidate" as much as he wants. The contribution limits "restrict [this] aspect of [House's] freedom of political association." *Randall*, 548 U.S. at 246. Thus, he has Article III standing.

Defendants' theory would make cases like *Thompson v. Hebdon*, 589 U.S. 1 (2019), bizarre. As they admit, the *Thompson* plaintiffs were contributors. Defs. Br. (ECF 122) at 3 n.1. Still, defendants say that is irrelevant because *Thompson* did not address standing. *Id.* But the *Thompson* Court did not need to address standing because the case it relied on—*Randall*—already held that contribution limits "do restrict" one "aspect" of a contributor's freedom of association. 548 U.S. at 246. And *Thompson* did not hide this issue. The Supreme Court explained that the plaintiffs' *entire theory* was that they "wanted to contribute more" than Alaska law allowed. *Thompson*, 589 U.S. at 2. The fact that *Randall* applies in *Thompson* means contribution limits burden a contributor's rights (or else they would have no claim), and thus inflict an Article III injury.

Because House has Article III standing to bring both claims, it is unnecessary to resolve standing for the other plaintiffs. *See Biden v. Nebraska*, 600 U.S. 477, 489 (2023). Even so, both Lopez and Pelton have standing for both claims. *See* Plfs. Br. (ECF 119) at 1-2.

B. Lopez's claims are not moot.

Lopez's claim is not moot because he has a past history of running for statewide office and testified that he intends to do so again during the next election cycle. Plfs. Br. (ECF 119) at 1-2. Defendants' argument otherwise conflates the standards for standing and mootness. But these are not the same, and the differences matter.

Standing is assessed at the time of the complaint, and no one disputes that Lopez was running for statewide office and subject to the contribution limits when he filed suit. Defs. Br. (ECF 122) at 4. So the only question is mootness. But unlike standing, *defendants* bear the burden to prove mootness. *West Virginia v. EPA*, 597 U.S. 697, 719 (2022). And this burden is "stringent." *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1165 (10th Cir. 2023).

Defendants claim that Lopez cannot satisfy the second prong of the mootness exception for cases capable of repetition but evading review, which requires that "a reasonable expectation exists for the plaintiff to again experience the same injury." *Id.* at 1166.[2] This "bar is not meant to be high." *Id.* Yet defendants contend that Lopez—a two-time candidate for governor who testified he intends to run for statewide office again—cannot meet it because, with two years before the election, he is undecided on which office he is pursuing.

Defendants mistakenly rely on *standing* caselaw to argue that Lopez's claim is moot. They contend Lopez's future intent is not sufficiently "concrete." Defs. Br. (ECF 122) at 5. But that language is from *Baker v. USD 229 Blue Velley*, 979 F.3d 866 (10th Cir. 2020)—a case about

[2] Defendants do not dispute that plaintiffs' claims meet the first prong of the exception—that "the challenged action ended too quickly to be fully litigated." *Rio Grande*, 57 F.4th at 1166.

standing, not mootness. *Id.* at 875. Rather than "concrete plans," the capable of repetition but evading review rule requires a plaintiff to only show there is "a reasonable expectation that it will again be subjected to the alleged illegality." *Federal Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 463 (2007). In *Wisconsin Right to Life*, the plaintiff met that standard simply by alleging "that it planned on running 'materially similar' future targeted broadcast ads mentioning a candidate within the blackout period." *Id.* at 463. The Supreme Court held that the case "fit comfortably within" the exception without requiring the plaintiff to describe the ads in detail or even identify which candidate the plaintiff might mention or what election that might be. *Id.* at 462-63. Here, by contrast, Lopez testified he plans on running for a statewide office during the next cycle and continues to maintain an active candidate committee to do so. Trial Tr. Vol. 1, 50-51. That means he will be subject to the same laws he challenged during his 2022 bid for governor (and his 2018 bid before that). Given that Lopez has run for statewide office during the last two cycles, his testimony easily clears the threshold.

Next, defendants buried the lead with their suggestion that Lopez's situation materially differs from 2022 because now he is "a sitting federal congressman." *See* Defs. Br. (ECF 122) at 4. Lopez testified that he was only elected to finish an unexpired congressional term that ends early January 2025. Trial Tr. Vol. 1, 51-52. He did not appear on the 2024 general election ballot for that congressional seat. *Id*. Accordingly, after early January 2025, Lopez will not be a federal official, and he will be available to run for any Colorado statewide office in 2026. This evidence corroborates the "reasonable expectation" that Lopez will run for statewide office, not a federal office, and be subject to Colorado's contribution limits.

C. The claims against the voluntary spending limits are not moot.

Defendants argue that the candidate plaintiffs' claims against Section 4 are moot because their reasonable expectation of future injury is too speculative. This argument suffers from two

errors: it conflates questions about justiciability with the merits, and it (again) confuses standing and mootness.

First, the candidate plaintiffs are injured by Section 4 because being forced to choose between asymmetric contribution limits and an expenditure cap itself violates the First Amendment. *See* Plfs. Br. (ECF 119) at 30-33. It does not matter what choice the candidate plaintiffs make, or what choice their opponents make. The injury lies in *having to choose*, because either choice burdens their First Amendment rights. *See id.*

Defendants are wrong that the candidate plaintiffs' injury depends on whether they accept voluntary spending limits, whether they raise 10% of the limits, or what choice their opponents make. The testimony that they have run for state office in the past and will again in the next election cycle suffices because they will be subject to the same unlawful choice.

Second, defendants once more argue mootness by relying on standing cases. They again refer to *Baker*'s "concrete plans" language regarding standing. Defs. Br. (ECF 122) at 6. And they add a citation to *Murthy v. Missouri*, 144 S. Ct. 1972 (2024), another standing case where the Supreme Court held that the plaintiffs could not establish a present or future injury *at the time they filed suit*. *Id.* at 1986. The word "moot" does not appear in *Murthy* because, unlike here, those plaintiffs lacked standing at the outset. Defendants do not cite a single mootness case for their theory that plaintiffs' future injuries are too speculative to satisfy the second prong of the capable-of-repetition-but-evading-review exception for mootness.

Finally, defendants do not argue that House's claim against Section 4 is moot, instead resting only on their standing theory for him. House testified about his long history of donating to candidates subject to the ordinary limits while running against opponents who could receive double contributions. Trial Tr. Vol. 1, 153-61. He continues to donate to candidates, and he

would donate more than the limits allow if he could. *Id.* at 143, 145-52; Trial Tr. Vol. 2, 206-07. For the same reason that the candidate plaintiffs' claims are not moot, neither is House's claim.

II. COLORADO'S CONTRIBUTION LIMITS DO NOT FURTHER A PERMISSIBLE ANTICORRUPTION INTEREST.

A. Colorado cannot explain how its contribution limits further legitimate anticorruption interests when it discards those limits in exchange for a promise to reduce spending.

Defendants argue that the Court should not consider the state's interest in enacting its contribution limits because any limit—no matter the circumstances—furthers the legitimate interest of combating *quid pro quo* corruption or its appearance. That is wrong.

Start with defendants' claim that evaluating the state's interest has nothing to do with the dollar amount of the contribution limits. For this, defendants cite *Lair v. Motl*, 873 F.3d 1170 (9th Cir. 2017) (*Lair III*). *See* Defs. Br. (ECF 122) at 13. But *Lair III* relied on the same Ninth Circuit precedent that the Supreme Court unanimously and summarily rejected in *Thompson*. *See* 873 F.3d at 1178 (citing *Mont. Right to Life Ass'n v. Eddelman*, 343 F.3d 1085, 1092 (9th Cir. 2017)); *Thompson v. Hebdon*, 909 F.3d 1027, 1037 & n.5 (9th Cir. 2018), *vacated,* 589 U.S. 1 (2019) (per curiam). *Lair III* provides no guidance for this Court.

Still, defendants misconstrue plaintiffs' argument about how Section 4 fatally undermines the state's asserted interest in its contribution limits. Colorado must show that its limits "further[] a permissible anticorruption goal." *Federal Election Comm'n v. Ted Cruz for Senate*, 596 U.S. 289, 313 (2022). Governments fail this test when they also adopt laws that undermine their asserted interest for no justifiable reason. *See Ted Cruz for Senate*, 596 U.S. at 313. That is what Section 4 does.

Colorado claims it adopted its contribution limits to prevent *quid pro quo* corruption and its appearance, but that the same law doubles those limits for any candidate that agrees to a spending cap. Taken together, these provisions show that Colorado's interest is in limiting

spending because it is willing to abandon its contribution limits in favor of expenditure limits. "Either [Colorado] is openly tolerating a significant [amount] of [corruption or its appearance] . . . than it would normally think fit to allow," or the contribution limits "are in no real sense" designed to prevent such corruption. *See Ted Cruz for Senate*, 596 S. Ct. at 313. The contribution limits do not further the *permissible* goal of limiting corruption if Colorado will double those limits to promote the *impermissible* goal of limiting expenditures.

Nor does this argument depend on the size of Colorado's limits. Consider a state that enacts the same asymmetric contribution scheme Colorado uses, but has a $10,000 base contribution limit that doubles if the candidate agrees to an expenditure cap. The same analysis applies: the state's willingness to trade double limits for an expenditure cap shows that the limits themselves are designed to reduce spending. Of course, that conclusion is even stronger here where the base limits are so low that it is obvious the goal is to limit expenditures.

Defendants contend plaintiffs' argument is only about narrow tailoring, which does not apply to contribution limits. Not so. When the government adopts laws undermining its purported interest, it casts doubt on whether the state proffered a legitimate interest at all. In *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), for example, the Supreme Court held that "the City's asserted interests [were] insufficient" because the policy undermined those interests—not because it failed narrow tailoring. *Id.* at 541–42. Likewise, in *Ted Cruz for Senate*, the Supreme Court did not even decide whether "closely drawn" scrutiny or strict scrutiny applied, 596 U.S. at 305, but still rejected the government's asserted interest because it did not make sense within the rest of the statutory structure. *Id.* at 313. "In general, the government can't prove a compelling interest when a policy has exceptions that cut against its proffered goal." *Nat'l Republican*

Senatorial Comm. v. Federal Election Comm'n, 117 F.4th 389, 2024 U.S. App. LEXIS 22607 at *34-*35 (6th Cir. 2024) (*en banc*) (Thapar, J., concurring). That is Colorado's problem here.

Defendants next argue that different limits do not undermine the state's interest any more than a state adopting different limits "for candidates of different offices." Defs. Br. (ECF 122) at 15-16. They submit that states must be able to "balance their anticorruption interest with other valid interests" as well. Defs. Br. (ECF 122) at 16. This only proves the point. What other valid interests? States might very well conclude that different offices are susceptible to different risks of corruption. And states might also conclude that higher limits for some offices are a necessary tradeoff so that challengers can "mount[] effective campaigns." *Randall*, 548 U.S. at 248-49. Indeed, those are legitimate interests for adopting different contribution limits.

But no such interest explains Section 4. It does not impose different limits for different offices. The *only* difference between a candidate subject to the base limit and a candidate subject to the doubled limit is that the latter has agreed to limit campaign spending and the former has not. And because "limiting the amount of money in politics" is not a valid interest, *Ted Cruz for Senate*, 596 U.S. at 313, Colorado cannot claim either its contribution limits or Section 4 furthers valid anticorruption interests when it willingly abandons its contribution limits in exchange for reduced candidate spending. This tradeoff shows that Colorado's real interest is in reducing money in politics, which is unconstitutional.[3]

[3] Despite defendants' assertions, *see* Defs. Br. (ECF 122) at 16, history does not support contribution limits. "Judged by [America's] early legal landscape, [the contribution limits are] far afield from those methods of regulation recognized by relevant history and tradition to be within [Colorado's] power." *Nat'l Republican Senatorial Comm.*, 117 F.4th 389, 2024 U.S. App. LEXIS 22607 at *67 (6th Cir. 2024) (Bush, J., concurring). *See also id*. at *41-*69 & n.50.

B. Defendants cannot produce any evidence that the contribution limits prevent *quid pro quo* corruption or its appearance.

Even if Section 4 did not undermine the state's purported interest in its contribution limits, defendants cannot meet their evidentiary burden to show that the limits reduce *quid pro quo* corruption or its appearance.

1. Defendants bear the evidentiary burden of proving Colorado's interest.

Defendants argue that no such evidence is necessary and the Court must conclude as a matter of law that all contribution limits further a legitimate anticorruption purpose—full stop. Defs. Br. (ECF 122) at 13-14. For this, Colorado cites *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000), a case that provides exactly the opposite. In *Shrink*, the Supreme Court explained that the amount of proof in any given case "will vary up or down with the novelty and plausibility of the justification raised." *Id.* at 391. And in many cases, the facts and holdings of *Buckley v. Valeo*, 424 U.S. 1 (1976), will suffice for the state to meet its burden in defending a challenge to a state's contribution limits. *Id.* at 392-93. But defendants leave out the Supreme Court's closing admonition: "There might, of course, be need for a more extensive evidentiary documentation if petitioners [make] any showing of their own to cast doubt on the apparent implications of *Buckley*'s evidence and the record here." *Id.* at 394. Plaintiffs made this showing, so, defendants must rely on more than "mere conjecture" to meet their "First Amendment burden." *Id.* at 392.

2. No evidence supports Colorado's purported anticorruption interest.

On the evidence, defendants make a three-part argument.

First, defendants point to the language in Colo. Const. art. XXVIII § 1 for proof that the contribution limits exist to combat *quid pro quo* corruption and its appearance. But the question here is whether the limits actually further that interest. *See Ted Cruz for Senate*, 596 U.S. at 309-10 (rejecting evidence about legislative intent because it does not show the "limitation was

necessary to prevent *quid pro quo* corruption or its appearance"). And the text is particularly unhelpful here given that Colo. Const. art. XXVIII § 4 allows candidates to *double* their contribution limits in exchange for limiting spending, which in no way furthers the goal of preventing *quid pro quo* corruption or its appearance.

Second, defendants argue that the lack of any "recent history of *quid pro quo* corruption is a sign that the limits are working." Defs. Br. (ECF 122) at 17. But Colorado had no history of *quid pro quo* corruption before the current limits were enacted, Trial Tr. Vol. 5, 928-29, 933-35, which means the earlier (and higher) limits worked. Enacting lower limits to stop a problem the law already solved confirms the current limits exist to reduce money in politics.

Third, defendants turn to the testimony from the two competing experts—Dr. Abby Wood and Dr. David Primo. They urge the Court to disregard Dr. Primo's research and rely on Dr. Wood's testimony instead.

To start, defendants do not attempt to repair Dr. Wood's credibility after she conceded she made a significant statistical error when trying to prove that Dr. Primo's analysis omitted an important variable. *See* Trial Tr. Vol. 6, 1045-46. The error was so severe that defendants do not mention her opinion on this topic in their brief. But the damage extends beyond that specific opinion. Dr. Wood conceded her opinions in this case are "imprecise" and not backed by enough evidence to submit through a rigorous peer review process. That admission, plus her failure to recognize her own error when attacking Dr. Primo's research, makes clear that Dr. Wood's opinions in this case deserve little—if any—weight. Yet even at face value, Dr. Wood's testimony does not provide the evidence the First Amendment requires. *See Ted Cruz for Senate*, 596 U.S. at 310.

Defendants point to her conclusion that Coloradans are "more likely" than other Americans to believe that bribery is more corrupt than things like access and undue influence. Defs. Br. (ECF 122) at 1051. Never mind that this survey was conducted over a decade after the contribution limits were enacted. And never mind that it contains no information about whether Coloradans believe their own government is corrupt. The real problem is that the survey included only 20 people from Colorado, which Dr. Wood agreed was a "pretty small" sample. Trial Tr. Vol. 6, 1052. She also agreed that the sample size means her conclusions "weren't very precise," and that she has no idea if those 20 people from Colorado were a random, representative sample. *Id.* at 1052-53. Defendants shrug at these concessions, saying Dr. Wood would have "preferred to have more Colorado respondents." Defs. Br. (ECF 122) at 18. But what Dr. Wood actually said was that the low, non-representative sample size makes her conclusions—at best—"imprecise." *Id.* at 1052-53.

Defendants next claim that Dr. Wood found that before Colo. Const. art. XXVIII, "Coloradans were more negative on government than the rest of the county, but after the passage of [Colo. Const. art. XXVIII] they were less likely to think that quite a few [politicians] were crooked." Defs. Br. (ECF 122) at 19 (cleaned up). Defendants concede that Dr. Wood's primary conclusion was that Coloradans' views "aren't all that different" than those held by the rest of the country. *Id.* But even defendants' claim that Coloradans' views may have changed after passing Colo. Const. art. XXVIII only tells half the story. She acknowledged that the survey data also showed that after passing Colo. Const. art. XXVIII, people were less likely to think that "hardly any" politicians were crooked. In other words, the results point in opposite directions. And these results, too, suffer from the same flaw above: a small sample size that Dr. Wood

cannot say is representative of the general population. As Dr. Wood agreed, there's "not enough evidence" to submit this research to peer review. *Id.* at 1058-59.

Dr. Wood's third study involving newspapers merits only a brief mention. She found 62 newspaper articles written about corruption to try and decipher how Coloradans used this word at the time Colo. Const. art. XXVIII was enacted. Trial Tr. Vol. 6, 1003-04. She concluded that only 11 articles could have been clearly coded as referring to *quid pro quo* corruption, while another 29 might have been about *quid pro quo* corruption or undue influence. Trial Ex. 321. Another third of the articles were so ambiguous she could not tell. *Id.* Defendants never even try to explain how this minimal evidence proves that Colorado's contribution limits prevent *quid pro quo* corruption or its appearance.

Defendants' effort to undermine Dr. Primo's testimony similarly falls flat. Having abandoned Dr. Wood's flawed analysis of his statistical model, defendants instead lob criticisms at Dr. Primo's research without ever confronting how he addressed each one.

Defendants first argue that Dr. Primo's research does not apply here because he did not study Colorado specifically, nor did he study the effects of different contribution amounts. But Dr. Primo explained why both of those critiques are wrong. Running an analysis of only Colorado, rather than embedding Colorado into a larger dataset, "wouldn't be consistent with sound social science." Trial Tr. Vol. 2, 302. Defendants offer no expert opinion to the contrary. Instead, Colorado admits nothing distinguishes it from elsewhere to provide any "special justification," *Randall*, 548 U.S. at 261, for its contribution limits. *See* Pretrial Order (ECF 97) at 4.

Likewise, Dr. Primo explained that measuring public perception based on the amount of the limit, rather than whether a limit exists at all, would not be helpful because it would introduce

noise into the analysis and the public is generally not aware of the details of campaign-finance law for it to matter. Trial Tr. Vol. 2, 274-78. Defendants offer no expert opinion to the contrary.[4]

Defendants also critique Dr. Primo for using voter trust and confidence as a proxy for the appearance of *quid pro quo* corruption. But as Dr. Primo explained, he made that choice because that's what the Supreme Court said in *Buckley*. There, the Supreme Court explicitly tied "the appearance of corruption" to the public's "confidence in the system of representative Government." *Id.* at 27. Dr. Primo thus measured the public's confidence in government to test the empirical claim in *Buckley*. Trial Tr. Vol. 2, 232-33.

Defendants suggest that it is "unlikely" that some of the questions in these surveys would "trigger an ethics- or corruption-based response," pointing to one example of a question that asked individuals how confident they are that their government can handle state problems. Defs. Br. (ECF 122) at 20. Defendants point only to Dr. Wood's anecdotal opinion that *she* would not think about corruption when answering that question. But it is not obvious why. The problem with *quid pro quo* corruption is that government officials make choices based on who gave them money, not on the best interest of the public. So presumably, if someone thought the government is corrupt, she would also not have confidence in the government's ability to handle problems. And that was the *Buckley* Court's point. 424 U.S. at 27.

Finally, defendants criticize Dr. Primo for coding his survey data on a 100-point scale, by pointing out that similar responses in the dataset might be coded differently because of how the survey was structured. True. But defendants' second guessing does not explain why that makes

[4] This methodological choice only casts more doubt on the effect of these laws. Dr. Primo's research shows that the public's trust and confidence in government in states with contribution limits and public financing systems is virtually *no different* than states that have none of these laws. *See* Trial Ex. 120.

his research unreliable. Dr. Primo controlled for this issue in his research design. *See* Trial Ex. 119 (note). And even though defendants and Dr. Wood replicated Dr. Primo's analysis with their own modifications, they failed to produce any evidence that changing Dr. Primo's coding choice would alter his results.

III. THE CONTRIBUTION LIMITS FAIL *RANDALL* ANALYSIS.

A. Both statewide and legislative limits show "danger signs."

Defendants concede that Colorado's legislative limits have *Randall*'s danger signs "because they are lower than limits in other states and lower than limits previously upheld by the Supreme Court." *See* Defs. Br. (ECF 122) at 10. This reasoning also applies to Colorado's statewide limits "because they are lower than limits in other states and lower than limits previously upheld by the Supreme Court." *Id*. Defendants' objection otherwise is without merit.

Indeed, Colorado's governor, attorney general, and treasurer candidate contribution limits are lower than the comparable limits in 48 other states. *See* Tr. Ex. 1. The secretary of state candidate contribution limit is the lowest in the country. *Id*. And the amount of the statewide contribution for all of these offices, $1,450, is lower than the lowest individual contribution limit ever approved by the Supreme Court, which is "over $1,600 in [2019] dollars." *Thompson*, 589 U.S. at 5. Defendants admit this fact. *See* Defs. Br. (ECF 122) at 10.

Defendants resist this conclusion because Colorado's 49th lowest statewide limit is not substantially lower than Montana's 48th lowest limit, which the Ninth Circuit has upheld. Never mind that the limits in 47 other states are more than 100% higher than Colorado's limits, a clear

danger sign for Colorado. *Id*.; Tr. Ex. 1. That danger sign does not disappear simply because one single state—with a population over five times smaller than Colorado—has a lower limit.[5]

B. Colorado's contribution limits fail *Randall*'s tailoring requirements.[6]

1. The contribution limits significantly restrict the amount of funding available for challengers to run competitive campaigns.

Randall says contribution limits cannot "significantly restrict the amount of funding available for challengers to run competitive campaigns." *Id*. at 253. The "critical question" for this factor concerns "the ability of a candidate running against an incumbent officeholder to mount an effective challenge." *Id*. at 255 (emphasis omitted).

But defendants presented no relevant evidence for *Randall*'s first factor. Instead of addressing the "critical question," *id*., defendants began their argument with an irrelevant anecdotal discussion of plaintiffs' and defense witnesses' campaign fundraising efforts, none of whom ever faced an incumbent officeholder. *See* Defs. Br. (ECF 122) at 22-24.

Next, instead of addressing the "critical question," *Randall*, 548 U.S. at 255, defendants reframe *Randall*'s first factor as a question about incumbent reelection rates. Defs. Br. (ECF 122) at 26. But the *Randall* Court never mentions incumbent reelection rates as a means of testing whether challengers have the funds necessary to run competitive campaigns or testing the constitutionality of contribution limits. *Id*. at 248-62. Indeed, incumbent reelection rates are only

[5] The Ninth Circuit upheld Montana's limits primarily by applying the same erroneous legal standard the Supreme Court rejected in *Thompson*. *See* § II A *supra*. While the Ninth Circuit also discusses *Randall*, it is unclear whether its one-paragraph alternative analysis correctly applies *Randall*. *See Lair III*, 873 F.3d at 1187. And, when *Lair III* was decided, Montana's limits were arguably higher than five other states, *id*., while Colorado's limits are either the lowest or next to the lowest in the country depending on the office—a clear "danger sign." *See* Trial Ex. 1.

[6] Defendants quibble over whether *Randall* requires traditional "narrow tailoring" or something else. *See* Defs. Br. (ECF 122) at 12 n.7. *Randall* directly states that the whole point of its five-factor analysis is to determine whether contribution limits are "narrowly tailored." 548 U.S. at 261. *Randall* did not plot a new "narrow tailoring" course. It explicitly defined it.

discussed in Justice Stevens's dissent (and in reference to whether state *expenditure* limits are constitutional). *Id*. at 279 (Stevens, J., dissenting).

Dr. Spencer never studied whether "Colorado's limits [were] preventing *challengers* from being elected" as defendants claim. Defs. Br. (ECF 122) at 29 (emphasis added). Instead, he studied whether Colorado's limits were preventing *incumbents* from being reelected. *See* Trial Tr. Vol. 6, 1083, 1095, 1097, 1102, 1108, 1120-21. But incumbent reelection rates are "not necessarily the best measure" of electoral competitiveness, *id*. at Vol. 3, 384, and they are irrelevant under *Randall*. *See* 548 U.S. at 248-62 (no mention of reelection rates in *Randall*'s five factor analysis). For these reasons, and for the reasons stated in plaintiffs' summation brief, *see* Plfs. Br. (ECF 119) at 20-21, Dr. Spencer's testimony provides no insight into this factor.

And defendants' critique of plaintiff's evidence on this point is without merit.

Start with Colorado's arguments about Dr. Damon Cann's testimony. First, defendants complain that Dr. Cann's analysis of election contestation rates is irrelevant to the issue of contribution limits. Not so. Low contribution limits have the insidious effect of discouraging potential first-time candidates from running for office due to an incumbent's fundraising advantage and the inability to overcome the messages produced from opposition independent expenditure committees ("IECs"). Trial Tr. Vol. 4, 620-31, 681-82, 686-87. Indeed, a first-time state senate candidate must raise "at least" 20% more money than an incumbent to win the race. *Id*. at 626-27. Thus, because a first-time candidate is more dependent on individual donors than an incumbent, a challenger's potentially competitive race ends before it even begins due to the ingrained fundraising advantage incumbents have with contribution limits. *Id*. at 620-31.

Defendants' criticism of Dr. Cann's research that shows Colorado's general election rate of contestation could be 3% higher if its contribution limits were unlimited likewise misses the

mark. While Colorado has higher general election contestation rates than some other states (but much lower primary contestation rates), this fact is "in spite of" Colorado's contribution limits rather than because of them. *See* Trial Tr. Vol. 3, 557. Defendants' argument otherwise fails to engage with a basic statistical principle: controlling for other variables. Contribution limits are not the only factor that might affect contestation rates, and so Dr. Cann controlled for state campaign finance laws, political party parity (one party v. two party states), and independent redistricting commissions for his analysis.[7] *Id*. at 471, 557-58. Failure to control these additional factors could lead to biased estimates of the effects that contribution limits have on contestation rates. *Id*. at 462. So, for example, comparing Colorado's general election contestation rate to Oregon or Utah does not account for how contestation rates are lower in traditionally one-party states (like Oregon and Utah). *Id*. at 557-59. Colorado's general election contestation rate would be higher, and tens of thousands more Coloradans would have a choice in the general election absent the state's restrictive contribution limits. *Id*. at 469-74, 558.

Nor is Dr. Cann's analysis "structurally flawed." *See* Defs. Br. (ECF 122) at 28 n.8, 30-31. As the most restrictive state, Colorado represents one end of the contribution limit spectrum, and Utah and Oregan represent the other end with their unrestricted contribution limits. All other possible limits are between these states. Thus, the election trends going from low to unlimited contribution limits change only in degree no matter what contribution limit is chosen on the spectrum. *See* Trial Tr. Vol. 3, 530-31.

[7] Contrary to defendants' assertion, *see* Defs. Br. (ECF 122) at 30, open seats should not be a factor in election contestation rates for states with term-limits, like Colorado. These laws artificially create open seats and, thus, artificially raise the election contestation rate. *See* Trial Tr. Vol. 3, 457-59. And no *Randall* exception exists for contribution limits in elections that are more competitive every three cycles because of term limits.

Dr. Cann's analysis also included "political action committee contribution limits, labor union contribution limits, and corporate contribution limits" with individual limits because they are "highly correlated with one another," and presents "a holistic view of what's going on in the overall campaign finance regulatory system of each state." *Id*. at 465-66, 469. Political party contribution limits, like the limits in Colorado, were omitted because "roughly half of the states don't have any contribution limits for parties." *Id*. at 526. And, mathematically, including other limit types with individual limits are irrelevant if "those other factors [are] constant," *id*. at 469, while the individual limits fluctuate. Just as it is with the individual-limit-only spectrum, if the other types of limits remain constant, switching from low individual limits up to unlimited individual limits would be consistent with Dr. Cann's election analysis and only change in degree depending on the chosen individual limit. *Id*. at 470, 530-31.

Defendants also argue that Dr. Cann's analysis of the average increase in challenger vote share is unhelpful under *Randall*. *See* Defs. Br. (ECF 122) at 31. While the *Randall* Court focused on how contribution limits impacted "competitive races" rather than "average races," 548 U.S. at 255 (emphasis removed), isolating Dr. Cann's testimony here is misleading. Dr. Cann conducted several different studies to analyze how the limits effect electoral competitiveness, and his testimony about average challenger vote share is simply one more piece of the puzzle. He testified about competitive races, too. Indeed, Dr. Cann explained that a challenger's vote share would increase, on average, by 3.2% if he could raise an additional $40,000. *See* Trail Tr. Vol. 3, 494-96. But he also testified that a challenger's vote share in a competitive race would also increase, albeit by a smaller percentage. *Id*. at 546. And in competitive elections, even a 1% vote share increase for a challenger could be enough to change the outcome in his favor.

Defendants' criticism of Dr. Cann's never reckons with the economic law of diminishing returns. *See* Defs. Br. (ECF 122) at 32 n.10. Money raised and spent by challengers and incumbents are "not equal in terms of the effect it has on their campaigns." Trail Tr. Vol. 3, 382. The effectiveness of incumbent fundraising and spending suffers under the law of diminishing returns. Incumbents "already have some measure of name recognition, they've previously engaged in some amount of campaign spending, they've been doing outreach to their district for some period of time, whereas a challenger is typically starting that from scratch." *Id*. at 484. So, "even a modest increase of additional spending for a challenger makes a big difference in election outcomes" and "at the end of the day, it's actually challengers that are advantaged, not incumbents, when [states] increase contribution limits." *Id*. at 493-94.

Colorado's characterization of Dr. Christopher Bonneau's testimony also falls short. Defendants refer to an academic paper that Dr. Bonneau cites in his research "that found 'states without contribution limits give an advantage to incumbents over challengers.'" Defs. Br. (ECF 122) at 27. This advantage, however, is a fundraising advantage, *see* Trial Tr. Vol. 3, 401-02, which all incumbents have whether contribution limits exist in a state or not. *See* Plfs. Br. (ECF 119) at 17-20. That's why the law of diminishing returns matters here. Indeed, Dr. Bonneau testified that low contribution limits are "more likely to hurt challengers than incumbents," without "any benefits" of preventing corruption or increasing "political trust." Trial Tr. Vol. 3, 387-89.

Defendants' criticism of Ben Engen's testimony also misses the mark. Engen used a definition of "incumbent" that, while unconventional in academia, is intuitive and practical in his field of campaign consulting. *Id*. at Vol. 4, 590-94, 609-10. Indeed, Engen defined "incumbent" to mean "anyone who has previously held a Colorado level office, regardless of the district that

they represented." *Id*. at Vol. 4, 608-09. And he only employed it in his analysis "of a state representative running for the state senate," and "a state representative or state senator's district number changing as a result of reapportionment." *Id*. at Vol. 5, 788-89. This is appropriate for the legislature because "name recognition doesn't just reset when you change districts. It's not as though people within a state representative's district all of [a] sudden forget who they were entirely when that person runs for state senate." *Id*. at Vol. 4, 609. Engen's definition "is a better reflection of the issue at hand, which is can new candidates adequately compete against people who have existing name recognition as a result of their service in public office." *Id*.

One example of how Engen's definition of incumbent is superior to others is current Colorado state senator Kevin Priola. *Id*. at 609-10. "In 2016, at that time, Kevin was term limited out of the state house. He had served four terms over eight years. He was the most successful Republican politician among unaffiliated voters and one of the most successful fundraisers, as well as the leader on numerous pieces of legislation, who had received extensive media coverage. Most academics would treat him as [just a challenger when] he decided to run for the senate. But no rational individual would ever accept the explanation that none of the prior work that Kevin Priola put in in the eight prior three years in no way assisted him in winning the state senate seat above his house race." *Id*. at 610.

Consider it this way. Under the conventional understanding, "if a state representative runs for state senate, [ ] every voter in their district immediately forgets who they are; [ ] all of their relationships with their colleagues, donors, or lobbyists at the capitol suddenly evaporate; [ ] those individuals enter some sort of fugue state where they can no longer remember the candidate, having met them, or even having ever heard their name." *Id*. at Vol. 5, 789. But under Engen's definition, "if a state representative runs for state senate or any other seat, for that matter

– that [ ] state representative would continue to enjoy some of the benefits of the name recognition that they have worked to create. They would continue to maintain the relationships with their colleagues at the capitol, including lobbyists, and that all of the prior dollars that they would have invested in winning their race would help them in their subsequent campaigns." *Id*. at 789-90. The advantages from Engen's approach are obvious.

Defendants argue Engen's ingenuity creates a "fatal flaw" in his analysis. Defs. Br. (ECF 122) at 32. But they never explain how Engen's definition of "incumbent" prevents him from analyzing whether challengers can mount "effective campaigns against incumbent officeholders." *Id*. at 32 (quoting *Randall*, 548 U.S. at 249). Nor could they. The *Randall* Court was concerned that incumbents have advantages from already being in the public eye. 548 U.S. at 256. And Engen's definition accounts for that concern.

Defendants also claim Engen's analysis leads to "absurd results" because his "incumbent" definition means, for example, that "the 2022 gubernatorial race between the sitting Governor, Jared Polis, and a member of the University of Colorado Board of Regents, Heidi Ganahl, [w]as a contest between two incumbents." Defs. Br. (ECF 122) at 32-33. Not so. Engen used his definition only in his analysis of whether a challenger could run a competitive campaign against an incumbent when "a state representative [was] running for the state senate," and when "a state representative or state senator[] [was running for office after their] district number chang[ed] as a result of reapportionment." Trial Tr. Vol. 5, 788-89. He limited the use of his "incumbent" definition to these circumstances to avoid "the examples," *id*. at 788, defendants rely on. *See* Defs. Br. (ECF 122) at 32-33.[8]

[8] Even still, it is not clear why it matters that some races feature two incumbents running against each other. If the *Randall* Court was concerned about an incumbent's built-in advantages against

Next, defendants complain Engen did not discuss successful challengers for state house seats in the elections immediately following the enactment of the contribution limits. *See* Defs. Br. (ECF 122) at 33 n.11. But he did. Engen testified, "there was an initial uptick in the percentage of first-time candidates winning their race for state house. However, that was followed by a sustained decline thereafter. It's one of the reasons that in both my report and in our discussion on direct [examination] that I chose to emphasize the average level over the preceding and subsequent five races [to the contribution limits' enactment] as opposed to the immediate reactions in [my report and testimony]." Trial Tr. Vol. 5, 783-84.

Defendants' last complaint is that Engen's analysis did not "compare Colorado to other states." *Id*. at 33. So what? All of plaintiffs' expert evidence paints a picture of how Colorado's contribution limits neither serve an important government interest, nor allow challengers enough funding to run competitive campaigns. *See* Plfs. Br. (ECF 119) at 8-12, 17-21. Some of the expert evidence compares Colorado to other states. Some expert evidence focuses exclusively on Colorado. Collectively, the expert testimony shows Colorado's contribution limits are unconstitutional from all standpoints—from a broad nationwide or state focused perspective. Defendants' criticism is especially odd because they complain that Dr. Primo's testimony was defective for not focusing on Colorado, *see* Defs. Br. (ECF 122) at 20, and then they complain that Engen's analysis only focuses on Colorado. *Id*. at 33. But while Engen's evidence was Colorado specific, Dr. Bonneau and Dr. Cann compared Colorado to other states. And all three reached the same conclusion: Colorado's contribution limits "significantly restrict the amount of funding available for challengers to run competitive campaigns." *Randall*, 548 U.S. at 253.

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challengers, 548 U.S. at 256, it makes sense to account for those advantages regardless of terminology.

2. Political party contributions have practical limitations that mitigate their theoretical impact on competitive races.

Even though Colorado candidates can receive more funding from their party than they can receive from an individual, the record shows this legal ability does not necessarily translate into monetary reality. *See* Plfs. Br. (ECF 119) at 21-23.

Defendants argue the lack of party funding to a candidate is a matter of "party choice." Defs. Br. (ECF 122) at 35. But all candidates have a First Amendment right "to mount an effective challenge." *Randall*, 548 U.S. at 255 (emphasis omitted). Defendants' claim is no consolation for a challenger that must finance his campaign against an incumbent with low individual contributions because his political party is either unable or unwilling to contribute to him.

And Colorado political parties rarely use their voice fully by contributing the maximum amount allowed. *See* Trial Tr. Vol. 1, 162-64, 184-86; Vol. 4, 645-56. So, even if Colorado party contributions to candidates were unlimited, the practical restraints on a political party's ability and willingness to contribute to candidates would still prevent them from taking advantage of this unlimited opportunity, which demonstrates the reduced significance of party contributions. *See* Plfs. Br. (ECF 119) at 21-22.

Defendants also criticize plaintiffs for presenting evidence of the obvious truth that IEC spending has surpassed the significance of political party contributions in elections. *See* Defs. Br. (ECF 122) at 36; Plfs. Br. (ECF 119) at 22-23. Regardless of what defendants believe, however, IEC spending and influence now dwarfs political party candidate contributions and importance. *See* Trial Tr. Vol. 4, 667-68, 681-82, 686-87; Trial Ex. 83 (political party candidate contributions over $1.7 million), 84 (IEC spending nearly $122.8 million supporting and opposing candidates). That reduces party contributions to a "whisper," just as *Randall* feared. *Randall*, 548 U.S. at 259 (internal quotation marks omitted). The Court should weigh this factor accordingly.

3. The contribution limits' treatment of volunteer services is not properly tailored.

Colorado's treatment of volunteer services is identical to Vermont's law in *Randall*. Vermont "exclude[d] from its definition of 'contribution' all 'services provided without compensation by individuals volunteering their time on behalf of a candidate.'" *Randall*, 548 U.S. at 259 (quoting Vt. Stat. Ann., Tit. 17, § 2801(2) (2002))). The text of Colorado's analogous law matches Vermont's statute verbatim. *See* Colo. Const. Art. XXVIII §2(5)(b). Like Vermont, Colorado "does not exclude the expenses [ ] volunteers incur, such as travel expenses, in the course of campaign activities." *Randall*, 548 U.S. at 259; *see* Colo. Const. Art. XXVIII §2(5)(b); 8 CCR 1505-6 § 1.6.2. And, like Vermont, Colorado's "lack of tailoring in [its] definition of 'contribution' [i]s an added factor counting against the constitutional validity of [its] contribution limits." *Randall*, 548 U.S. at 260.

Defendants attempt to solve this problem with Colorado case law. *See* Defs. Br. (ECF 122) at 36-37 (citing *Keim v. Douglas Cnty. Sch. Dist.*, 399 P.3d 722 (Colo. App. 2015)). They claim that "*Keim* supplies the definition of 'contribution' in Colorado, and that definition does not encompass volunteer expenses" because a contribution must be 'put into the possession of or provided to a candidate or someone acting on the candidate's behalf.'" Defs. Br. (ECF 122) at 36-37 (quoting *Keim*, 399 P.3d at 729). That is wrong.

First, *Keim* does not define "contribution" in Colorado. Rather, Colorado has *four* definitions of "contribution," Colo. Const. Art. XXVIII §2(5)(a)(I)-(IV), and *Keim* only interprets one of them. 399 P.3d at 728 (interpreting Colo. Const. Art. XXVIII §2(5)(a)(IV)). Other definitions—which *Keim* never discusses—include things like the "fair market value" of any property given or "loan[ed]" to a campaign. Colo. Const. Art. XXVIII §2(5)(a)(III). Does that capture a volunteer who "loans" her car to the campaign? *Keim* doesn't say.

And when individuals ask defendants whether their actions are volunteer services or a campaign contribution, defendants refer them to the "specific [contribution] exemption in the Constitution," Trial Tr. Vol. 5, 884, *i.e.*, Colo. Const. Art. XXVIII §2(5)(b). But *Keim* is silent on Colo. Const. Art. XXVIII §2(5)(b). In fact, *Keim* does not even discuss volunteers or the definition of volunteer services, much less expenses, making it irrelevant here.

Defendants' misreading of *Keim* makes no sense and leads to absurd results. For example, if a contribution must be put into a candidate's possession, then any campaign can coordinate with a volunteer media company to produce and publish television, radio, and internet ads expressly advocating for the election of their candidate. They will avoid Colorado's contribution limits, according to defendants, because none of these intangible objects are put into the campaign's "possession." If the costliest campaign expenditure, *i.e.* advertising, can avoid Colorado's contribution limits this easily, then the state should concede this lawsuit and allow unlimited contributions. Defendants' argument is obviously wrong because the definition of "contribution" includes other provisions that *Keim* did not analyze. *See, e.g.*, Colo. Const. Art. XXVIII §2(5)(a)(II) (defining "contribution" to include payments made to third parties "for the benefit" of a campaign).

Additionally, defendants misinterpret plaintiffs' tailoring argument as a "vagueness challenge." Defs. Br. (ECF 122) at 37. The *Randall* Court criticized Vermont's "lack of *tailoring* in [its] definition of 'contribution' as an added factor counting against the constitutional validity of [its] contribution limits." *Randall*, 548 U.S. at 260 (emphasis added). That's because uncertainty could lead to candidates making "costly" mistakes in the middle of a campaign. *Id.* Colorado, like Vermont, "owes its citizens precision." *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1247 (10th Cir. 2023). But Colorado's "ambiguous" volunteer service rules "offer[] only

uncertainty." *Id*. at 1248. "Narrow *tailoring* is crucial where First Amendment activity is chilled—even if indirectly—because First Amendment freedoms need breathing space to survive.'" *Id*. at 1248 (quoting *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021)) (cleaned up) (emphasis added). This is not a vagueness challenge

4. The contribution limits are not adjusted for inflation.

Defendants argue that because the contribution limits have increased some since they were enacted, they are adjusted for inflation. *See* Defs. Br. (ECF 122) at 38. Defendants also argue that the degree of responsiveness *Randall* requires for inflation adjustments depends on how well a state's contribution limits perform under the other *Randall* factors. *Id*. at 38-39. According to defendants, because Colorado's contribution limits comply with the other *Randall* factors, as long as an inflation adjustment exists, "regardless of its structure," the inflation adjustment mechanism meets *Randall*'s mandate. *Id*. at 39. Not so.

Randall made clear that adjusting for inflation is critical to ensure a state's contribution limits do not "decline in real value each year." *Randall*, 548 U.S. at 261. "A failure to index limits means that limits which are already suspiciously low will almost inevitably become too low over time." *Id.* (internal citation omitted). So the degree of responsiveness required is one that ensures the limits do not lose real value year over year. Yet that is what Colorado's limits do.

Defendants dismiss plaintiffs' criticism of their inflation mechanism's structure as "fiction." Defs. Br. (ECF 122) at 38. But that ignores the record. From 2002 to 2022, cumulative inflation increased 64.7%, while the statewide and legislative contribution limits only increased 45% and 12.5%, respectively. *See* Trial Tr. Vol. 4, 579-83, 688; Trial Ex. 40. Those numbers are not fiction, and they are eerily similar to the inflation disparity in *Randall*. 548 U.S. at 261. And

more importantly, Colorado's inflation mechanism makes it impossible for the contribution limits to keep up—it ensures that its limits will "decline in real value each year." *Id.*

Defendants suspect that the Court will not agree with them and propose severing "Colorado's 'round down' provision" from its contribution limits. Defs. Br. (ECF 122) at 40. Even if the Court could sever the rounding-down provision, removing it will not remedy Colorado's First Amendment violation because the contribution limits would still be and remain too low. As stated above, cumulative inflation escalated 64.7% since the contribution limits were enacted, while the statewide and legislative contribution limits only increased 45% and 12.5%, respectively. *See* Trial Tr. Vol. 4, 579-83, 688; Trial Ex. 40. Current statewide and legislative individual contribution limits would be 14% and 47% higher, respectively, if they were adjusted for inflation every four years without rounding down. *Id*. Mathematically, merely removing the rounding down provision now will not ever allow the contribution limits to rise to their actual inflation adjusted amount. Colorado's "already suspiciously low" limits will remain "too low over time." *Randall*, 548 U.S. at 261. And the Court does not have the power to order a retroactive increase for the contribution limits to their unrounded amounts. *See Iancu v. Brunetti*, 588 U.S. 388, 397 (2019) (courts cannot "rewrite a law to conform it to constitutional requirements." (internal quotation marks omitted)).

Still, defendants' severability argument misunderstands *Randall* and how severability works. Courts can sever parts of a law when those "portions . . . are unconstitutional." *People v. Montour*, 157 P.3d 489, 502 (Colo. 2007). And the severability provision of Colo. Const. Art. XXVIII §14 requires the same by allowing courts to sever unconstitutional parts of the law only if that part is "held invalid." So to sever the rounding-down provision, the Court would have to conclude that it is unconstitutional for a state's contribution limits to round down its inflation

adjustment. But *Randall* does not hold that it is unconstitutional for a state to omit an inflation adjustment for its contribution limits. Rather, *Randall* identifies the lack of a proper inflation adjustment as one important factor among others to determine whether a state's contribution limits are unconstitutionally low. If the Court makes *that* conclusion, choosing to "sever" the rounding-down provision would be no different than the choosing to "sever" the amount of the contribution limits considered in *Randall*'s first factor. Neither on its own might be unconstitutional but might be unconstitutional "when taken together." 548 U.S. at 262. Thus, the Court would simply be choosing its preferred method to rewrite an unconstitutional law with defendants' suggestion.

5. Colorado has no "special justification" for its contribution limits.

Defendants did not respond to plaintiffs' assertion that they have no "special justification" to "warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems" described in *Randall*. 548 U.S. at 261. The issue is conceded.

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Colorado "does not point to a legitimate statutory objective that might justify [the] special burdens" in its contribution limits. *Id*. at 261-62. And *Randall*'s "five sets of considerations, taken together," demonstrate Colorado's contribution limits "are not narrowly tailored." *Id*. Indeed, the contribution limits "disproportionately burden[] numerous First Amendment interests." *Id.* at 262. Therefore, they are unconstitutional.

IV. SECTION 4'S ASYMMETRIC CONTRIBUTION LIMIT SCHEME IS UNCONSTITUTIONAL.

Colorado defends Section 4 by recasting the law as no different than a public-financing scheme, in which candidates are given a choice between two different funding structures. Under this theory, Section 4 is constitutional so long as the choice to accept spending limits is not

coercive. But the cases defendants rely on contradict this claim. Section 4 does not give candidates a free choice because it penalizes individuals who do not accept limits by triggering an asymmetric contribution scheme if those individuals engage in "unfettered political speech." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 739 (2008). That means Section 4 is unconstitutional unless it furthers a permissible anticorruption interest—and defendants do not attempt to argue that it does.

Defendants try to hide this issue in a footnote—but it is dispositive here. *See* Defs. Br. (ECF 122) at 47 n.16. In *Davis*, the Supreme Court confronted a case that also gave candidates a choice: choose to limit self-financing *or* be "'subject[] to discriminatory fundraising limitations.'" *Ariz. Free Enter. Club's Freedom PAC v. Bennett*, 564 U.S. 721, 736 (2011) ("*AFE*") (quoting *Davis*). The law in *Davis* gave candidates higher contribution limits only if their opponents self-financed over a certain threshold. 554 U.S. at 739-40. But the First Amendment guarantees the "right to make unlimited expenditures of . . . personal funds." *Id.* at 736. Thus, no matter which choice a candidate selected, the law unconstitutionally burdened the candidate's First Amendment rights. And as the Supreme Court said: "The resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Id.* at 739.

So too here. Section 4 requires candidates to either cap their own expenditures *or* be "subject[] to discriminatory fundraising limitations." *Id.* at 736. This choice "is not remotely parallel to" a public-financing scheme. *Id.* at 740. And because it "imposes a substantial burden on" candidates exercising their right to "engage in unfettered political speech," *id.* at 739-40, it "cannot stand unless it is justified by a compelling state interest." *Id.* at 740 (cleaned up).

Defendants contend that *Davis* does not apply because the 10% threshold for triggering Section 4's double contributions is not "a substantial amount of money." Defs. Br. (ECF 122) at 47 n.16. They cite no authority to support this claim because it does not exist. For good reason: *Davis* does not tie its holding to how "substantial" the triggering threshold is. In fact, *Davis* does the opposite. The *Davis* Court held that the problem was the law required candidates to give up their right to "engage in *unfettered* political speech." *Id.* at 739 (emphasis added). Any limit on how much a candidate can spend during an election imposes a serious First Amendment burden, so requiring a candidate to choose to limit expenditures or else face an asymmetrical contribution scheme triggers strict scrutiny.[9]

Defendants also suggest it matters that the 10% threshold "serves only to substantiate the opponent's viability." Defs. Br. (ECF 122) at 47 n.16. That only makes it worse. It means that Colorado activates an asymmetric contribution scheme only when a race is likely to have higher spending caused by viable opponents running against each other. This only further confirms the Tenth Circuit's conclusion that Section 4 "was intended to encourage candidates to limit their expenditures," *Lopez v. Griswold*, 2023 U.S. App. LEXIS 3421, at *1 (10th Cir. February 13, 2023), as it applies only when it is likely candidates might otherwise need to spend more money.

Defendants' case law does not help either. Of the cases they rely on, only one was decided after *Davis*. But that decision, *Corren v. Condos*, 898 F.3d 209 (2d Cir. 2018), confirms plaintiffs' point. In *Corren*, the Second Circuit upheld a public-financing system and distinguished Vermont's law from *Davis* in a way that does not apply here. *Id.* at 213, 227-28. It

[9] In fact, a lower spending or fundraising threshold makes things worse. The higher the trigger, the fewer candidates affected. But here, more candidates must consider the unconstitutional choice because they are more likely to trigger the asymmetrical contribution limits because of Section 4's 10% fundraising threshold.

also "expressly distinguished" a choice to accept public financing from a choice that gives a candidate's opponent "expanded contribution limit[s]." *Id*. at 227-28. The *Corren* Court explained that the problem in *Davis* was that the "selective expansion of the contribution limit unconstitutionally penalized expenditures of personal funds." *Id.* at 227-28. Thus, "a candidate had to choose either to restrict her spending or to trigger disparate contribution limits." *Id.* at 228. The *Davis* problem did not appear in *Corren* because one candidate's spending did not affect the other candidates' rights. But here, candidates in Colorado must "choose either to restrict [their] spending or to trigger disparate contribution limits." *Id.* As *Corren* explained, that choice is unconstitutional. *Id.*[10]

Because *Davis* controls, defendants must show Section 4 is "justified by a compelling state interest." *Davis*, 554 U.S. at 740. But defendants do not attempt argue that it serves one. *See* Defs. Br. (ECF 122) at 44 n.15. Thus, defendants' argument that the record shows Section 4 "enhances speech and is not coercive," *id.* at 44-46, is immaterial.

V. CONCLUSION

The Court should find for the plaintiffs on both counts, *see* Am. Compl. (ECF 46) at 7-10, declare that Colorado's individual contribution limits and its asymmetric contribution scheme are unconstitutional, and permanently enjoin defendants from enforcing them.

[10] For the same reason, this Court can ignore defendants' string cite of public-financing cases. *See* Defs. Br. (ECF 122) at 42-43. Those cases neither involve a triggering mechanism for candidates who choose to engage in unfettered political speech, nor were they decided after *Davis* and *AFE*. Cases like *Vote Choice Inc v. DiStefano*, 4 F.3d 26 (1st Cir. 1993), or *Kennedy v. Gardner*, No. 98-608-M, 1999 U.S. Dist. LEXIS 23480 (D. N.H. 1999), do not help Defendants either. While both of those cases involved asymmetric contribution schemes, both arose before *Davis* and thus offer no guidance about how to resolve the issues under current Supreme Court precedent.

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Respectfully submitted,

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