No. 22-1082

In the United States Court of Appeals for the Tenth Circuit

GREG LOPEZ, ET AL.,

Plaintiffs/Appellants,

v.

JENA GRISWOLD, ET AL.,

Defendants/Appellees.

On appeal from an order of the United States District Court
for the District of Colorado, The Hon. John L. Kane
(Dist. Ct. No. 22-cv-00247-SKC)

APPELLANTS' REPLY BRIEF

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July 26, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

State Constitution

ARGUMENT

I. THIS CASE IS JUSTICIABLE.

A. *Mootness and Standing Are Related, but Different.*

The answer brief conflates standing and mootness. "Standing concerns whether a plaintiff's action qualifies as a case or controversy when it is filed; mootness ensures it remains one at the time a court renders its decision." *Brown v. Buhman*, 822 F.3d 1151, 1163 (10th Cir. 2016). While standing is measured "as of the time the plaintiff files suit," *id.* at 1164 (citation omitted), mootness is measured when the court undertakes its review and can be affected by intervening circumstances, *see id.* at 1165–66. Applied to this interlocutory appeal then, Plaintiffs' standing (or lack thereof) was established on February 7, 2022—the day they moved for a preliminary injunction, App. at 4. Later developments go only to the question of mootness. *Contra* Answer Br. 7 n.1.

This is not a meaningless distinction. A party asking for relief must prove his own standing. *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 544 (10th Cir. 2016) (citation omitted). But the party asserting lack of jurisdiction based on mootness must prove it. *Kan. Judicial Review v. Stout*, 562 F.3d 1240, 1245 (10th Cir. 2009). Thus, while Plaintiffs must establish that they had standing to request a preliminary injunction in February, Defendants have to prove the request has become moot since then.

B. *All Three Plaintiffs Had Standing to Request a Preliminary Injunction.*[1]

When Plaintiffs moved for a preliminary injunction, their standing was plain. "To establish Article III standing, a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014) (internal quotations omitted). "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Rather, the Court should "accept as valid the merits of [the plaintiffs'] legal claims" and consider what the injury is, presuming the challenged law is indeed unlawful. *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1647 (2022).

All three Plaintiffs met each of these requirements with regard to Colorado's differential-contribution-limit regime. First, the challenged regime injured Plaintiffs. On February 7, 2022, Greg Lopez's primary-election opponent had already "accepted more than 100 individual contributions greater than" anything he could accept, App. at 169; *accord id.* at 151; the state limited how much Rodney Pelton could

[1] So long as the Court finds that at least one party has standing, it need not address the remaining Plaintiffs. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 827 n.1 (2002).

spend on his election campaign, App. at 155; and Steven House was only allowed to contribute half as much to some of his preferred candidates as other contributors were allowed to contribute to those candidates' opponents, *see* App. 159, 174.

These are all recognized injuries. *See, e.g.*, *Davis v. FEC*, 554 U.S. 724, 733 (2008) (candidate has standing to challenge differential campaign contribution limits); *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976) (per curiam) (campaign expenditure limits "place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression"); *Riddle v. Hickenlooper*, 742 F.3d 922, 926–27 (10th Cir. 2014) (harm to contributors when candidates subject to different contribution limits).

And Colorado's contribution-limit regime directly produced these injuries—they wouldn't have existed but for the state's decision to subject different candidates in the same race to different contribution limits.

Finally, enjoining enforcement of the differential-limit regime would have relieved these harms: Lopez and other candidates preferred by House would have faced their opponents on an even playing field; and Pelton's campaign could spend as much money as it could raise, without worrying about expenditure limits. Thus, all Plaintiffs had standing to request a preliminary injunction.

Defendants argue that neither House nor Pelton is harmed by the

differential-limit regime, Answer Br. 8–9, 15–17, and that, even if those two suffered injuries, a preliminary injunction would not redress them, *id.* at 9, 17.[2]

With respect to House, Defendants first argue that because this appeal does not challenge the underlying contribution limits, there is no harm from holding him to those limits. *Id.* at 9. Second, they argue that even if the differential limits harm House, his injury is a denial of equal protection, not of First Amendment rights. *Id.* at 8.

Both arguments are misguided. Even when an underlying prohibition may be lawful in isolation, a plaintiff is still harmed when that prohibition applies to the plaintiff but not others. *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2355 (2020) (opinion of Kavanaugh, J.) (citing *Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993); *Heckler v. Mathews*, 465 U.S. 728, 737–40 (1984)). Furthermore, whether this is characterized as a "First Amendment equal-treatment" injury, *Barr*, 140 S. Ct. at 2354, or a "Denial of Equal Protection," *Riddle*, 742 F.3d at 925, is a distinction without a difference. The same standards apply to both inquiries. *See Barr*, 140 S. Ct. at 2355 (opinion of Kavanaugh, J.)

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[2] The government also argues that Lopez's injuries are not redressable. Answer Br. 14–15. But because Plaintiffs concede that the present appeal is moot as to him, *infra* Pt. I.C, there is no point in going blow-for-blow with Defendants on standing.

(applying Equal Protection cases like *Heckler* and *Associated General Contractors* to First Amendment inquiry); *Riddle*, 742 F.3d at 927–30 (applying First Amendment cases like *Buckley* and *Davis* to Equal Protection inquiry); *Cmty.-Serv. Broad. of Mid-Am., Inc. v. FCC*, 593 F.2d 1102, 1127 n.18 (D.C. Cir. 1978) (Bazelon, J., concurring) (referring to distinction as "an academic inquiry" because "the test applied to governmental action would be the same"); *see also Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1326 (D.C. Cir. 2010) ("[E]ven if the Government were justified in maintaining a ban on exclusive contracts, it would have to do so even-handedly to satisfy the First Amendment.").

Thus, the fact that House can only contribute $1250 and $400 to some of his preferred candidates in Tier 1 and Tier 2 races, respectively, while others can contribute $2500 and $800, respectively, is sufficient harm to establish standing, irrespective of whether that harm is characterized as a First Amendment or equal-protection violation.

The government also claims that Plaintiffs should not be allowed to rely on any harm to House in the first place because they did not raise that harm in the district court. That is untrue. Plaintiffs' motion explicitly mentioned harm to House stemming from the differential-limit regime. App. at 36. True, Plaintiffs emphasized the harm to the candidates among them, whose injuries were most obviously imminent and severe. *See id.* at 36–37. *See generally Buckley*, 424 U.S. at 20–21 (noting contribution limits are less of a First Amendment infringement

than expenditure limits). But they did not neglect House's injury.

Furthermore, the relevant inquiry is how the lower court understood the appealing party's arguments, not whether the party made a mathematically precise argument in its briefing. *United States v. Robinson*, 583 F.3d 1265, 1269 n.1 (10th Cir. 2009). And the district court understood House to be asserting "that donors such as himself are harmed when their contributions to a candidate who has not agreed to the voluntary spending limits are restricted to a greater extent than the contributions of donors supporting a different candidate who has agreed to the spending limits." App. at 108–09. Defendants may have missed that point in the briefing and argument below, but the court did not.

As for Pelton, the government says he is unharmed by spending limits because his campaign would not have reached those limits under any circumstances. Answer Br. 16. That is speculation. It is true that spending in Pelton's previous campaigns did not reach the current expenditure-limit amounts. *See* App. at 177. But he ran for a different office in those races, with a smaller district (both by area and population), different constituents, different contributor pools, and so on. *See id.* at 168 (noting Pelton is running for state Senate); *id.* at 177 (discussing previous races for state House of Representatives). His past spending does not accurately measure what it will take for him to win a different race in 2022—especially since fundraising can vary wildly from election to election, even with exactly the same candidate running

in a race for exactly the same office, *see* App. at 27–28, 74.

Furthermore, whether Pelton will or will not hit the expenditure cap during the present election cycle is immaterial because the mere existence of the differential-limit regime forced him to alter his behavior. Pelton would have preferred to run his campaign without a spending limit. But he chose the limit as a defensive strategy, to avoid letting any opponent benefit from increased contribution limits. App. at 155. Such altered behavior suffices to establish the necessary injury. *See Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1113 (10th Cir. 2010); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1183 (10th Cir. 2010).

Indeed, Pelton's injury is much like the injury that supported standing in *Davis*. In that case, the law required a candidate to declare early on whether he intended to spend more than a certain amount of personal funds on his campaign. That declaration triggered a differential-limit regime where the self-funder's opponent (but not the self-funder himself) could accept larger contributions. 554 U.S. at 729. The plaintiff in that case filed the self-funding declaration, but his opponent never accepted any larger-than-normal contributions. *Id.* at 731. Still, the plaintiff had standing not just to challenge the requirement that he file the declaration, *id.* at 733, but also to challenge the differential-limit scheme itself, *id.* at 734.

Here, the situation is similar. Because of the differential-limit

scheme, Pelton had to decide whether to be bound by expenditure limits.[3] That he chose the route that kept his opponents from getting increased contribution limits does not mean he was not harmed. The requirement that he make the choice in the first place gave him the necessary injury for standing purposes.

Defendants also claim that a preliminary injunction would not remedy House's injury because it would not impact the amount he could personally contribute to any candidate. But this argument misconceives House's injury. The problem of differential limits is not that House cannot contribute as much as he wants to the candidates of his choice. It's that his associational rights are burdened when opposing candidates' supporters may contribute twice as much to their candidates than House may to his. An injunction that applied the same contribution limits to all candidates would remedy that injury.

Even setting aside the remedying of unequal treatment, however, whether House could contribute more to particular candidates after an injunction would largely depend on whether the injunction expands the availability of doubled contributions to all candidates (on the theory

[3] That he could have avoided expenditure limits by making a different choice is irrelevant to standing. *See Cruz*, 142 S. Ct. at 1647–48. Likewise, the district court's statement that "there is no First Amendment right to be free from having to make a choice regarding campaign financing," App. at 122, whether true or not, does not matter to the standing inquiry. *See Warth*, 422 U.S. at 500.

that by allowing greater limits Colorado has already conceded that the lower limits are unnecessary to satisfy any anti-corruption interest) or limits all candidates to the standard base-level contribution limits—in other words, whether the injunction imposes a "leveling-up" or a "leveling-down" remedy. The availability of a leveling-up remedy is a complicated issue.[4] *See Barr*, 140 S. Ct. at 2354–55 (opinion of Kavanaugh, J.) (finding that leveling-down remedy was acceptable because baseline rule was a valid time/place/manner restriction); *id.* at 2365–66 (Gorsuch, J., concurring in part and dissenting in part) (arguing that leveling-up remedy is generally proper course in First Amendment case); *see also Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017) (in choosing between leveling-up and leveling-down

[4] The issue was not briefed before the district court because of the context in which the request for an injunction arose: Plaintiffs asked the Court to preliminarily enjoin both the standard contribution limits and the mechanism allowing for differential contribution limits between candidates. Had that injunction issued, the leveling-up vs. leveling-down discussion wouldn't have been relevant because there would have been no underlying limits to level down to. In pursing this more-limited appeal, however, that question has suddenly become relevant. Given this posture, the best route would be to simply hold that the district court erred in denying Plaintiffs an injunction on the differential-limit scheme and return the case for the district court to determine the injunction's scope. *Cf. Brackeen v. Haaland*, 994 F.3d 249, 432 (5th Cir. 2021) (opinion of Duncan, J.) ("We decline to perform a severability analysis of a complex statute . . . when the parties have not deeply engaged with the issue."), *cert granted* 142 S. Ct. 1205.

injunction, court looks to "legislature's intent, as revealed by the statute at hand"). But for the standing inquiry, it's enough to say that such a remedy is *possible*. Again, the ultimate merits of a plaintiff's substantive arguments are irrelevant to standing. *Warth*, 422 U.S. at 500.

As for the redressability of Pelton's injury, Defendants' argument hinges on a hyper-formalist reading of the opening brief. Because the opening brief only cited article XXVIII, section 4, subsection *5* of the Colorado Constitution (the part establishing differential limits) and the spending limits reside in a slightly different part—article XXVIII, section 4, subsection *1*—the government argues Pelton will be stuck with spending limits regardless. Answer Br. 17.

Not so. Plaintiffs' challenge plainly runs to the differential-contribution-limit regime as a whole, of which expenditure limits are an integral part. *See, e.g.*, Opening Br. 2 (question presented); *id.* at 9 (arguing that the differential-limit regime is an "attempt[] to circumvent [the Supreme Court's] prohibition" on limiting candidates' expenditures); *id.* at 16 (discussing expenditure limits' burden on speech). Any properly scoped preliminary injunction would naturally release Pelton from the expenditure limits.

C. *Neither Pelton's nor House's Need for a Preliminary Injunction Is Moot.*

Defendants correctly note that this appeal is moot with respect to

Lopez because he lost the primary election. *See Thournir v. Buchanan*, 710 F.2d 1461, 1463–65 (10th Cir. 1983).[5] But Pelton and House are different stories.

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969) (citation omitted). "The crucial question is whether granting a present determination of the issues . . . will have some effect in the real world." *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000) (internal quotes omitted).

Defendants have not adequately shown that Pelton lacks a stake in the outcome of this appeal.[6] As mentioned above, *supra* Pt. I.B, as long as the differential-limit regime—with its concomitant expenditure limits—continues, he will be subject to those expenditure limits. And he's running against an opponent who is not subject to those limits.

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[5] The underlying district-court case is a separate matter, however. *Bogaert v. Land*, 543 F.3d 862, 864 (6th Cir. 2008); *accord Pearlman v. Vigil-Giron*, 71 F. App'x 11, 14 (10th Cir. 2003).

[6] Defendants do not use the word "moot" with regard to Pelton, but their arguments—which rely on events from April and June of this year and had to be supported by a supplemental affidavit rather than evidence already in the record—sound in mootness. *See* Answer Br. 15; *see also id.* 7 n.1 ("[S]*ubsequent developments* in . . . Pelton's race[] have deprived [him] of standing to obtain a preliminary injunction." (emphasis added)).

Answer Br. 15 (citing Bouey Aff. ¶ 8). As the race heats up, Pelton will have to adhere to spending limits and his opponent will not. He is only in this position because of Colorado's decision to promote spending limits through a differential-limit regime. A preliminary injunction would relieve him of this burden. Thus, his claims are not moot.

The government seems to think it's relevant that Pelton had a chance to withdraw from the spending limits and did not do so. *See* Answer Br. 15. But, as mentioned above, an escape-hatch to potentially avoid the harm is irrelevant to justiciability. *Cruz*, 142 S. Ct. at 1647–48. Defendants also note that Pelton might benefit from doubled contribution limits compared to his opponent. Answer Br. 15. But getting an arguable advantage elsewhere doesn't relieve the burdens of spending limits. Absent injunctive relief, Pelton is stuck with those burdens. Because a preliminary injunction would relieve the injury Colorado's differential-limit regime inflicts on Pelton, his claims are not moot.

House's claims are not moot either.[7] When they moved for a preliminary injunction, Plaintiffs used Lopez as an example of a House-supported candidate who was subject to lower contribution limits than

[7] Defendants have not argued that House's preliminary-injunction request is moot. But because the Court may raise the issue sua sponte, *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996) (citation omitted), Plaintiffs think it prudent to address the matter.

his opponent. *See* App. at 159. Lopez is, of course, no longer running. But House has already identified another candidate whom he supports and intends to contribute to and who is likewise on the short end of differential limits. (Plaintiffs are supplementing the record on this point.) Indeed, it was virtually inevitable that House would support another such candidate. *See id.* at 75 (about one quarter to one third of candidates choose expenditure limits and their concomitant higher contribution limits); *id.* at 159 (noting House's history of maximum-allowable contributions and stating he "expect[ed] to give the full amount that I am allowed to give for both the primary and general elections to other . . . candidates"). Both his continuing contributions in the current election cycle and the good chance he will "be[] likewise injured in the future," *Facio v. Jones*, 929 F.2d 541, 544 (10th Cir. 1991), keep House's request for preliminary relief from mootness.

Thus, this appeal presents a live issue. The Court may address the substantive issues Plaintiffs have raised.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING PLAINTIFFS' PRELIMINARY INJUNCTION MOTION.

The Supreme Court has "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. This Court should not do so now.

The district court held that Section 4(5) is not subject to

heightened scrutiny because it purportedly does not burden candidates' First Amendment rights. Defendants maintain that position on appeal, arguing not only that the Constitution is not offended by a system allowing one candidate in a race to accept contributions twice as large as her opponents but also that such a system does not implicate any First Amendment interests *at all*. Answer Br. 20–21. Under this theory, the First Amendment does not limit Defendants' regulation of campaign finance so long as they stick a supposedly non-coercive choice somewhere in a candidate's decision tree. This is incorrect.

A "drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Davis*, 554 U.S. at 739. A reviewing court must still consider whether the consequences of the choice burden constitutional rights and, if so, apply the appropriate level of scrutiny. Limits on the amount a supporter can contribute or a candidate receive, or on the amount a candidate can spend, obviously burden First Amendment activity. And a government-imposed inequality between candidates in those areas is a First Amendment injury *whether or not* the limits would be constitutional in isolation.

Nearly all the cases relied on by Defendants on this point predate *Davis v. FEC*. And even if they are still good law, the cases all involve situations where—unlike here—public financing is available to candidates. At any rate, Defendants cannot escape the controlling law

established in *Davis* and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (*AFE*), 564 U.S. 721 (2011), which make clear that the choice Colorado's differential-limit scheme imposes on candidates implicates First Amendment rights.

Once that burden is acknowledged, Section 4(5) wilts under heightened scrutiny because the differential limits do not serve any valid governmental interest. *Riddle*, 742 F.3d at 928–29.

A. *The District Court's Decision Receives No Deference.*

Defendants beat on the abuse-of-discretion standard as if it blocks granting relief here. *See* Answer Br. 18–19. But an abuse of discretion occurs when a court "commits an error of law," *Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 775 (10th Cir. 2009), and legal issues are reviewed de novo—the appellate court affords the lower court's decision no deference. *Citizens United v. Gessler*, 773 F.3d 200, 209 (10th Cir. 2014).

This appeal presents a pure issue of law for de novo review. And the district court's conclusion that the differential limitations impose no burden on the First Amendment rights of candidates and their supporters cannot be reconciled with the established campaign finance law. Opening Br. 16–17.

B. *The Facial vs. As-Applied Distinction Is Inconsequential at This Stage.*

Defendants also go too far by claiming that the facial vs. as-

applied distinction has some important meaning in this case. Despite courts sometimes talking about facial "claims" or as-applied "claims," these are not claims per se. They are arguments that sound in remedy. *Citizens United v. FEC*, 558 U.S. 310, 331 (2010); *Sonnier v. Crain*, 613 F.3d 436, 452 n.3 (5th Cir. 2010) (Dennis, J., concurring in part and dissenting in part). Nor is there a clear line between facial and as-applied arguments anyway—it's more a continuum than a dichotomy. *See Doe v. Reed*, 561 U.S. 186, 194 (2010). Thus, while Defendants' claims about the "strong medicine" of a facial remedy, Answer Br. 19 (internal quotes omitted), may have some purchase in determining the proper scope of a preliminary injunction,[8] they are irrelevant to whether Plaintiffs are likely to succeed on their underlying First Amendment claims. *See generally Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019) ("[C]lassifying a lawsuit as facial or as-applied . . . does not speak at all to the substantive rule of law necessary to establish a constitutional violation." (citation omitted)).

[8] Plaintiffs freely admit that they are making facial arguments. Section 4(5)'s burdens don't fall only on Plaintiffs, and Colorado points to no circumstances that would justify its differential-limit regime in some cases but not others. Thus, like the statutes at issue in *Davis* and *AFE*, the remedy here should include facial invalidation.

C. *Plaintiffs Are Likely to Prevail in Their Challenge to Colorado's Differential-Contribution-Limit Regime.*

1. *Section 4(5) burdens Plaintiffs' constitutional rights.*

Agreeing with the District Court, Defendants contend that "[l]aws that allow candidates to voluntarily accept spending limits in exchange for other benefits," such as a doubled contribution limit, do not burden First Amendment rights "as long as they are not coercive." Answer Br. 21. And because Section 4(5) is not coercive (according to Defendants), there is nothing wrong with it. *See id.* at 20–21, 24–26.

But candidates cannot choose to accept or reject Section 4(5)'s contribution-limit differential. A more apt characterization is that candidates face a dilemma—that is, two unattractive but inescapable burdens on their First Amendment rights. Opening Br. 17.

At any rate, an uncoerced "choice" is not the cut-off for determining a First Amendment burden. Analysis of whether the "choice" burdens constitutional rights must focus on the *consequences* of the choice. *See Davis*, 554 U.S. at 739; *see also* Opening Br. 21 (noting that, in *AFE*, the only opinion finding coerciveness or non-coerciveness relevant was the dissent).

The district court and Defendants thus miss the First Amendment burden that Colorado's system imposes. Plaintiffs do not claim some "First Amendment right to be free from having to make a choice regarding campaign financing," App. at 122. What Plaintiffs claim is

that Colorado forces candidates to accept one of two burdens on their First Amendment rights: either (a) limit their campaign spending or (b) bear the burden of their opponents accepting contributions up to twice as large as otherwise permitted. The former has been a recognized First Amendment burden since at least 1976. *See Buckley*, 424 U.S. at 39 (campaign spending limits "impose direct and substantial restraints on the quantity of political speech"). And the discriminatory treatment in the latter has been a recognized First Amendment burden since at least 2008. *See Davis*, 424 U.S. at 740 (noting "burden that is placed on [a First Amendment] right by the activation of a scheme of discriminatory contribution limits"). And, as with the unconstitutional statute in *Davis*, Colorado "does not provide any way in which a candidate can exercise [his] right[s] without abridgement," 554 U.S. at 741.

2. *The cases Defendants rely on are irrelevant because Colorado does not offer public financing for political campaigns.*

Defendants rely on *Corren v. Condos*, 898 F.3d 209 (2d Cir. 2018), and other cases from jurisdictions that, unlike Colorado, offer public financing for campaigns in exchange for expenditure limits. *See* Answer Br. 21–23.

But relying on *Corren* and other such cases[9] leaves out the

[9] The remaining public-financing cases relied on by Defendants (i.e., cases other than *Corren*) did not have the benefit of *Davis* and *AFE*. Thus, it is doubtful their conclusions that the statutes at issue did not

punitive aspect of Colorado's system. That portion of the system raises the same problem that concerned the Supreme Court in *Davis* and *AFE*.

As recognized by *Corren*, public-financing systems do not impermissibly burden First Amendment rights so long as "they merely create another viable funding option." *Corren*, 898 F.3d at 220. But that is not what Section 4(5) does. Colorado leaves all candidates with the same funding options. It just allows certain candidates to access that funding option twice as much.

Furthermore, when courts have upheld public financing, they have done so when the public financing system operates independently of any decisions by a non-publicly-financed candidate. *See Davis*, 554 U.S. at 739–40 (distinguishing public-financing model upheld in *Buckley*); *see also Green Party v. Garfield*, 616 F.3d 213, 230–46 (2d Cir. 2010) (upholding public-financing system's neutral eligibility criteria but striking down provisions that triggered public financing based on a candidate's opponents' expenditures). In Colorado, however, a candidate who chooses to fully exercise his constitutional right to use any funds he can lawfully raise to promote his candidacy is punished when his opponent chooses to limit her campaign expenditures. In other words,

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burden First Amendment rights remain good law. *See Green Party v. Garfield*, 648 F. Supp. 2d 298, 370–73 (D. Conn. 2009); *McComish v. Brewer*, 2008 U.S. Dist. LEXIS 83307, at *15–20 (D. Ariz. Oct. 17, 2008) (unpublished).

just as in *Davis*, the Colorado law "does not provide any way in which a candidate can" ensure his ability to fully exercise his "right without abridgement." *Id.* at 740.

At any rate, *Corren* and the other public financing cases do not permit the government to escape showing a valid interest. To the contrary, the cases conclude that the First Amendment burdens imposed by those public-financing regimes are adequately justified by an important government interest.[10] By contrast, the district court undertook none of the analysis required by heightened scrutiny.

Lastly, Defendants argue that Section 4(5) resembles a public-financing plan more than it does the "Millionaire's Amendment" struck down in *Davis*. According to Defendants, neither Section 4(5) nor public financing systems "*automatically* burden one candidate" because, under them, "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." Answer Br. 27 (emphasis added); *see also id.* at 28–29 (trying to distinguish *AFE* on same grounds). But Defendants' assertion once again mistakenly

[10] The interest generally asserted on behalf of public financing systems is eliminating the risk of quid pro quo corruption (or its appearance): without private donors, there is no chance that someone will contribute to a candidate and expect special favors in return. *See Buckley*, 424 U.S. at 96; *Corren*, 898 F.3d at 223.

focuses on the "choice" aspect of the system rather than the punishment. The constitutionality of a particular scheme does not hinge on whether it is triggered automatically upon the decision to exercise one's First Amendment rights or because of some later choice by a third party.

Indeed, in *Davis* the opponent of the candidate who challenged the system never accepted any larger-than-normal contribution—i.e., he didn't even take advantage of the system. 554 U.S. at 731. This was immaterial to the Court. The fact that the system created the possibility that a candidate's campaign would be punished for refusing to curtail the exercise of First Amendment rights rendered the system unconstitutional. Colorado's system operates basically the same way: once a candidate chooses to eschew spending limits, an opponent with increased contribution limits becomes a live possibility. At any moment, an opponent could come along and accept doubled contributions, and the candidate exercising his full First Amendment rights could do nothing about it. That is the key point.

3. *Defendants fail to distinguish* Davis *and* AFE.

Besides analogizing Colorado's system to public financing, Defendants also try to distinguish *Davis* by claiming that it turned on the expenditure of a candidate's own personal funds. Answer Br. 26–27. But this distorts *Davis*' reasoning. *Davis* concerned the right to free speech, which applies both when a candidate uses his own money to get

his message out and when he uses lawfully raised contributor funds, *see Buckley*, 424 U.S. at 17–19; *see also Davis*, 554 U.S. at 750 (Stevens, J., dissenting) (recognizing, in arguing that Court should overturn *Buckley*, that it held "any regulation of the quantity of money spent on campaigns for office ought to be viewed as a direct regulation of speech itself"). True, the *Davis* Court did mention that the law at issue there "impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech," but the Court did not suggest that personal funds specifically were important to its reasoning. "First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection" to one over the other. *McDonald v. Smith*, 472 U.S. 479, 485 (1985). *Davis*' mention of personal funds is merely a function of the fact that the unconstitutional regulation there was triggered by the expenditure of personal funds; it did not mean that personal expenditures get some special treatment.

AFE confirms that *Davis* cannot be distinguished by its self-funding aspect. In *AFE*, the challengers were candidates financed by private contributions, and independent groups supporting them. *AFE*, 564 U.S. at 732–33. Yet the *AFE* Court held that even without a self-funding issue, its conclusions were largely controlled by "the logic of *Davis*." 564 U.S. at 736. That logic also controls here.

In the end, Section 4(5) "does what the Supreme Court has never countenanced: It creates different contribution limits for individuals

running against one another." *Riddle*, 742 F.3d at 929 (citation omitted); *see also Davis*, 554 U.S. at 43–44 ("[I]mposing different contribution and . . . expenditure limits on candidates vying for the same seat is antithetical to the First Amendment."). Differential limits like those in Section 4(5) do not offer the same choices to all candidates because, in reality, all candidates are not the same. Candidates' individual circumstances differ, with each having his or her own unique strengths and weakness. *See Davis*, 554 U.S. at 741-42. The law's treatment of candidates, however, cannot be asymmetrical.

4. *Colorado's differential-limit system does not survive heightened scrutiny.*

The district court acknowledged that if Section 4(5) burdened First Amendment rights, heightened scrutiny would apply.[11] App. at 120. However, after its erroneous threshold conclusion, the district court did not properly scrutinize the statute. Defendants similarly fail to do so. Regardless, Section 4(5) fails constitutional review.

Although the district court recognized that deterring corruption is

[11] The district court referred to "exacting scrutiny," which is the intermediate level of review for disclosure requirements, *see Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021). Disclosure requirements are not at issue here, however. The district court probably meant to refer to "closely drawn scrutiny," which often applies to limits on campaign finances specifically. *See generally Cruz*, 142 S. Ct. at 1652 (noting, but not deciding, dispute over whether "strict" or "closely drawn" scrutiny applies to campaign-finance rules).

the only interest that can justify limits on political speech or association, it did not address how Section 4(5) furthered that interest. *See* App. at 120. And though the district court mentioned "the interconnectedness of [Plaintiffs'] campaign speech with . . . the public interest," it left unanswered specifically what that interest might be. *Id.* at 122.

The government "may regulate campaign contributions to protect against corruption or the appearance of corruption." *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) (citation omitted). But it is unclear how Section 4(5)'s differential limits further any valid interest. In fact, because Section 4(5) permits larger contributions in exchange for spending less—thereby increasing the risk of corruption—it runs counter to a legitimate government interest. *See Davis*, 554 U.S. at 741 ("[G]iven Congress' judgment that liberalized limits for [some] candidates do not unduly imperil anticorruption interests, it is hard to imagine how the denial of liberalized limits to [some] candidates can be regarded as serving anticorruption goals . . . ."); *Riddle*, 742 F.3d at 928–29 (holding "interest in fighting corruption . . . is not advanced by a law that allows" one candidate in race to collect larger donations than others).

By contrast, Section 4(5)'s goal of reducing campaign spending is obvious. *See Buckley*, 424 U.S. at 57 ("The campaign expenditure ceilings appear to be designed primarily to serve the government

interest in reducing the allegedly skyrocketing costs of political campaigns."). That, however, is not a legitimate justification for infringing on First Amendment rights. The differential-limits scheme cannot rest on "the constitutionally insufficient purpose of reducing what [Colorado] saw as wasteful and excessive campaign spending." *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) (citing *Buckley*, 424 U.S. at 57).

Moreover, the government should not put its thumb on the scale in favor of candidates who are willing to spend (and speak) less. *See McCutcheon*, 572 U.S. at 192 ("Campaign finance restrictions that pursue other objectives [besides reducing corruption] impermissibly inject the Government into the debate over who should govern." (internal quotes omitted)); *Davis*, 554 U.S. at 742 ("[I]t is a dangerous business for Congress to use the election laws to influence the voters' choices."). Among its many other problems, government intervention inevitably favors the incumbents already in government. *Accord McCutcheon*, 572 U.S. at 192.

The district court declined to enjoin the differential limits based in part on its preliminary determination that Section 3's base contribution limit was "likely constitutional." App. at 122. Because those limits are already intended to deter corruption, however, Section 4(5) is, at best, a "prophylaxis-upon-prophylaxis approach," which "is a significant indicator that the regulation may not be necessary for the interest it

seeks to protect." and must be justified separately. *Cruz*, 142 S. Ct. at 1653. But neither the district court nor Defendants have tried to independently justify Section 4(5)'s differential limits. As in *AFE*, where "Arizona already ha[d] some of the most austere contribution limits in the United States," 564 U.S. at 751–52, Colorado's contribution limits are the most austere in the country, *accord* App. at 115. Thus, like the matching provision in *AFE*, "it is hard to imagine what marginal corruption deterrence could be generated by" differential limits, 564 U.S. at 752, especially given that Section 4(5) doubles contribution limits, undermining their deterrent effect.

Even assuming Section 4(5) serves some legitimate governmental interest, though, the district court still did not consider whether the differential limits were closely drawn, and Defendants do not try either. "In the absence of a link between the differing contribution limits and the battle against corruption, the means chosen are not closely drawn to the State's asserted interest." *Riddle*, 742 F.3d at 928.

As in *Davis* and *Riddle*, Section 4(5) presents "the same . . . anomaly of candidates running against each other with different contribution limits, and the disparity is not closely drawn to the asserted interest in fighting corruption or its appearance," *Riddle*, 742 F.3d at 930 (citing *Davis*, 554 U.S. at 737-44). The anomaly here must likewise be struck down because "it is not closely drawn to the State's anticorruption goal," *id.*

5. *The differential-limits scheme violates the unconstitutional-conditions doctrine.*

Finally, Defendants argue that the unconstitutional-conditions doctrine does not apply here. Much of their argument on this point is simply a recapitulation of their earlier points that spending limits are okay in exchange for public financing, that Colorado's system implicates no constitutional rights, and so on. *See* Answer Br. 29–31.

However, Defendants also take the remarkable position that Colorado's differential-limit system does not involve a government benefit and, in fact, that the unconstitutional-conditions doctrine doesn't apply to a campaign-finance cases at all. *Id.* at 31–32. This is incorrect.

Throughout their brief, Defendants acknowledge that doubled contribution limits are a benefit offered to candidates by the government. Answer Br. 2, 21, 24, 27–30. To suddenly argue that there is no benefit involved is odd. But even if Defendants merely mean to say that the unconstitutional-conditions doctrine only comes into play when the government spends money directly rather than just allowing people to do or not do certain things, *see id.* at 31, that does not track the caselaw. The doctrine is commonly applied to land-use permits that involve no direct government spending and where the "benefit" is permission to do something that would otherwise not be allowed. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604–09

(2013).

Also, their claim that the doctrine never applies to campaign-finance rules is belied by *Corren*—a campaign-finance case Defendants spend several pages arguing is analogous to this one, *see* Answer Br. 20, 22– 23, 25. In an alternative holding, *Corren* explicitly applied the doctrine to the public-financing system at issue there. 898 F.3d at 222–23. Of course, the logic of *Corren* does not directly translate here. Section 4(5) does not merely "require[] an individual to choose between two methods of exercising the same constitutional right," 898 F.3d at 219; the differential limits burden different rights: limits on spending infringe on speech rights, while limits on contributions infringe on associational rights. But *Corren* does support the idea that the unconstitutional-conditions doctrine retains its power in the campaign-finance context.

Given that First Amendment speech is protected activity that must be restricted to receive the benefit of increased contribution limits, *see Davis*, 554 U.S. at 740, Colorado's scheme implicates the unconstitutional-conditions doctrine. *Accord Corren*, 898 F.3d at 219, 222–23. To be sure, the government may regulate the exercise of First Amendment rights in various ways. But conditioning benefits on the forfeiture of fundamental rights, or forcing people to choose among their rights, is impermissible.

D. *The Remaining Preliminary Injunction Factors Favor Granting Plaintiffs' Motion.*

The parties agree that the likelihood of success is determinative, and their respective positions on irreparable harm are flip sides of that same coin. So, too, are their positions on the public interest: because "it is always in the public interest to prevent the violation of a party's constitutional rights," *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012), a finding that Section 4(5) likely infringes Plaintiffs' First Amendment rights will dispose of the issue.

CONCLUSION

The district court's order denying Plaintiffs' motion for a preliminary injunction should be vacated with respect to the differential-limits scheme.

Dated: July 26, 2022

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CERTIFICATE OF COMPLIANCE

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Dated: July 26, 2022

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