



June 2, 2014

Honorable Scott Gessler  
Secretary of State of Colorado  
Via Email [Stephen.Bouey@sos.state.co.us](mailto:Stephen.Bouey@sos.state.co.us)

Re: Petition for Declaratory Order by Citizens United

Dear Secretary Gessler:

Pursuant to the May 1, 2014 Hearing Notice, Colorado Ethics Watch respectfully submits this written testimony regarding the petition for declaratory order filed by Citizens United (“CU Petition”). The Secretary has noticed a public hearing to consider the Petition for June 3, 2014 at 9:00am. Ethics Watch requests the Secretary consider this testimony providing “relevant views and arguments” in its determination of whether to grant the CU Petition.

As explained below, the CU Petition should be rejected as not appropriate for a declaratory order. However, if the Secretary chooses to substantively answer the CU Petition, he should issue an order declaring that Citizens United is not entitled to any exemptions from the disclosures required by Article XXVIII of the Colorado Constitution should it choose to take actions that trigger the independent expenditure or electioneering communication provisions. As was stated by eight Justices of the U.S. Supreme Court when it upheld the disclosure requirements of federal law as applied to both advertisements for the 2008 Citizens United film *Hillary* and the film itself:

The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

*Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 371 (2010). Citizens United is a not a broadcaster, publisher, or vendor which qualifies for an exception from the disclosure mandated

by Colorado law. As David Bossie, Citizen United's President and Chairman of the Board, himself stated: "I'm not a broadcaster who feels the need to defend myself..."<sup>1</sup>

***A. The CU Petition is Not Appropriate for a Declaratory Order under the Secretary's Rule 1.2***

The Petition for Declaratory Order, filed April 17, 2014 by Citizens United essentially seeks a complete waiver from compliance with the disclosure obligations created by citizens in Article XXVIII of the Colorado Constitution. *See* Colo. Const. art. XXVIII, §§ 5(1) and 6(1). Specifically, the CU Petition asks the Secretary to declare that its as-yet-unfinished film and advertisements fit within the constitutional and statutory exceptions to the definitions of "electioneering communications" and "expenditure." *See* Colo. Const. art. XXVIII, §§ 2(7)(b)(I)-(III) and 2(8)(b)(I)-(III). It is not appropriate to use the declaratory order procedure to decide this matter, because the CU petition does not satisfy the requirements of the declaratory order rule and a declaratory order will not in fact terminate controversies raised by Citizens United.

***1. The CU Petition does not fall within the requirements of Rule 1.2***

Under 8 CCR 1505-3, Rule 1.1, declaratory orders are limited to circumstances where an individual petitioner seeks clarification of rules or statutory provisions to that petitioner's conduct. *See also Colorado Office of Consumer Council v. Mountain States Tel. & Tel. Co.*, 816 P.2d 278, 284-85 (Colo. 1991) (*Mountain States*) (explaining agency adjudicatory proceedings resulting in orders). The Secretary's rules state that a declaratory order is not proper if the petition is a "hypothetical question or will result in advisory opinion." *See* 8 CCR 1505-3, Rule 1.2(B)(4). The petitioner has the burden to prove facts necessary to show the nature of the controversy and that the circumstances support application of the declaratory order rule. *See* 8 CCR 1505-3, Rule 1.4(B). The CU Petition fails to do so.

Citizens United explicitly seeks a proactive advisory opinion regarding *future conduct* that it might take. *See* CU Petition at 17. The CU Petition explains how its film is currently in production, but "it is likely that the film will include unambiguous references [sic] election Colorado officials who are candidates for re-election this year." CU Petition at 3. Thus, not only is Citizens United attempting to obtain a declaratory order regarding prospective conduct of showing and advertising the film, the film and advertisements themselves are not even completed yet. A petition premised on facts that are simply "likely" to occur is "hypothetical" and not appropriate under Rule 1.2.

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<sup>1</sup> Interview with David Edwards, "5 questions for Citizens United president about his new anti-Obama film" (Sept. 6, 2012) available at <http://www.rawstory.com/rs/2012/09/06/5-questions-for-citizens-united-president-about-his-new-anti-obama-film/>.

**2. A declaratory order would not terminate any controversy involving Citizens United**

Citizens United argues that a declaratory is proper under Rule 1.2 because it will “terminate a controversy” within the Secretary’s enforcement authority. *See* CU Petition at 5-6. This argument misunderstands the campaign finance system in Colorado, which is very different from the process at the Federal Election Commission to which the CU Petition analogizes. In fact, a declaratory order issued by the Secretary would not terminate any controversy or avoid litigation of issues raised by Citizens United’s conduct this fall.

Although the Secretary does have authority to issue \$50 per day fines for late filings, the Secretary is not involved in enforcement matters if an organization such as Citizens United simply refuses to initially register as an independent expenditure committee or file transactional reports for electioneering communications spending. *See* Colo. Const. art. XXVIII, § 10(2)(a). As the Secretary knows, these types of issues under campaign finance law are enforced not by the Secretary, but through private party complaints resolved by an Administrative Law Judge. *See* Colo. Const. art. XXVIII, § 9(2)(a). The imposition of fines is handled automatically by the Secretary’s office only for committees which are already registered within the online system and therefore subject to a reporting schedule. Late filing and fine notices are generated in that system. However, if Citizens United never registers or files any reports, the Secretary would not notify or impose fines upon the organization until or unless a private party litigated a successful administrative enforcement case against them.<sup>2</sup> Therefore, no active controversy could be resolved by issuance of a declaratory order to Citizens United, just as the Secretary recognized in the Final Agency Decision, *In the Matter of the Colorado Republican Party’s Petition for Declaratory Order*, Feb. 6, 2014, at p.3.

**B. Citizens United is not entitled to any exemption from constitutionally-required disclosures for independent expenditures and electioneering communications.**

If the Secretary deems the CU Petition to fall with the requirements for a declaratory order and chooses to analyze the substantive issues presented, the order should state that Citizens United does not fit any of the exceptions cited in the CU Petition. While controlling case law provides the opportunity for Citizens United to make communications that fall within the definition of “expenditure” or “electioneering communications,” it is not entitled to do so while escaping public disclosure under Colorado law. *See Citizens United*, 558 U.S. at 365; *In Re Interrogatories Propounded by Governor Ritter, Jr. Concerning the Effect of Citizens United v. Federal Election Comm’n*, 558 U.S.\_\_\_\_ (2010) on *Certain Provisions of Article XXVIII of The Constitution of the*

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<sup>2</sup> While art. XXVIII, § 9(2)(a)’s authorization of “any person” to file campaign finance enforcement matters could include the Secretary, by rule the Secretary’s discretionary authority to file such complaints is limited to violations discovered “in the ordinary course of his or her duties in maintaining a campaign finance filing system.” Campaign and Political Finance Rule 18.2, 8 C.C.R. § 1505-6 (2012).

*State of Colorado*, 227 P.3d 892 (Colo. 2010). Citizens United is attempting to stretch Colorado exemptions to fit its political activities so that it may avoid the disclosure obligations upheld by the Supreme Court. Specifically, the Supreme Court held that disclaimer and disclosure requirements must be followed for both the film and the advertisements proposed by Citizens United because they qualified as “electioneering communications” under federal law. *See Citizens United*, 558 U.S. at 370-371. The Court did not consider Citizens United an exempt entity, nor find any risk of chilling member donations based on disclosure of the source of funds used for the film and advertisements. *See id.* Nor did the Court accept the argument that these proposed ads proposed a commercial transaction to the viewer (“buy the Citizens United DVD”) outside the scope of federal disclosure law.

Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election.

*Id.* at 396. Citizens United seeks from the Secretary what the U.S. Supreme Court refused to provide: a blanket exemption from all campaign finance disclosure obligations.

Colorado law has three specific exceptions to the definitions of “expenditure” and “electioneering communications” and Citizens United does not meet any of them. These three exceptions from the definitions are:

1. Any news articles, editorial endorsements, opinion or commentary writings, or letters to the editor printed in a newspaper, magazine or other periodical not owned or controlled by a candidate or political party. *See* Colo. Const. art. XXVIII, §2(7)(b)(I) & §2(8)(b)(I) (“publisher exception”)
2. Any editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party. *See* Colo. Const. art. XXVIII, §2(7)(b)(II) & §2(8)(b)(II) (“broadcaster exception”)
3. Any communication by persons made in the regular course and scope of their business or any communication made by a membership organization solely to members of such organization and their families. *See* Colo. Const. art. XXVIII, §2(7)(b)(III) & §2(8)(b)(II) (“regular business exception”)<sup>3</sup>

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<sup>3</sup> There is slightly different phrasing for the regular business exemption in the definition of “expenditure” but it does not affect the substantive analysis as there is no indication that the scope is intended to be different than that of the provision in the “electioneering communications” definition enacted at the same time.

The Secretary must apply the Colorado Constitution's campaign finance provisions according to their plain language and should interpret them in light of the intent of the citizens who adopted that ballot measure. *See Senate Majority Fund 2012 CO 12 at ¶ 20; Colorado Citizens for Ethics in Gov't v. Cmte for the Am. Dream*, 187 P.3d 1207, 1213-1214 (Colo. App. 2008) ("CCEG").

Citizens United's spending on its proposed film and advertising does not satisfy any of the exceptions according to their plain language. The film itself does not fall under the publisher exception, which applies only to periodicals. Even if the film is included in broadcast or digital streaming services, it will be not aired as an editorial or opinion during a program and therefore will not satisfy the broadcaster exemption. Finally, display and distribution of the film will not fit under the regular business exception unless Citizens United – as a self-proclaimed membership organization – limits its distribution "solely to members" under that exception. *See* CU Petition at 1 ("Citizens United is organized and operated as a non-profit membership organization").

The proposed advertising and marketing of Citizens United's film also does not fall under the plain language of any of these exceptions. Print advertisements for the film purchased by Citizens United do not meet the plain language of the publisher exception as paid advertising is distinct content from "news articles, editorial endorsements, opinion or commentary writings, or letters to the editor." It is possible that Citizen United's internet marketing could be considered "printed in a...periodical" under the publisher exception, but paid advertisements would again be treated differently than editorial or opinion content on a website. Therefore, any paid internet marketing for Citizens United's film would not qualify for the publisher exception. Nor are paid advertisements broadcast on television or radio considered editorial or opinion content under the broadcaster exception. Citizen United's proposed direct mail and billboard advertisements would be conducted in separate media that do not fit under either the publisher or broadcaster exceptions. *Cf.* Federal Election Commission Advisory Opinion 2011-28 (holding paid ads on Facebook must be reported as independent expenditures). Finally, none of these marketing activities would qualify under the plain language of the regular business exception because Citizens United is seeking to market beyond its membership.

If the Secretary believes that the plain language of one or more of these exceptions is ambiguous, then a review of voter intent and relevant case law reinforces the conclusion that Citizens United's film and advertisements do not fall within the scope of any of these three exceptions. *CCEG* examined the scope of these exceptions in the context of electioneering communications, but the analysis applies equally to the parallel exceptions for expenditures adopted at the same time.

The Colorado Court of Appeals found the voter intent behind Article XXVIII disclosure requirements was to “regulate communication designed to ‘influence the outcome of Colorado elections.’” *CCEG*, 187 P.3d at 1216 (internal citations omitted). With this voter intent in mind, the court described the scope and interplay of the exceptions as follows:

The exceptions in section 2(7)(b)(I) and (II) encompass most material from those sources, such as “news articles,” “editorial endorsements,” or “opinions.” However, reading the definition and these exceptions together, but without regard to section 2(7)(b)(III), would leave broadcasters and publishers subject to the reporting requirements of Article XXVIII for advertisements that “unambiguously [refer] to any candidate.”

As discussed above, the reporting requirement is directed at persons who seek to “influence election outcomes.” Broadcasters and publishers do not seek to influence elections as their primary objective, except where they are “owned or controlled by a candidate or political party,” which limits section 2(7)(b)(I) and (II). Hence, such reporting usually would not advance the purpose of Article XXVIII.

*CCEG*, 187 P.3d at 1216. Thus, the broadcaster and publisher exceptions are limited in scope to the company that publishes or broadcasts the materials at issue. Citizens United is the content generator, not the broadcaster or publisher. Similarly, the fact that Citizens United routinely makes movies to influence elections does not entitle it to claim the regular business exception:

Exempting persons such as CAD, who regularly make electioneering communications for the purpose of influencing elections, from reporting requirements would frustrate Article XXVIII's purpose of full disclosure...

Instead, we interpret the regular business exception more narrowly, as limited to persons whose business is to broadcast, print, publicly display, directly mail, or hand deliver candidate-specific communications within the named candidate's district as a service, rather than to influence elections.

*Id.* (citations omitted).

There is no dispute that Citizens United is an advocacy organization in the “business” of creating, distributing and advertising films that attack candidates. In addition to *Hillary*, Citizens United has run marketing around anti-Obama films in both 2008 and 2012 (*Hype: The Obama Effect* and *The Hope and the Change*). Citizens United also produced and advertised a 29 minute “film” about the Democratic candidate for Governor during Virginia’s election last year (*Fast Terry*). Citizens United recently co-hosted a “Freedom Summit” in New Hampshire as a forum for potential Republican Party candidates called the “unofficial kickoff of the 2016 process.”<sup>4</sup> Mr. Bossie, President of Citizens United, is not shy about explaining exactly the plan to “influence the outcome of elections” in everything the Citizens United does:

- Regarding spending advertising money on the 2012 anti-Obama film on MSNBC and CNN instead of Fox News: “I’m not gonna preach to the choir with this film.”<sup>5</sup>
- Regarding Citizens United’s decision to produce and purchase advertising in Ohio and Wisconsin during the 2011 election season: “We believe, from the 30,000-foot view, that every single one of these races is connected to defeating Barack Obama next November.”<sup>6</sup>
- Regarding the 2012 anti-Obama films shown at the Citizens United Theater during the Republican National Convention: “We’re aiming for the 5-to-7 million voters in the middle that could make a difference in this election.”<sup>7</sup>

The CU Petition urges the Secretary to rely upon a 2010 advisory opinion from the Federal Election Commission granting “press entity” status under federal law. This determination under federal law is case-specific and does not automatically grant Citizens United blanket exemptions under all campaign finance requirements for the 50 states. For example, Citizens United reported independent expenditures for radio advertising in Virginia during last year’s gubernatorial election without apparently claiming to be exempt from state reporting requirements. *See* Independent Expenditure Report dated September 17, 2013 (Attachment A). There is no compelling argument under Colorado law that Citizens United should not be similarly required to file disclosures for our citizens regarding advertisements related to the 2014 gubernatorial election.

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<sup>4</sup> CBS News, “Potential 2016 GOP candidates slam Obamacare at conservative gathering,” (April 12, 2014) available at <http://www.cbsnews.com/news/potential-2016-gop-candidates-slam-obamacare-at-conservative-gathering/>.

<sup>5</sup> The Daily Beast, “The Hope and the Change: New Citizens United Movie Blasts Obama,” (August 12, 2012) available at <http://www.thedailybeast.com/articles/2012/08/21/the-hope-and-the-change-new-citizens-united-movie-blasts-obama.html>.

<sup>6</sup> Joe Varden, “Battle for Senate Bill 5; Money rains, rallies rock in Issue 2 slugfest,” The Columbus Dispatch (Ohio), November 4, 2011 at B1.

<sup>7</sup> Steve Persall, “Film Festival tout GOP Message on big screen,” The Tampa Bay Times, August 28, 2012 at 14.

Even if the Secretary were to take the FEC advisory opinion as persuasive authority when interpreting the scope of Colorado's differently-worded state law exceptions, the federal exemption is not as broad as Citizens United describes. In 2011, the FEC issued an advisory opinion that Viacom, Inc. was required to file campaign finance disclosures related to political advertisements and activities which were outside the scope of its "legitimate press function." *See* AO 2011-11 (Colbert) (Attachment B). If Viacom, undeniably a broadcasting corporation, may be required to disclose political spending, certainly Citizens United may be required to comply with Colorado's disclosure laws.

Colorado voters demand disclosure of political advertisements outside of a candidate's control. Since the U.S. Supreme Court ruling in *Citizens United*, Colorado voters overwhelmingly adopted another ballot measure – Amendment 65 – supporting limitations on contributions and spending by outside groups in elections. Regardless of any other decision under other laws, Citizens United is not entitled to any exemption under the Colorado Constitution consistent with that voter intent.

***C. The Secretary should issue an order requiring Citizens United to comply with all electioneering communications reporting requirements.***

The Secretary can issue an order on the substantive question of whether Citizens United's film and advertisements trigger specific electioneering communications reporting, even without the specific footage and text. The definition of "electioneering communications" under Article XXVIII provides a simple checklist of items to determine whether reporting is required. The definition applies to any communication that:

- (1) Is broadcasted by television or radio, printed in a newspaper on or a billboard, directly mailed or delivered by hand to personal residences;
- (2) Unambiguously refers to any state candidate;
- (3) Is broadcasted, printed, mailed or distributed within 30 days before a primary election or 60 days before a general election; and
- (4) Directed to an audience that includes members of the electorate for such public office.

*See* Colo. Const. art. XXVIII, § 2(7)(a).

The CU Petition admits each of these elements for the proposed film and its advertisements. The film and its advertisements will be broadcast on television, and additional advertisements will be broadcast on television, radio, published in newspaper ads, direct mail and billboards. *See* CU Petition at 3-4. The film and advertisements will both include "unambiguous references" to Colorado state candidates, including Governor Hickenlooper. *See* CU Petition at 3. Finally, the CU Petition admits that "marketing & distribution in Colorado is



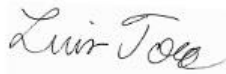
slated to occur within the 60 day window preceding November 4, 2014 general election.” *See* CU Petition at 4. Thus all elements of the “electioneering communications” definition is met.

On the basis of the admissions in the CU Petition, the Secretary should issue an order that Citizens United must comply with all electioneering communications reporting requirements for its film and advertisements in the 60 days preceding the November 2014 election.

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Colorado law requires disclosure of advertisements of advocacy groups that expressly advocate for or against state candidates and communications that refer to state candidates in the time immediately before an election. Citizens United is such an advocacy group, not a broadcaster or publisher. As such, there is no authority for the Secretary to issue the declaratory order sought by the CU Petition.

Very truly yours,

A handwritten signature in cursive script that reads "Luis Toro". The signature is written in dark ink on a light-colored background.

Luis Toro  
Director