

BEFORE THE SECRETARY OF STATE
STATE OF COLORADO

IN THE MATTER OF CITIZENS UNITED'S PETITION
FOR A
DECLARATORY ORDER

CITIZENS UNITED'S MEMORANDUM OF FACTS & LAW
IN SUPPORT OF THE PETITION

Petitioner, Citizens United, hereby submits this Memorandum of Facts & Law in support of its Petition for a Declaratory Order.

SUMMARY

On April 14, 2014, Citizens United filed a Petition with the Secretary of State requesting a declaratory order determining whether its forthcoming documentary film about various Colorado advocacy groups and their impact on Colorado government and public policy qualifies as an "expenditure" or "electioneering communication" under Colorado's campaign finance laws. Citizens United contends that its film and advertising to promote the film are excluded from the definitions of those terms under the law's news media/press exclusions, *See* Col. Const. Art. XXVIII, § 2(7)(b)(I) and (II) and § 2(8)(b)(I) and (II); and C.R.S. § 1-45-103(9) and § 1-45-103(10), and the exclusions for communications and spending "made in the regular course and scope of [its] business." Col. Const. Art. XXVIII, § 2(7)(b)(III) and § 2(8)(b)(III); and C.R.S. § 1-45-103(9) and § 1-45-103(10). Citizens United urges the Secretary to issue a declaratory order confirming that its film and its advertising fall within the scope of those exclusions and consequently neither one is an "electioneering communication" nor an "expenditure."

FACTS

The following facts have been adduced from the testimony and other relevant evidence in this matter.

Petitioner Citizens United is a Virginia non-stock corporation with its principle place of business in Washington, DC. Citizens United is organized and operated as a non-profit membership organization that is exempt from Federal income taxes under Section 501(c)(4) of the U.S. Internal Revenue Code. Citizens United is registered to solicit contributions for charitable purposes in various jurisdictions throughout the United States, including the State of Colorado.

Citizens United is not a political committee, nor is it owned or controlled by any candidate, political party or political committee.

Citizens United regularly produces, markets and distributes documentary films, including films that explore controversial political organizations, personalities and policies in the United States and abroad. Since 2004, Citizens United has produced and released twenty-three documentary films, some of which are award winning.

Citizens United distributes its films in a variety of formats including: theaters, DVDs, television and digital streaming. In order to promote the sale of its films, Citizens United advertises them on television, on billboards, in newspapers, via direct mail and electronic mail, and on the internet.

In 2010, the Federal Election Commission, which is the Federal governmental agency that administers and enforces Federal campaign finance law, issued Advisory Opinion 2010-08 to Citizens United. That Advisory Opinion concludes that Citizens

United's films and advertising promoting its films are exempt from the definitions of "expenditure" and "electioneering communication" under Federal campaign finance law under the Federal exemptions to those terms that cover news media and press activities.

Citizens United is currently producing a documentary film about various Colorado advocacy groups and their impact on Colorado government and public policy. The film will be approximately one hour in length. The film will likely include unambiguous references to elected Colorado officials who are candidates for election in this year's elections, which will be held on November 4, 2014. While the film is not expected to editorially endorse any candidates, due to the subject matter covered, it is likely to include audio and video content of events where participants in those events expressly advocate the election or defeat of one or more candidates in the November 4, 2014 elections.

The precise cost of producing, marketing and distributing the film is not yet known, but costs will run into the hundreds of thousands of dollars. Thus, far exceeding the \$1,000 thresholds for mandated reporting of "electioneering communications" and "independent expenditures" under Colorado's campaign finance laws.

The film is planned for release in September 2014, and will be marketed and distributed across the United States, including in Colorado. Citizens United will distribute and market the film in a manner similar to its previous films. Modes of distribution will include DVD sales, television broadcast and digital screening. Advertising for the film will include television ads, newspaper ads, direct mail, e-mail communications, internet ads and/or billboards. Marketing and distribution in Colorado

will occur within the 60 day period immediately preceding the November 4, 2014 general elections.

ANALYSIS

1. The Secretary of State should issue a Declaratory Order confirming that Citizens United's forthcoming film is not an "expenditure" or "electioneering communication" under Colorado's campaign finance laws.

a. The Secretary of State has jurisdiction in this matter.

The Colorado Administrative Procedure Act mandates that every state agency "provide by rule for the entertaining, in its sound discretion, and prompt disposition of petitions for declaratory orders." C.R.S. § 24-1-105(11). Accordingly, Rule 1.1 of the Secretary of State's rules states that "[a]ny person may petition the Secretary of State for a declaratory order to terminate controversies or to remove uncertainties as to the applicability to the petitioner of any statutory provisions or any rule or order of the Secretary of State as required by CRS 24-4-105(11)." C.C.R. § 1505-3, Rule 1.1.

In determining whether to rule on a petition, the Secretary may consider a number of factors, including:

- (1) Whether a ruling on the petition will terminate a controversy or remove uncertainties as to the applicability to the petitioner of any statutory provision, rule or order of the Secretary.
- (2) Whether the petition involves any subject, question or issue which is the subject of a formal or informal matter or investigation currently pending before the Secretary or a court involving one or more of the petitioners.
- (3) Whether the petition involves any subject, question or issue which is the subject of a formal or informal matter or investigation currently pending before the Secretary or a court but not involving any petitioner.

- (4) Whether the petition seeks a ruling on a moot or hypothetical question or will result in an advisory ruling or opinion.

Id. at Rule 1.2(B).

The Petitioner has the burden of proving all facts stated in the Petition, all facts necessary to show the nature of the controversy or uncertainty, the manner in which the statute, rule, or order in question applies or potentially applies to the Petitioner, and any other facts the Petitioner desires the Secretary to consider. *Id.* at Rule 1.4(B).

The testimony and other evidence presented by Citizens United establishes the Secretary's jurisdiction to issue a declaratory order in this matter because there is uncertainty as to whether the distribution and marketing of the forthcoming documentary film will require Citizens United to register and/or file disclosure reports with the Secretary of State for independent expenditures or electioneering communications under Colorado's campaign finance law. *See* Col. Const. Art. XXVIII § 5(1) and § (6)(1); and C.R.S. § 1-45-107.5 and § 1-45-108(1)(a)(III). If Citizens United fails to timely make a required filing, the Secretary is required to impose a penalty of \$50 per day for each day that a required filing is not filed. *See* Col. Const. Art. XXVIII, § 10(2)(a). A declaratory order in this matter will terminate the uncertainty because it will be determinative of whether or not the distribution and marketing of Citizens United's film in Colorado will trigger registration and/or reporting under Colorado's campaign finance laws. Further, as explained below, the Secretary's interpretation of the campaign finance law with respect to this matter will be entitled to a high level of deference by the state's courts.

Registration, reporting and the imposition of penalties for failure to comply with the registration and reporting requirements of the state's campaign finance regime is the

one area over which the Secretary of State has primary authority to administer and enforce the state's campaign finance laws. *See* Col. Const. Art. XXVIII, §§ 5(1), 6(1) and 10(2)(a). Consequently, this is the one area of Colorado's campaign finance law where any interpretation of the law by the Secretary will be entitled to substantial deference by the state's courts. As the Supreme Court explained in *Coffman v. Colorado Common Cause*, "we must give particular deference to the reasonable interpretations of the administrative agencies that are authorized to administer and enforce a particular statute." 102 P.3d 999, 1005 (Colo. 2004). Thus, while the Secretary of State's interpretation is not absolutely binding on the state's courts, the Supreme Court has instructed that the Secretary's interpretation of the law is to be viewed as "persuasive" as long as it "is a reasonable construction consistent with public policy." *Id.*

The facts of this proceeding, when applied to the law and legal authorities cited above conclusively show that the Secretary has jurisdiction to issue the requested declaratory order. The Secretary's decision will terminate uncertainly regarding the application of Colorado's campaign finance law to Citizens United's film. Further, because the issues in this matter are governed by the area of campaign finance law over which the Secretary has primary authority, the Secretary's interpretation of the applicable law will be given a high level of deference by any reviewing court.¹

¹ On the question of jurisdiction, Citizens United's petition is quite different from the recent petition by the Colorado Republican Party. In the Republican Party matter, the Secretary was asked to issue a declaratory order concerning the amounts and sources from which the Party's independent expenditure committee could raise funds. That is an area of the campaign finance law over which the Secretary does not have primary authority to administer and enforce the law. Consequently, the Secretary's interpretation in the Republican Party matter would not have been entitled to the level of deference applicable to the pending matter.

b. Citizens United’s film is excluded from the definitions of “electioneering communication” and “expenditure.”

Article XXVIII of the State Constitution (“Article XXVIII”) and the Fair Campaign Practices Act (“FCPA”) define an “electioneering communication” as:

any communication broadcasted by television or radio, printed in a newspaper or on a billboard, directly mailed or delivered by hand to personal residences or otherwise distributed that:

- (I) Unambiguously refers to any candidate; and
- (II) Is broadcasted, printed, mailed, delivered, or distributed within thirty days before a primary election or sixty days before a general election; and
- (III) Is broadcasted to, printed in a newspaper distributed to, mailed to, delivered by hand to, or otherwise distributed to an audience that includes members of the electorate for such public office.

Col. Const. Art. XXVIII, Sect. 2(7)(a); and C.R.S. § 1-45-103(9).

The Rules adopted by the Secretary added a requirement that the communication be “the functional equivalent of express advocacy” in order to qualify as an electioneering communication. *See* 8 C.C.R. § 1501-6, Rule 1.7. That Rule, however, was struck down by the Colorado Court of Appeals in December 2013.² *See Colorado Ethics Watch v. Gessler*, 2013 COA 172 (2013 Col. App. LEXIS 1914)(Col. App. 2013).

Article XXVIII and FCPA exclude from the definition of “electioneering communication” certain communications that otherwise meet the statutory definition set out above. Excluded from the definition of electioneering communication are:

² If Rule 1.7 were still in effect it might have had bearing on the issues in this Petition.

(I) 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;

(II) Any editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party;

(III) 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;

(IV) Any communication that refers to any candidate only as part of the popular name of a bill or statute.

Col. Const. Art. XXVIII, § 2(7)(b); and FCPA, § 1-45-103(9).

Article XXVIII and the FCPA define an “expenditure” as:

any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question. An expenditure is made when the actual spending occurs or when there is a contractual agreement requiring such spending and the amount is determined.

Col. Const. Art. XXVIII, Sect. 2(8)(a); and FCPA, § 1-145-103(10).

Article XXVIII and the FCPA exclude from the definition of “expenditure” certain communications that otherwise meet the statutory definition set out above.

Excluded from the definition of “expenditure” are:

(I) 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;

(II) Any editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party;

(III) Spending by persons, other than political parties, political committees and small donor committees, in the regular course and scope of their business or payments by a membership organization for any communication solely to members and their families;

(IV) Any transfer by a membership organization of a portion of a member's dues to a small donor committee or political committee sponsored by such membership organization; or payments made by a corporation or labor organization for the costs of establishing, administering, or soliciting funds from its own employees or members for a political committee or small donor committee.

Col. Cons. Art. XXVIII, § 2(8)(b); and C.R.S. § 1-45-103(10).

Unless one or more of the exclusions apply, Citizens United's film and advertising will likely qualify as either an "electioneering communication" or "expenditure."

With respect to the definition of an "electioneering communication," the film and its advertising will be "broadcast by television . . . printed in a newspaper or on a billboard, directly mailed . . . or otherwise distributed." *See* Col. Const. Art. XXVII, § 2(7)(a). The content will "unambiguously refer[]" to one or more candidates. *See Id.* at § 2(7)(a)(I). The broadcast, mailing, delivery and other distribution of the film and its advertising will occur within 60 days prior to the November 4, 2014 general election. *Id.* at § 2(7)(a)(II). Finally, the audience to which the content is broadcasted to, printed in a newspaper distributed to, mailed to or otherwise distributed includes members of the electorate for the public offices that are subject to election on November 4, 2014." *See Id.* at § 2(7)(a)(III). Thus, the film and its advertising meet each of the statutory requirements for an electioneering communication.³

³ As explained on page 7 of this memorandum, Rule 1.7, which required a communication to meet a "functional equivalent of express advocacy" test in order to

But for the exclusions, the film and its advertising might also qualify as an “expenditure.” While the film will not editorially endorse or oppose any candidate, and the purpose of the advertising will be to promote the sale of the film, it is likely that the film and/or its advertising would include footage of events where participants in those events expressly advocate the election or defeat of one or more candidates. It is therefore possible that amounts spent in producing and/or distributing the film or its advertising could be interpreted as payments or distributions by Citizens United “for the purpose of expressly advocating the election or defeat of a candidate.” Col. Const. Art. XXVIII, § 2(8)(a).

i. Citizens United’s film and its advertising are excluded from the definitions of “electioneering communication” and “expenditure” under the news media/press exclusions to those terms.

Currently, there are no Colorado legal authorities delineating the scope of the news media exclusions to the terms “electioneering communication” or “expenditure” under Article XXVIII or the FCPA. Nor is there any state precedent applying those terms to a documentary film.⁴

qualify as an “electioneering communication” has been struck down by the Colorado Court of Appeals. If Rule 1.7 remained in effect, the film might not qualify as an “electioneering communication.” Although the film is likely to include footage in which participants at events covered by the film express support for or opposition to one or more candidates, the film itself will not editorially endorse or oppose any candidate. Thus, it is unlikely that the film could be categorized as “subject to no reasonable interpretation other than an appeal to vote for or against a specific candidate.” See 8 C.C.R. § 1506-6, Rule 1.7.1.

⁴ The only reported Colorado authority discussing the scope of Colorado’s exclusions from the definitions of “expenditure” and “electioneering communication” appears to be *Colorado Citizens for Ethics in Gov’t v. Committee for the American Dream*, 187 P.3d 1208 (Col. App. 2008). That case is of little, if any, assistance in analyzing the scope of the news media/press exclusions because it focuses on the portion of the exclusions covering communications “by persons made in the regular course and

But there is authority addressing the scope of the Federal news media/press exemptions to the terms “electioneering communication” and “expenditure” under Federal campaign finance law. In 2010, the Federal Election Commission, which is the Federal regulatory agency charged with administering and enforcing Federal campaign finance law, issued Advisory Opinion 2010-08 to Citizens United, which determined that Citizens United’s films and the advertising undertaken to promote the films are exempted from the definitions of “electioneering communication” and “expenditure” under the news media/press exemptions to those terms under Federal campaign finance law. A copy of that Advisory Opinion was appended to our Petition.⁵ We urge the Secretary to follow that Advisory Opinion in this matter because it is persuasive authority on the application of the news media/press exclusions.

The Federal definitions of “electioneering communication” and “expenditure” are similar to the Colorado definitions of those terms. Likewise, the Federal news

scope of their business” and does not address the scope of the state’s news media/press exclusions. *See id.* at 1214-1218.

⁵ An FEC Advisory Opinion is similar in purpose and effect to a Declaratory Order. The purpose of an FEC Advisory Opinion is to render a written determination “concerning the application of [Federal campaign finance law], or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person” requesting the advisory opinion. 2 U.S.C. § 437f(a)(1). The effect of an FEC Advisory Opinion is that the recipient and others whose undertaking is “indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered,” *id.* at § 437(f)(c)(1); and 11 CFR § 112.5(a), are entitled to rely on the advisory opinion and are not subject to any sanction as a result of any such act undertaken in good faith reliance on the advisory opinion. 2 U.S.C. § 437(f)(2); and 11 CFR § 112.5(b). An FEC Advisory Opinion is considered final agency action that is subject to judicial review. *See Unity08 v. FEC*, 596 F.3d 861, 864-867 (D.C. Cir. 2010).

media/press exemptions to those terms are similar to the Colorado news media/press exclusions.

Federal campaign finance law defines an “electioneering communication” as “any broadcast, cable, or satellite communication which—

- (I) Refers to a clearly identified candidate for Federal office;
- (II) Is made within—
 - (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
 - (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
- (III) In the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

2 U.S.C. § 434(f)(3)(A); *see also* 11 CFR § 100.29(a).

The Federal definition “expenditure” is:

- (i) Any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and
- (ii) A written contract, promise, or agreement to make an expenditure.

2 U.S.C. § 431(9)(A). This definition was narrowed by the U.S. Supreme Court in *Buckley v. Valeo*, requiring the disbursement or payment be for the purpose of expressly advocating the election or defeat of a candidate in order to qualify as an “expenditure.”

424 U.S. 1, 39-44 (1976).

Under Federal campaign finance law, an “electioneering communication’ does not include . . . a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate.” 2 U.S.C. § 434(f)(3)(B)(i); and 11 CFR § 100.29(c)(2). Similarly, an “expenditure’ does not include . . . any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.” 2 U.S.C. § 431(9)(B)(i); and 11 CFR § 100.132. These exemptions to the definitions of “electioneering communication” and “expenditure” are known in common parlance as the Federal “news media/press exemptions.”

When the Federal definitions of “electioneering communication” and “expenditure” and their corresponding news media/press exemptions are compared to the Colorado definitions of those two terms and their corresponding news media/press exclusions, it is clear that the terms and exclusions are nearly identical. The only significant textual differences are that the Colorado definition of “electioneering communication” and its corresponding exclusions are broader than the Federal definition of “electioneering communication” and the corresponding exemptions to that particular term. The Federal definition of “electioneering communication” includes only broadcast communications, while the Colorado definition includes broadcast and print communications. Consequently, the Colorado exclusion for news media/press activities is broader than the Federal exemption because it covers both broadcast and printed materials, while the Federal exemption covers only broadcast communications. Other

than that, the Federal and Colorado definitions of “electioneering communication” and “expenditure” and their corresponding news media/press exemptions/exclusions essentially mimic one another.

It is also clear that the purposes of the Federal and Colorado news media/press exemptions/exclusions are the same. The Federal exemptions were adopted to ensure that the Federal campaign finance regulatory regime does not infringe on the First Amendment’s guarantee of freedom of the press. The legislative history of the Federal news media/press exemption indicates that Congress did not intend to “limit or burden in any way the First Amendment freedoms of the press and of association. [The exemption] assures the unfettered right of the newspapers, TV networks and other media to cover and comment on political campaigns.” H.R. Rep. No. 93-1239 at 4 (1974). The due process clause of the U.S. Constitution’s Fourteenth Amendment makes the First Amendment’s freedom of the press clause as applicable to the State of Colorado and it is the Federal government. *See Nebraska Press Association v. Stuart*, 427 U.S. 539, 556 (1976), quoting *Near v. Minnesota ex rel. Olson*, 297 U.S. 697, 707 (1931)(“it is ‘no longer open to doubt that the liberty of the press and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action”). Consequently, the Colorado news media/press exclusions serve the same purposes as the Federal news media/press exemption. Thus, the scope of Colorado’s news media/press exclusions ought to be interpreted consistent with the reach of the Federal news media/press exemptions.⁶

⁶ Any attempt to constrain the scope of the news media/press exemption to cover just the institutional news media would render the construction unconstitutional. *See*

In Advisory Opinion 2010-08, the FEC employed its traditional two-step analysis in reaching its conclusion that Citizens United films and their accompanying advertising are exempted from the definitions are “electioneering communication” and “expenditure” under Federal campaign finance law. Step one of the analysis asks whether the entity engaging in the activity at issue is a press entity. The second step employs a two-part analysis, which inquires as to: (a) Whether the entity is owned or controlled by a political party, political committee, or a candidate; and (b) Whether the entity is acting as a press entity in conducting the activity at issue (*i.e.* whether the press entity is acting it its “legitimate press function”). The second step of the analysis is only employed if the first step is answered in the affirmative.

See FEC Advisory Opinion 2010-08 (June 11, 2010) at 4-5.

The FEC’s analysis answered step one in the affirmative. The Commission explained:

Since 2004, Citizens United has produced and distributed fourteen film, with four additional film in production. Additionally, a substantial port of Citizens United’s annual budget for each of the past six year has been devoted to the production and distribution of films, including documentaries. In light of these fact, and given that Citizens United produces documentaries on a regular basis, the Commission concludes that it is a press entity for purposes of this advisory opinion.

Id. At 5.

As to step two of the analysis, the FEC first noted that “Citizens United is not owned or controlled by a political party, political committee, or candidate,” *id.* at 6. It

Citizens United v. Federal Election Commission, 558 U.S. 310, 352 (2010)(“We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers”).

then moved onto the substantive analysis of whether or not Citizens United is engaged in its legitimate press function when it produces and distributes documentary films. The FEC had no difficulty in answering that question in the affirmative. The Advisory Opinion explains:

There are two considerations in determining whether an entity is engaging in its legitimate press function: (1) whether the entity's materials are available to the general public, and (2) whether they are comparable in form to those ordinarily issued by the entity.

* * * *

The distribution of documentary films to the public is the legitimate press function of an entity, such as Citizens United, that regularly produces 'news stories commentary, or editorial' in the form of film.

Id.

Finally, the FEC concluded that in light of its conclusion that Citizens United's films are exempted from the definitions of "electioneering communication" and "expenditure" so too is any advertising to promote those films. On this point, the FEC explained:

[C]ourts have held that where the underlying product is covered by the press exemption, so are advertisement to promote the underlying product.

Id. at 7, citing, *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981), and *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

In light of the similarities between the Federal news media/press exemption and Colorado news media/press exclusions, the Secretary ought to follow the methodology and rationale of FEC in Advisory Opinion 2010-08 to reach the conclusion that Citizens United's forthcoming documentary film and any advertising to promote the film fall

within the scope of Colorado's news media/press exclusions to the terms "electioneering communication" and "expenditure."

As was the case in 2010, the evidence in this matter shows that Citizens United is a press entity that produces documentary films on a regular basis. By 2010, Citizens United had produced and distributed fourteen films. As of today, that number has increased to twenty-three. The film that is the subject of this proceeding will be Citizens United's twenty-fourth film in ten years.

The evidence further establishes that Citizens United is not owned or controlled by a political party, political committee, or candidate.

Finally, as was the case in 2010, the distribution of documentary films to the public remains the legitimate press function of Citizens United. The forthcoming film that is the subject of this proceeding will be but a continuation of Citizens United's press function of regularly producing news stories, commentary or editorial in the form of films.

In light of the factors discussed herein, Citizens United submits that a decision by the Secretary to follow the methodology and rationale of FEC Advisory Opinion 2010-08 in determining that Citizens United's forthcoming film is exempted from the definitions of "electioneering communication" and "expenditure" under the Colorado exclusions for news media/press activity would be a "reasonable construction" of the statutory terms at issue "consistent with public policy" entitling the Secretary's determination and interpretation of the statute to "particular deference" as "persuasive" authority by Colorado's courts. *See Colorado Common Cause*, 102 P.3d at 1005.

ii. **Citizens United’s film and its advertising are excluded from the definitions of “electioneering communication” and “expenditure” as communications and spending made in the regular course and scope of Citizens United’s business.**

Besides being excluded from the definitions of “electioneering communication” and “expenditure” under the news media/press exclusions, Citizens United’s film and its advertising are excluded from the definitions of those two terms under the exclusions covering communications and spending “by persons made in the regular course and scope of their business.” *See* Col. Const. Art. XXVIII, § 2(7)(b)(III) and § 2(8)(b)(III).

In *Colorado Citizens for Ethics in Government v. Committee for the American Dream*, the Court of Appeals held that the regular business exclusions do not apply to political committees that “regularly make electioneering communications for the purpose of influencing elections.” 187 P.3d 1207, 1216 (Colo. App. 2008). The court said such a broad reading the exclusions would “frustrate Article XXVIII’s purpose of full disclosure” of political expenditures expressly aimed at influencing the outcome of Colorado elections. *Id.* Instead, the court construed the exclusion as applying 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.”

The evidence in this matter clearly establishes that Citizens United regularly produces and markets documentary films in the regular course and scope of its business and that its activities in this regard are akin to that of a service provider. Since 2004, Citizens United has produced and released 23 documentary films. Those films are regularly distributed on DVD and licensed for broadcast and digital streaming. In

addition, several films have been released theatrically. Citizens United intends to market and distribute its forthcoming film in a manner consistent with its practices over the past ten years. Such a pattern clearly qualifies as a regular course and scope of business.

It is irrelevant that Citizens United is a non-profit corporation. As the Colorado Court of Appeal explained in *Committee for the American Dream*, the term “business” as used in the state’s campaign finance laws is interpreted “without regard to whether an organization has a profit objective.” 187 P.3d 1208, 1215 (Col. App. 2008).

Further, the reasons cited by the Court of Appeals in finding that the regular course of business exclusions do not apply to the Committee for the American Dream are not applicable here. Citizens United, in contrast to the Committee for the American Dream, is not a political committee. Nor does Citizens United regularly undertake electioneering communications or independent expenditures. Mr. Bossie testified that Citizens United has only undertaken one independent expenditure in its 25 year history. Citizens United’s primary purpose, pursuant to Section 501(c)(4) of the Federal Internal Revenue Code, is to promote social welfare, which, by definition, excluded the promotion of the election or defeat of candidates for public office.

The evidence in this matter clearly establishes that Citizens United’s production, distribution and marketing of documentary films is akin to a business that broadcasts, prints or publicly displays or directly mails communications as a service. Similar to a service company, and unlike a political committee, Citizens United is paid a fee for access to its documentary film content. Citizens United sells and mails DVDs bearing its films to purchasers; it makes its films available for exhibition at movie theatres in return

for a portion of the box office receipts; and it licenses its films to television broadcasters and digital streaming companies in exchange for fees and royalties. A political committee, in contrast, pays a fee to the broadcast company or other service provider to air or otherwise distribute its communications to the public.

Further, the fact that Citizens United pays a fee to other service providers to air or otherwise publicly display advertisements promoting the sale of its films does not weaken the claim that its advertising for its film is excluded from the definitions of “electioneering communication” and “expenditure” under the regular course and scope of business exclusions. Service providers routinely pay other service providers fees to air or display advertisements promoting their products and services. Here, Citizens United’s purposes in airing advertisements or displaying a billboard would be to sell DVDs of its film and encourage people to watch the film on television or via digital streaming. That’s precisely how the big Hollywood film companies promote their films.

Excluding Citizens United’s film and its related advertising from the definitions of “electioneering communication” and “expenditure” under the exclusions for communications undertaken in the regular course and scope of an entity’s business will not “frustrate” the purposes of Colorado campaign finance law. Citizens United will be acting in a manner consistent with that of a “service provider” and it will market and distribute its film in Colorado in the same manner that it distributes and markets its film outside of the state, and it will employ the same methods of distribution and advertising that it has regularly used over the past ten years in marketing and distributing its 23 other films.

Citizens United submits a decision by the Secretary that Citizens United's forthcoming film and advertising for the film are excluded from the definitions of "electioneering communication" and "expenditure" under the ordinary course and scope of business clause of Exclusion III to Article XXVIII's definitions of those two terms would be entitled to the same high level of deference as a determination that Citizens United's film and its advertising are excluded from the terms' definitions under the news media/press exemption. Such a determination would be a "reasonable construction" of the statutory terms at issue "consistent with public policy" entitling the Secretary's determination and interpretation to "particular deference" as "persuasive" authority by Colorado's courts. *See Colorado Common Cause*, 102 P.3d at 1005.

2. If, and only if, the Secretary declines to issue a Declaratory Order in this matter, Citizens United requests that an Advisory Opinion be issued.

A Declaratory Order is clearly preferable to an advisory opinion in this matter because a Declaratory Order will have the force of law. Nonetheless, an advisory opinion would have some value. As the Secretary noted in the decision on the Colorado Republican Party's petition, an advisory opinion could be cited as "persuasive evidence" in any enforcement proceeding or litigation. Here, the issues presented are novel and no precedent exists on the application of Colorado's campaign finance law to a documentary film. Thus, an advisory opinion would be helpful to Citizens United in this matter if the Secretary declines to issue a Declaratory Order.

CONCLUSION

For the reasons set forth herein, Citizens United respectfully requests that the Secretary issue a declaratory order determining that Citizens United's forthcoming

documentary film about various Colorado advocacy groups and their impact on Colorado government and public policy does not qualify as either an “electioneering communication” or an “expenditure” under Colorado’s campaign finance laws because the film and its advertising are excluded from the definitions of those terms by the exclusions for news media/press activity and communications and spending undertaken in the regular course and scope of Citizens United’s business.

If, and only if, the Secretary declines to issue a declaratory order, Citizens United request an advisory opinion that reaches a similar conclusion.

Respectfully submitted this 3rd Day of June 2014.

By: 

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