

BEFORE THE SECRETARY OF STATE  
STATE OF COLORADO

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

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**CITIZENS UNITED'S SUPPLEMENTAL MEMORANDUM**  
**IN SUPPORT OF THE PETITION**

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

**INDRODUCTION**

This Supplemental Memorandum addresses the following issues, which were raised at the June 3, 2014 hearing on Citizens United's Petition for a Declaratory Order:

(1) What impact, if any, does the Court of Appeals discussion in *Colorado Citizens for Ethics in Government v. Committee for the American Dream*, 187 P.3d 1207, 1216 (Colo. App. 2008), of the "interplay" between the news media/press exclusions in section 2(7)(b)(i)-(ii) and the regular business exclusion in section 2(7)(b)(iii) have on Citizens United's contention that its film and advertising is excluded from the definitions of "electioneering communication" and "expenditure"?

(2) Whether the exclusions for "news Articles, editorial endorsements, opinion or commentary writings" set out in sections 2(7)(b)(I) and 2(8)(b)(I) cover only content appearing in newspapers, magazines or other periodicals? Or does the source limitation only apply to "letters to the editor"?

(3) Whether the exclusions for "editorial endorsements or opinions" set out in sections 2(7)(b)(II) and 2(8)(b)(ii) apply to only to the owners of "broadcast facilities"?

Or do the exclusions apply also to entities that use the services of “broadcast facilities” to distribute their “editorial endorsements or opinions”?

## ANALYSIS

**1. The Court of Appeals discussion in *Committee for the American Dream* of the “interplay” between the news media exclusion and the regular business exclusion supports Citizens United’s claim that its film is exempted from the definitions of “electioneering communication” and “expenditure”.**

In *Committee for the American Dream*, the Court of Appeals determined that the Committee for the American Dream was not excluded from the definition of “electioneering communication” under the exclusion for “[a]ny communication by persons made in the regular course and scope of their business” because it was acting in its capacity as a political committee in airing a television commercial opposing a candidate for the state legislature, and not as a business service provider, such as a broadcast station selling time to an advertiser or a direct mail company that prepares materials for a candidate or political committee. 187 P.3d at 1215-1217. In the course of that discussion, the Court made the following observation:

This interpretation recognizes the interplay among the three subsections of the regular business exception. The electioneering communication definition in section 2(7)(a) includes communications of broadcasters and newspaper publishers, among others, that “unambiguously [refer] to any candidate.” 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.”

*Id* at 1216 (emphasis supplied).

This observation is fully consistent with Citizens United's claim that its film is excluded from the definitions of "electioneering communication" and "expenditure." It makes clear that "news articles" that are "aired by a broadcast facility" fall within the scope of the news media exclusions for "electioneering communications." But that can only occur, consistent with the plain language of the constitutional provision, if section 2(7)(b)(I) excludes not only "news articles", "editorial endorsement" and "opinions" that are "printed in a newspaper, magazine or other periodical," but also "news articles", "editorial endorsement" and "opinions" that are distributed by other means. If section 2(7)(b)(I)'s exclusion does not reach more than printed material appearing in a newspaper, magazine or other periodical, "news articles" that are "aired by a broadcast facility," such as an evening television news report on a candidate, would not be covered by the news media exclusions because "news articles" are not mentioned in section 2(7)(b)(II)'s exclusions. Given that the Court of Appeals in *Committee for the American Dream* has interpreted section 2(7)(b)(I)'s exclusion as covering not only printed materials, but also broadcast news reports, it would be quite reasonable and consistent with the Court of Appeals decision, to interpret section 2(7)(b)(I)'s exclusions, as well as the corresponding exclusions for "expenditure" at section 2(8)(b)(ii), as including "news articles," "editorial endorsement" and "opinion" distributed by other means, including Citizens United's film, when it is distributed via DVD or digital platform.

**2. The exclusions for "news Articles, editorial endorsements, opinion or commentary writings" set out in sections 2(7)(b)(I) and 2(8)(b)(I) are not limited to content appearing in newspapers, magazines or other periodicals. Those source limitations applies only to "letters to the editor".**

In construing a voter approved constitutional provision words are to be given “their ordinary and popular meaning.” *Committee for the American Dream*, 187 P.3d at 1215. The construing authority “should avoid an unreasonable interpretation or one that produces an absurd result,” *id.*, and be “guided by general principles of statutory interpretation and aids in construction.” *Id.*

Here, the plain language of the constitutional provision, guided by general principles of statutory interpretation, shows that “printed in a newspaper, magazine or other periodical” qualifies only the phrase “letters to the editor.” Such an interpretation is not only consistent with the Court of Appeal’s discussion of the media exclusion in *Committee for the American Dream* (see discussion above), but is also consistent with the last antecedent rule of statutory construction. Under that rule, qualifying words and phrases are interpreted as referring “solely to the clause immediately preceding [them].” *People v. McPherson*, 200 Colo. 429, 432 (1980). Finally, such a construction avoids an interpretation that produces an unreasonable or absurd result. If sections 2(7)(b)(i) and 2(8)(b)(i) are not read as including more than just printed content appearing in a periodical, than broadcast news reports will not be exempted from the terms “electioneering communication” or “expenditure” because they are not mentioned in sections 2(7)(b)(ii) and 2(8)(b)(ii).

In short, Citizens United’s forthcoming documentary film is included within the scope of sections 2(7)(b)(i)’s and 2(8)(b)(i)’s exclusions because they cover “news articles”, “editorial endorsements” and “opinion” in a variety of formats, including print media, DVDs, television broadcasts and digital platforms.

**(3) The exclusions for “editorial endorsements or opinions” set out in sections 2(7)(b)(II) and 2(8)(b)(ii) are not limited to the owners of “broadcast facilities.” They also apply to entities that use the services of “broadcast facilities” to distribute their “editorial endorsements or opinions.”**

The plain language of sections 2(7)(b)(II) and 2(8)(b)(ii) clearly indicates that the exclusions from the definitions of “electioneering communication” and “expenditure” are applicable to the content comprising an editorial endorsement or opinion that is “aired by a broadcast facility not owned or controlled by a candidate or political party,” and not just editorial endorsement or opinions made by owners of the broadcast facility airing those viewpoints. The operable language uses the word “any” to describe the “editorial endorsements or opinions” covered by the exclusion. Thus, to interpret the exclusion as only covering editorial endorsements or opinions made by the owners of the broadcast facility would require ignoring the “ordinary and popular meaning” of the words as used in those sections.

Further, it would result in an unreasonable and absurd result, *see Committee for the American Dream*, 187 P.3d at 1215. For example, under such an interpretation, the owner of a broadcast facility could air an editorial endorsing a candidate, but the broadcast facility owner would be subject to reporting as an “electioneering communication” or “expenditure” if it allowed representatives of the public to offer opposing or differing viewpoints on the candidate.

Thus, as properly construed, Citizens United’s use of broadcast facilities to air its documentary film, which includes “opinion,” would clearly fall within the scopes of sections 2(7)(b)(ii) and 2(8)(b)(ii).



## CONCLUSION

For the reasons set forth herein, in the Petition for a Declaratory Order, during the testimony and argument at the June 3, 2014 hearing, and in the Memorandum of Fact & Law in Support of the Petition, Citizens United requests that the Secretary issue a declaratory order determining that its 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.

Respectfully submitted this 4th Day of June 2014.

By: 

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