



June 4, 2014

Honorable Scott Gessler
Secretary of State of Colorado
Via Email (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 Common Cause respectfully submits this written testimony addressing the Petition for Declaratory Order (the "Petition") filed by Citizens United ("CU"). Common Cause is a nonpartisan, nonprofit organization that is dedicated to restoring the core values of American democracy, reinventing an open, honest and accountable government that serves the public interest, and empowering ordinary people to make their voices heard in the political process.

This testimony expands upon the testimony Colorado Common Cause provided at the June 3, 2013 Hearing on the Petition (the "Hearing"), in which Colorado Common Cause adopted the written submission and testimony of Colorado Ethics Watch. The purpose of this testimony is to follow up on the additional testimony received at the Hearing and on the Memorandum of Facts & Law in Support of the Petition ("Memorandum") submitted by CU at the Hearing. As set forth below, the Petition should be denied based on procedural grounds alone; however, if the Secretary reaches the merits of the Petition, it should also be denied on substantive grounds.

With respect to procedural grounds, the Petition should be denied because a declaratory order from the Secretary would not resolve a controversy or remove uncertainty, if any, that exists with respect to CU's proposed film. Additionally, whether CU's proposed film, which is still in the early stages of production, is excepted from the disclosure requirements in Colo. Const. art. XXVIII and the Fair Campaign Practices Act ("FCPA") is a content-driven analysis that should not be undertaken at this time. If the Secretary nevertheless considers the merits of the Petition, the Petition and testimony provided by CU's representatives at the Hearing illustrate that CU's proposed film and supporting marketing campaign do not fall within any of the exceptions to the definitions of "electioneering communication" or "expenditure."

I. A Declaratory Order on the Petition Would Be Inappropriate Because Such Order Would Not Resolve a Controversy or Remove Uncertainty; Rather, Such Order Would Result in a Ruling on a Hypothetical Question.

Pursuant to Secretary of State Rule 1.2, the Secretary considers the following factors, among others, when determining whether to rule upon a petition for declaratory order:

- (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.

Here, the Petition fails on factors 1 and 4 and thus the Secretary should decline to issue an order on the Petition.

A. A Declaratory Order Would Not Terminate a Controversy or Remove Uncertainty in Connection with CU's Proposed Film Because the Secretary Does Not Have Enforcement Authority and an Enforcing Court Would Not Give Deference to Such Order.

In the Matter of the Colorado Republican Party's Petition for Declaratory Order (Feb. 6, 2014) ("CRP Decision"), the Secretary addressed the Colorado Republican Party's petition seeking a declaratory order confirming "that its independent expenditure committee may raise funds in any amounts from any source permissible under Colorado law." The Republican Party's petition implicated Colorado's campaign finance laws under Colo. Const. art. XXVIII and the Fair Campaign Practices Act ("FCPA"). The Secretary declined to issue an order on the Colorado Republican Party's petition because such order would not terminate a controversy or resolve uncertainty for the Colorado Republican Party.

The Secretary first reasoned that Secretary's enforcement authority is limited on campaign finance matters under Colo. Const. art. XXVIII, §9, which is "carefully designed to keep the Secretary of State out of the litigation process." CRP Decision at 4. Rather, enforcement of such matters is left primarily to citizen complaints, which are handled by administrative law judges by referral from the Secretary. *Id.* Consequently, an order from the Secretary would have done little to resolve a controversy because such controversies are not handled by the Secretary. *See id.* The Secretary further reasoned that the administrative law judge or Colorado court with enforcement authority would not defer to a Declaratory Order issued by the Secretary. *Id.* Therefore, an order from the Secretary would have done little to remove uncertainty concerning the status of the law. *See id.* ("The constitutional framework for

enforcement of campaign finance violations is unlike other enforcement authority under the Secretary's jurisdiction. It provides the Secretary with very limited enforcement authority, which *devalues any declaratory order the Secretary might issue in the realm of campaign finance*") (emphasis added).

Like the Colorado Republican Party's petition, the Petition here implicates Colorado's campaign finance laws under Colo. Const. art. XXVIII and the FCPA. Therefore, the Secretary's enforcement authority and the deference given by an administrative law judge or court to any declaratory order by the Secretary are the same. While CU asserts that the imposition of penalties for missed campaign finance deadlines occurs under Colo. Const. art XXVIII, §10 and not §9, which was at issue in the CRP Decision, the Secretary's enforcement authority is similar under both sections. First, there is no investigative arm of the Secretary of State that seeks out undisclosed electioneering communications for sanction under Section 10, leaving the enforcement by appropriate officers to be established by citizen complaints as in Section 9(2). Second, any person required to file a report that has received a penalty from the appropriate officer may appeal the decision and the Secretary shall refer the appeal to an administrative law judge, which is the same dispute resolution method established in Section 9. Accordingly, the Secretary should decline to issue a Declaratory Order on the Petition because such order will not resolve any controversy or uncertainty.

B. The Petition Seeks a Ruling on a Hypothetical Question Because the Content of CU's Unfinished Film and the Supporting Marketing Campaign Are Unknown.

Pursuant to Secretary of State Rule 1.2, a declaratory order should not be issued if the petition is a "hypothetical question or will result in an advisory opinion." As set forth in Section II C below, a key issue in determining whether the funding for CU's film and marketing campaign are exempted from disclosure requirements is whether the film and marketing campaign are intended to influence an election. This is necessarily a content-driven inquiry that requires the Secretary to review the film and marketing materials prior to declaring the supporting funding as not requiring disclosure.

However, it is undisputed that CU's film and marketing campaign are not finished. Petition at 3; Hearing Audio Tr. at 22:30. While CU provides sufficient information in the Petition to unequivocally determine that the planned film and advertising campaign meet the Colorado definitions of "electioneering communication" and "expenditure," the Petition does not provide sufficient information for the Secretary to determine whether the exceptions apply. The most significant detail CU provides with respect to the film's content is an analogy of the proposed film to one of CU's prior films, *Occupied Unmasked*, which was allegedly not intended to influence an election. Petition at 3; Hearing Audio Tr. at 54:25. CU also distinguished the proposed film from another CU film, *Hillary: the Movie*, which was intended to influence an election. Hearing Audio Tr. at 54:25; *Citizens United v. Fed. Election Comm'n* 558 U.S. 310, 326 (2010).

There are a number of issues with trying to assess CU's intentions based on this record. As an initial matter, simply stating the proposed film will be "similar in form and style" to another film fails to provide the Secretary with any understanding of the actual substantive content of the unfinished film. To the extent CU elaborated on specific content of the film at the hearing, such comments should not be accorded any weight because the Hearing was not an evidentiary hearing. Nevertheless, Mr. Bossie and Mr. Boos' comments concerning the content of the film were also extremely vague, likely because the film is still in early stages of production.

For this reason, Mr. Bossie explained that CU had not yet entered into any licensing agreements for the proposed film because, "people don't want to buy it until they see it." Hearing Audio Tr. at 33:00. The same reasoning should apply for the disclosure exceptions; the Secretary should not rule on their applicability until he sees the film. To do otherwise would be to answer a hypothetical question. Moreover, the hypothetical question here is devoid of facts that would permit the Secretary to provide a meaningful or accurate answer.

II. CU Must Comply With Colorado's Campaign Disclosure Laws Because CU's Proposed Film and Supporting Marketing Campaign and the Funding Therefore Do Not Meet Any of the Exceptions to the Definitions of "Electioneering Communications" or "Expenditures."

If the Secretary reaches the merits of the Petition it should order that none of the exceptions asserted in the Petition apply. Pursuant to Colo. Const. art. XXVIII, §7(b), certain communications are excepted from the definitions of "electioneering communications" and "expenditures" which trigger certain disclosure requirements. CU asserts the following three exceptions in an effort to avoid disclosure:

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 ["First Exception"]
2. Any editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party ["Second 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 ["Third Exception"]

Petition at 9-10 (citing Colo. Const. art. XXVIII, §2(7)(b)).

In interpreting and applying these exemptions, the Secretary should ascertain voter intent by giving words their ordinary and popular meaning, without engaging in narrow or overly technical construction of the language. *Colo. Citizens for Ethics in Gov't v. Comm. for the Am. Dream*, 187 P.3d 1207, 1215 (Colo. App. 2008). Based upon such application and the record before the Secretary, none of the exceptions apply.

A. The First Exception Does Not Apply Because the Proposed Film Is Not a Newspaper, Magazine, or Other Periodical.

It is undisputed that CU's proposed film, which is to be a motion picture, is not print media and is therefore not a newspaper or magazine. Petition at 3 (stating that the film will be distributed by "DVD sales, television broadcast and digital streaming"). Nevertheless, CU asserts that the Secretary should find that the film is an "other periodical." CU's argument for such an interpretation is based, almost exclusively, on a Federal Election Commission ("FEC") advisory opinion that is not binding precedent, is procedurally inapposite, and that applies dissimilar federal law. Petition at. 11 (citing FEC Advisory Opinion 2010-08 (June 11, 2010)).

Most significantly, the federal "press exemption" is based on the Federal Election Campaign Act of 1971 (the "Act") and its exceptions to the definition of "electioneering communications" and "expenditures." See 2 U.S.C. § 431(9)(B)(i); 2 U.S.C. § 434(f)(3)(B)(i). These federal exceptions treat the media formats enumerated therein the same. See *id.* In contrast, the Colorado Constitution distinguishes between different media formats. Consequently, the First Exception in the Colorado Constitution was intended to apply only to the specific media formats enumerated therein. Accordingly, the federal authority adopting a broad scope for the press exemption is inapposite.

Understanding this and applying the "ordinary and popular meaning" of the words in the First Exception, the Secretary rightfully pushed CU with respect to whether the proposed film is an "other periodical." CU testified that the film is not a periodical because each film has its own production schedule and that there is no set calendar for the release of films. Hearing Audio Tr. at 28:45. Because CU's films are issue driven and not produced on a regular schedule, the films cannot be considered periodicals.

B. The Second Exception Does Not Apply Because CU's Proposed Film Is Not Being Broadcast; Regardless, the Film Is Not An Editorial Endorsement Or Opinion Piece.

The Second Exception generally excludes editorials and opinion pieces aired by broadcast facilities. Colo. Const. art. XXVIII, §2(7)(b)(II). The Second Exception does not apply because CU intends to distribute its film other than by broadcast. See *e.g.*, Petition at 3 (stating film will be distributed, in part, through direct sales of DVDs); see also Hearing Audio Tr. at 33:20 (Mr. Bossie testifying, "I don't know if there's a way to broadcast, if there is we need to figure that out.").

Even if the film were being exclusively broadcast, the film is admittedly not an endorsement or opinion piece. Petition at 3 (stating, "neither the film nor its advertising will editorially endorse or oppose any candidates"); *see also* Hearing Transcript at 35:50 (Mr. Boos testing that film "will not editorially endorse or oppose" any candidate). Because Article XXVIII intentionally distinguishes between the scope of the exceptions for different media formats, the scope of the broadcast exception should be interpreted as plainly stated therein. Accordingly, the Second Exception does not apply.

C. The Third Exception Does Not Apply Because the Record Reveals That CU Intends to Influence an Election with the Film and Supporting Marketing Campaign.

The Third Exception applies, in pertinent part, to "any communication by persons made in the regular course and scope of their business." Colo. Const. art. XXVIII, §2(7)(b)(III). As the Secretary recognized at the Hearing the Third Exception does not apply when a person intends in the regular course and scope of their business "to influence the outcome of Colorado elections.". *See Colo. Citizens for Ethics in Gov't v. Comm. For the Am. Dream*, 187 P.3d 1207, 1216 (Colo. App. 2008). Although CU cannot provide many specifics about the proposed film, CU admits that the film and its advertising material are likely to include "individuals within the film express[ing] support or opposition to candidates" (Hearing Audio Tr. at 35:50); references to specific candidates by showing, for example, "Governor Hickenlooper at a rally and it says 'Hickenlooper for Governor' behind him" (Hearing Audio Tr. at 20:00); and that the film would "obviously have inferences to [candidates'] characters and positions on policies" (Hearing Audio Tr. at 22:00).

Additionally, CU admits the proposed film will be similar in content and style to the previous CU film, *Occupy Unmasked*. Hearing Audio Tr. at 14:45. Petitioners distinguished the upcoming Colorado film from *Hillary: The Movie*, which was found by the Supreme Court to qualify as the "functional equivalent of express advocacy" such that there was "no reasonable interpretation of Hillary other than as an appeal to vote against Senator Clinton." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 326 (2010). However, even accepting this distinction, a film connecting Colorado advocacy groups to persons who happen to be candidates and made in the same style of *Occupy Unmasked* should be reasonably interpreted as intended to influence the upcoming Colorado elections. Fox News reporter Perry Chiamonte wrote that in *Occupied Unmasked*, "Breitbart attempts to implicate President Obama as helping to foment the grief and alienation that others fashioned into a full-blown political force. *While the film's attempt to link the movement to the Obama administration is inconclusive*, the President did praise Occupy Wall Street during its early days." Perry Chiamonte, *Breitbart film bares roots of 'Occupy' movement*, Fox News (Sept. 9, 2012) available at:

<http://www.foxnews.com/entertainment/2012/09/06/breitbart-film-seeks-to-bare-roots-of-occupy-movement/> (emphasis added); *see also* Michael Tracy, "Occupy Unmasked" – *Unmasked*, The Nation (Oct. 9, 2012) available at:

<http://www.thenation.com/article/170453/occupy-unmasked-unmasked> ("[Occupy Unmasked's] central thesis holds that the movement was founded as – and remains – an elaborate front for the

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Obama re-election effort . . ."). By trying to connect President Obama to the Occupy Wall Street movement in a negative light shortly before the 2012 election, CU was attempting to influence the outcome of the election.

Here, marketing and distribution of CU's proposed film in Colorado is "slated to occur within the 60 day window preceding the November 4, 2014 general election." Petition at 4. In determining if the circulation of a voter guide was specifically intended to affect election results, the United States District Court for the District of Colorado found that the distribution of the guides "immediately before the primary and general elections" was a factor indicating intent to influence the elections. *Colo. Right to Life v. Davidson*, 95 F.Supp.2d 1001, 1019 (D. Colo. 2005). Based on the timing and already-acknowledged content of CU's proposed film, it is evident that CU intends to influence the outcome of the 2014 Colorado elections.

In sum, the Secretary should order that none of the exceptions apply and therefore CU will be subject to Colorado's campaign finance laws in connection with distributing and marketing its proposed film.

Thank you for your consideration. Please let us know if you have questions or want additional information.

Sincerely,

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