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APR 18 2014

April 17, 2014

Honorable Scott Gessler
Secretary of State
Colorado Department of State
1700 Broadway, Suite 200
Denver, CO 80290

Re: Petition for Declaratory Order

Dear Secretary Gessler:

I have enclosed for your consideration a Petition for Declaratory Order on behalf of Citizens United, requesting a determination that the organization's forthcoming documentary film about various Colorado advocacy groups will not qualify as an "expenditure" or "electioneering communication" under the Campaign and Political Finance Amendment to the Colorado Constitution or the Fair Campaign Practices Act. On behalf of Citizens United I thank you in advance for your consideration of the Petition.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael Boos", with a long horizontal flourish extending to the right.

Michael Boos
Citizens United Vice President &
General Counsel

Enclosure

BEFORE THE SECRETARY OF STATE
STATE OF COLORADO

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IN THE MATTER OF CITIZENS UNITED'S PETITION FOR A DECLARATORY ORDER CONCERNING THE APPLICATION OF THE CAMPAIGN AND POLITICAL FINANCE AMENDMENT'S EXCLUSIONS TO THE DEFINITIONS OF "EXPENDITURE" AND "ELECTIONEERING COMMUNICATIONS" TO A DOCUMENTARY FILM AND RELATED ADVERTISING

PETITION FOR DECLARATORY ORDER

I. INTRODUCTION

Citizens United petitions the Secretary of State for a Declaratory Order confirming that a forthcoming documentary film about various Colorado advocacy groups will not qualify as an "expenditure" or "electioneering communication" under the Campaign and Political Finance Amendment, Col. Const. Art. XXVIII ("Article XXVIII") and the Fair Campaign Practices Act ("FCPA"), C.R.S. § 1-45-101 *et seq.*

Citizens United is a Virginia non-stock corporation with its principal 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 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. Among its many programmatic activities, Citizens United regularly produces, markets and distributes documentary films, including documentary films that explore controversial political organizations, personalities and policies in the United States and abroad.

Examples of recently produced Citizens United documentaries include: *Fast Terry* (copyright 2013), *Occupied Unmasked* (copyright 2012), *Our Sacred Honor* (copyright 2012), *The Hope & The Change* (copyright 2012), *The Gift of Life* (copyright 2011), *Nine Days That Changed The World* (copyright 2010), *Generation Zero* (copyright 2010), *Ronald Reagan Rendezvous with Destiny* (copyright 2009), *Perfect Valor* (copyright 2009), and *Hillary The Movie* (copyright 2008).¹ Details about these films, other Citizens United films and programs can be found on the organization's internet website at www.citizensunited.org.

Citizens United distributes its films in a variety of formats including: theaters, DVDs, television and digital streaming. Some films are licensed to commercial distributors in exchange for royalties or other fees. For example, *Occupied Unmasked* is currently being distributed under a commercial distribution agreement with Magnolia Pictures. Many films are sold on DVD directly by Citizens United.

Also, Citizens United routinely advertises its films on television, billboards, in newspapers and over the internet.

In 2010, the Federal Election Commission ("FEC" or "Commission") ruled that Citizens United's films and the advertisements for the films are exempt from the definitions of "expenditure" and "electioneering communication" under Federal campaign finance law. See FEC Advisory Opinion 2010-08 (June 11, 2010)(copy attached hereto and marked as "Addendum A"). The FEC found that Citizens United's film making activities qualified the organization as a "press entity" that was exempt from the definitions of "expenditure" and "electioneering communication" under the statutory news media/press exemptions of those

¹ Some of Citizens United's documentary films were produced in conjunction with Citizens United Foundation, a related IRC Section 501(c)(3) organization. A few were produced by subsidiary companies for which Citizens United was the majority stakeholder.

terms. *Id.* In light of its conclusion that Citizens United's films fell under the news media/press exemptions, the FEC declined to rule whether or not Citizens United's films and related advertising were also exempt from the definitions of "expenditure" and "electioneering communication" as "bona fide commercial activity." *Id.*

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. It will be similar in form and style to *Occupy Unmasked*, which is available for purchase on DVD at retail establishments or viewing through Video On Demand outlets. In light of the topic covered by the film it is likely that the film will include unambiguous references elected Colorado officials who are candidates for re-election this year, including Governor John Hickenlooper and members of the state legislature. Advertising for the film may also include unambiguous references to candidates in this year's Colorado general election. Neither the film nor its advertising will editorially endorse or oppose any candidates, but some of the background footage appearing in the film and/or advertising may include audio statements from, and/or visual images of, activities wherein the election or defeat of one or more candidates is expressly advocated by participants in those activities.

The film is expected to be released in September 2014, and will be marketed and distributed across the United States, including in Colorado. Modes of distribution will include DVD sales, television broadcast and digital streaming. DVDs will be sold directly to consumers by Citizens United, primarily through internet website sales. The latter two modes of distribution will entail licensing the film to one or more broadcast outlets and/or Video On Demand platforms. Advertising would include television ads, newspaper ads,

direct mail, e-mail communications, internet ads and billboards. Marketing and distribution in Colorado is slated to occur within the 60 day window preceding the November 4, 2014 general election.

II. JURISDICTION

The Secretary of State has jurisdiction to entertain the requested Declaratory Order under Colorado's Administrative Procedure Act ("APA") and the Rules issued by the Secretary concerning election-related matters. The APA states:

Every agency shall provide by rule for the entertaining, in its sound discretion, and prompt disposition of petitions for declaratory orders to terminate controversies or to remove uncertainties as to the applicability to the petitioners of any statutory provision or any rule or order of the agency. The order disposing of the petition shall constitute agency action subject to judicial review.

C.R.S. § 23-4-105(11). In conformity with the APA, the Secretary has adopted rules governing Declaratory Orders. Rule 1.1 matches the statutory provision quoted above regarding the availability of Declaratory Orders. *See* 8 C.C.R. 1505-3, Rule 1.1.

Rule 1.2 makes clear that the Secretary has discretionary authority to rule or not rule on a Petition for a Declaratory Order. *Id.* at Rule 1.2(A). The Rule sets out a non-exclusive listing of matters that the Secretary is to consider in determining whether or not to rule upon a Petition. Those factors include the following:

- (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).

Citizens United respectfully submits that this Petition falls squarely within the first factor to be considered. A Declaratory Order from the Secretary would “remove uncertainties as to the applicability” of the definitions of “electioneering communication” and “expenditure” under Article XXVIII and the FPCA, and the corresponding registration and reporting regime as it applies to Citizens United’s forthcoming documentary film. Unless this uncertainty is removed, Citizens United will not know whether or not its film and related advertising triggers the need to file a registration and/or reports with the Secretary of State, *see* Col. Const. Art. XXVIII §§ 5(a) and (6)(1); and C.R.S. § 1-45-107.5. If any required filing is not timely filed, the Secretary is required to impose a penalty of fifty dollars (\$50) per day for each day Citizens United fails to file each required filing.² *See* Col. Const. Art. XXVIII, § 10(2)(a).

² Citizens United is aware that on February 4, 2014, the Secretary declined to issue a Declaratory Order to the Colorado Republican Party following receipt of a Petition requesting a Declaratory Order confirming “that its independent expenditure committee may raise funds in any amounts from any source permissible under Colorado law.” *See* Colorado Republican Party’s Petition for Declaratory Order at 1 (available at www.sos.state.co.us/pubs/elections/CampaignFinance/filed/2013/20131108CORepublicanParty-IEDeclaratoryOrder.pdf). The Secretary declined to issue the Order for lack of jurisdiction because the lawfulness of contribution sources and contribution amounts did not fall within the scope of the Secretary’s enforcement authority under Article XXVIII or the FCPA. *See* Final Agency Decision, In The Matter of the Colorado Republic Party’s Petition for Declaratory Order (available at www.sos.state.co.us/pubs/elections/CampaignFinance/files/2014/20140206FinalAgencyDecision.pdf). The Secretary instead issued an Advisory Opinion

Rule 1.3 sets out the substantive requirements for the Petition, which must include the following three things: (1) name and address of the petitioner and the nature of the relationship between the petitioner and the Secretary; (2) the statute, rule or order to which the petition relates; and (3) a concise statement of all of the facts necessary to show the nature of the controversy or uncertainty and the manner in which the statute, rule or order in question applies or potentially applies to the petitioner. *See* 8 C.C.R. 1505-3 at Rule 1.3. Each of these three requisites is addressed below.

A. Name & Address of the Petitioner and Relationship to the Secretary.

The Petitioner is Citizens United. Its business address is 1006 Pennsylvania Ave., SE, Washington, DC 20003. Citizens United was established in 1988 as a Virginia non-stock corporation. Citizens United is organized as a membership organization and has approximately 500,000 members across the United States, including members in Colorado. Citizens United is exempt from Federal Income taxes as a social welfare organization under Section 501(c)(4) of the Internal Revenue Code. One of Citizens United's major program activities is the production, marketing and distribution of documentary films, including films on controversial political topics.

Citizens United has been registered with the Secretary under Colorado's Charitable Solicitations Act, C.R.S. § 6-16-101 *et seq.*, as a charitable organization eligible to solicit

concluding that the proposed conduct complies with Colorado's campaign finance laws. *Id.* at 6-11.

In contrast to the Colorado Republican Party's Petition, Citizens United's Petition implicates the area of Colorado campaign finance law over which the Secretary has direct enforcement powers (*i.e.* the imposition of late fees for failure to timely file a required registration or report under Article XXVIII, §§ 5 and 6). Thus, the Secretary has clear jurisdiction over the matters central to Citizens United's Petition.

contributions for charitable purposes in Colorado since September 2005. Aside from its registration as a charitable organization and this Petition, Citizens United has no other relationship with the Secretary at this time.

B. Applicable Statutes/Rules/Etc.

The applicable statutes include: Article XXVIII of the Colorado Constitution, and the Fair Campaign Practices Act, C.R.S. § 1-45-101 *et seq.* The applicable Rules are 8 CCR § 1505-6, Rule 1.7. More particularly, the focus of this Petition is on the definitions of “expenditure” and “electioneering communication,” *see* Col. Const. Art. XXVIII, Sections 2(7)(a) and 8(a), C.R.S. §§ 1-45-103(9)-(10), and 8 CCR § 1505-6, Rule 1.7, the exclusions from those definitions, *see* Col. Const. Art. XXVIII, Sections 2(7)(b) and 8(b), and C.R.S. §§ 1-45-103(9)-(10), and the disclosure regimes for independent expenditures and electioneering communications. *See* Col. Const. Art. XXVIII, Sections 5 & 6; FCPA, C.R.S. §§ 1-45-107.5 and 1-45-108(1)(a)(III) and 8 CCR § 1501-6, Rule 11.

C. Nature of the Uncertainty at Issue.

The issue in this Petition is whether Citizens United’s forthcoming documentary film about various Colorado advocacy groups and advertising marketing the film are excluded from the definitions of “expenditure” and “electioneering communication”. If the film and its related advertising fall within the scope of one or more of the exclusions, distribution of the film in Colorado and its related advertising will not be subject to the state’s applicable disclosure regimes for “independent expenditures” and “electioneering communications.” On the other hand, if the film and its related advertising do not fall within the scope of any of the exclusions, distribution in Colorado during the 60 days preceding the November 4, 2014 general election will trigger time sensitive registration and/or reporting. *See* Col.

Const. Art. XXVIII, Sections 5 & 6; FCPA, C.R.S. §§ 1-45-107.5 and 1-45-108(1)(a)(III) and 8 CCR § 1501-6, Rule 11.

Article XXVIII and the 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. § 1-45-101(9).

The Rules adopted by the Secretary added a requirement that the communication include the “functional equivalent of express advocacy” in order to qualify as an electioneering communication. *See* 8 CCR § 1501-6, Rule 1.7. That Rule, however, was struck down by the Colorado Court of Appeals in December 2013.³ *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:

³ Rule 1.7 will only have bearing on the issues in this Petition if it is determined that the film does not fall within one or more of the exclusions to the definitions of “expenditure” and “electioneering communication” set out in Article XXVIII, Sections 2(7)(b) and 2(8)(b).

(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, Sect. 2(7)(b); and FCPA, § 1-45-101(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, § 1-145-101(10).

In contrast to the definition of “electioneering communication” the Secretary’s Rules do not further elaborate on the definition of “expenditure.” However, as in the case of “electioneering communication,” 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, Sect. 2(8)(b); and FPCA, § 1-45-103(10).

Citizens United requests that the Secretary issue a Declaratory Order that its forthcoming film and its advertising are excluded from the definition of an "electioneering communication" under subsections I, II and III of Article XXVIII, Section 2(7)(b) and FCPA, § 1-45-101(9), and that the film and its advertising are similarly excluded from the definition of "expenditure" under subsections 1, II and III of Article XXVIII, Section 2(8)(b) and FCPA, § 1-45-109(10). These exclusions are hereinafter referred to as "Exclusions I, II and III" to the respective definitions of "electioneering communication" and "expenditure."

III. ANALYSIS

A. Citizens United's forthcoming documentary film about various Colorado advocacy groups and the film's advertising are excluded from the definitions of "electioneering communication" and "expenditure" under Article XXVIII's Exclusions I and II.

In 2010, the FEC issued Advisory Opinion 2010-08 to Citizens United which concluded that Citizens United's documentary films and their related marketing activities

are excluded from the definitions of an “electioneering communication” and “expenditure” under the media/press exemptions to those terms under Federal campaign finance law.⁴ *See* FEC Advisory Opinion 2010-08 (June 11, 2010)(copy attached hereto as “Addendum A”). In reaching that conclusion, the FEC found first that Citizens United is a press entity for purposes of the exemptions because it regulatory produces and distributes documentary films. *Id.* at 5-6. Second, the Commission noted that the Citizens United was not owned or controlled by a political party, political committee, or candidate. *Id.* at 6. And third, the Commission found that Citizens United’s production and distribution of documentary films qualified as part of the organization’s “legitimate press function.” On this latter point, the FEC stated:

The distribution of documentary films to the public is the legitimate press function of an entity, such as Citizens United,

⁴At the federal level an FEC Advisory Opinion is similar in process, purpose and effect to a Declaratory Order issued at the state level by the Secretary. Procedurally both require a formal written request, *compare* 8 C.C.R. § 1505-3, Rule 1.3 and 2 U.S.C. §437f(a) and 11 CFR § 112.1. Both also include a process for public comment. *Compare* 8 C.C.R. § 15035-3, Rules 1.4(A)(3) and 2 U.S.C. § 437f(d) and 11 CFR § 112.3. The purpose and effect of a Declaratory Order is “to terminate controversies or to remove uncertainties as to the applicability to the petitioners of any statutory provision or of any rule or order of the agency.” C.R.S. § 24-4-105(11). 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). Finally, the Secretary’s action on a Petition for a Declaratory Order and the FEC’s action on an Advisory Opinion request both constitute final agency action that is subject to judicial review. *See* C.R.S. § 24-4-105(11); and *Unity08 v. FEC*, 596 F.3d 861, 864-867 (D.C. Cir. 2010).

that regularly produces ‘news stories, commentary, or editorials’ in the form of films.

Id. at 6-7. Based on those three factors, the FEC concluded that Citizens United’s films are excluded from the definitions of “electioneering communication” and “expenditure” under the news media/press exemptions that apply to those terms. The FEC also determined that advertising for Citizens United films falls within the scope of the news media/press exemption, explaining “where the underlying product is covered by the press exemption, so are advertisements to promote that underlying product. *Id.* at 7 (citing *FEC v. Phillips Publ’g*, 517 F.Supp. 1308, 1313 (D.D.C. 1981) and *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981)).

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 Colorado’s news media/press exclusions (*i.e.* Exclusions I and II) because it focuses on the portion of Exclusion III covering communications “by persons made in the regular course and scope of their business” and does not address the scope of the state’s news media/press exclusions from definitions of electioneering communication or expenditure. *See id.* at 1214-1218.

In light of the absence of any Colorado authority on the scope of the state’s news media/press exclusions, Citizens United urges the Secretary to accept the rationale of the FEC in Advisory Opinion 2010-8 as persuasive authority in delineating the scope of those

exclusions. The Colorado exclusions for news media/press activity are functionally the same as the Federal news media/press exemptions. They were adopted with knowledge of the similar Federal exemptions and their texts are quite similar, covering news articles/stories, editorial content and opinion or commentary. *Compare* Col. Const. Art. XXVIII, § 2 (7)(b)(I)-(II) and § 2 (8)(b)(I)-(II) and 2 U.S.C. §§ 434(f)(3)(B)(i) and 431(9)(B)(i); and 11 CFR §§ 100.29(c)(2) and 100.132. The only substantive textual differences between the Colorado exclusions and the Federal news media/press exemptions are the consequence of the wider variety of communication modes falling within the definition of an “electioneering communication” under Colorado law. The Colorado definition of an “electioneering communication” includes communications that are “broadcast by television or radio, printed in a newspaper or on a billboard, directly mailed or delivered by hand to personal residences or otherwise distributed,” Col. Const. Art. XXVIII, § (7)(a), while the Federal definition of an “electioneering communication” is limited to communications made via “broadcast, cable, or satellite.” 2 U.S.C. § 434(f)(3)(A)(i); and 11 CFR § 100.29(b)(1). Thus, the Colorado exclusions to the definition of “electioneering communication” are necessarily broader than the Federal news media/press exemption in order to capture the full array of communication modes falling within the scope of the term’s definition. Other than that, Colorado’s news media/press exclusions essentially mimic the Federal news media/press exemptions. Given the textual similarity between Exclusions I and II to the Colorado definitions of “expenditure” and “electioneering communication” and the corresponding exemptions under Federal campaign finance law, the Secretary would be fully justified in following the approach taken by the FEC in Advisory opinion 2010-08, wherein the FEC concluded that Citizens United’s documentary

films and advertising for those films fall squarely within the scope of the Federal news media/press exemptions to the definitions of “expenditure” and “electioneering communication.” Citizens United therefore requests that the Secretary confirm that Citizens United’s forthcoming film and advertisements to promote the film are excluded from the Colorado definitions of “expenditure” and “electioneering communication” under Exclusions I and II.

B. Citizens United’s forthcoming documentary film about various Colorado advocacy groups and the film’s advertising are excluded from the definitions of “electioneering communication” and “expenditure” under the “regular course and scope of business” clause of Article XXVIII’s Exclusion III.

As noted above, in *Committee for the American Dream*, the Colorado Court of Appeals addressed the scope of the portion of Exclusion III from the definitions of “electioneering communication” and “expenditure” covering communications “by persons made in the regular course and scope of their business.” *See Committee for the American Dream*, 187 P.3d at 1214-1217. The Court held that excluding advertisements by a political committee such as the Committee for the American Dream would “frustrate” the reporting requirements of Article XXVIII, because such groups “regularly make electioneering communications for the purpose of influencing elections.” *Id.* at 1216. The Court therefore concluded that Exclusion III was:

limited to persons whose business is to broadcast, print, publicly display, directly mail, or hand deliver candidate-specific communications with the named candidate’s district as a service, rather than to influence elections.

Id.

In contrast to the Committee for the American Dream, Citizens United is not a political committee. Nor does Citizens United “regularly make electioneering communications for the purpose of influencing elections.” 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 excludes promotion of the election or defeat of candidates for public office. *See* 26 CFR § 1.501(c)(4)-1(2)(ii)(“The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office”).

Further, 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 containing candidate-specific references “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 DVDs bearing its films and mails the DVDs to the purchasers; makes its films available for exhibition at movie theatres in return for a portion of the box office receipts; and licenses its films to television broadcasters and digital streaming companies in exchange for fees and/or royalties. A political committee, in contrast, pays a fee to the broadcast company or other service provider to air or otherwise distribute its communications.⁵

Further, the fact that Citizens United pays a fee to a service provider to air or otherwise publicly display advertisements promoting the sale of its films does not weaken

⁵ Citizens United’s status as a non-profit organization has no bearing on the analysis under Exclusion III. As the Court of Appeals explained in *Committee for the American Dream*, the term “business” as used in Article XXVIII is interpreted “without regard to whether an organization has a profit objective.” 187 F.3d at 1215.

the claims that the films and their advertising are excluded from the definitions of “expenditure” and “electioneering communication” under regular course of business exclusions. Service providers routinely pay other service providers fees to air or display advertisements promoting for their products and services. Here, Citizens United’s purpose in airing advertisements or displaying a billboard would be aimed at selling DVDs of its film and encouraging people to watch the film at on television or via digital streaming.

In short, excluding Citizens United’s film and its related advertising from the definitions of “electioneering communication” and “expenditure” under Article XXVIII’s exclusion for spending and communications undertaken “in the regular course and scope of [its] business” would not “frustrate” the purposes of Article XXVIII because Citizens United is not a political committee that regularly seeks to influence Colorado’s elections. Instead, Citizens United would be acting in a manner consistent with that of a “service provider” when it distributes and markets its film in Colorado, and it would be doing this in Colorado consistent with the manner that it distributes and markets its film elsewhere in the regular course and scope of its business. Citizens United therefore requests that the Secretary confirm that the forthcoming film and its related advertising are exempt from the definitions of “electioneering communication” and “expenditure” under the “ordinary course of business” clause of Exclusion III to Article XXVIII’s definitions of those two terms.

IV. CONCLUSION

For the reasons set forth above, Citizens United respectfully requests that the Secretary issue a Declaratory Order confirming that its forthcoming documentary film about various Colorado advocacy groups and the marketing activities it undertakes to promote the

film are excluded from the definitions of “electioneering communication” and “expenditure” under Exclusions I, II and III of Article XXVIII’s respective definitions of “electioneering communication” and “expenditure.”

If, however, the Secretary declines to issue a Declaratory Order in this matter, Citizens United respectfully requests that an Advisory Opinion be issued, which would be available for usage by Citizens United as “persuasive evidence” in any enforcement proceeding or litigation. Here, the issues presented are novel and no precedent exists as to the application of Colorado’s campaign finance law to a documentary film. *See* Final Agency Decision, In The Matter of the Colorado Republican Party’s Petition for Declaratory Order at 6.

Respectfully submitted this 17th Day of April, 2014.

By:



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Citizens United Vice President &
General Counsel
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ADDENDUM A

CITIZENS UNITED

PETITION FOR DECLARATORY ORDER



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 11, 2010

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2010-08

Theodore B. Olson, Esq.
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306

Dear Mr. Olson:

We are responding to your advisory opinion request on behalf of Citizens United concerning whether its filmmaking activities constitute expenditures and electioneering communications under the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations.

The Commission concludes that Citizens United's costs of producing and distributing its films, in addition to related marketing activities, are covered by the press exemption from the Act's definitions of "expenditure" and "electioneering communication." Whether or not the activity is "*bona fide* commercial activity" is moot given that the media exemption applies.

Background

The facts presented in this advisory opinion are based on your letters received on March 29, 2010, and April 26, 2010.

Citizens United is a Virginia non-stock corporation and is exempt from Federal taxes under Section 501 of the Internal Revenue Code. Its principal purpose is "to promote social welfare through informing and educating the public on conservative ideas and positions on issues, including national defense, the free enterprise system, belief in God, and the family as the basic unit of society." Citizens United advocates issues, recruits members, and disseminates information through direct mail efforts,

telemarketing, conferences, publications, print and broadcast advertising, Internet activities, and litigation. Citizens United conducts political activities, including making contributions and independent expenditures, through Citizens United Political Victory Fund (a separate segregated fund) and The Presidential Coalition, LLC (an affiliate). Citizens United is not owned or controlled by a political party, political committee, or candidate.

In furtherance of its purpose, Citizens United produces and distributes films on various political topics through its in-house unit, Citizens United Productions, and, on occasion, through affiliated entities.¹ Since 2004, Citizens United has produced and distributed fourteen films: CELSIUS 41.11: THE TEMPERATURE AT WHICH THE BRAIN BEGINS TO DIE (2004); BROKEN PROMISES: THE UNITED NATIONS AT 60 (2005); BORDER WAR (2006); ACLU: AT WAR WITH AMERICA (2006); REDISCOVERING GOD IN AMERICA (2007); HILLARY: THE MOVIE (2008); HYPE: THE OBAMA EFFECT (2008); BLOCKING "THE PATH TO 9/11": THE ANATOMY OF A SMEAR (2008); RONALD REAGAN: RENDEZVOUS WITH DESTINY (2009); WE HAVE THE POWER (2009); PERFECT VALOR (2009); REDISCOVERING GOD IN AMERICA II: OUR HERITAGE (2009); NINE DAYS THAT CHANGED THE WORLD (2010); and GENERATION ZERO (2010). Citizens United also has four additional films currently in production. Some of Citizens United's films and marketing materials refer to clearly identified Federal candidates, and some may constitute expenditures or electioneering communications under the Act.

Approximately 25% of Citizens United's annual budget for each of the past six years has been devoted to the production and distribution of its films. In 2009, that figure was approximately \$3.4 million, and Citizens United anticipates spending a similar proportion of its budget on film-related activities for the foreseeable future.

Citizens United has distributed, and plans to continue distributing, its films in three primary ways: as DVDs, as theatrical releases, and on broadcast, cable, and satellite television. Citizens United typically sells its films as DVDs for both retail and wholesale bulk purchase, although in 2008 it provided free DVDs of one film, HYPE: THE OBAMA EFFECT, as a newspaper insert in five newspapers in Florida, Nevada, and Ohio. Additionally, Citizens United has arranged for limited theatrical release of three² of its films. Such releases typically involve Citizens United licensing the films in exchange for a percentage of box office sales, although it also allows its films to be screened free of

¹ For example, Citizens United and a non-candidate individual investor formed Citizens United Productions No. 1, LLC, to produce and distribute an upcoming documentary film (GENERATION ZERO). Citizens United owns 75% of, and maintains operational and board control over, Citizens United Productions No. 1. Citizens United also plans to establish Citizens United Productions No. 2, LLC, to produce a second film (SAVING AMERICA), as well as additional entities to produce and distribute future films. All such affiliates will be structured, owned, and operated in a manner similar to Citizens United Productions No. 1. Because Citizens United will maintain ownership and control over all such affiliates, for the purpose of this advisory opinion, the Commission assumes that all films produced and/or distributed by a Citizens United affiliate are produced and distributed by Citizens United.

² CELSIUS 41.11 (2004), BORDER WAR (2006), and GENERATION ZERO (2010).

charge at film festivals and educational institutions and hosts free screenings for select members of the public and news media.

Two of Citizens United's films—RONALD REAGAN: RENDEZVOUS WITH DESTINY and WE HAVE THE POWER—have been televised, and Citizens United is in negotiations for the rights to show a third, PERFECT VALOR, on The Military Channel. Preliminary discussions indicate that Citizens United will receive advertising time for its own use during the cable broadcast as compensation, an arrangement which would parallel the terms under which RONALD REAGAN: RENDEZVOUS WITH DESTINY was broadcast. Additionally, Citizens United is in discussions regarding the licensing of certain of its films for cable and satellite broadcast in a video-on-demand format. Citizens United represents that it will receive a royalty, commission, or other fee from the broadcasters each time one of its films is ordered for viewing.

Questions Presented

- 1. Are the costs of producing and distributing Citizens United's films and related marketing activities covered by the press exemption from the Act's definitions of "expenditure" and "electioneering communication"?*
- 2. Do the production and distribution of Citizens United's films and related marketing activities constitute "bona fide commercial activity" by a commercial entity?*

Legal Analysis and Conclusions

Question 1. Are the costs of producing and distributing Citizens United's films and related marketing activities covered by the press exemption from the Act's definitions of "expenditure" and "electioneering communication"?

Yes, the costs of producing and distributing Citizens United's films, along with related marketing activities, are covered by the press exemption from the Act's definitions of "expenditure" and "electioneering communication."

Under the Act, "[t]he term '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). The Act and Commission regulations also include a similar exemption from the definition of "electioneering communication" for a communication that appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. *See* 2 U.S.C. 434(f)(3)(B)(i) and 11 CFR 100.29(c)(2). Together, these exclusions are known as the "press exemption" or "media exemption."

The legislative history of the 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) (emphasis added). While an earlier Commission advisory opinion narrowly concluded that a news story, commentary, or editorial distributed through facilities other than the enumerated media (*i.e.*, a book) is generally not covered by the press exemption,³ later Commission actions have read the press exemption more broadly, consistent with the Act’s legislative history, to cover cable television,⁴ the Internet,⁵ satellite broadcasts,⁶ and rallies staged and broadcast by a radio talk show.⁷ In fact, “[t]he Commission has not limited the press exemption to traditional news outlets, but rather has applied it to ‘news stories, commentaries, and editorials *no matter in what medium they are published...*’” Advisory Opinion 2008-14 (Melothé, Inc.) (citing the Commission’s 2006 rulemaking, *Explanation and Justification for Final Rules on Internet Communications*, 71 FR 18589, 18608 (Apr. 12, 2006), extending the press exemption to websites and “any Internet or electronic publication”).

The Commission has historically conducted a two-step analysis to determine whether the media exemption applies. First, the Commission asks whether the entity engaging in the activity is a press or media entity. *See* Advisory Opinions 2005-16 (Fired Up!), 1996-16 (Bloomberg), and 1980-90 (Atlantic Richfield). Second, the Commission applies the two-part analysis presented in *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981), which requires it to establish:

³ Advisory Opinion 1987-08 (AIG/U.S. News). This advisory opinion involved, among other things, applicability of the media exemption to a book. The Commission concluded, “[w]ith respect to AIG’s sponsorship of the Book, the Commission notes that the ‘news story’ exemption does not apply to distribution through facilities other than a broadcasting station, newspaper, magazine, or other periodical publication.... Because the Book does not fit within any of these categories, it would not qualify for the ‘news story’ exception.” *Id.* at 5. Although the question of whether a theatrical release of a film could qualify for the media exemption was raised by some respondents in MURs 5474 (Dog Eat Dog Films, Inc.) and 5539 (Fahrenheit 9/11), the Commission ultimately found no reason to believe respondents violated the Act because the documentary constituted *bona fide* commercial activity and was not an independent expenditure or electioneering communication.

⁴ *Explanation and Justification for Final Rules on Candidate Debates and News Stories*, 61 FR 18049 (Apr. 24, 1996).

⁵ *Explanation and Justification for Final Rules on Internet Communications*, 71 FR 18589 (Apr. 12, 2006).

⁶ Advisory Opinion 2007-20 (XM Radio).

⁷ *See* MUR 5569 (The John and Ken Show, *et al.*), First General Counsel’s Report at 9 (in a matter where a radio talk show expressly advocated the election and defeat of Federal candidates, and that also staged and broadcast public rallies outside the offices of Federal candidates, the Commission concluded that the media exemption applied to the rallies because they were “similar in form to other broadcast events featured on the Show” which was also covered by the media exemption.).

(A) That the entity is not owned or controlled by a political party, political committee, or candidate; and

(B) That the entity is acting as a press entity in conducting the activity at issue (*i.e.*, whether the press entity is acting in its “legitimate press function”).

See also *FEC v. Phillips Publ'g*, 517 F.Supp. 1308, 1312-13 (D.D.C. 1981); Advisory Opinions 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired Up!), and 2004-07 (MTV).

1) Press Entity Status

Neither the Act nor Commission regulations use or define the term “press entity.” Therefore, when determining whether the term applies to a particular entity, the Commission has focused on whether the entity in question produces on a regular basis a program that disseminates news stories, commentary, and/or editorials. *See, e.g.*, Advisory Opinions 2008-14 (Melothé, Inc.), 2007-20 (XM Radio), and 2005-19 (Inside Track). In the Explanation and Justification for the Final Rules on Electioneering Communications, the Commission stated that it will interpret “news story, commentary, or editorial” to include documentaries and educational programming within the context of the media exemption to the electioneering communication definition in 11 CFR 100.29(c)(2).⁸ *See Explanation and Justification for Final Rules on Electioneering Communications*, 67 FR 65190, 65197 (Oct. 23, 2002). Whether an entity qualifies as a press entity does not necessarily turn on the presence or absence of any one particular fact. *See* Advisory Opinions 2007-20 (XM Radio) and 2005-19 (Inside Track).

Since 2004, Citizens United has produced and distributed fourteen films, with four additional films currently in production. Additionally, a substantial portion of Citizens United’s annual budget for each of the past six years has been devoted to the production and distribution of films, including documentaries. In light of these facts, and given that Citizens United produces documentaries on a regular basis, the Commission concludes it is a press entity for the purposes of this advisory opinion.⁹

⁸ The Commission has not explicitly determined that it will interpret “news story, commentary, or editorial” to include documentaries within the context of the media exemption from the definition of “expenditure.” However, because the Commission uses the same analysis to determine the application of both the 2 U.S.C. 431(9)(B)(i) and 11 CFR 100.29(c)(2) media exemptions, it follows that the term “news story, commentary, or editorial” includes documentaries for the purposes of both media exemptions discussed herein.

⁹ In Advisory Opinion 2004-30 (Citizens United), the Commission determined that the costs of a film produced by Citizens United did not qualify for the press exemption in part because Citizens United had produced only two documentaries over the preceding sixteen years. Since 2004, the volume and frequency of Citizens United’s film production have increased substantially. As a result, the Commission is presented with a significant change in the facts in the time that has passed since it issued Advisory Opinion 2004-30 (Citizens United). The Commission has not imposed a requirement that an entity seeking to avail itself of the press exemption first demonstrate that it has a track record of engaging in media activities. *See, e.g.*, Advisory Opinion 2008-14 (Melothé, Inc.).

While Citizens United's films may be designed to further its principal purpose as a non-profit advocacy organization, an entity otherwise eligible for the press exemption does not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial. *See* Advisory Opinions 2005-19 (Inside Track) (citing First General Counsel's Report, MUR 5440 (CBS Broadcasting, Inc.)) and 2005-16 (Fired Up!) (citing same).

2) Ownership Criteria and Legitimate Press Function

A) Ownership or Control

Citizens United is not owned or controlled by a political party, political committee, or candidate. Further, neither Citizens United Productions No. 1 nor Citizens United Productions No. 2 is owned or controlled by a political party, political committee, or candidate. The Commission presumes, for purposes of this advisory opinion only, that any future affiliates through which Citizens United produces and/or distributes documentary films will also not be owned or controlled by a political party, political committee, or candidate.

B) Legitimate Press Function

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. Advisory Opinions 2005-16 (Fired Up!) (citing *FEC v. Mass. Citizens for Life ("MCFL")*, 479 U.S. 238, 251 (1986)) and 2000-13 (iNEXTV) (concluding that a website was "viewable by the general public and akin to a periodical or news program distributed to the general public"). In *MCFL*, the Supreme Court held that a "Special Edition" newsletter did not qualify for the press exemption on the basis that it deviated from certain "considerations of form" relating to the production and distribution of its regular newsletter. 479 U.S. at 250-51. Among those "considerations of form" enumerated by the Supreme Court were the fact that the Special Edition was not published through the facilities of the regular newsletter, but by a staff which prepared no previous or subsequent newsletters, and the increase in distribution to a group far larger than the newsletter's regular audience. *Id.*

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 editorials" in the form of films. The Commission previously has concluded that press functions include the "provision of news stories, commentary, and editorials." Advisory Opinions 2008-14 (Melothe, Inc.) and 2005-16 (Fired Up). Citizens United makes some of its films available to the general public via broadcast on television, satisfying the first consideration. Although not entirely in the same fashion, Citizens United's distribution of other films via cable and satellite television, including the use of a video on demand format, DVD, and movie theater provides similar access to

the general public. Although the latter forms of distribution are not free to the public, whether payment is required has not been a determining factor in the Commission's discussion of this consideration. *See* Advisory Opinions 2007-20 (XM Radio) and 2004-07 (MTV). *But see* Advisory Opinion 2008-14 (Melothe, Inc.) (identifying free access as a relevant factor).

Under *MCFL's* "considerations of form" analysis, Citizens United's films constitute a legitimate press function. The films contemplated in the request appear to be comparable in form to those previously produced. For instance, Citizens United plans to continue to produce its films through its in-house unit, Citizens United Productions, or through affiliated entities over which Citizens United will maintain majority ownership and control.

Moreover, Citizens United states that it will not pay to air its documentaries on television; instead it will receive compensation from the broadcasters.¹⁰ *See* Advisory Opinion 2004-30 (Citizens United) ("[T]he very act of paying a broadcaster to air a documentary on television, rather than receiving compensation from a broadcaster, is one of the 'considerations of form' that can help to distinguish an electioneering communication from exempted media activity."). Therefore, Citizens United's distribution of its documentary films by broadcast, cable, and satellite television, including the use of a video on demand format, DVD, and movie theater are eligible for the press exemption.

Although some of Citizens United's film-related advertisements also may be classified as expenditures or electioneering communications, courts have held that where the underlying product is covered by the press exemption, so are advertisements to promote that underlying product. *See Phillips Publ'g*, 517 F. Supp. at 1313 (citing *Reader's Digest*, 509 F. Supp. at 1215). Thus, Citizens United's advertisements will only come within the press exemption to the extent that Citizens United is not "acting in a manner unrelated to its [press] function" when it produces and distributes the advertisements themselves. *See* Advisory Opinion 2004-07 (MTV). Advertisements promoting activities that are not part of Citizens United's legitimate press function, however, may be considered expenditures or electioneering communications. Advisory Opinion 2004-30 (Citizens United) (citing *Phillips Publ'g*, 717 F. Supp. at 1313).

Because the costs referenced above with respect to film production, distribution, and related marketing activities fall within the media exemption for "expenditures" and "electioneering communications," they are exempt from the Act's disclosure, disclaimer, and reporting requirements.

¹⁰ The request notes that in certain circumstances Citizens United pays a fee to a movie theater in order to have its films available on certain dates, but receives 100% of the box office ticket sales. According to the request, such types of contracts are standard in the film industry. Assuming that to be true, such payments would not upset the determination that this request falls within the press exemption.

Question 2. Do the production and distribution of Citizens United's films and related marketing activities constitute "bona fide commercial activity" by a commercial entity?

This question is moot given the answer to Question 1.

The Commission expresses no opinion regarding the possible applicability of any Federal or State tax laws or other laws to the matters presented in your request, as those issues are outside its jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law, including, but not limited to, statutes, regulations, advisory opinions, and case law. The cited advisory opinions are available on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)
Matthew S. Petersen
Chairman