

OFFICE OF THE SECRETARY OF STATE

STATE OF COLORADO

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

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**DECLARATORY ORDER**

I, Suzanne Staiert, Deputy Secretary of State for the State of Colorado, reviewed Citizens United's Petition for Declaratory Order filed on April 18, 2014, and conducted a hearing in accordance with section 24-4-105 (11), C.R.S., and section 1505 of the Colorado Code of regulations.<sup>1</sup>

**Procedural Facts**

Petitioner, Citizens United, is a Virginia non-stock corporation with its principal place of business in Washington, D.C. Citizens United is a non-profit membership organization under Section 501 (c) (4) of the Internal Revenue Code.

Petitioner filed its Petition for Declaratory Order ("Petition") with the Secretary of State on April 18, 2014, requesting an order stating that Petitioner's forthcoming documentary film about various Colorado advocacy groups will not qualify as an "expenditure" or as an "electioneering communication" under the Colorado Constitution or Colorado's Fair Campaign Practices Act ("FCPA").

On May 1, 2014, the Secretary of State issued a Notice of Hearing in accordance with state law.<sup>2</sup> The Secretary provided notice of the hearing to Petitioner and published the notice in the Colorado Register and on the Secretary of State's official website.

Before and after the hearing, the Secretary received several written comments related to the Petition; those comments are part of the record. No commenter has intervened in the Petition proceedings.

I, as the Secretary's designee, convened and conducted the hearing on June 3, 2014. At the hearing, Petitioner and members of the public testified. The hearing was broadcast live via the Secretary of State's website.

Having reviewed the Petition and having heard the testimony, I find that the Secretary of State has jurisdiction to issue a Declaratory Order. This Declaratory Order is a final agency action.

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<sup>1</sup> 8 Colo. Code Regs. §1505-3.

<sup>2</sup> Colo. Rev. Stat. §24-4-105(2)(a); 8 Colo. Code Regs. §1505-3 , Rule 1.4(B).

## Analysis

### **1. The Secretary of State has jurisdiction to issue this Declaratory Order to remove uncertainties as to the applicability of certain campaign-finance regulations to Petitioner.**

As a preliminary matter, I find that the Secretary of State has jurisdiction to issue this Declaratory Order. The Colorado Administrative Procedure Act (“APA”) requires every state agency to “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 of a statute or rule on the petitioner.<sup>3</sup> Here, Petitioner has complied with the APA and the Secretary of State’s petition rule. Because the Secretary of State has enforcement powers over fines for failure to timely file campaign-finance reports and because there is uncertainty as to the application of certain reporting requirements to Petitioner, this Order is necessary.

a. *Petitioner complied with all requirements in its Petition for Declaratory Order.*

In accordance with the APA, the Secretary of State promulgated General Policies and Administration Rule 1, which, among other things, requires those who petition for a declaratory order to provide: Petitioner’s name and address; the statute or rule to which the petition relates; and a concise statement showing the controversy or uncertainty.<sup>4</sup> Petitioner has complied with these 3 requirements.

b. *This Declaratory Order will remove uncertainties as to whether Petitioner’s film falls within the definitions of “electioneering communication” and “expenditure.”*

As mentioned above, the APA allows a petitioner to request a declaratory order to remove uncertainties as to the applicability of a certain statute or rule to the petitioner’s activity. Whether to issue a declaratory order is within the agency’s discretion.<sup>5</sup> The Secretary has, by rule, laid out certain factors to consider when determining whether to issue such an order, 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.

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<sup>3</sup> Colo. Rev. Stat §24-4-105(11).

<sup>4</sup> 8 Colo. Code Regs. §1505-3.

<sup>5</sup> Colo. Rev. Stat §24-4-105(11).

- (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.<sup>6</sup>

In its Petition, Citizens United asserted, and I agree, that its request falls squarely within the first factor to be considered; that is:

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 [sic], 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.<sup>7</sup>

In part because no Colorado Court has opined on the particular questions presented in the petition, I am issuing this Declaratory Order to remove uncertainties as to Petitioner’s reporting requirements.

Additionally, while factors (2) and (3) above aren’t relevant to the petition, I find that, under factor (4), Petitioner’s film and advertising activities are not merely hypothetical. As such, the issue is ripe and this Declaratory Order is necessary.

- c. *This Declaratory Order is appropriate because the Secretary of State has the duty to impose fines for failure to timely file required information.*

Earlier this year, the Secretary of State opted, in his discretion, to not issue a Declaratory Order after the Colorado Republican Party filed a petition requesting an order allowing it to create and operate an independent expenditure committee. In denying the request for a Declaratory Order, I stated that “declaratory relief would not terminate the uncertainty Petitioner faces because the constitution limits the Secretary’s enforcement authority.”<sup>8</sup> But here Petitioner seeks an order that would resolve uncertainties as to its requirement to register and disclose certain campaign finance information. As Petitioner states in its petition:

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).

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<sup>6</sup> 8 Colo. Code Regs. §1505-3.

<sup>7</sup> Petition, p. 5.

<sup>8</sup> *In the Matter of the Colorado Republican Party’s Petition for Declaratory Order*, February 6, 2014.

Thus, the Secretary has clear jurisdiction over the matters central to Citizens United's Petition.<sup>9</sup>

I agree with Petitioner's analysis; because Petitioner complied with all statutory and regulatory requirements, because this Declaratory Order will remove an uncertainty, and because the Secretary of State has direct authority over failure to timely disclose certain information, I find that the Secretary of State has jurisdiction to issue this Declaratory Order.

**2. Under a plain-language analysis, Petitioner's forthcoming documentary is an electioneering communication.**

Citizens United's upcoming film on advocacy groups in Colorado falls squarely within the definition of electioneering communication. The Colorado Constitution states that electioneering communications means:

[A]ny 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.<sup>10</sup>

Citizens United's forthcoming documentary meets all three prongs of this definition. First, Petitioner states in its petition that "it is likely that the film will include unambiguous references elected [sic] Colorado officials who are candidates for re-election this year, including Governor John Hickenlooper and members of the state legislature."<sup>11</sup> Second, the petition states that "Marketing and distribution in Colorado is slated to occur within the 60 day window preceding the November 4, 2014 general election."<sup>12</sup> Lastly, Petitioner states that the film "will be marketed and distributed across the United States, including in Colorado."<sup>13</sup>

Accordingly, I find that Citizens United's forthcoming documentary is an electioneering communication under Colorado campaign finance law. The question turns, then, to whether the proposed film fits within one of the enumerated exceptions to "electioneering communication."

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<sup>9</sup> Petition, p. 5, FN 2.

<sup>10</sup> Colo. Const. Article XXVIII, Sec. 2(7)(a).

<sup>11</sup> Petition, p. 3.

<sup>12</sup> *Id.* at p. 4.

<sup>13</sup> *Id.* at p. 3.

**3. Petitioner’s film does not fall within any of the exemptions to the definition of electioneering communication.**

Citizens United’s film does not fall within any of the enumerated exemptions to electioneering communication. Under the Colorado Constitution, the term electioneering communication does not include:

- (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 a 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.<sup>14</sup>

Petitioner requests a declaratory order that the forthcoming film and its advertising are excluded from the definition of electioneering communication under exemptions I, II, and III above.<sup>15</sup> Petitioner offers no arguments, and I issue no order, regarding exemption IV.

a. *Petitioner’s film does not meet the first exemption because it is not print media.*

The first exemption to electioneering communication allows certain communications that are “*printed* in a newspaper, magazine, or other periodical.”<sup>16</sup> (Emphasis added.) Here, the forthcoming documentary is a film, which cannot be printed in a newspaper, magazine, or other periodical. While the advertisements accompanying the film may be printed, such advertisements do not fit within the specific types of communications listed in exemption I.

Petitioner does not try to fit the film or advertisements within the plain language of this exemption; rather, Petitioner argues that this exemption (along with the second exemption), are the basis of a general “press-entity exemption.” But no such exemption exists in Colorado law. (I address this exemption in section 4. below.) As such, I find that Citizens United is not exempt from reporting the film as an electioneering communication under exemption I.

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<sup>14</sup> Colo. Const. Article XXVIII, Sec. 2(7)(b).

<sup>15</sup> Petition, p. 10.

<sup>16</sup> Colo. Const. Article XXVIII, Sec. 2(7)(b).

- b. *Petitioner's film does not meet the second exemption because Petitioner is not a broadcast facility.*

Exemption II exempts from the “electioneering communication” definition editorial endorsements or opinions aired by a broadcast facility. Petitioner is not a broadcast facility and, as such, does not fall within this exemption. Though Citizens United commented at the hearing that it will likely license its forthcoming documentary for distribution *through* broadcast facilities, Citizens United *itself* is not a broadcast facility. And the distinction is important. As the Colorado Court of Appeals stated, “the reporting requirement is directed at persons who seek to ‘influence election outcomes.’ Broadcasters and publishers do not seek to influence elections as their primary objective... Hence, such reporting usually would not advance the purpose of Article XXVIII.”<sup>17</sup>

Further, even if Petitioner licenses its forthcoming film to air through a broadcast facility, the broadcast facility would not be airing the film as an editorial endorsement or opinion of the broadcast facility. Rather, the film would be more akin to a paid advertisement: a communication not protected by exemption II. For these reasons, I find that Petitioner’s film falls outside of exemption II.

- c. *Petitioner's film does not meet the third exemption because Citizens United is not the type of business to which the regular-business exception applies and because Citizens United is not distributing its film solely to its members.*

Exemption III to the electioneering communication definition actually contains two separate exceptions. It removes reporting requirements for communications by:

- Persons made in the regular course and scope of their business; or
- A membership organization solely to members of such organization and their families.<sup>18</sup>

I will address each of these clauses in turn.

Petitioner’s forthcoming documentary film is not a communication by a person made in the regular course of business. In *Colo. Citizens for Ethics in Gov’t. v. Comm. For the Am. Dream*, the Committee for the American Dream (“CAD”) made certain advertisements that the Colorado Court of Appeals determined fit squarely within the definition of electioneering communication.<sup>19</sup> The court also found that CAD’s goal was to influence elections.<sup>20</sup> In finding that the regular-business exception did not apply to CAD, the court stated that applying the exemption to such an organization would defeat the purpose of Colorado’s campaign finance laws:

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<sup>17</sup> *Colo. Citizens for Ethics in Gov’t v. Comm. for the Am. Dream*, 187 P.3d 1207, (Colo. Ct. App. 2008).

<sup>18</sup> Colo. Const. Article XXVIII, Sec. 2(7)(b)(3).

<sup>19</sup> *Colo. Citizens for Ethics in Gov’t*, 187 P.3d at 1216.

<sup>20</sup> *Id.*

Exempting persons such as CAD, who regularly make electioneering communications for the purpose of influencing elections, from reporting requirements would frustrate Article XXVIII's purpose of full disclosure.<sup>21</sup>

The court went on to narrowly construe the regular-business exception:

Instead, we interpret the regular business exception more narrowly, as limited to persons whose business is to broadcast, print, publicly display, directly mail, or hand-deliver candidate-specific communications within the named candidate's district as a service, rather than to influence elections.<sup>22</sup>

Here, Petitioner is similar to CAD: its forthcoming film falls squarely within the definition of electioneering communication and, according to Petitioner's own petition and comments at the hearing, Citizens United regularly makes such documentaries. Additionally, though Petitioner has not yet made the film, there certainly seems to be indicia that the intent of the film and its advertising is to influence the election: Petitioner testified that the film will talk about people as candidates and is slated to be released when Colorado voters will likely be paying the most attention. As such, Petitioner is exactly the type of entity to which Article XXVIII's disclosure requirements apply.

Next, then, comes the question whether Citizens United is a person whose business is to "broadcast, print, publically display, directly mail, or hand-deliver candidate-specific communications" as a service. Petitioner argues in its petition that Citizens United's filmmaking activities are akin to such businesses.<sup>23</sup> In portraying itself as akin to a service provider, Petitioner states:

Citizens United sells DVDs bearing its films and mails the DVDs to 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.<sup>24</sup>

But these activities aren't quite like those of service providers described in *Comm. for the Am. Dream*. As mentioned above, Citizens United does not itself broadcast or print any of its documentaries. And while Citizens United may make arrangements to have its films shown in movie theatres, it does not itself publicly display its films. Similarly, while Petitioner may directly mail or hand-deliver some copies of its DVDs, it does not do so as a service. In sum, the regular-business exemption is for businesses whose service is primarily to distribute content; here, Citizens United is primarily the content developer. Because Citizens United is more like CAD than it is like a service provider such as a broadcaster or publisher, I find that the forthcoming film does not meet the regular-business exception prong of exemption III.

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Petition p. 15.

<sup>24</sup> *Id.*

As to the second prong of exemption III, the membership-organization prong, Petitioner's film does not satisfy the test because Petitioner plans to distribute the film to people outside of Petitioner's membership. In fact, at the hearing Petitioner plainly stated that distribution of the film will extend beyond its membership. Thus, I find that Citizens United's forthcoming documentary is not excepted from the definition of electioneering communication because it falls outside of both clauses in exemption III.

In sum and for the reasons stated above, I find that Petitioner's film falls squarely within the definition of electioneering communication and that the film does not meet any of the definition's exemptions.

**4. The Colorado Secretary of State does not have the authority to either create or grant Petitioner a "press exemption" to Colorado's campaign finance reporting requirements.**

As illustrated above, Petitioner's proposed filmmaking activities do not pass a plain-language analysis of Colorado's campaign finance laws. But Petitioner also requests that the Secretary of State find that its forthcoming documentary is exempt under a more-general "news media/press exemption."<sup>25</sup> In essence, Citizens United is asking the Colorado Secretary of State to adopt Federal Election Commission ("FEC") Advisory Opinion 2010-8, an opinion that exempts Petitioner's film from the definitions of "electioneering communication" and "expenditure" at the federal level. The Secretary of State can neither create nor grant such an exemption to Citizens United.

- a. *The Federal Election Commission essentially created the "press exemption" at the federal level, likely to avoid First-Amendment concerns.*

By way of background, Colorado's definition of electioneering communication is nearly identical to the federal definition of electioneering communication. Despite the similarity in language, Petitioner argues that its forthcoming documentary film about various Colorado advocacy groups and the film's advertising are excluded from the definition of electioneering communication under a press exemption, an exemption that exists at the federal level. Specifically, Petitioner points to FEC Advisory Opinion 2010-08, which concluded that Citizens United's documentary films and their related marketing activities are excluded from the definition of electioneering communication. While the FEC may have the authority to read some type of press exemption into the plain language of federal law, the Colorado Secretary of State does not have the authority to read such an exemption into the plain language of Colorado law.

Petitioner attached the FEC Advisory Opinion to its petition. In the Advisory Opinion, the FEC states that the first two exemptions to the definition of electioneering communication (which are similar to exemptions I and II in Colorado's campaign finance law) create the press exemption. Specifically, the Advisory Opinion says:

The [Federal Election Campaign] Act and [Federal Election] Commission regulations also include [an] exemption from the definition of "electioneering

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<sup>25</sup> Petition p. 12.



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. [Citation removed.] *Together, these exclusions are known as the “press exemption” or “media exemption.”*<sup>26</sup> (Emphasis added.)

Importantly, there seems to be no basis in either statutory or common law for the federal-level press exemption. Rather, the FEC points to legislative history for its justification of the press exemption, stating generally that Congress did not intend to limit or burden in any way the First Amendment freedoms of the press and of association.<sup>27</sup>

Because the exemption has no basis in statutory or common law, or even the FEC’s regulations, the Commission established its own test for determining who qualifies for the exemption. In fact, the FEC’s Advisory Opinion states that:

Neither the Act or 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.<sup>28</sup>

Applying this test to Petitioner, the FEC found that Citizens United has produced and distributed several documentaries on a regular basis and therefore qualifies as a press entity at the federal level. But this press exemption doesn’t exist in Colorado, and I decline to create and apply one here.

- b. *Whether or not the Secretary of State agrees with the FEC’s logic and reasoning in creating the “press exemption,” the Secretary lacks the authority to apply well-reasoned, settled First Amendment law to Colorado.*

Simply put, the Secretary of State is prohibited from interpreting Colorado’s campaign finance laws in the manner that Citizens United requests. As mentioned above, the FEC likely created the press exemption to avoid First Amendment concerns and challenges surrounding political speech. While the Colorado Secretary of State’s office is very concerned with First-Amendment rights, Colorado courts have repeatedly held that the Secretary does not have the authority to apply settled federal constitutional law to Colorado. In the same vein, the Secretary lacks the authority to either extend the FEC’s press exemption to Colorado or create a new press exemption, notwithstanding the fact that the text of Colorado’s campaign finance provisions are nearly identical to those at the federal level.

There are several examples of Colorado courts limiting the Secretary’s ability to apply federal standards to Colorado. In 2012, the Secretary promulgated 6 new campaign finance rules to clarify the increasingly confusing field of campaign finance law. Generally, these rules were

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<sup>26</sup> FEC Advisory Opinion 2010-08 p. 3.

<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.* at 5.

designed to apply recent federal case law concerning the constitutionality of several provisions to Colorado's campaign finance regulatory scheme. The Secretary was subsequently sued on a claim that he exceeded his rulemaking authority and the district court agreed, invalidating all but one rule. On appeal, a division of the Colorado Court of Appeals invalidated all of the Secretary's rules and found that he exceeded his authority to administer and enforce the law.<sup>29</sup>

The current Secretary's predecessor suffered the same fate. In 2010, then-Secretary Buescher promulgated a rule in response to a Tenth Circuit opinion invalidating registration and reporting requirements as they applied to a particular neighborhood group. Upon attempting to import the Tenth Circuit's reasoning and analysis to Colorado via rule, the Secretary was sued and the trial court held that the Secretary exceeded his rulemaking authority. Again, a division of the Colorado Court of Appeals agreed with the district court, stating that while it understood the Secretary's motivations for promulgating the rule, the rule nonetheless exceeded the Secretary's authority.<sup>30</sup> There are other examples of Colorado courts invalidating the Secretary's clarifying rules or advisory opinions in the realm of campaign finance.<sup>31</sup>

Given the history of how Colorado courts have treated the Secretary's attempts to apply federal principles to Colorado citizens in order to protect their First Amendment rights, I find that the Colorado Secretary of State simply lacks the authority to import the FEC's analysis and decision regarding a "press exemption" to Colorado. As such, Petitioner's remedy lies with courts in the form of litigation, the legislature in the form of a referendum, or the people in the form of an initiative.

**5. The Secretary cannot issue a declaratory order regarding whether Petitioner's film fits the definition of "expenditure" because the Secretary has not seen the film.**

Petitioner also requests that the Secretary declare that its forthcoming documentary and related advertisements are exempt from the definition of the term "expenditure." Because the film has not yet been made, the Secretary is not in a position to state whether the film falls within the definition.

### **Finding**

For the above stated reasons I find that:

- The Secretary of State has jurisdiction to issue this declaratory order to remove uncertainties as to the applicability of certain campaign-finance regulations to Petitioner;
- Under a plain-language analysis, Petitioner's forthcoming documentary is an electioneering communication;
- Petitioner's film does not fall within any of the exemptions to the definition of electioneering communication;

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<sup>29</sup> *Colo. Ethics Watch v. Gessler*, 2013 Colo. App. LEXIS 2056.

<sup>30</sup> *Colo. Common Cause & Colo. Ethics Watch v. Gessler*, 2012 COA 147.

<sup>31</sup> *See Sanger v. Dennis*, 148 P.3d 404 (Colo. Ct. App. 2006); *Colo. Ethics Watch v. Clear the Bench Colo.*, 277 P.3d 931 (Colo. Ct. App. 2012).

- The Colorado Secretary of State does not have the authority to either create or grant Petitioner a “press exemption” to campaign finance reporting requirements; and
- The Secretary cannot issue a declaratory order regarding whether Petitioner’s film fits the definition of “expenditure” because the Secretary has not seen the film.

This Declaratory Order constitutes final agency action for purposes of judicial review.

Dated this 5<sup>th</sup> day of June, 2014.



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