June 2, 2014

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

RE: Citizens United's Petition for Declaratory Order

Dear Secretary Gessler:

The Center for Competitive Politics ("CCP") is a § 501(c)(3) nonprofit organization dedicated to protecting the First Amendment political rights of speech, petition, and assembly. CCP works to defend these freedoms through scholarly research, regulatory comments, and federal and state litigation. CCP submits these written comments concerning Citizens United's Petition for Declaratory Order ("the Petition").

The Petition asks whether Citizens United's activity qualifies for Colorado's press exemption. Both the definition of "electioneering communications" and the definition of "expenditure" contain an exemption for press activity (collectively, the "press exemption").[1] The exemption is identical in both cases. Because the relevant Constitutional language is vague, the Secretary of State is empowered to provide authoritative guidance to Citizens United, and should take this opportunity to grant the Petition.

I. Colorado's press exemption is not clearly defined, and therefore the Secretary should issue formal guidance.

Because crucial terms in its definition are undefined, the scope of the press exemption is vague. This leaves would-be speakers unsure whether they qualify as "press," causing them to refrain from speech rather than risk violations of Colorado's extensive disclosure and regulatory regime.

[1] *Compare* COLO. CONST. art. XXVIII §§ 2(7)(b)(I) and (II) *with* COLO. CONST. art. XXVIII §§ 2(8)(b)(I) and (II).

The Colorado Constitution provides a press exemption for "[a]ny 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."[2] Likewise, "[a]ny editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party" are exempted.[3] Neither of these provisions of the press exemption is clear. We take each in turn.

a. Articles, editorial endorsements, opinion, or commentary in "other periodicals"

The term "other periodical" is vague under Colorado Constitution art. XXVIII §§ 2(7)(b)(I) and 2(8)(b)(I), and is not further defined elsewhere. The Fair Campaign Practices Act ("FCPA")[4] simply incorporates the constitutional definition.[5]

To illustrate the practical impact of this lack of clarity, consider some simple questions a would-be speaker might encounter.[6] How many times must an organization publish a work for it to count as a "periodical"? Is a single pamphlet or paper enough? What if the pamphlet is part of a short series examining a complex topic, such as tax policy under the Taxpayer Bill of Rights ("TABOR")? Would two pamphlets make it a periodical? What if they are published only a few hours apart?

How often ought the organization publish? While the *Denver Post* lands on Coloradoan's doorsteps daily, local papers like the *Northglenn-Thornton Sentinel* are published weekly. Yet scholarly journals are published only a few times a year, or even annually. Would a law review fall under the press exemption as an "other periodical"?

Must the periodicals be written and/or published in Colorado? While *Westword* and *5280 Magazine* are local to the Denver area, other media companies reach into the state from offices and facilities in New York, Los Angeles, and across the globe. Must the publishing be done in Colorado to qualify for the Colorado press exemption? Would a statement in *The Atlantic*, a Washington, D.C.-based magazine, be cleared under Colorado's press exemption even though it is produced

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[2] COLO. CONST. art. XXVIII § 2(7)(b)(I); COLO. CONST. art. XXVIII § 2(8)(b)(I).
[3] COLO. CONST. art. XXVIII § 2(7)(b)(II); COLO. CONST. art. XXVIII § 2(8)(b)(II).
[4] C.R.S. § 1-45-101 *et seq.*
[5] C.R.S. §§ 1-45-103(9) and (10).
[6] These questions are not entirely hypothetical. As the Secretary is aware, the undersigned attorney represents the Coalition for Secular Government in a constitutional challenge raising these issues in the context of ballot-issue speech. The scope of the press exemption is, consequently, before the Colorado Supreme Court in the context of a biennially-published public-policy paper. *See Coal. for Secular Gov't v. Gessler,* No. 12-cv-1708 Doc. 34 (D. Colo.) *certified questions accepted* 2012 SA 312 (Colo.).

out of state? Would a paper (or series of papers) from an environmental organization based in California count as an "other periodical"?

Since "other periodical" is undefined, organizations such as Citizens United do not know if their activity is regular enough to qualify under the press exemption. Given the very real danger of investigations, enforcement proceedings, and fines that can be levied by Colorado—and private action by others[7]—offering Citizens United clarity via declaratory order is warranted.

b. Editorial endorsements or opinions aired by a broadcast facility

The term "broadcast facility" is vague under Colorado Constitution art. XXVIII §§ 2(7)(b)(II) and 2(8)(b)(II), and is not further defined elsewhere. Again, the FCPA is unhelpful, as it simply refers to the constitutional definition.[8]

What is a "broadcast facility"? Must it be licensed by the Federal Communications Commission to qualify? At one time, television stations like KUSA or radio stations like KOA were the only method for broadcasting to a large audience. But in the age of YouTube and Vimeo, do Internet communications count as "broadcast"? Likewise, video on demand services and DVD/Blu-Ray distribution services are a new method of reaching large audiences. Does Netflix count as a "broadcast facility"? The streaming media and DVD service has allowed people from all over the country to watch various television shows and films—including political documentaries like *Mitt*,[9] *The War Room*,[10] and *The Big Buy: Tom DeLay's Stolen Congress*.

Such Internet video is more broadly viewed than content distributed via traditional broadcast facilities because Internet videos reach the entire world. Indeed, combined, the streaming services provided by Netflix and YouTube account for over half of North American downstream Internet traffic.[11]

Since "broadcast facility" is undefined, organizations that use new technology—as Citizens United does—do not know if their activity qualifies for the press exemption. Again, given the very real danger of investigations, enforcement

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[7] *See*, *e.g.*, COLO. CONST. art. XXVIII §9(2)(a) (describing enforcement and private rights of action for violations of Colorado's campaign finance laws).

[8] C.R.S. §§ 1-45-103(9) and (10).

[9] Detailing the failed 2012 presidential campaign by Mitt Romney.

[10] Following the successful 1992 presidential campaign of Bill Clinton.

[11] Amanda Holpuch, *Netflix and YouTube make up majority of US internet traffic, new report shows: Peer-to-peer file sharing has declined and Amazon and Hulu struggle to win receding American attention spans*, THE GUARDIAN, Nov. 11, 2013 http://www.theguardian.com/technology/2013/nov/11/netflix-youtube-dominate-us-internet-traffic.

proceedings, and fines levied by Colorado—and private action by others[12]—offering Citizens United clarity by issuing a declaratory order is warranted.

c. New media must qualify under the press exemption.

Must the periodical be in printed format, or do online fora count as "periodicals"? The United States Supreme Court, the Colorado Supreme Court, and the Federal Election Commission ("FEC") have all recognized that the law does not limit the definition of "the press" to specific technologies.

As the Supreme Court noted as early as 1938, in *Lovell v. City of Griffin*, "[t]he liberty of the press is not confined to newspapers and periodicals."[13] Indeed, *Lovell* examined the distribution of pamphlets and religious tracts,[14] which are not specifically enumerated in Colorado's press exemption. Yet the Supreme Court said, "[t]he press in its historical connotation comprehends every sort of publication which affords a vehicle of information and opinion."[15]

The Colorado Supreme Court has reached the same conclusion, quoting *Lovell* and its progeny.[16] Colorado does not force a text to be "frozen in time as of its enactment date," and instead "assess[es] the…statute on its face, as it applies to current conditions."[17] The "press," like many other means of communication, is evolving due to new technology and methods of disseminating information.

In its Petition, Citizens United helpfully provided the organization's Advisory Opinion ("AO") from the FEC. But AO 2010-08 goes beyond just the organization's planned activity: the AO underscores the FEC's recognition that the federal press exemption was intended to keep pace with technological innovation. Indeed, the FEC recognized that the Federal Election Campaign Act's legislative history indicates an intent for the press exemption to incorporate new technologies like "cable television, the Internet, satellite broadcasts, and rallies staged and broadcast by a radio talk show."[18] The press exemption applies to 'news stories, commentaries, and editorials *no matter in what medium they are published*.'"[19]

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[12] *See*, *e.g.*, COLO. CONST. art. XXVIII §9(2)(a) (describing enforcement and private rights of action for violations of Colorado's campaign finance laws).

[13] *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

[14] *Id.* at 448.

[15] *Id.* at 452.

[16] *Joe Dickerson & Associates v. Dittmar*, 34 P.3d 995, 1004 (Colo. 2001) (quoting and citing *Lovell*, 303 U.S. at 452).

[17] *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30, 36 (Colo. 2000) (quoting *AT&T Communications of Mountain States, Inc. v. State, Dep't of Revenue*, 778 P.2d 677, 682 (Colo. 1989)).

[18] AO 2010-08 ("Citizens United") at 4 (internal citations omitted) (available as an appendix to the declaratory order).

[19] AO 2010-08 at 4 (quoting AO 2008-14 ("Melothé, Inc.") at 3) (emphasis in AO 2010-08)).

Following AO 2010-08, in response to an advisory opinion request by television personality Steven Colbert, the FEC noted the very next year: "[t]he 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…[it] assures the unfettered right of the newspapers, TV networks, and *other media* to cover and comment on political campaigns."[20]

Thus, Supreme Court, Colorado Supreme Court, and FEC decisions all align: new technology qualifies for the press exemption. Whether that new media be in the form of a blog, a YouTube channel, video on demand, or DVD sales, the Colorado press exemption must keep pace with changing tools for communication. It cannot be "frozen in time."[21] Yet, without guidance, it appears that the press exemption *is* frozen—by being limited to traditional media—absent a declaratory ruling on the meaning of "other periodical" and "broadcast facility."

II. In the campaign finance context, clear guidance is crucial to effective vindication of constitutional values.

As outlined above, Colorado's press exemption is vague, and vague campaign finance laws have long been disfavored by the United States Supreme Court. This is because such laws chill speech by "blanket[ing] with uncertainty whatever may be said. [They] compel[] the speaker to hedge and trim."[22] Rights guaranteed by the First Amendment are subject to the strictest of protections—and that protection demands specificity in the regulation First Amendment conduct.[23]

Citizens United is unable to discern whether its activity falls under the press exemption, and therefore must "hedge and trim" its speech in Colorado due to the state constitution's vague definitions of expenditure and electioneering communications.

Such harms, whether experienced by Citizens United or others, may provide grounds for a federal civil rights challenge. Under 42 U.S.C. § 1988, federal courts "may allow the prevailing party, other than the United States, a reasonable attorney's fee" for bringing an action to challenge state laws.[24] Additionally, expert fees may be awarded.[25] Indeed, the presumption is that "the prevailing party 'should ordinarily recover an attorney's fee unless special circumstances would

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[20] AO 2011-11 ("Colbert") at 6 (citing H.R. REP. NO. 93-1239, at 4 (1974)) (emphasis added).
[21] *Town of Telluride*, 3 P.3d at 36.
[22] *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).
[23] *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity") (citations omitted).
[24] 42 U.S.C. § 1988(b).
[25] 42 U.S.C. § 1988(c).

render such an award unjust.'"[26] The fees are intended to be paid out of public funds.[27]

Consequently, clarification from your office will benefit Citizens United by allowing it to comply with Colorado law. At the same time, such a declaration will potentially save the state thousands of dollars in litigation costs, including possible attorney and expert fees from any organization seeking to speak in a similar way in Colorado.

III. The Secretary has the authority to decide this Petition

One way to avoid the constitutional vagueness concerns outlined above is for the Secretary to clarify the law's application when asked to do so by organizations like Citizens United. Issuing declaratory orders is a narrow exercise of authority granted by the voters of Colorado, ratified by the legislature, and upheld by the courts. The declaratory order provides clarity regarding particular facts and law. While not eliminating the inherent weaknesses of Colorado law in this area, such guidance nonetheless allows the requesting group, and those similarly situated, to speak publicly, knowing that its speech, at least, will not trigger PAC status.

This was the voters' intention when they passed Article XXVIII. They decided that "[t]he Secretary shall…Promulgate such rules, in accordance with article 4 of title 24, C.R.S., or any successor section, as may be necessary to administer and enforce any provision of this article."[28] The Fair Campaign Practices Act further ratifies this power by echoing the constitutional provision.[29] And Article 4 of title 24 of the Colorado Revised Statutes, Colorado's Administrative Procedure Act ("APA"), also reflects this policy.[30]

In reviewing the Secretary of State's actions in the campaign finance context, the Colorado Court of Appeals articulated the test for reviewing agency action: "[a]n administrative agency's decision will not be reversed unless the agency acted in an arbitrary and capricious manner, made a determination that is unsupported by the evidence and the record, erroneously interpreted the law, or exceeded its constitutional or statutory authority."[31] "[T]he General Assembly cannot delegate explicitly for every contingency....[T]herefore, it is...well-established that agencies

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[26] *Phelps v. Hamilton*, 120 F.3d 1126, 1131 (10th Cir. 1997) (quoting *Blanchard v. Bergeron*, 489 U.S. 87, 89 n.1 (1989)).
[27] *Wilson v. Stocker*, 819 F.2d 943, 951 (10th Cir. 1987) (internal citation omitted).
[28] COLO. CONST. art. XXVIII § 9(1)(b).
[29] C.R.S. § 1-45-111.5(1).
[30] C.R.S. § 24-4-101 *et seq.*
[31] *Colo. Citizens for Ethics in Gov't v. Comm. for the Am. Dream*, 187 P.3d 1207, 1214 (Colo. Ct. App. 2008); *see also* C.R.S. § 24-4-106(7).

possess implied and incidental powers filling the interstices between express powers to effectuate their mandates."[32]

There is precedent supporting action by the Secretary in similar cases. The state courts approved of the Secretary's predecessor promulgating rules to save Article XXVIII from constitutional infirmity. In *Independence Institute v. Coffman*, the Colorado Court of Appeals merely noted with approval that then-Secretary Coffman promulgated a rule to modify the definition of "issue committee" in Article XXVIII § 2(10) to require *both* "a major purpose" of supporting or opposing a ballot measure *and* a monetary trigger of $200 in contributions or expenditures.[33] But that deference does not apply to more informal administrative action.[34]

Similarly, the Secretary's predecessor promulgated rules for issuing declaratory orders[35] pursuant to the APA's declaratory order provision for state agencies.[36] Citing these statutes and rules, the Colorado Court of Appeals has upheld the Secretary of State's power to issue declaratory orders.[37]

The APA grants authority 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 to the petitioners of any statutory provision or of any rule or order of the agency."[38] The Secretary's determination of a declaratory order is "agency action subject to judicial review."[39]

In reviewing the declaratory order provision of the APA, the Colorado Court of Appeals recently noted that "Section 24-4-105(11)…falls within a statutory section that principally concerns the procedural due process requirements of hearings conducted by administrative agencies."[40] That is, rather than a rule of general applicability, the declaratory order applies to the specific petitioner's facts.

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[32] *Comm. for the Am. Dream*, 187 P.3d at 1217 (quoting *Hawes v. Colo. Div. of Ins.*, 65 P.3d 1008, 1016 (Colo. 2003)) (brackets and ellipses in *Comm. for the Am. Dream*).

[33] *Independence Institute v. Coffman*, 209 P.3d 1130, 1135 (Colo. App. 2008) ("By regulation, Coffman has interpreted the emphasized word 'or' to mean 'and'") (citing then-Rule 1.7, 8 C.C.R. 1505-6, *now codified at* Rule 1.12.2, 8 C.C.R. 1505-6).

[34] *Colo. Ethics Watch v. Clear the Bench Colo.*, 2012 COA 42 ¶ 40 (Colo. Ct. App. 2012) ("Here, the position expressed by the Secretary's staff was not the product of formal adjudication or formal rulemaking…[and] is not entitled to deference").

[35] Rule 1, 8 C.C.R. 1505-3 (adopted Nov. 6, 1991, 14 Colo. Reg. 12).

[36] Rule 1.1, 8 C.C.R. 1505-3, (citing C.R.S. § 24-4-105(11)).

[37] *National Inst. of Nutritional Educ. v. Meyer*, 855 P.2d 31, 32 (Colo. Ct. App. 1993) (citing Rule 1, 8 C.C.R. 1505-3 and C.R.S. § 24-4-105(11)) ("Defendant has discretion to decide whether to rule upon a petition for declaratory relief in appropriate circumstances").

[38] C.R.S. §24-4-105(11).

[39] *Id.*

[40] *Chittenden v. Colo. Bd. of Soc. Work Examiners*, 2012 COA 150M, ¶ 19 (Colo. Ct. App. 2012).

To summarize, the Petition does not call for a rulemaking of general applicability. It will not change the wording of a constitutional provision. But it *is* made pursuant to the formal adjudication authority of the APA. Citizens United asks if its activity qualifies for the press exemption under its particular facts. In considering the Petition, the Secretary is properly acting under the APA's declaratory order provisions. As outlined above, such a declaration is vitally needed to avoid vagueness that chills the speech of Citizens United and other groups. The Petition should be granted.

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For the reasons set forth above, the Center for Competitive Politics supports Citizens United's Petition for Declaratory Order. CCP appreciates the Secretary's willingness to consider these comments. Similarly, should the Secretary, or his staff, have any questions, comments, or concerns, please do not hesitate to contact us.

Respectfully submitted,

Allen Dickerson
Legal Director